TEXAS REGISTER

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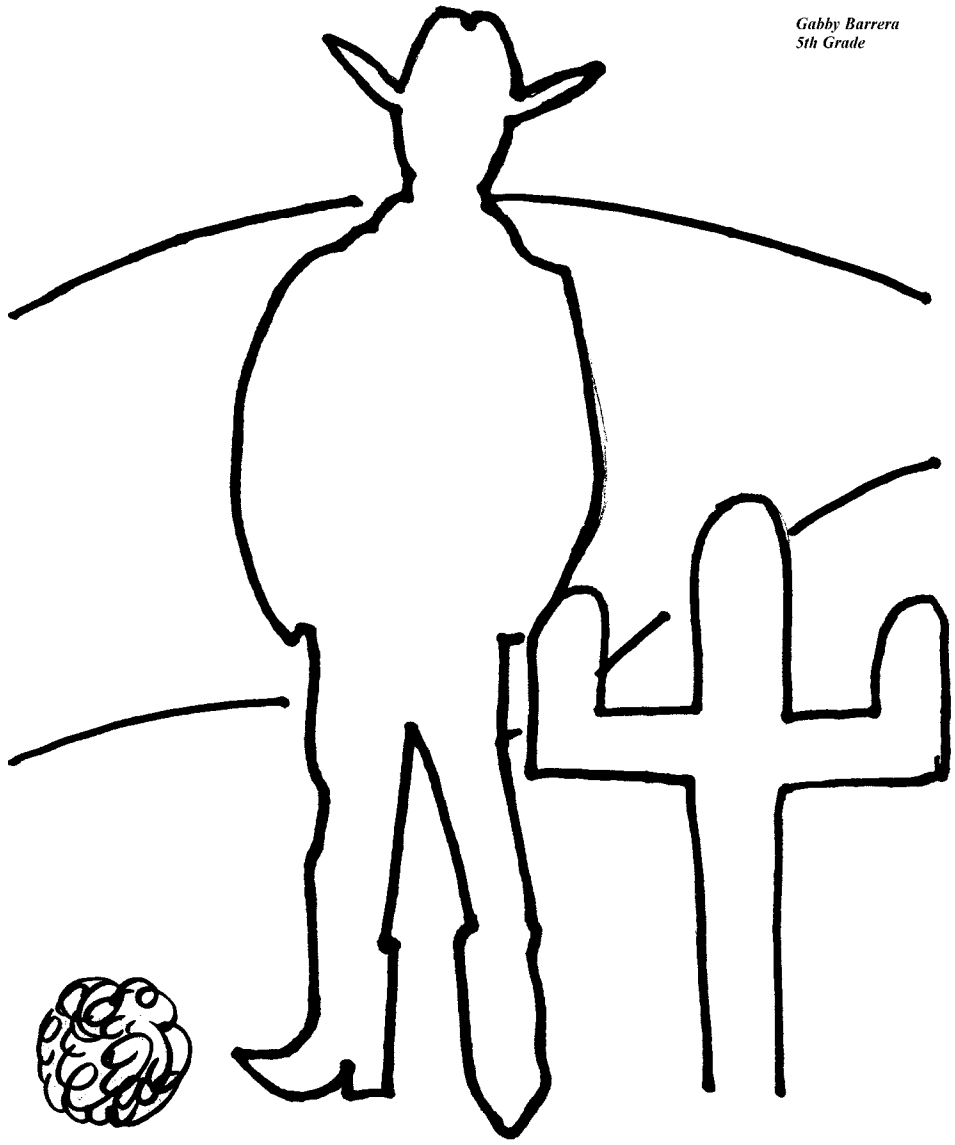

Gabby Barrera
5th Grade

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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ADOPTED RULES

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Office of Consumer Credit Commissioner

Credit Union Department

Texas Commission on Environmental Quality

Department of State Health Services

Texas Lottery Commission

Texas Parks and Wildlife Department

Public Utility Commission of Texas

Texas Water Development Board

Workforce Solutions Brazos Valley Board

Open Meetings

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

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

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

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

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

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

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

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

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

THE 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-1039-GA

Requestor:

The Honorable Chris Martin

Criminal District Attorney

Van Zandt County

400 S. Buffalo

Canton, Texas 75103

Re: Authority to set the compensation and the hours of the court reporter for a statutory county court (RQ-1039-GA)

Briefs requested by March 9, 2012

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

TRD-201200890
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: Februar 14, 2012

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TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by the Government Code, §571.091, to issue advisory opinions in regard to the following statutes: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39. Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

Ethics Advisory Opinion

EAO-503. The Texas Ethics Commission has been asked to consider whether a corporation makes a campaign contribution to a candidate by making a campaign expenditure that benefits the candidate, to a vendor shared by the corporation and the candidate. (AOR-566)

SUMMARY

The single fact that a corporation shares a vendor with a candidate would not constitute a campaign contribution by the corporation to the candidate. If a corporation uses its general treasury funds to make a campaign expenditure to a vendor for services to benefit a candidate, and if the vendor is concurrently providing campaign services to both the corporation and the candidate or if the vendor has previously provided campaign services to the candidate, the expenditure may constitute a prohibited contribution to the candidate. Whether the expenditure constitutes a prohibited contribution depends on whether the expenditure is made with the prior consent or approval of the candidate. An expenditure that is not made with the prior consent and approval of the candidate is not a campaign contribution to the candidate.

The Texas Ethics Commission is authorized by §571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 159, Local Government Code; (8) Chapter 36, Penal Code; (9) Chapter 39, Penal Code; (10) §2152.064, Government Code; and (11) §2155.003, Government Code.

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

TRD-201200920
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Filed: February 15, 2012

♦ ♦ ♦

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 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 17. MARKETING AND PROMOTION

SUBCHAPTER G. GO TEXAN PARTNER PROGRAM RULES

The Texas Department of Agriculture (the department) proposes amendments to §§17.300 - 17.305 and §§17.307 - 17.310; and the repeal of §17.306, concerning the GO TEXAN Partner Program Rules. The amendments and repeal are proposed to make Subchapter G conform to new requirements established by the department for the administration of the GO TEXAN Partner Program under the new, reduced funding structure appropriated by the Texas Legislature.

Bryan Daniel, Chief Administrator for Trade and Business Development, has determined that, for the first five-year period the amendments and repeal are in effect, there will be no fiscal implications for state or local government as a result of the administration and enforcement of the amendments and repeal.

Mr. Daniel also has determined that for each year of the first five years the amendments and repeal are in effect, the public benefit anticipated as a result of implementation of the amendments and repeal will be to update the rules to conform to new requirements established by the department for the administration of the GO TEXAN Partner Program. There will be no adverse fiscal impact on microbusinesses or small businesses or individuals required to comply with the proposal.

Written comments on the proposal may be submitted to Karen Reichek, Grants Coordinator, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711. Written comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

4 TAC §§17.300 - 17.305, 17.307 - 17.310

The amendments to §§17.300 - 17.305 and §§17.307 - 17.310 are proposed under the Texas Agriculture Code (the Code), §46.012, which provides the department with the authority to adopt rules for administration of its duties under the Code, Chapter 46.

The proposal affects the Code, Chapter 46.

§17.300. Statement of Purpose.

The GO TEXAN Partner Program is a [~~dollar-per-dollar~~] matching fund promotion program designed to increase consumer awareness of Texas agricultural products and expand the markets for Texas agricultural products by developing a general promotional campaign for Texas agricultural products and advertising campaigns for specific Texas agricultural products based on project requests submitted by successful applicants.

§17.301. Definitions.

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

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

(7) GO TEXAN Program--A marketing and promotion program for Texas agricultural products that meet program requirements, as established by Subchapter C of this chapter (relating to GO TEXAN and Design Mark) [~~§§17.51 - 17.58 of this title (relating to TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, and] GO TEXAN and Design marks)~~].

(8) (No change.)

(9) Qualified expenses--Expenses incurred as part of the awarded project proposal.

(10) [~~(9)~~] Small business--A legal agricultural entity, including a corporation, partnership, or sole proprietorship that:

(A) is formed for the purpose of making a profit; and

(B) has fewer than 50 full-time employees or less than $1 million in annual gross receipts.

(11) [~~(10)~~] Texas agricultural product--An agricultural, apicultural, horticultural, silvicultural, viticultural, or vegetable product, either in its natural or processed state, that has been produced, processed, or otherwise had value added to the product in this state, including:

(A) equine species;

(B) feed for use by livestock or poultry;

(C) fish or other aquatic species;

(D) livestock, a livestock product, or a livestock by-product;

(E) planting seed;

(F) poultry, a poultry product, or a poultry by-product; or

(G) wildlife processed for food or by-products.

§17.302. Administration.

(a) The department's responsibilities under this subchapter are as follows.

(1) The department [department's Marketing and Promotion Division] shall administer the GO TEXAN Partner Program, subject to the availability of funds.

[(2) Department staff shall solicit GO TEXAN Partner Program project requests by posting public notice in the Texas Register and by publicizing to the general public via media outlets.]

(2) [(3)] Department staff shall develop a general promotional campaign for Texas agricultural products.

(3) [(4)] Department staff shall receive project requests, submitted by eligible applicants, on an application form provided by the department, for advertising or promotional campaigns for specific Texas agricultural products.

[(5) Department staff shall screen applicants for eligibility.]

[(6) Department staff shall present eligible project requests, as determined by the department, to the board.]

(4) [(7)] Department staff may establish procedures [guidelines] on advertising or promotional activities by applicants.

(5) [(8)] The department may contract with media representatives for the purpose of dispersing promotional materials.

(6) [(9)] The department shall disburse [receive] matching funds on a reimbursement basis to [from] program applicants upon approval of documented qualified expenses.

(7) [(10)] The department may accept donations or grants from any source.

(b) The board's responsibilities under this subchapter are as follows.

(1) (No change.)

(2) The board shall meet [no less often than bi-annually,] subject to the availability of grant funds;

(3) - (6) (No change.)

§17.303. Eligibility.

(a) An eligible applicant must be a current GO TEXAN Program Tier 2, 3 or sponsorship member as defined in §17.55 of this title (relating to Registration of Those Entitled to Use the GO TEXAN and Design Mark) and:

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

(6) any other entity or business, other than a business meeting the definition of small business, that promotes the marketing and sale of Texas agricultural products. [If a retailer or distributor, the applicant must demonstrate a direct benefit to GO TEXAN members in the manner provided in subsection (b) of this section.] For purposes of this section, the department shall have the sole discretion to determine whether an entity meets program eligibility requirements.

(b) Retailers/distributors can apply if:

(1) 70% of their agricultural products are sourced from Texas;

(2) 70% of their products are sourced from GO TEXAN members; or

(3) 70% of their participating businesses, companies, or members and/or vendors are GO TEXAN members, other than associate or retail members.

[(b) A retailer or distributor who applies under the program, must meet the requirements of paragraph (1) or (2) of this subsection, in order to document a direct benefit to GO TEXAN members:]

[(1) Applying with GO TEXAN members.]

[(A) The retailer/distributor must apply jointly with GO TEXAN members, other than associate or other retail members, in order to submit a GOTEPP project proposal.]

[(B) All participating applicants must be GO TEXAN members.]

[(i) GOTEPP project proposals with a total project amount from $0.00 to $5,000.00 require a minimum of one co-applicant/producer in addition to the originating retailer or distributor applicant.]

[(ii) GOTEPP project proposals with a total project amount from $5,001.00 to $30,000.00 require a minimum of three co-applicants/producers in addition to the originating retailer or distributor applicant.]

[(iii) GOTEPP project proposals with a total project amount from $30,001.00 to $99,999.00 require a minimum of seven co-applicants/producers in addition to the originating retailer or distributor applicant.]

[(iv) GOTEPP project proposals with a total project amount over $100,000.00 require a minimum of 10 or more co-applicants/producers, in addition to the originating retailer or distributor applicant.]

[(C) All participating co-applicants and originating applicant retailers/distributors must submit all required GOTEPP documentation.]

[(D) A retailer/distributor is permitted to utilize the same additional applicants no more than twice in a biennium; or]

[(2) Demonstration of GO TEXAN members/vendors. Retailer/distributors can apply without applying with other GO TEXAN members if 70% of their members and/or vendors are GO TEXAN members, other than associate or retail members.]

(c) (No change.)

§17.304. Requirements for Participation.

To be eligible for participation in this program utilizing matching state funds under this subchapter, an applicant must:

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

(5) submit to the department, at least quarterly, no more frequently than monthly, project expenditure invoices documenting qualified expenses, [within ten business days after receiving a request for funds from the department, cash matching funds] as specified in the grant agreement [performance contract] and in accordance with this subchapter.

(6) (No change.)

§17.305. Filing Requirements; Consideration of Project Requests; Grant Awards [Project Requests].

(a) A project request submitted by an eligible applicant in the format prescribed by the department must describe the advertising or other market-oriented promotional activities to be carried out [using matching funds]. [The department shall not submit to the board a project request submitted under this subchapter unless the request includes:]

[(1) a cover page including the name of the entity, name, title, address, phone number and email address, if available, of applicant;]

[(2) a table of contents;]

[(3) a one page abstract, preferably 200 words or less, including the title, if any, a brief description of the project, specific objectives and importance of the project, project plan and methodology, and expected contribution to further or enhance the GO TEXAN Program;]

[(4) a detailed specific narrative or factual description of the project, anticipated benefits to a specific region of the state, to specific commodities, any preliminary market research and sales percent increases to be achieved as a result of the project, a description of expected results, a biography of the applicant, a description of the business entity, and a statement identifying the eligibility criteria in §17.303 of this title (relating to Eligibility) that applicant meets.]

[(5) a detailed project budget including specific dollar amounts for all potential costs;]

[(6) a description of how anticipated sales increases due to implementation of the project will be quantified and reported to the department; and]

[(7) a completed creative blueprint on a form provided by the department.]

[(8) The applicant shall submit, along with the original project request, ten copies of the original project request.]

(b) An applicant must submit a project request, completed in accordance with this subchapter, to the department, at 1700 N. Congress Ave., 11th Floor, Austin, Texas 78711.

(c) A maximum grant award of $50,000 (not including applicant matching funds) per project/applicant may be approved by the board.

(d) Project/applicants must provide matching funds, in amount equal to or greater than the amount requested from the department.

(e) In-kind contributions do not qualify as acceptable matching funds.

(f) No more than one project per biennium may be approved for any one applicant.

§17.307. Selection Criteria.

(a) Project requests shall be scored [selected] on a competitive basis by the board, using criteria determined by the department.

(b) Additional points [Preference] shall be awarded for [given to] project requests that are unique in nature and avoid duplication with other project requests that are being funded by the department.

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

(e) Only project requests submitted by applicants who are physically located in Texas or who have their principal place of business in Texas shall be funded. For purposes of this section, the board shall have the [sole] discretion to determine whether an applicant meets selection criteria.

(f) The department may make final funding decisions.

§17.308. Use of Funds.

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

(e) The department shall not be responsible for costs incurred by the applicant in the event that a contracted project is cancelled.

[(e) Projects funded shall meet all state purchasing and bidding requirements.]

[(f) 80% of all funds for each approved and contracted project shall be expended to promote the specific product(s) of applicants and 20% of all funds for each approved and contracted project shall be expended on the department's GO TEXAN Program.]

[(g) Upon the completion or cancellation of a project, the department will refund to the successful applicant the applicant's share of any unexpended funds approved and contracted for the project, minus the 20% portion of funds allocated to the department's GO TEXAN program. A refund will be made after quantification information required by the project contract has been submitted to the department. The minimum amount of a refund that will be returned to the applicant by the department is $10.]

[(h) A person may not receive GO TEXAN program funds as a vendor or applicant during any grant award period or agreement term during which the person is also acting as an agent for an applicant.]

§17.309. Use of GO TEXAN and Design Mark.

(a) Use of the GO TEXAN and Design mark by program members under this subchapter is subject to the rules of the GO TEXAN Program as provided in Subchapter [subchapter] C of this chapter (relating to [TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, and] GO TEXAN and Design Mark [marks]).

(b) Selected applicants must receive written approval from the department to utilize, display, or depict the GO TEXAN mark in any manner associated with the project by the GO TEXAN Partner Program.

§17.310. Administrative Penalties; Other Enforcement Remedies.

(a) A person violates this subchapter if the person is a GO TEXAN Partner Program member and:

(1) misuses [uses, reproduces, or distributes] the GO TEXAN and Design mark, or reproduces or distributes the mark without the express written permission of the department [registering with the department as a GO TEXAN Program member]; or

(2) violates a requirement of this subchapter or Subchapter [subchapter] C of this chapter (relating to [TAP, Taste of Texas, Vintage Texas, Texas Grown, Naturally Texas, and] GO TEXAN and Design Mark [marks]).

(b) A person who violates this subchapter:

(1) forfeits the person's ability to use the GO TEXAN and Design mark; and

(2) is ineligible for a future grant of funds under this subchapter.[;]

[(3) forfeits applicant matching funds required to satisfy outstanding debts incurred to implement applicant's project request.]

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

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

Filed with the Office of the Secretary of State on February 9, 2012.

TRD-201200694

Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 463-4075

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4 TAC §17.306

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

The repeal of §17.306 is proposed under the Texas Agriculture Code (the Code), §46.012, which provides the department with the authority to adopt rules for administration of its duties under the Code, Chapter 46.

The proposal affects the Code, Chapter 46.

§17.306. Filing Requirements and Consideration of Project Requests.

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 February 9, 2012.

TRD-201200695
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 463-4075

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §25.6

The Public Utility Commission of Texas (commission) proposes an amendment to §25.6 relating to Cost of Copies of Public Information and the repeals of §25.87 relating to Distribution Unbundling Reports, §25.182 relating to Energy Efficiency Grant Program, and §25.185 relating to Energy Efficiency Incentive Program for Military Bases. The amendment and repeals are consistent with the orders adopted following the Chapter 25 review that was required by the Administrative Procedure Act (APA), Texas Government Code §2001.039, which requires each state agency to review and readopt its rules every four years. The proposed amendment and repeals respond to orders under Project Number 37115, pertaining to the review of Subchapters A - G, and Project Number 37228, pertaining to the review of Subchapters H - J.

The following are the proposed sections to be amended or repealed with a brief description as to why each provision is being proposed for repeal or amendment.

§25.6. Cost of Copies of Public Information. The section contains an obsolete Texas Administrative Code (TAC) reference to 1 TAC §§111.61 - 111.70, which applied to the Building and Procurement Commission, which is a state agency that no longer exists. The cite is being changed to reflect that the Office of the Secretary of State now handles fees for copies of public information in accordance with 1 TAC §71.8. *(See* Page 3 in Order Readopting Chapter 25, Subchapters A - G in Project Number 37115.)

§25.87. Distribution Unbundling Reports. The section is obsolete because the requirement to file the distribution unbundling reports expired April 1, 2001. *(See* Page 7 in Order Readopting Chapter 25, Subchapters A - G in Project Number 37115.)

§25.182. Energy Efficiency Grant Program. The purpose of the section was to provide implementation guidelines for the grant program and the grant program is no longer in effect. *(See* Page 4 in Order Readopting Chapter 25, Subchapters H - J in Project Number 37228.)

§25.185. Energy Efficiency Incentive Program for Military Bases. The target date of January 1, 2005 to meet reduction amounts has expired. *(See* Page 5 and 6 in Order Readopting Chapter 25, Subchapters H - J in Project Number 37228.)

Julie Black, economist in the commission's Competitive Markets Division, has determined that for each year of the first five-year period the proposed sections are in effect there will be no fiscal implications for state or local government as a result of administering the changes.

Ms. Black has determined that for each year of the first five years the proposed sections are in effect the public benefit anticipated will be an updated version of Chapter 25. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing the changes. Therefore, no regulatory flexibility analysis is required. There is no anticipated economic cost to persons who are required to comply with the sections as proposed.

Ms. Black has also determined that for each year of the first five years the proposed sections are in effect there should be no effect on a local economy and therefore no local employment impact statement is required under 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 30 days after publication.

Initial comments on the proposed sections to Chapter 25 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 publication. Sixteen copies of comments on the proposed sections are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 45 days after publication. Comments should be organized in a manner consistent with the organization of the proposed amendment and repeals. All comments should refer to Project Number 39823.

The amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 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 as well as the Administrative Procedure Act (APA), Texas Government Code Annotated §2001.039 (West and Supp. 2011) which requires each state agency to review and readopt its rules every four years.

Cross Reference to Statutes: PURA §14.002 and APA §2001.039.

§25.6. Cost of Copies of Public Information.

The rules set forth in 1 TAC §71.8 [~~§§111.61-111.70~~] (relating to Costs of Copies of Public Information) [~~as in effect on September 18, 1996,~~] will apply to copies of public records made at the commission.

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

Filed with the Office of the Secretary of State on February 10, 2012.

TRD-201200739
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 946-7223

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SUBCHAPTER D. RECORDS, REPORTS, AND OTHER REQUIRED INFORMATION

16 TAC §25.87

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

The repeal is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 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 as well as the Administrative Procedure Act (APA), Texas Government Code Annotated §2001.039 (West and Supp. 2011) which requires each state agency to review and readopt its rules every four years.

Cross Reference to Statutes: PURA §14.002 and APA §2001.039.

§25.87. Distribution Unbundling Reports.

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 February 10, 2012.

TRD-201200740
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 936-7223

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SUBCHAPTER H. ELECTRICAL PLANNING
DIVISION 2. ENERGY EFFICIENCY AND CUSTOMER-OWNED RESOURCES

16 TAC §25.182, §25.185

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

The repeals are proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 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 as well as the Administrative Procedure Act (APA), Texas Government Code Annotated §2001.039 (West and Supp. 2011) which requires each state agency to review and readopt its rules every four years.

Cross Reference to Statutes: PURA §14.002 and APA §2001.039.

§25.182. Energy Efficiency Grant Program.
§25.185. Energy Efficiency Incentive Program for Military Bases.
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 February 10, 2012.

TRD-201200741
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 936-7223

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SUBCHAPTER J. COSTS, RATES AND TARIFFS
DIVISION 1. RETAIL RATES

16 TAC §25.244

The Public Utility Commission of Texas (commission) proposes new §25.244, relating to Billing Demand for Certain Utility Customers. The new section addresses demand ratchets and the billing units for nonresidential secondary voltage service customers of transmission and distributions utilities, pursuant to House Bill 1064 of the 82nd Legislature, Regular Session in 2011, which enacted Public Utility Regulatory Act §36.009. Project Number 39829 has been assigned to this proceeding.

Richard Lain, Director of Tariff and Rate Analysis in the Rate Regulation Division, has determined that for each year of the first five-year period the proposed new section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the new section.

Mr. Lain has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be the implementation of PURA §36.009. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing the new section. Therefore, no regulatory flexibility analysis is required. There is no anticipated economic cost to persons who are required to comply with the new section as proposed.

Mr. Lain has also determined that for each year of the first five years the new section is 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 on Wednesday, March 28, 2012. The request for a public hearing must be received within 30 days after publication.

Initial comments on the proposed rule 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 publication. Sixteen copies of comments on the proposed new section are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 40 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule. All comments should refer to Project Number 39829.

The new section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 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 §36.009, which requires the commission to establish by rule the requirement that a transmission and distribution utility waive the application of demand ratchet provisions for certain nonresidential secondary service customers.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §36.009.

§25.244. Billing Demand for Certain Utility Customers.

(a) Application. This section applies to a transmission and distribution utility (TDU) that provides retail distribution service.

(b) Definitions. The following terms, when used in this section, have the following meanings, unless the context indicates otherwise.

(1) Demand ratchet--A provision in a TDU's tariff for retail distribution service that allows a customer to be billed based on the greater of the peak demand by that customer in the current month or some fixed percentage of the peak demand for that customer during previous months.

(2) Nonresidential secondary voltage service customer--A nonresidential customer that is billed demand charges for retail distribution service and that receives retail distribution service at secondary voltage through one point of delivery and that is measured using one meter.

(c) Rates. In a proceeding in which base rates are set for nonresidential secondary voltage service customers, the rates set for nonresidential secondary voltage service customers shall provide that these customers shall be billed on a kilowatt hour (kWh), kilowatt (KW), or kilovolt-amperes (kVa) basis, and that a demand ratchet shall not apply to a nonresidential secondary voltage service customer that has an annual load factor less than or equal to 25 percent.

(d) Annual Verification. Upon the implementation of rates consistent with subsection (c) of this section, a TDU shall determine annually for each of its nonresidential secondary service customers whether to apply a demand ratchet. In addition, on the first anniversary of the date of the commission's final order in a proceeding described by subsection (c) of this section and annually thereafter, a TDU shall file an affidavit certifying that it has accurately identified and billed nonresidential secondary service customers who under subsection (c) of this section cannot be charged a demand ratchet. In addition, the TDU shall attach to the affidavit a thorough description of the procedures that it uses to ensure that these customers are accurately identified and billed.

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 February 10, 2012.

TRD-201200742
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 936-7223

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PART 8. TEXAS RACING COMMISSION

CHAPTER 307. PROCEEDINGS BEFORE THE COMMISSION

SUBCHAPTER C. PROCEEDINGS BY STEWARDS AND RACING JUDGES

16 TAC §307.67

The Texas Racing Commission proposes an amendment to 16 TAC §307.67, Appeal to the Commission, concerning appeals from decisions of the boards of stewards and judges to the Commission. The section establishes the procedures for filing an appeal from a ruling of stewards or racing judges. The proposed amendment implements House Bill 2271, 82nd Legislature, Regular Session, which in part provides new authority to the executive secretary to review a decision of the stewards or judges and modify the penalty. The amendment specifies that an appeal from a modification by the executive secretary must be filed not later than 5:00 p.m. of the fifth calendar day after the person is informed of the penalty modification.

Chuck Trout, Executive Director, has determined that for the first five-year period the amendment is in effect there will be no fiscal

implications for state or local government as a result of enforcing the amendment.

Mr. Trout has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be to preserve the due process rights of licensees and to ensure conformity with House Bill 2271.

There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

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

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

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

The amendment is proposed under Texas Revised Civil Statutes Annotated Article 179e, §3.02, which authorizes the Texas Racing Commission to make rules relating exclusively to horse and greyhound racing, and §3.07, which authorizes the executive secretary to review and modify decisions of the stewards and judges.

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

§307.67. Appeal to the Commission.

(a) (No change.)

(b) Filing Procedure.

(1) An appeal must be in writing in a form prescribed by the executive secretary. An [~~The~~] appeal from a ruling of the stewards or racing judges must be filed not later than 5:00 p.m. of the third calendar day after the day the person is informed of the ruling by the stewards or racing judges. An appeal from the modification of a penalty by the executive secretary must be filed not later than 5:00 p.m. of the fifth calendar day after the person is informed of the penalty modification. The appeal must be filed at the main Commission offices in Austin or with the stewards or racing judges at a Texas pari-mutuel racetrack where a live race meet is being conducted. The appeal must be accompanied by a cash bond in the amount of $150, to defray the costs of the court reporter and transcripts required for the appeal. The bond must be in the form of a cashier's check or money order.

(2) (No change.)

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

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

Filed with the Office of the Secretary of State on February 13, 2012.

TRD-201200820

Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 833-6699

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16 TAC §307.69

The Texas Racing Commission proposes an amendment to 16 TAC §307.69, Action by Commission, concerning the authority of the Commission to take action on a decision of the board of stewards or judges without an appeal having been filed. The proposed amendment implements House Bill 2271, 82nd Legislature, Regular Session, which transferred the authority to take direct action on a decision of the board of stewards or judges from the Commission to the executive secretary.

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

Mr. Trout has also determined that for each year of the first five years the amendment is in effect the anticipated public benefits will be conformity with House Bill 2271, to provide additional administrative oversight over stewards' and judges' decisions, to further the uniform and consistent treatment of similarly situated individuals, and to provide additional enforcement authority where the penalties available to the stewards and judges are insufficient to adequately address the violation.

To the extent that the executive secretary enhances a penalty, there will be an economic cost of up to an additional $5,000 in penalties for persons who have been found to have violated the Commission's rules. However, this increase may be mitigated by a decrease in costs for those persons that the executive secretary determines should have their penalties decreased.

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

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

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

The amendment is proposed under Texas Revised Civil Statutes Annotated Article 179e, §3.02, which authorizes the Texas Racing Commission to make rules relating exclusively to horse and greyhound racing; and §3.07, which authorizes the executive secretary to review and modify decisions of the stewards and judges.

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

§307.69. Review by Executive Secretary [~~Action by Commission~~].

(a) Within fourteen days after a board of stewards or judges issues a written ruling under §307.63 of this title (relating to Ruling), the executive secretary may review the ruling and modify the penalty. A penalty modified by the executive secretary may include a fine not to exceed $10,000, a suspension not to exceed two years, or both a

fine and a suspension. [~~On its own motion or on request by the executive secretary, the Commission may reverse a decision of the stewards or racing judges, modify a penalty imposed by the stewards or racing judges, or reinstate a person's license and rescind the penalty.~~]

(b) The decision to modify a penalty must be on a form that includes:

(1) the full name, license type, and license number of the person who is the subject of the penalty modification;

(2) the original ruling number and the date the ruling was issued by the stewards or judges;

(3) the date the modified penalty was issued by the executive secretary;

(4) the modified penalty imposed;

(5) a statement of the reason for modifying the penalty; and

(6) a statement informing the person of the person's right to appeal the ruling, with the modified penalty, to the Commission.

(c) In determining whether to modify a penalty, the executive secretary may consider, but is not limited to, the following reasons:

(1) to further the uniform and consistent treatment of similarly situated individuals; and

(2) to remedy rulings where the penalties available to the stewards or judges are insufficient to adequately address the violation.

(d) The decision to modify a penalty must be signed by the executive secretary.

(e) The executive secretary shall provide written notice to each person who is subject to a penalty modification decision under this section by:

(1) sending by certified mail, return receipt requested, a copy of the decision to the person's last known address, as found in the Commission's licensing files; or

(2) personal service by any Commission employee.

(f) An appeal of a ruling whose penalty has been modified under this section must be filed in accordance with §307.67 of this title (relating to Appeal to the Commission).

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

Filed with the Office of the Secretary of State on February 13, 2012.

TRD-201200821
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 833-6699

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CHAPTER 311. OTHER LICENSES
SUBCHAPTER A. LICENSING PROVISIONS
DIVISION 1. OCCUPATIONAL LICENSES
16 TAC §311.3

The Texas Racing Commission proposes an amendment to 16 TAC §311.3, Information for Background Investigation, concerning requirements and procedures for checking criminal history records. The proposed amendment allows applicants who desire to renew an occupational license to utilize a new process whereby the Department of Public Safety may resubmit an applicant's original fingerprints on file instead of requiring the applicant to provide new fingerprints.

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

Mr. Trout has also determined that for each year of the first five years the amendment is in effect the public will benefit by providing savings and convenience to renewal applicants.

There is no anticipated economic cost to persons who are required to comply with the proposed amendment. Instead, the amendment will result in decreased costs for persons who desire to renew a license and already have fingerprints on file with the Department of Public Safety.

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

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

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

The amendment is proposed under Texas Revised Civil Statutes Annotated Article 179e, §3.02, which authorizes the Texas Racing Commission to make rules relating exclusively to horse and greyhound racing, and §5.03, which requires license applicants to submit fingerprints to the Commission.

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

§311.3. Information for Background Investigation.

(a) Fingerprint Requirements and Procedure.

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

(4) A person who desires to renew an occupational license must:

(A) have submitted a set of fingerprints pursuant to this section within the three years prior to renewal; [~~or~~]

(B) provide a new set of fingerprints for classification by the Federal Bureau of Investigation; or [.]

(C) if the applicant's original fingerprints are classified and on file with the Department of Public Safety, the applicant must pay a processing fee of $34.25 to resubmit the original fingerprints in lieu of submitting another set of fingerprints under paragraph (6) of this subsection.

(5) - (6) (No change.)

(b) (No change.)

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

Filed with the Office of the Secretary of State on February 13, 2012.

TRD-201200853
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 833-6699

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SUBCHAPTER B. SPECIFIC LICENSES

16 TAC §311.103

The Texas Racing Commission proposes an amendment to 16 TAC §311.103, Kennel Owners, concerning the requirements and qualifications to be licensed as a Kennel Owner. Currently, there is a prohibition against "dual ownership" in kennels--that is, a person cannot own more than one kennel under contract at a particular greyhound racetrack. The amendment would clarify the intent of the rule by prohibiting ownership of multiple kennels by persons who are residentially domiciled together.

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

Mr. Trout has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be to enhance the current prohibition against dual ownership in kennels.

There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

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

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

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

The amendment is proposed under Texas Revised Civil Statutes Annotated Article 179e, §3.02, which authorizes the Texas Racing Commission to make rules relating exclusively to horse and greyhound racing, and §7.01, which requires all persons who participate in racing with pari-mutuel wagering to be licensed by the Commission.

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

§311.103. Kennel Owners.

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

(e) Restrictions on Placement in Kennels. A person who owns an interest in a kennel booked at one Texas racetrack may not:

(1) own an interest in another kennel booked at that racetrack; [~~or~~]

(2) be residentially domiciled with a person who owns an interest in another kennel booked at that racetrack; or

(3) [~~(2)~~] own an interest in a greyhound that is racing out of another kennel booked at that racetrack.

(f) (No change.)

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

Filed with the Office of the Secretary of State on February 13, 2012.

TRD-201200843
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 833-6699

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CHAPTER 313. OFFICIALS AND RULES OF HORSE RACING
SUBCHAPTER B. ENTRIES, SCRATCHES, AND ALLOWANCES
DIVISION 1. ENTRIES

16 TAC §313.103

The Texas Racing Commission proposes an amendment to 16 TAC §313.103, Eligibility Requirements, concerning the eligibility requirements for a horse to be entered into a race. The proposed amendment deletes language that prohibits a horse from participating as a member of more than one breed at the same race meeting, even though the horse may be registered with more than one breed registry.

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

Mr. Trout has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be to both increase the availability of races in Texas for dual-registered horses and to increase the availability of horses for Paint and Quarter Horse races. The change may also encourage the breeding of horses that are eligible for dual registration.

There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

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

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

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

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

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

§313.103. Eligibility Requirements.

(a) - (h) (No change.)

~~[(i) A horse may not participate as a member of more than one breed at the same race meeting, even though the horse may be registered in more than one breed registry.]~~

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 February 13, 2012.

TRD-201200846
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 833-6699

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 33. STATEMENT OF INVESTMENT OBJECTIVES, POLICIES, AND GUIDELINES OF THE TEXAS PERMANENT SCHOOL FUND

19 TAC §§33.1, 33.5, 33.10, 33.15, 33.20, 33.25, 33.40, 33.55

The State Board of Education (SBOE) proposes amendments to §§33.1, 33.5, 33.10, 33.15, 33.20, 33.25, 33.40, and 33.55, concerning the Texas Permanent School Fund. The sections establish investment objectives, policies, and guidelines for the Texas Permanent School Fund. The proposed amendments would implement changes reflecting the November 8, 2011, voter approval of Proposition 6, the constitutional amendment that expanded the base by which Permanent School Fund distributions to the Available School Fund are calculated. Additional changes are also proposed that would clarify current procedures and policies.

The Texas Education Code (TEC), §7.102(c)(31), states that the SBOE may invest the Permanent School Fund within the limits of the authority granted by the Texas Constitution, Article VII, §5, and TEC, Chapter 43. The Texas Government Code, §2263.004, requires the SBOE to adopt by rule standards of conduct applicable to certain financial advisors or service providers. In accordance with statute, the rules in 19 TAC Chapter 33 establish investment objectives, policies, and guidelines for the Permanent School Fund.

The 82nd Texas Legislature, 2011, passed House Joint Resolution 109 resulting in Proposition 6, the constitutional amendment that expanded the base by which Permanent School Fund distributions to the Available School Fund are calculated. Proposition 6 was approved by voters on November 8, 2011, and necessitates amendments to 19 TAC Chapter 33 to incorporate the provisions of the constitutional amendment. Additional changes would clarify current procedures and policies. The proposed amendments to 19 TAC Chapter 33 would incorporate these changes as follows.

Section 33.1, Constitutional Authority and Constitutional Restrictions, would be amended in subsection (a)(1) to address the constitutional amendment resulting from Proposition 6.

Section 33.5, Code of Ethics, would be amended to provide clarification regarding the definition of conflicts of interest in subsection (f)(3) and the definition of direct placement in subsection (j)(1). Additional changes include revisions to the definition of SBOE Member in subsection (d)(1), the disclosure requirement in subsection (f)(3), the dissemination of copies of Texas Ethics Commission opinions in subsection (i)(3), the selection criteria for hiring external professionals in subsection (l), and due dates for required reports in subsection (n)(2)(J) and (K) and subsection (o)(1).

Section 33.10, Purposes of Texas Permanent School Fund Assets and the Statement of Investment Policy, would be amended in subsection (b) to include an additional purpose to the investment policy statement.

Section 33.15, Objectives, would be amended to add a description for the objective of risk parity as new subsection (c)(12) and to add risk parity to the asset classes specified in subsection (d)(3).

Section 33.20, Responsible Parties and Their Duties, would be amended to replace the term "textbooks" with "instructional materials" in subsection (a), to use the term "financial company" in subsection (b)(1) and (2), and to clarify SBOE duties relating to ratifying investment transactions in subsection (e)(2).

Section 33.25, Permissible and Restricted Investments and General Guidelines for Investment Managers, would be amended to clarify real estate related investments in subsection (a)(3) and to add risk parity as a permissible investment in subsection (a)(7). In subsection (b)(13), the term "fixed income security" would be clarified.

Section 33.40, Trading and Brokerage Policy, would be amended in subsection (c)(6) to correct the date on which the broker expenditure report is to be filed as well as the dates for the time period the report must cover.

Section 33.55, Standards for Selecting Consultants, Investment Managers, Custodians, and Other Professionals To Provide Outside Expertise for the Fund, would be amended in paragraph (1) to revise the criteria for selecting qualified professionals to assist in investment and related matters.

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

In accordance with the Texas Education Code, §43.0031(c), the SBOE will submit a copy of the proposed amendment to 19 TAC §33.5 to the Texas Ethics Commission and the state auditor for

review and comment. The SBOE will consider any comments from the commission or state auditor prior to final adoption.

Holland Timmins, executive administrator and chief investment officer of the Texas Permanent School Fund, has determined that for the first five-year period the proposed amendments are in effect there will be no additional costs for state or local government as a result of enforcing or administering the proposed amendments.

Mr. Timmins 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 would be the update and clarification of provisions supporting the management and investment of the Permanent School Fund. The distribution of the Permanent School Fund will flow to the school districts and reduce the tax burden to the public and the state of Texas. There is no anticipated economic cost to persons who are required to comply with the proposed amendments.

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

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-5337. A request for a public hearing on the proposed rule actions submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register.*

The amendments are proposed under the Texas Education Code (TEC), §7.102(c)(31), which authorize the State Board of Education to invest the Permanent School Fund within the limits of the authority granted by the Texas Constitution, Article VII, §5, and the TEC, Chapter 43; the TEC, §43.0031, which authorizes the State Board of Education to adopt and enforce an ethics policy that provides standards of conduct relating to the management and investment of the Permanent School Fund; and the TEC, §43.004, which authorizes the State Board of Education to develop written investment objectives concerning the investment of the Permanent School Fund; the Texas Government Code, §2263.004, which authorizes the State Board of Education to adopt by rule standards of conduct applicable to certain financial advisors or service providers; and the Texas Constitution, Article VII, §5.

The amendments implement the Texas Education Code, §§7.102(c)(31), 43.0031-43.0034, and 43.004; the Texas Government Code, §2263.004; and the Texas Constitution, Article VII, §5.

§33.1. Constitutional Authority and Constitutional Restrictions.

(a) The Texas Permanent School Fund (PSF) is comprised of the principal of investment assets [~~all bonds and other funds,~~] and the principal arising from the sale of the lands set apart for the PSF, including dividends and other income to the fund. The total amount distributed from the permanent school fund to the available school fund:

(1) must be an amount that is not more than 6.0% of the average of the market value of the permanent school fund, excluding real property belonging to the fund that is managed, sold, or acquired under the Texas Constitution, Article VII, §4, but including discretionary real assets investments and cash in the state treasury derived from property belonging to the fund, on the last day of each of the 16 state fiscal quarters preceding the regular session of the legislature that begins before that state fiscal biennium, in accordance with the rate adopted by:

(A) a vote of two-thirds of the total membership of the State Board of Education, taken before the regular session of the legislature convenes; or

(B) the legislature by general law or appropriation, if the State Board of Education does not adopt a rate as provided by subparagraph (A) of this paragraph; and

(2) over the 10-year period consisting of the current state fiscal year and the nine preceding state fiscal years, may not exceed the total return on all investment assets of the permanent school fund over the same 10-year period.

(b) In managing the assets of the PSF, the State Board of Education (SBOE) may acquire, exchange, sell, supervise, manage, or retain, through procedures and subject to restrictions it establishes and in amounts it considers appropriate, any kind of investment, including investments in the Texas Growth Fund created by the Texas Constitution, Article XVI, §70, that persons of ordinary prudence, discretion, and intelligence, exercising the judgment and care under the circumstances then prevailing, acquire or retain for their own account in the management of their affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

§33.5. Code of Ethics.

(a) General principles. The Texas Permanent School Fund (PSF) is held in public trust for the benefit of the schoolchildren of Texas. All those charged with the management of the PSF will aspire to the highest standards of ethical conduct. The purpose of the PSF code of ethics is to assist and help guide all such persons in the proper discharge of their duties and to assist them in avoiding even the appearance of impropriety.

(b) Fiduciary responsibility. The members of the State Board of Education (SBOE) serve as fiduciaries of the PSF and are responsible for prudently investing its assets. The SBOE members or anyone acting on their behalf shall comply with the provisions of this section, the Texas Constitution, Texas statutes, and all other applicable provisions governing the responsibilities of a fiduciary.

(c) Compliance with constitution and code of ethics. The SBOE members are public officials governed by the provisions of the Texas Government Ethics Act, as stated in the Texas Government Code, Chapter 572.

(d) Definitions. For purposes of this section, the following terms shall have the following meanings.

(1) SBOE Member--For the purposes of the PSF code of ethics, a member of the SBOE shall be deemed to include the SBOE Member or a person related to the member within the second degree of affinity or consanguinity. [~~Member's spouse and dependent child(ren). "Dependent child(ren)" is defined as an individual's child(ren), including adopted child(ren) or stepchild(ren) for whom the SBOE Member or SBOE Member's spouse provides more than 50% of support during the current or prior calendar year.~~]

(2) Persons Providing PSF Investment and Management Services to the SBOE (PSF Service Providers) are the following individuals:

(A) any person responsible by contract for managing the PSF, investing the PSF, executing brokerage transactions, or acting as a custodian of the PSF;

(B) a member of the Committee of Investment Advisors;

(C) any person who provides consultant services for compensation regarding the management and investment of the PSF;

(D) any person who provides investment and management advice to an SBOE Member, with or without compensation, if an SBOE Member:

(i) gives the person access to PSF records or information that are identified as confidential; or

(ii) asks the person to interview, meet with, or otherwise confer with a PSF Service Provider or Texas Education Agency (TEA) staff;

(E) any member of the TEA PSF staff or legal staff who is responsible for managing or investing assets of the PSF, executing brokerage transactions, acting as a custodian of the PSF, or providing investment or management advice or legal advice regarding the investment or management of the PSF to an SBOE Member or PSF staff; or

(F) any person who submits a response to a Request for Proposal (RFP) or Request for Qualifications (RFQ), or similar types of solicitations, while such response is pending. An applicant is not required to file reports under this section except as required in the RFP or RFQ process.

(e) Assets affected by this section. The provisions of this section apply to all PSF assets, both publicly and nonpublicly traded investments.

(f) General ethical standards.

(1) SBOE Members and PSF Service Providers must comply with all applicable laws, specifically, the following statutes: Texas Government Code, Chapter 2263 (Ethics and Disclosure Requirements for Outside Financial Advisors and Service Providers), §572.051 (Standards of Conduct for Public Servants), §552.352 (Distribution of Confidential Information), §572.058 (Private Interest in Measure or Decision; Disclosure; Removal from Office for Violation), §572.054 (Representation by Former Officer or Employee of Regulatory Agency Restricted), §572.002 (General Definitions), §572.004 (Definition: Regulation), and Chapter 305 (Registration of Lobbyists); Texas Penal Code, Chapter 36 (Bribery, Corrupt Influence, and Gifts to Public Servants) and Chapter 39 (Abuse of Office, Official Misconduct); and Texas Education Code, §43.0031 (Permanent School Fund Ethics Policy), §43.0032 (Conflicts of Interest), and §43.0033 (Reports of Expenditures). The omission of any applicable statute listed in this paragraph does not excuse violation of its provisions.

(2) SBOE Members and PSF Service Providers must be honest in the exercise of their duties and must not take actions that will discredit the PSF.

(3) SBOE Members and PSF Service Providers shall be loyal to the interests of the PSF to the extent that such loyalty is not in conflict with other duties, which legally have priority. SBOE Members and PSF Service Providers shall avoid personal, employment, or business relationships that create conflicts of interest as defined in subsection (i)(1) of this section. Should an SBOE Member [~~Members~~] or a PSF Service Provider [~~Providers~~] become aware of any conflict of interest involving himself or herself or another SBOE Member or PSF Service Provider, he or she has[~~, they have~~] an affirmative duty to disclose the conflict to the SBOE chair and vice chair and the commissioner within seven days of discovering the conflict and, in the case of a conflict involving himself or herself, to cure the conflict in a manner provided for under this section prior to the next SBOE or committee meeting and such SBOE Member shall take no action nor participate in the RFP or RFQ process, or similar types of solicitations, that concerns the conflict.

(4) SBOE Members and PSF Service Providers shall not use nonpublic information gained through their relationship with the PSF to seek or obtain personal gain beyond agreed compensation and/or any properly authorized expense reimbursement. This should not be interpreted to forbid the use of PSF as a reference or the communication to others of the fact that a relationship with PSF exists, provided that no misrepresentation is involved.

(5) An SBOE Member shall report in writing the name and address of any PSF Service Provider, as defined by subsection (d)(2)(D) of this section, who provides investment and management advice to that SBOE Member. The SBOE Member shall submit the report to the commissioner of education for distribution to the SBOE within 30 days of the PSF Service Provider first providing investment and management advice to that SBOE Member.

(6) SBOE Members and PSF Service Providers shall report in writing any action described by the Texas Education Code, §7.108, to the commissioner of education for distribution to the SBOE within seven days of discovering the violation.

(7) A PSF Service Provider shall not make any gift or donation to a school or other charitable interest on behalf of, at the request of, or in coordination with an SBOE Member. Any PSF Service Provider or SBOE Member shall disclose in writing to the commissioner of education any information regarding such a donation.

(8) A PSF Service Provider shall disclose in writing to the commissioner of education for dissemination to all SBOE Members any business or financial transaction greater than $50 in value with an SBOE Member, the commissioner of education, or any TEA employee within 30 days of the transaction. Excluded from this subsection are checking accounts, savings accounts, credit cards, brokerage accounts, mutual funds, or other financial accounts that are provided to the SBOE Member under the same terms and conditions as they are provided to members of the general public.

(9) An SBOE Member shall disclose in writing to the commissioner of education on a quarterly basis any business or financial transaction greater than $50 in value between the SBOE Member, or a business entity in which the SBOE Member has a significant ownership interest, and a PSF Service Provider. A report shall be filed even if there has not been a business or financial transaction greater than $50 in value between the SBOE Member, or a business entity in which the SBOE Member has a significant ownership interest, and a PSF Service Provider. Excluded from this subsection are checking accounts, savings accounts, credit cards, brokerage accounts, mutual funds, or other financial accounts that are provided to an SBOE Member under the same terms and conditions as they are provided to members of the general public. The reports shall be filed on or before January 15, April 15, July 15, and October 15 and shall cover the preceding three calendar months. The first report filed for each SBOE Member shall cover the preceding one-year period. Subsection (u) of this section does not apply to the first report filed. The commissioner of education shall communicate the information included in the disclosure to all SBOE Members.

(g) Notification of disclosure. In order to preserve the integrity and public trust in the PSF, it is deemed necessary and appropriate to allow all SBOE Members a reasonable time to promptly review and respond to any disclosures or written inquiries made by applicants or made by PSF Service Providers as provided in SBOE operating procedures. In compliance with Texas Government Code, §2156.123, no SBOE Member or PSF Service Provider should publicly disclose any submission materials prior to completion of the RFP or RFQ process.

For purposes of this subsection, an RFP or RFQ is completed upon final award of an RFP, or selection of qualified bidders for an RFQ, or closure without any selection. This subsection does not allow an SBOE Member to refrain from publicly disclosing a conflict of interest as required by subsections (f)(3) and (i)(4) of this section and Texas Government Code, §572.058.

(h) Disclosure.

(1) If an SBOE Member solicited a specific investment action by the PSF staff or a PSF Service Provider, the SBOE Member shall publicly disclose the fact to the SBOE in a public meeting. The disclosure shall be entered into the minutes of the meeting. For purposes of this section, a matter is a prospective directive to the PSF staff or a PSF Service Provider to undertake a specific investment or divestiture of securities for the PSF. This term does not include ratification of prior securities transactions performed by the PSF staff or a PSF Service Provider and does not include an action to allocate classes of assets within the PSF.

(2) In addition, an SBOE Member shall fully disclose any substantial interest in any publicly or nonpublicly traded PSF investment (business entity) on the SBOE Member's annual financial report filed with the Texas Ethics Commission pursuant to Texas Government Code, §572.021. An SBOE Member has a substantial interest if the SBOE Member:

(A) has a controlling interest in the business entity;

(B) owns more than 10% of the voting interest in the business entity;

(C) owns more than $25,000 of the fair market value of the business entity;

(D) has a direct or indirect participating interest by shares, stock, or otherwise, regardless of whether voting rights are included, in more than 10% of the profits, proceeds, or capital gains of the business entity;

(E) is a member of the board of directors or other governing board of the business entity;

(F) serves as an elected officer of the business entity; or

(G) is an employee of the business entity.

(i) Conflicts of interest.

(1) A conflict of interest exists whenever SBOE Members or PSF Service Providers have personal or private commercial or business relationships that could reasonably be expected to diminish their independence of judgment in the performance of their duties. For example, a person's independence of judgment is diminished when the person is in a position to take action or not take action with respect to PSF and such act or failure to act is, may be, or reasonably appears to be influenced by considerations of personal gain or benefit rather than motivated by the interests of the PSF. Conflicts include, but are not limited to, beneficial interests in securities, corporate directorships, trustee positions, or other special relationships that could reasonably be considered a conflict of interest with the duties to the PSF. Further, Texas Education Code, §43.0032, requires disclosure and no anticipation, unless a waiver is granted, when an SBOE Member or a PSF Service Provider has a business, commercial, or other relationship that could reasonably be expected to diminish a person's independence of judgment in the performance of the person's responsibilities relating to the management or investment of the PSF. Such business, commercial, or other relationship is defined to be a relationship that is prohibited under Texas Government Code, §572.051, or that would require public disclosure under Texas Government Code, §572.058, or a relationship that does not rise to this level but that is determined by the SBOE to create an unacceptable risk to the integrity and reputation of the PSF investment program.

(2) Any SBOE Member or PSF Service Provider who has a possible conflict of interest as defined in paragraph (1) of this subsection shall disclose the possible conflict to the commissioner of education and the chair and vice chair of the SBOE on the disclosure form. The disclosure form is provided in this paragraph entitled "Potential Conflict of Interest Disclosure Form."
Figure: 19 TAC §33.5(i)(2) (No change.)

(3) A person who files a statement under paragraph (2) of this subsection disclosing a possible conflict of interest may not give advice or make decisions about a matter affected by the possible conflict of interest unless the SBOE, after consultation with the general counsel of the TEA, expressly waives this prohibition. The SBOE may delegate the authority to waive this prohibition. If an SBOE Member or a PSF Service Provider wishes to seek a waiver or determination of a possible conflict of interest, the SBOE Member or PSF Service Provider shall request an opinion from the Texas Ethics Commission. An SBOE Member will be given the assistance of the TEA ethics advisor to help draft a request for an opinion, if such assistance is requested. When the SBOE Member or PSF Service Provider receives the opinion of the Texas Ethics Commission and if a waiver is still sought, the SBOE Member or PSF Service Provider shall forward the opinion to the SBOE chair and vice chair and the commissioner. An opinion of the Texas Ethics Commission that determines a conflict exists is final and the SBOE may not waive the conflict of interest. An opinion of the Texas Ethics Commission that determines that no conflict exists will automatically result in an SBOE waiver. If a decision concerning a waiver cannot be achieved with sufficient expedition through the procedures specified in this subsection, the SBOE may vote to grant a waiver after consultation with the general counsel of the TEA.

(4) If an SBOE Member believes he or she has a conflict of interest based on the existence of certain relationships described in Texas Government Code, §572.058, the SBOE Member shall publicly disclose the conflict at an SBOE meeting or committee meeting and the SBOE Member shall not vote or otherwise participate in any decision involving the conflict. This requirement is in addition to the requirement of filing a disclosure under paragraph (2) of this subsection.

(5) Texas Government Code, §572.051, establishes standards of conduct for state officers and employees. SBOE Members and TEA employees shall abide by these standards.

(j) Prohibited transactions and interests.

(1) For purposes of this section, the term "direct placement" (with respect to investments that are not publicly traded) is defined as a direct sale of securities, generally to institutional investors, with or without the use of brokers or underwriters, primarily offered to Qualified Institutional Buyers (QIBs) and not registered by the Securities and Exchange Commission.

(2) For the purposes of this section, the term "placement agent" is defined as any third party, whether or not affiliated with a PSF Service Provider, that is a party to an agreement or arrangement (whether written or oral) with a PSF Service Provider for direct or indirect payment of a fee in connection with a PSF investment.

(3) No SBOE Member or PSF Service Provider shall:

(A) have a financial interest in a direct placement investment of the PSF;

(B) serve as an officer, director, or employee of an entity in which a direct placement investment is made by the PSF; or

(C) serve as a consultant to, or receive any fee, commission or payment from, an entity in which a direct placement investment is made by the PSF.

(4) No SBOE Member shall:

(A) act as a representative or agent of a third party in dealing with a PSF manager or consultant in connection with a PSF investment; or

(B) be employed for two years after the end of his or her term on the SBOE with an organization in which the PSF invested, unless the organization's stock or other evidence of ownership is traded on the public stock or bond exchanges.

(5) A PSF Service Provider shall:

(A) not act as a representative or agent of a third party in dealing with a PSF manager or consultant in connection with a PSF investment; and

(B) not use a placement agent in connection with a PSF investment unless:

(i) the relationship with the placement agent and any compensation is disclosed in writing to and approved by the SBOE;

(ii) the placement agent is registered with the Securities and Exchange Commission or the Financial Industry Regulatory Authority; and

(iii) such placement agent does not share any fees with a non-registered person or entity.

(6) A placement agent approved by the SBOE may only be used in accordance with the SBOE's approval. If a PSF Service Provider wishes to use the same placement agent for a different purpose or in a different manner, a separate approval is required.

(7) A placement agent shall file campaign contribution reports in the same manner as does a PSF Service Provider under subsection (o)(1) of this section.

(k) Solicitation of support. No SBOE Member shall solicit or receive a campaign contribution on behalf of any political candidate, political party, or political committee from a PSF Service Provider or any PSF manager, consultant, or staff member. The manager, PSF Service Provider, consultant, or staff member shall report any such incident in writing to the commissioner of education for distribution to the SBOE.

(l) Hiring external professionals. The SBOE may contract with private professional investment managers to help make PSF investments. The SBOE has the authority and responsibility to hire other external professionals, including custodians or consultants. The SBOE shall select each professional based [~~solely~~] on merit and cost and subject to the provisions of §33.55 of this title (relating to Standards for Selecting Consultants, Investment Managers, Custodians, and Other Professionals To Provide Outside Expertise for the Fund).

(m) Responsibilities of PSF Service Providers. The PSF Service Providers shall be notified in writing of the code of ethics contained in this section. Any existing contracts for investment and any future investment shall strictly conform to this code of ethics. The PSF Service Provider shall report in writing any suggestion or offer by an SBOE Member to deviate from the provisions of this section to the commissioner of education for distribution to the SBOE within 30 days of the PSF Service Provider discovering the violation. The PSF Service Provider shall report in writing any violation of this code of ethics committed by another PSF Service Provider to the commissioner of education for distribution to the SBOE within 30 days of the PSF Service Provider discovering the violation. A PSF Service Provider or other person retained in a fiduciary capacity must comply with the provisions of this section.

(n) Gifts and entertainment.

(1) Bribery. SBOE Members are prohibited from soliciting, offering, or accepting gifts, payments, and other items of value in exchange for an official act, including a vote, recommendation, or any other exercise of official discretion pursuant to Texas Penal Code, §36.02.

(2) Acceptance of gifts.

(A) An SBOE Member may not accept gifts, favors, services, or benefits that may reasonably tend to influence the SBOE Member's official conduct or that the SBOE Member knows or should know are intended to influence the SBOE Member's official conduct. For purposes of this paragraph, a gift does not include an item with a value of less than $50, excluding cash or negotiable instruments.

(B) An SBOE Member may not accept a gift, favor, service, or benefit from a person that the SBOE Member knows is interested or is likely to become interested in a charter, contract, purchase, payment, claim, or other pecuniary transaction over which the SBOE has discretion.

(C) An SBOE Member may not accept a gift, favor, service, or benefit from a person that the SBOE Member knows to be subject to the regulation, inspection, or investigation of the SBOE or the TEA.

(D) An SBOE Member may not solicit, accept, or agree to accept a benefit from a person with whom civil or criminal litigation is pending or contemplated by the SBOE or the TEA.

(E) So long as the gift or benefit is not given by a person subject to the SBOE's or the TEA's regulation, inspection, or investigation, an SBOE Member may accept a gift, payment, or contribution from an individual who is not registered as a lobbyist with the Texas Ethics Commission if it fits into one of the following categories:

(i) items worth less than $50 (may not be cash, checks, or negotiable instruments);

(ii) independent relationship, such as kinship, or a personal, professional, or business relationship independent of the SBOE Member's official capacity;

(iii) fees for services rendered outside the SBOE Member's official capacity;

(iv) government property issued by a governmental entity that allows the use of the property; or

(v) food, lodging, entertainment, and transportation, if accepted as a guest and the donor is present.

(F) The following provisions govern the disposition of an individual who is a PSF Service Provider or who is both a lobbyist registered with the Texas Ethics Commission and who represents a person subject to the SBOE's or the TEA's regulation, inspection, or investigation.

(i) An SBOE Member may not accept:

(I) loans, cash, or negotiable instruments;

(II) travel or lodging for a pleasure trip;

(III) travel and lodging in connection with a fact-finding trip or to a seminar or conference at which the SBOE Member does not provide services;

(IV) entertainment worth more than $250 in a calendar year;

(V) gifts, other than awards and mementos, that combined are worth more than $250 in value for a calendar year. Gifts do not include food, entertainment, lodging, and transportation; or

(VI) individual awards and mementos worth more than $250 each.

(ii) An SBOE Member may accept food and beverages if the PSF Service Provider or lobbyist is present.

(G) An SBOE Member may not solicit, agree to accept, or accept an honorarium in consideration for services that the SBOE Member would not have been asked to provide but for the SBOE Member's official position. An SBOE Member may accept food, transportation, and lodging in connection with a speech performed as a result of the SBOE Member's position in accordance with the rulings with the Texas Ethics Commission, which may place limitations on the type of entity that may fund such travel. An SBOE Member must report the food, lodging, or transportation accepted under this subparagraph in the SBOE Member's annual personal financial statement.

(H) Under no circumstances shall an SBOE Member accept a prohibited gift if the source of the gift is not identified or if the SBOE Member knows or has reason to know that the gift is being offered through an intermediary.

(I) If an unsolicited prohibited gift is received by an SBOE Member, he or she should return the gift to its source. If that is not possible or feasible, the gift should be donated to charity. The SBOE Member shall report the return of the gift or the donation of the gift to the commissioner of education.

(J) A PSF Service Provider shall file a report annually on January 31 [~~April 15~~] of each year on the expenditure report provided in this subparagraph entitled "Report of Expenditures of Persons Providing Services to the State Board of Education Relating to the Management and Investment of the Permanent School Fund." The report shall be for the time period beginning on January 1 and ending on December 31 of the previous year. The expenditure report must describe in detail any expenditure of more than $50 made by the person on behalf of:

Figure: 19 TAC §33.5(n)(2)(J) (No change.)

(i) an SBOE Member;

(ii) the commissioner of education; or

(iii) an employee of the TEA or of a nonprofit corporation created under the Texas Education Code, §43.006.

(K) A PSF Service Provider shall file a report annually with the TEA's PSF office, in the format specified by the PSF staff, on or before January 31 [~~April 15~~] of each year. The report will be deemed to be filed when it is actually received. The report shall be for the time period beginning on January 1 and ending on December 31 of the previous year. It shall list any individuals who served in any of the following capacities at any time during the reporting period:

(i) all members of the governing body of the PSF Service Provider;

(ii) the officers of the PSF Service Provider;

(iii) any broker who conducts transactions with PSF funds;

(iv) all members of the governing body of the firm of a broker who conducts transactions with PSF funds; and

(v) all officers of the firm of a broker who conducts transactions with PSF funds.

(L) This subsection does not apply to campaign contributions.

(M) Each SBOE Member and each PSF Service Provider shall, no later than April 15, file an annual report affirmatively disclosing any violation of this code of ethics known to that person during the time period beginning January 1 and ending December 31 of the previous year which has not previously been disclosed in writing to the commissioner of education for distribution to all board members, or affirmatively state that the person has no knowledge of any such violation. For purposes of this subparagraph only, "SBOE Member" means only the individual elected official.

(o) Campaign contributions.

(1) A PSF Service Provider shall, no later than January 31 [~~April 15~~] and July 31 [~~October 15~~], file a semi-annual report of each political contribution that the PSF Service Provider has made to an SBOE Member or a candidate seeking election to the SBOE in writing to the commissioner of education. The report shall be for the six-month time period preceding the reporting dates and include the name of each SBOE Member or candidate seeking election to the SBOE who received a contribution, the amount of each contribution, and date of each contribution. Subsection (u) of this section does not apply to the first report filed. A report shall be filed even if the PSF Service Provider made no reportable contribution during the reporting period to an SBOE Member or a candidate seeking election to the SBOE. The commissioner of education shall communicate the information included in the disclosure to all SBOE Members.

(2) Any person or firm filing a response to an RFP or RFQ relating to the management and investments of the PSF shall disclose in the response whether at any time in the preceding four years from the due date of the response to the RFP or RFQ the person or firm has made a campaign contribution to a candidate for or member of the SBOE.

(p) Compliance with professional standards.

(1) SBOE Members and PSF Service Providers who are members of professional organizations which promulgate standards of conduct must comply with those standards.

(2) PSF Service Providers must comply with the Code of Ethics and Standards of Professional Conduct of the Chartered Financial Analyst Institute (CFA Institute).

(q) Transactions between PSF Service Providers and/or consultants.

(1) PSF Service Providers or persons who act as consultants to the SBOE regarding investment and management of the PSF shall not engage in any transaction involving the assets of the PSF with another PSF Service Provider or a person who acts as a consultant to the SBOE regarding investment and management of the PSF.

(2) PSF Service Providers and/or consultants to the SBOE who provide advice regarding investment and management of the PSF shall report to the SBOE on a quarterly basis all investment transactions or trades and any fees or compensation paid or received in connection with the transactions or trades with another PSF Service Provider or a person who acts as a consultant to the SBOE regarding investment and management of the PSF.

(r) Compliance and enforcement.

(1) The SBOE will enforce this section through its chair or vice chair or the commissioner of education.

(2) Any violation of this section will be reported to the chair and vice chair of the SBOE and the commissioner of education and a recommended action will be presented to the SBOE by the chair or the commissioner. A violation of this section may result in the termination of the contract or a lesser sanction. Repeated minor violations may also result in the termination of the contract.

(3) The PSF compliance officer under the direction of the TEA confidentiality officer shall act as custodian of all statements, waivers, and reports required under this section for purposes of public disclosure requirements.

(4) The ethics advisor of the TEA shall respond to inquiries from the SBOE Members and PSF Service Providers concerning the provisions of this section. The ethics advisor may confer with the general counsel and the executive administrator of the PSF.

(5) No payment shall be made to a PSF Service Provider who has failed to timely file a completed report as described by subsection (m) of this section, until a completed report is filed.

(s) Ethics training. The SBOE shall receive annual training regarding state ethics laws through the Texas Ethics Commission and the TEA's ethics advisor.

(t) TEA general ethical standards. The commissioner of education and PSF staff shall comply with the General Ethical Standards for the Staff of the Permanent School Fund and the Commissioner of Education.

(u) Reporting period. A new report required by an amendment to the code of ethics need only concern events after the effective date of the amendment. An amendment to a rule that presently requires a report does not affect the reporting period unless the amendment explicitly changes the reporting period.

(v) Statutory statement.

(1) A "statutory financial advisor or service provider" as defined in this subsection shall on or before April 15 file a statement as required by Texas Government Code, §2263.005, with the commissioner of education and the state auditor, for the previous calendar year. The statement will be deemed filed when it is actually received. A statutory financial advisor or service provider shall promptly file a new or amended statement with the commissioner of education and the state auditor whenever there is new information required to be reported under Texas Government Code, §2263.005(a).

(2) A "statutory financial advisor or service provider" is a member of the Committee of Investment Advisors or an individual or business entity, including a financial advisor, financial consultant, money or investment manager, or broker, who is not an employee of the TEA, but who provides financial services or advice to the TEA or the SBOE or an SBOE member in connection with the management and investment of the PSF and who may reasonably be expected to receive, directly or indirectly, more than $5,000 in compensation from the TEA or the SBOE during a fiscal year.

(3) An annual statement required to be filed under this subsection will be made using the form developed by the state auditor.

§33.10. Purposes of Texas Permanent School Fund Assets and the Statement of Investment Policy.

(a) The purpose of the Texas Permanent School Fund (PSF), as defined by the Texas Constitution, shall be to support and maintain an efficient system of public free schools. The State Board of Education (SBOE) views the PSF as a perpetual institution. Consistent with its perpetual nature, the PSF shall be an endowment fund with a long-term investment horizon. The SBOE shall strive to manage the PSF consistently with respect to the following: generating income for the benefit of the public free schools of Texas, the real growth of the corpus of the PSF, protecting capital, and balancing the needs of present and future generations of Texas school children. The PSF will strive to maintain intergenerational equity by attempting to pay out a constant distribution per student after adjusting for inflation.

(b) The purposes of the investment policy statement are to:

(1) specify the investment objectives, policies, and guidelines the SBOE considers appropriate and prudent, considering the needs of the PSF, and to comply with the Texas Constitution by directing PSF assets;

(2) establish SBOE performance criteria for an investment manager;

(3) communicate the investment objectives, guidelines, and performance criteria to the SBOE, PSF investment staff and managers, and all other parties;

(4) guide the ongoing oversight of PSF investment and test compliance with the Texas Constitution and other applicable statutes;

(5) document that the SBOE is fulfilling its responsibilities for managing PSF investments solely in the interests of the PSF; [~~and~~]

(6) document that the SBOE is fulfilling its responsibilities under Texas law; and[~~.~~]

(7) provide transparency and accountability to the citizens of Texas.

§33.15. Objectives.

(a) Investment objectives.

(1) Investment objectives have been formulated based on the following considerations:

(A) the anticipated financial needs of the Texas public free school system in light of expected future contributions to the Texas Permanent School Fund (PSF);

(B) the need to preserve capital;

(C) the risk tolerance set by the State Board of Education (SBOE) and the need for diversification;

(D) observations about historical rates of return on various asset classes;

(E) assumptions about current and projected capital market and general economic conditions and expected levels of inflation;

(F) the need to invest according to the prudent person rule; and

(G) the need to document investment objectives, guidelines, and performance standards.

(2) Investment objectives represent desired results and are long-term in nature, covering typical market cycles of three to five years. Any shortfall in meeting the objectives should be explainable in terms of general economic and capital market conditions and asset allocation.

(3) The investment objectives are consistent with generally accepted standards of fiduciary responsibility.

(4) Under the provisions of this chapter, investment managers shall have discretion and authority to implement security selection and timing.

(b) Goal and objectives for the PSF.

(1) Goal. The goal of the SBOE for the PSF shall be to invest for the benefit of current and future generations of Texans consistent with the safety of principal, in light of the strategic asset allocation plan adopted. To achieve this goal, PSF investment shall be carefully administered at all times.

(2) Objectives.

(A) The preservation and safety of principal shall be a primary consideration in PSF investment.

(B) Fixed income securities shall be purchased at the highest yield consistent with the preservation and safety of principal.

(C) To the extent possible, the PSF administrators shall hedge against inflation.

(D) Securities, except investments for cash management purposes as specified in §33.25 of this title (relating to Permissible and Restricted Investments and General Guidelines for Investment Managers), shall be selected for investment on the basis of long-term investment merits rather than short-term gains.

(c) Investment rate of return and risk objectives.

(1) Because the education needs of the future generations of Texas school children are long-term in nature, the return objective of the PSF shall also be long-term and focused on fairly balancing the benefits between the current generation and future generations while preserving the real per capita value of the PSF.

(2) Investment rates of return shall adhere to the Chartered Financial Analyst (CFA) Institute Global Investment Performance Standards (GIPS) guidelines in calculating and reporting investment performance return information.

(3) The overall risk level of PSF assets in terms of potential for price fluctuation shall not be extreme and risk variances shall be minimal. The primary means of achieving such a risk profile are:

(A) a broad diversification among asset classes that, as nearly as possible, react independently through varying economic and market circumstances;

(B) careful control of risk level within each asset class by avoiding over-concentration and not taking extreme positions against the market averages; and

(C) a degree of emphasis on stable growth.

(4) Over time, the volatility of returns (or risk) for the total fund, as measured by standard deviation of investment returns, should be comparable to investments in market indices in the proportion in which the PSF invests.

(5) The objective of the domestic equity fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative benchmark index, combining dividends and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark index.

(6) The objective of the international equity fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative international benchmark index in U.S. dollars, combining dividends and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark index.

(7) The objective of the domestic fixed income fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative benchmark index, combining interest income and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark index.

(8) The objective of the real estate fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative benchmark index in U.S. dollars, combining income and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark index.

(9) The objective of the private equity fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative benchmark or a targeted internal rate of return in U.S. dollars, combining income and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark.

(10) The objective of the absolute return fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative benchmark index in U.S. dollars, combining income and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark index.

(11) The objective of the real return fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative benchmark index in U.S. dollars, combining income and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark index.

(12) The objective of the risk parity fund shall be to earn, over time, an average annual total rate of return that meets or exceeds that of a representative benchmark index in U.S. dollars, combining income and capital appreciation, while maintaining an acceptable risk level compared to that of the representative benchmark index.

(13) [~~(12)~~] The objective of the short-term cash fund shall be to provide liquidity for the timely payment of security transactions, while earning a competitive return. The expected return, over time, shall meet or exceed that of the representative benchmark index, while maintaining an acceptable risk level compared to that of the representative benchmark index.

(14) [~~(13)~~] Notwithstanding the risk parameters specified in paragraphs (4) - (13) [~~(4)~~ - ~~(12)~~] of this subsection, consideration shall be given to marginal risk variances exceeding the representative benchmark indices if returns are commensurate with the risk levels of the respective portfolios.

(d) Asset allocation policy.

(1) The SBOE shall adopt and implement a strategic asset allocation plan based on a well diversified, balanced investment approach that uses a broad range of asset classes indicated by the following characteristics of the PSF:

(A) the long-term nature of the PSF;

(B) the spending policy of the PSF;

(C) the relatively low liquidity requirements of the PSF;

(D) the investment preferences and risk tolerance of the SBOE;

(E) the rate of return objectives; and

(F) the diversification objectives of the PSF, specified in the Texas Constitution, Article VII, §5(d), the Texas Education Code, Chapter 43, and the provisions of this chapter.

(2) The strategic asset allocation plan shall contain guideline percentages, at market value of the total fund's assets, to be invested in various asset classes. The target mix may not be attainable at

a specific point in time since actual asset allocation will be dictated by current and anticipated market conditions, as well as the overall directions of the SBOE.

(3) The SBOE Committee on School Finance/Permanent School Fund, with the advice of the PSF investment staff, shall review the provisions of this section at least annually and, as needed, rebalance the assets of the portfolio according to the asset allocation rebalancing procedure specified in the PSF Investment Procedures Manual. The SBOE Committee on School Finance/Permanent School Fund shall consider the industry diversification and the percentage allocation within the following asset classes:

(A) domestic equities;

(B) international equities;

(C) domestic fixed income;

(D) real estate;

(E) private equity;

(F) absolute return;

(G) real return; [~~and~~]

(H) risk parity; and

(I) [~~(H)~~] cash.

(4) Investments shall not exceed the strategic ranges the SBOE establishes for each asset class.

(5) Periodically, the SBOE shall allocate segments of the total fund to each investment manager and specify guidelines, investment objectives, and standards of performance that apply to those assets.

§33.20. Responsible Parties and Their Duties.

(a) The Texas Constitution, Article VII, §§1-8, establishes the Available School Fund, the Texas Permanent School Fund (PSF), and the State Board of Education (SBOE), and specifies the standard of care SBOE members must exercise in managing PSF assets. In addition, the constitution directs the legislature to establish suitable provisions for supporting and maintaining an efficient public free school system, defines the composition of the PSF and the Available School Fund, and requires the SBOE to set aside sufficient funds to provide free instructional materials [~~textbooks~~] for the use of children attending the public free schools of this state.

(b) The SBOE shall be responsible for overseeing all aspects of the PSF and may employ any of the following parties, whose duties and responsibilities are as follows.

(1) An investment manager is a person, firm, corporation, financial company, [~~bank,~~] or insurance company the SBOE retains to manage a portion of the PSF assets under specified guidelines.

(2) A custodian is an organization, normally a financial company [~~bank~~], the SBOE retains to safekeep, and provide accurate and timely reports of, PSF assets.

(3) A consultant is a person or firm the SBOE retains to advise the PSF based on professional expertise.

(4) Investment counsel or consultant is a person or firm retained under criteria specified in the PSF Investment Procedures Manual to advise PSF investment staff and the SBOE Committee on School Finance/Permanent School Fund within the policy framework established by the SBOE. Counsel is responsible for asset allocation reviews, manager searches, spending policy recommendations and research related to the management of the fund's assets.

(5) A performance measurement consultant is a person or firm retained to provide the SBOE Committee on School Finance/Permanent School Fund an analysis of the PSF portfolio performance. The outside portfolio performance measurement service firm shall perform the analysis on a quarterly or as-needed basis. Quarterly reports shall be distributed to each member of the SBOE Committee on School Finance/Permanent School Fund, and a representative of the firm shall be available as necessary to brief the committee.

(6) The State Auditor's Office is an independent state agency that performs an annual financial audit of the Texas Education Agency (TEA) [~~TEA~~] at the direction of the Texas Legislature. The financial audit, conducted according to generally accepted auditing standards, is designed to test compliance with generally accepted accounting principles. The state auditor performs tests of the transactions of the PSF Investment Office as part of this annual audit, including compliance with governing statutes and SBOE policies and directives. The TEA Internal Audit Division will participate in the audit process by participating in entrance and exit conferences, being provided copies of all reports and management letters furnished by the external auditor, and having access to the external auditor's audit programs and working papers.

(7) The SBOE may retain independent external auditors to review the PSF accounts annually or on an as-needed basis. The TEA Internal Audit Division will participate in the audit process by participating in entrance and exit conferences, being provided copies of all reports and management letters furnished by the external auditor, and having access to the external auditor's audit programs and working papers.

(c) The SBOE shall meet on a regular or as-needed basis to conduct the affairs of the PSF.

(d) In case of emergency or urgent public necessity, the SBOE Committee on School Finance/Permanent School Fund or the SBOE, as appropriate, may hold an emergency meeting under the Texas Government Code, §551.045.

(e) The SBOE shall have the following exclusive duties:

(1) determining the strategic asset allocation mix between asset classes based on the attending economic conditions and the PSF goals and objectives;

(2) ratifying all [~~the~~] investment transactions pertaining to the purchase, sale, or reinvestment of assets [~~fixed income, equity, or cash securities~~] by all internal and external managers for the current reporting period;

(3) appointing members to the SBOE Investment Advisory Committee;

(4) approving the selection of, and all contracts with, external professional investment managers, financial advisors, financial consultants, or other external professionals employed to help the SBOE invest the PSF;

(5) approving the selection of, and the performance measurement contract with, a well-recognized and reputable firm employed to evaluate and analyze PSF investment results. The service shall compare investment results to the written investment objectives of the SBOE and also compare the investment of the PSF with the investment of other public and private funds against market indices and by managerial style;

(6) setting policies, objectives, and guidelines for investing PSF assets; and

(7) representing the PSF to the state.

(f) The SBOE may establish committees to administer the affairs of the PSF. The duties and responsibilities of any committee established shall be specified in the PSF Investment Procedures Manual.

(g) The PSF shall have an executive administrator, with a staff to be adjusted as necessary, who functions directly with the SBOE through the SBOE Committee on School Finance/Permanent School Fund concerning investment matters, and who functions as part of the internal operation under the commissioner of education. At all times, the PSF executive administrator and staff shall invest PSF assets as directed by the SBOE according to the Texas Constitution and all other applicable Texas statutes, as amended, and SBOE rules governing the operation of the PSF. The PSF staff shall:

(1) administer the PSF according to SBOE goals and objectives;

(2) execute all directives, policies, and procedures from the SBOE and the SBOE Committee on School Finance/Permanent School Fund;

(3) keep records and provide a continuous and accurate accounting of all PSF transactions, revenues, and expenses and provide reports on the status of the PSF portfolio;

(4) advise any officials, investment firms, or other interested parties about the powers, limitations, and prohibitions regarding PSF investments that have been placed on the SBOE or PSF investment staff by statutes, attorney general opinions and court decisions, or by SBOE policies and operating procedures;

(5) continuously research all internally managed securities held by the PSF and report to the SBOE Committee on School Finance/Permanent School Fund and the SBOE any information requested, including reports and statistics on the PSF, for the purpose of administering the PSF;

(6) establish and maintain a procedures manual that implements this section to be approved by the SBOE;

(7) make recommendations regarding investment and policy matters to the SBOE Committee on School Finance/Permanent School Fund and the SBOE; and

(8) establish and maintain accounting policies and internal control procedures concerning all receipts, disbursements and investments of the PSF, according to the procedures adopted by the SBOE.

§33.25. Permissible and Restricted Investments and General Guidelines for Investment Managers.

(a) Permissible investments.

(1) Equities are considered to be common or preferred corporate stocks; corporate bonds, debentures, or preferreds that may be converted into corporate stock; and investment trusts. Stocks listed or traded on well recognized or principal U.S. or foreign exchanges or nationally recognized over-the-counter markets are permitted.

(2) Fixed income securities are considered to be U.S. or foreign treasury or government agency obligations, U.S. or foreign corporate bonds, asset- or mortgage-backed securities, taxable municipal obligations, Canadian bonds, Yankee bonds, supranational bonds (denominated in U.S. dollars), and 144A securities.

(3) Real estate is considered to be investments in real properties, as well as investments in real estate related securities, [~~and~~] real estate related debt, and real estate related funds. Common property types associated with real estate investments are, but not limited to, apartments, office buildings, retail centers, infrastructure, timberlands, and industrial parks.

(4) Private equity is considered to be, but not limited to, venture capital, buy-out investing, mezzanine financing, and distressed debt.

(5) Absolute returns are investments in a diversified bundle of primarily marketable investment strategies that seek positive returns, regardless of market direction.

(6) Real returns are investments that target a return that exceed the rate of inflation, measured by the Consumer Price Index (CPI), by a premium.

(7) Risk parity is an investment strategy that creates a portfolio in which various asset class groups contribute equally to the overall risk of the portfolio as measured by the standard deviation of returns.

(8) [~~(7)~~] Cash equivalents are securities with maturities of less than or equal to one year that are considered to include interest bearing or discount instruments of the U.S. government or its agencies, money market funds, corporate discounted instruments, corporate-issued commercial paper, time deposits of U.S. or foreign banks, bankers acceptances, and fully collateralized repurchase agreements. Both U.S. and foreign offerings are permitted. All residual cash in the Texas Permanent School Fund (PSF) portfolio must be swept and invested on a daily basis.

(9) [~~(8)~~] Any form of investment or nonpublicly traded investment may be considered by the State Board of Education (SBOE) based on risk and return characteristics, provided the investment is consistent with PSF goals and objectives.

(10) [~~(9)~~] The SBOE may approve currency hedging strategies for the international portfolios and delineate the related procedures in the "Standards of Performance" section of the PSF Investment Procedures Manual.

(b) Prohibited transactions and restrictions. Unless the SBOE gives its written approval, the following prohibited transactions and restrictions apply for all PSF managers:

(1) short sales of any kind;

(2) purchasing letter or restricted stock;

(3) buying or selling on margin;

(4) engaging in purchasing or writing options or similar transactions;

(5) purchasing or selling futures on commodities contracts;

(6) borrowing money, or pledging or otherwise encumbering PSF assets;

(7) purchasing the equity or debt securities of the portfolio manager's organization or an affiliated organization;

(8) engaging in any purchasing transaction, after which the cumulative market value of common stock in a single corporation exceeds 2.5% of the PSF total market value or 5.0% of the manager's total portfolio market value;

(9) engaging in any purchasing transaction, after which the cumulative number of shares of common stock in a single corporation held by the PSF exceeds 5.0% of the outstanding voting stock of that issuer;

(10) engaging in any purchasing transaction, after which the cumulative market value of fixed income securities or cash equivalent securities in a single corporation (excluding the U.S. government, its federal agencies, and government sponsored enterprises) exceeds 2.5% of the PSF total market value or 5.0% of the manager's total portfolio market value;

(11) purchasing tax exempt bonds;

(12) purchasing guaranteed investment contracts (GICs) from an insurance company or bank investment contracts (BICs) from a bank not rated at least AAA by Standard & Poor's or Moody's;

(13) purchasing any publicly traded fixed income security not rated investment grade by at least two of the following ratings agencies: at least BBB- by Standard & Poor's, Baa3 by Moody's, and BBB by Fitch, subject to the provisions in the PSF Investment Procedures Manual related to the fixed income portfolio mandates regarding quality and duration;

(14) purchasing short-term money market instruments rated below A-1 by Standard & Poor's or P-1 by Moody's;

(15) engaging in any transaction that results in unrelated business taxable income (excluding current holdings);

(16) engaging in any transaction considered a "prohibited transaction" under the Internal Revenue Code or the Employee Retirement Income Security Act (ERISA);

(17) purchasing precious metals or other commodities;

(18) engaging in any transaction that would leverage a manager's position;

(19) lending securities owned by the PSF, but held in custody by another party, such as a bank custodian, to any other party for any purpose, unless lending securities according to a separate written agreement the SBOE approved; and

(20) purchasing fixed income securities without a stated par value amount due at maturity.

(c) General guidelines for investment managers.

(1) Each investment manager retained to manage a portion of PSF assets shall be aware of, and operate within, the provisions of this chapter and all applicable Texas statutes.

(2) As fiduciaries of the PSF, investment managers shall discharge their duties solely in the interests of the PSF according to the prudent expert rule, engaging in activities that include the following.

(A) Diversification. The investment policy shall be to diversify each manager's common stock portfolio by participating in industries and companies with above average prospects or sound fundamentals.

(B) Securities trading.

(i) Each manager shall send copies of each transaction record to the PSF investment staff and custodians.

(ii) Each manager shall be required to reconcile the accounts under management on a monthly basis with the PSF investment staff and custodians.

(iii) Each manager shall be responsible for complying fully with PSF policies for trading securities and selecting brokerage firms, as specified in §33.40 of this title (relating to Trading and Brokerage Policy). In particular, the emphasis of security trading shall be on best execution; that is, the highest proceeds to the PSF and the lowest costs, net of all transaction expenses. Placing orders shall be based on the financial viability of the brokerage firm and the assurance of prompt and efficient execution.

(iv) The SBOE shall require each external manager to indemnify the PSF for all failed trades not due to the negligence of the PSF or its custodian in instances where the selection of the broker dealer is not in compliance with §33.40 of this title (relating to Trading and Brokerage Policy).

(C) Acknowledgments in writing.

(i) Each external investment manager retained by the PSF must be a person, firm, or corporation registered as an investment adviser under the Investment Adviser Act of 1940, a bank as defined in the Act, or an insurance company qualified to do business in more than one state, and must acknowledge its fiduciary responsibility in writing. A firm registered with the Securities and Exchange Commission (SEC) must annually provide a copy of its Form ADV, Section II.

(ii) The SBOE may require each external manager to obtain coverage for errors and omissions in an amount set by the SBOE, but the coverage shall be at least the greater of $500,000 or 1.0% of the assets managed, not exceeding $10 million. The coverage should be specific as to the assets of the PSF. The manager shall annually provide evidence in writing of the existence of the coverage.

(iii) Each external manager may be required by the SBOE to obtain fidelity bonds, fiduciary liability insurance, or both.

(iv) Each manager shall acknowledge in writing receiving a copy of, and agreeing to comply with, the provisions of this chapter.

(D) Discretionary investment authority. Subject to the provisions of this chapter, any investment manager of marketable securities or other investments, retained by the PSF, shall have full discretionary investment authority over the assets for which the manager is responsible. Specialist advisors retained for alternative asset investments may have a varying degree of discretionary authority, which will be outlined in the respective management contract.

(d) Reporting procedures for investment managers. The investment manager shall:

(1) prepare a monthly and quarterly report for delivery to the SBOE, the SBOE Committee on School Finance/Permanent School Fund, and the PSF investment staff that shall include, in the appropriate format, items requested by the SBOE. The monthly reports shall briefly cover the firm's economic review; a review of recent and anticipated investment activity; a summary of major changes that have occurred in the investment markets and in the portfolio, particularly since the last report; and a summary of the key characteristics of the PSF portfolio. Quarterly reports shall comprehensively cover the same information as monthly reports but shall also include any changes in the firm's structure, professional team, or product offerings; a detail of the portfolio holdings; and transactions for the period. Periodically, the PSF investment staff shall provide the investment manager a detailed description of, and format for, these reports;

(2) when requested by the SBOE Committee on School Finance/Permanent School Fund, make a presentation describing the professionals retained for the PSF, the investment process used for the PSF portfolio under the manager's responsibility, and any related issues;

(3) when requested by the PSF investment staff, meet to discuss the management of the portfolio, new developments, and any related matters; and

(4) implement a specific investment process for the PSF. The manager shall describe the process and its underlying philosophy in an attachment to its investment management agreement with the PSF and manage according to this process until the PSF and manager agree in writing to any change.

§33.40. Trading and Brokerage Policy.

(a) Security transaction policy.

(1) The following principles shall guide all Texas Permanent School Fund (PSF) transactions.

(A) Each manager shall be responsible for complying fully with PSF policies for trading securities and selecting brokerage firms, as specified in this section. In particular, the emphasis of security trading shall be on best execution; that is, the highest proceeds to the PSF and the lowest costs, net of all transaction expenses. Placing orders shall be based on the financial viability of the brokerage firm and the assurance of prompt and efficient execution.

(B) Ongoing efforts must be made to reduce trading costs, in terms of both commissions and market impact, provided the investment returns of the PSF are not jeopardized.

(2) The State Board of Education (SBOE) may enter into brokerage commission recapture agreements or soft dollar agreements.

(3) The SBOE may evaluate transaction activity annually through a trading cost analysis.

(b) Directed trades. The SBOE may adopt directed trade procedures for the PSF portfolio according to procedures developed by the SBOE Committee on School Finance/Permanent School Fund.

(c) Guidelines for selecting a brokerage firm and standards of ethical conduct for brokerage firms.

(1) Introduction and basic principles.

(A) The SBOE intends that any transaction of publicly traded security occur through a brokerage firm or automated trading system, regardless of location, to obtain the lowest transaction cost consistent with best execution.

(B) Each investment manager shall be responsible for selecting brokerage firms or automated trading systems through which PSF trading shall be completed. The selections must meet PSF guidelines and be for the exclusive benefit of the PSF.

(2) Guidelines for selection and standards of ethical conduct. The broker or dealer firm must:

(A) have appropriate trading and market expertise;

(B) have comprehensive, proprietary, in-house research capabilities;

(C) be in compliance with applicable federal and Texas laws related to conducting business as a broker or dealer, including the Anti-Fraud provisions of the Securities Exchange Act of 1934;

(D) be a member in good standing of the major financial exchanges;

(E) have on-site, in-house trading capability and direct access to major markets;

(F) have in-house access to trading support equipment;

(G) trade for competitive rates that provide the lowest transaction cost consistent with best execution;

(H) be financially able to accommodate a capital commitment trade over an industry standard settlement period;

(I) have the ability and record to clear and settle trades without unnecessary delays or fails; and

(J) have been in business as a broker or dealer for a reasonable period of time to ensure financial and operational stability.

(3) Exemptions.

(A) Broker/dealer firms that are certified as Texas based historically underutilized businesses (HUBs) are exempted from the requirements specified in paragraph (2)(B), (D), and (H) of this subsection; and

(B) broker/dealer firms that are operating as electronic communication networks are exempted from the requirements specified in paragraph (2)(B) of this subsection.

(4) Reporting requirements. The executive administrator of the PSF will report to the SBOE Committee on School Finance/Permanent School Fund, on an ongoing basis, a list of broker dealers with whom the PSF has conducted business during the fiscal year that have been granted exemptions under paragraph (2)(B), (D), and (H) of this subsection and will identify the specific exemptions granted.

(5) Review and evaluation. At least annually, the SBOE Committee on School Finance/Permanent School Fund shall review the brokerage firms used by PSF investment managers and all transactions for compliance with the provisions of this section.

(6) Broker expenditure report. A broker shall file a report annually on April [~~January~~] 15 of each year on the expenditure report provided in §33.5(n)(2)(J) [~~§33.5(l)(2)(J)~~] of this title (relating to Code of Ethics) entitled "Report of Expenditures of Persons Providing Services to the State Board of Education Relating to the Management and Investment of the Permanent School Fund." The report shall be for the time period beginning on January 1 [~~December 1 of the previous year~~] and ending on December 31 [~~November 30~~] of the previous [~~current~~] year. The expenditure report must describe in detail any expenditure of more than $50 made by the person on behalf of:

(A) an SBOE Member;

(B) the commissioner of education; or

(C) an employee of the Texas Education Agency [~~TEA~~] or of a nonprofit corporation created under the Texas Education Code, §43.006.

§33.55. Standards for Selecting Consultants, Investment Managers, Custodians, and Other Professionals To Provide Outside Expertise for the Fund.

The State Board of Education (SBOE) may retain qualified professionals to assist in investment and related matters.

(1) Basis for selection. The SBOE shall retain professional assistance based [~~solely~~] on the demonstrated ability of the professional to provide the expertise or assistance needed along with the proposed cost of the service in order to provide the best overall value for the Permanent School Fund. For each type of expertise, relevant and objective criteria shall be established to judge and select experts.

(2) Types of expertise for consideration. Examples of professionals or specialized expertise the SBOE may retain include: investment managers, accountants, consultants, legal counsel, custodians, security lending agents, and system specialists.

(3) Process for selecting professional assistance. The SBOE shall establish and maintain in the Texas Permanent School Fund (PSF) Procedures Manual an objective process for selecting expertise or assistance. The SBOE Committee on School Finance/Permanent School Fund shall periodically review the process to ensure it reflects SBOE objectives.

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 February 13, 2012.

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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 66. STATE ADOPTION AND DISTRIBUTION OF INSTRUCTIONAL MATERIALS

The State Board of Education (SBOE) proposes amendments to §§66.1, 66.10, 66.21, 66.22, 66.27, 66.33, 66.36, 66.45, 66.48, 66.51, 66.54, 66.57, 66.63, 66.66, 66.67, 66.72, 66.73, 66.75, 66.78, 66.101, 66.104, 66.105, and 66.107 and the repeal of §§66.102, 66.121, 66.124, and 66.131, concerning the state adoption and distribution of instructional materials. The sections establish procedures for the adoption, purchase, and distribution of instructional materials. The proposed amendments and repeals would incorporate changes resulting from Senate Bill (SB) 6, 82nd Texas Legislature, First Called Session, 2011.

House Bill (HB) 2488 and HB 4294, 81st Texas Legislature, 2009, made significant changes pertaining to the review, adoption, acquisition, and distribution of instructional materials. The SBOE approved revisions to 19 TAC Chapter 66 in January and March 2010 in response to legislation. The 2010 revisions included updates to rules relating to publisher contracts, proclamation amendments, state review panel eligibility and appointment criteria, and pre-adoption samples and corrected copies of adopted materials. The 2010 revisions also included updates to rules relating to revisions, updates, and substitutions; selection of instructional materials by school districts; and requisitions, inventory, and disposition of Braille and large type instructional materials. The 2010 revisions added new rules relating to the adoption of open-source instructional materials, contracts for printing open-source instructional materials, credit for textbooks purchased below the established cost limit, and certification that each school district provides instructional materials that cover all elements of the essential knowledge and skills. The 2010 revisions also repealed an outdated rule relating to a pilot project for certain students enrolled in courses for concurrent high school and college credit.

SB 6, 82nd Texas Legislature, 2011, made significant changes pertaining to the review, adoption, and purchase of instructional materials and technological equipment for public schools. SB 6 changes include the establishment of the instructional materials allotment, including certification of alignment with the Texas essential knowledge and skills for instructional materials used by the district, and specification that a reference to a textbook means instructional materials. The statutory changes resulting from SB 6 necessitate revisions to rules in 19 TAC Chapter 66.

Proposed revisions to 19 TAC Chapter 66 to incorporate statutory changes resulting from SB 6 were presented to the SBOE for first reading and filing authorization at the January 2012 meeting. The SBOE took action to approve proposed revisions, as follows.

Subchapter A, General Provisions

Section 66.1, Scope of Rules, would be amended to remove reference to conforming and nonconforming instructional materials.

Section 66.10, Procedures Governing Violations of Statutes--Administrative Penalties, would be amended to reference instructional materials rather than textbooks and to clarify what is considered dated or inferior information.

Subchapter B, State Adoption of Instructional Materials

Section 66.21, Review and Adoption Cycles, would be amended to establish that no more than one-fourth of the subjects in the foundation curriculum may be reviewed each biennium. Additionally, criteria for prioritizing the subjects in the adoption cycle would be added.

Section 66.22, Midcycle Review and Adoption, would be amended to reference instructional materials rather than textbooks and to remove reference to conforming and nonconforming instructional materials.

Section 66.27, Proclamation, Public Notice, and Schedule for Adopting Instructional Materials, would be amended to establish that proclamations shall be issued 12 months before scheduled adoption of new instructional materials by the SBOE; to remove language that would require amending a proclamation to conform to state textbook funding levels; to update content submission requirements for proclamations, including the removal of references to the maximum cost for adopted instructional materials and the addition of specific requirements for samples filed with state review panels and requirements relating to instructions for submission of open-source instructional materials; and to reference instructional materials rather than textbooks. Additionally, the requirement regarding the 50% required minimum coverage of essential knowledge and skills would be clarified.

Section 66.33, State Review Panels: Appointment, would be amended to make a technical correction in a reference to the state review panels.

Section 66.36, State Review Panels: Duties and Conduct, would be amended to clarify the procedures for panel members to evaluate coverage of essential knowledge and skills, to clarify that the state panel members shall have no contact with other members of the panel regarding instructional materials being reviewed except during official meetings, and to reference instructional materials rather than textbooks. Additionally, language would be added to require that all recommendations to the commissioner include panel member signatures.

Section 66.45, State Review Panels: No-Contact Periods, would be amended to remove reference to conforming and nonconforming instructional materials.

Section 66.48, Statement of Intent to Bid Instructional Materials, would be amended to require publishers to indicate the percentage of coverage of essential knowledge and skills by its submitted instructional materials, to remove reference to conforming and nonconforming instructional materials, and to reference instructional materials rather than textbooks.

Section 66.51, Instructional Materials Purchased by the State, would be amended to remove references to the maximum cost for adopted instructional materials, to allow an extension of the contract terms to no more than 12 years, to reference instructional materials rather than textbooks, and to clarify language relating to coverage of essential knowledge and skills. Additionally, the requirements relating to non-adopted instructional materials would be removed. The section title would also be changed

to "Instructional Materials Ordered Through the State" instead of "Instructional Materials Purchased by the State."

Section 66.54, Samples, would be amended to reduce the number of samples required to be submitted to regional education service centers; to require publishers to submit electronic samples to school districts upon request, with the exception of prekindergarten materials; to add specific requirements for samples provided to state review panels and the Texas Education Agency (TEA); and to update the TEC definition of instructional materials.

Section 66.57, Regional Education Service Centers: Procedures for Handling Samples; Public Access to Samples, would be amended to update requirements for electronic samples retained for public review.

Section 66.63, Report of the Commissioner of Education, would be amended to remove reference to conforming and nonconforming instructional materials and to clarify language relating to coverage of essential knowledge and skills.

Section 66.66, Consideration and Adoption of Instructional Materials by the State Board of Education, would be amended to remove reference to conforming and nonconforming instructional materials and to revise language relating to coverage of essential knowledge and skills.

Section 66.67, Adoption of Open-Source Instructional Materials, would be amended to reference instructional materials rather than textbooks and to remove reference to conforming and nonconforming instructional materials. For clarification, language would be added regarding certification by a board of regents or corresponding governing body. Additionally, language would be added regarding SBOE review of the materials and the dissemination of SBOE comments regarding the open-source instructional materials placed on the adopted list. Language would be removed regarding assessing fines for university-developed open-source instructional materials. Language would also be removed regarding the compliance of an institution providing university-developed open-source materials with duties of publishers.

Section 66.72, Preparing and Completing Contracts, would be amended to reference instructional materials rather than textbooks.

Section 66.73, Contracts for Printing of Open-Source Textbooks, would be amended to reference instructional materials rather than textbooks and to remove a reference to conforming and nonconforming instructional materials. Additionally, the section title would be changed to "Contracts for Printing of Open-Source Instructional Materials" instead of "Contracts for Printing of Open-Source Textbooks."

Section 66.75, Updates, would be amended to reference instructional materials rather than textbooks.

Section 66.78, Delivery of Adopted Instructional Materials, would be amended to remove the requirement for a publisher to maintain a depository in Texas and to reference instructional materials rather than textbooks.

Subchapter C, Local Operations

Section 66.101, Sample Copies of Instructional Materials for School Districts, would be amended to update and clarify language relating to electronic samples that publishers must provide to school districts and open-enrollment charter schools.

Section 66.102, Textbook Credits, would be repealed.

Section 66.104, Selection of Instructional Materials by School Districts, would be amended to remove requirements relating to the maximum cost for adopted instructional materials, conforming and nonconforming instructional materials, non-adopted instructional materials, and classroom sets. Language would also be removed relating to restrictions on returning instructional materials, reimbursement for receipt of an insufficient number of materials, and specifications for publisher depositories. Language regarding instructional materials furnished by the state would be removed.

Section 66.105, Certification by School Districts, would be amended to update language relating to the required curriculum and instructional materials.

Section 66.107, Local Accountability, would be amended to remove requirements relating to placing orders based upon student enrollment and returning surplus instructional materials.

Subchapter D, Special Instructional Materials

Subchapter D, comprised of §66.121, Special Instructional Materials, and §66.124, Authorizing State Funds, would be repealed.

Subchapter E, Disposition of Instructional Materials

Subchapter E, comprised of §66.131, Out-of-Adoption Instructional Materials, would be repealed.

As a result of the proposed rule actions, appropriate changes will be incorporated into the Educational Materials (EMAT) system. The proposed amendments and repeals would have no new locally maintained paperwork requirements.

Anita Givens, associate commissioner for standards and programs, has determined that for the first five-year period the amendments and repeals are in effect there will be no additional costs for state or local government as a result of enforcing or administering the rule actions. The proposed rule actions would include options for school districts and open-enrollment charter schools when ordering instructional materials.

Ms. Givens has determined that for each year of the first five years the amendments and repeals are in effect the public benefit anticipated as a result of enforcing the amendments and repeals would include changes that align the instructional materials adoption and distribution process with recent statutory changes. There is no anticipated economic cost to persons who are required to comply with the proposed amendments and repeals.

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

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-5337. A request for a public hearing on the proposed rule actions submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register*.

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §66.1, §66.10

The amendments are proposed under the Texas Education Code, §7.102(c), which authorizes the SBOE to adopt rules required by the TEC, Chapter 31, and §31.003, which authorizes the SBOE to adopt rules for the adoption, requisition, distribution, care, use, and disposal of instructional materials.

The amendments implement the Texas Education Code, §7.102(c) and Chapter 31.

§66.1. Scope of Rules.

The State Board of Education (SBOE) shall adopt a list [~~lists~~] of [~~conforming and nonconforming~~] instructional materials for use in the public schools of Texas according to the Texas Education Code, Chapter 31, and the requirements in this chapter. Instructional materials recommended as suitable for use in special populations, including bilingual education programs, shall be adopted according to the rules in this chapter for adopting regular instructional materials.

§66.10. Procedures Governing Violations of Statute--Administrative Penalties.

(a) Complaints. An official complaint alleging a violation of the Texas Education Code, §31.151, must be filed with the commissioner of education. The commissioner may hold a formal or informal hearing in the case of an apparent violation of statute. Upon determining that a violation has occurred, the commissioner shall report his or her findings to the State Board of Education (SBOE).

(b) Administrative penalties. Under the Texas Education Code, §31.151(b), the SBOE may impose a reasonable administrative penalty against a publisher or manufacturer found in violation of a provision of §31.151(a). An administrative penalty shall be assessed only after the SBOE has granted the publisher or manufacturer a hearing in accordance with the Texas Education Code, §31.151, and the Administrative Procedure Act.

(c) Penalties for failure to correct factual errors.

(1) A factual error shall be defined as a verified error of fact or any error that would interfere with student learning. The context, including the intended student audience and grade level appropriateness, shall be considered.

(2) A factual error repeated in a single item or contained in both the student and teacher components of instructional material shall be counted once for the purpose of determining penalties.

(3) A penalty may be assessed for failure to correct a factual error identified in the list of corrections submitted by a publisher under §66.54(i) [~~§66.54(h)~~] of this title (relating to Samples) or for failure to correct a factual error identified in the report of the commissioner of education under §66.63(d) of this title (relating to Report of the Commissioner of Education) and required by the SBOE. The publisher shall provide an errata sheet approved by the commissioner of education with each teacher component of an adopted title.

(4) A penalty not to exceed $5,000 may be assessed for each factual error identified after the deadline established in the proclamation by which publishers must have submitted corrected samples of adopted instructional materials.

(d) Categories of factual errors.

(1) Category 1. A factual error in a student component that interferes with student learning.

(2) Category 2. A factual error in a teacher component only.

(3) Category 3. A factual error in either a student or teacher component that reviewers do not consider serious.

(e) First-year penalties. The base and per-book penalties shall be assessed as follows for failure to correct factual errors described in subsections (c) and (d) of this section.

(1) Category 1 error. $25,000 base plus 1% of sales.

(2) Category 2 error. $15,000 base plus 1% of sales.

(3) Category 3 error. $5,000 base plus 1% of sales.

(f) Second-year penalties. The base and per-book penalties shall be assessed as follows if a publisher, after being penalized for failure to correct factual errors described in subsections (c) - (e) of this section, repeats the violation in the subsequent adoption.

(1) Category 1 error. $30,000 base plus 1% of sales.

(2) Category 2 error. $20,000 base plus 1% of sales.

(3) Category 3 error. $10,000 base plus 1% of sales.

(g) Penalties for failure to deliver adopted instructional materials, including teacher components, in a timely manner or in the quantities the school district or open-enrollment charter school is eligible to receive as specified in the publisher's bid. The SBOE may assess penalties as allowed by law against publishers who fail to deliver adopted instructional materials, including teacher components specified by §66.51(a)(3) of this title (relating to Instructional Materials Ordered Through [~~Purchased by~~] the State), in accordance with provisions in the contracts.

(h) Penalties for selling instructional materials [~~textbooks~~] with factual errors. The SBOE may assess administrative penalties in accordance with the Texas Education Code, §31.151, against a seller of instructional materials [~~textbooks~~] who sells instructional materials [~~textbooks~~] with factual errors.

(i) Penalties for failure to maintain websites in state-adopted products. The SBOE may assess administrative penalties against a publisher who fails to maintain a website or provide a suitable alternative for conveying the information in the website, or who otherwise fails to meet the requirements of this subsection. Where applicable, the publisher shall monitor, update, and maintain any in-house and third party electronic, web-based, or online products furnished as part of the instructional materials specified in State of Texas Official Publisher Contract for the period determined by the SBOE. If, at any time during the contract period, the commissioner of education determines in a hearing that electronic, web-based, or online instructional materials furnished and supplied under the terms of a contract have faulty manufacturing characteristics or display dated or inferior information that is not in alignment with the Texas essential knowledge and skills that were in place at the time of the materials' original adoption, the instructional materials or information shall be replaced with complying materials or information by the publishers without cost to the state. The publisher further agrees that electronic, web-based or online instructional materials listed in a State of Texas Official Publishers Contract will not be altered in any way that would remove content from the curriculum, or that would change content in the curriculum without prior SBOE approval. The publisher will not allow advertising of any type to be placed in or associated with the materials. The publisher will not add any Internet links to the materials without the approval of the commissioner of education, will not redirect any user accessing the web-based or online instructional materials to other Internet or electronic sites, and will not collect any information about the user or computer accessing the materials that would allow determination of personal information, including email addresses. This section applies only to a website that is a component used to address Texas essential knowledge and skills [~~Essential Knowledge and Skills~~] as part of a state-adopted product.

(j) State Board of Education discretion regarding penalties. The SBOE may, if circumstances warrant, waive or vary penalties contained in this section for first or subsequent violations based on the seriousness of the violation, any history of a previous violation or violations, the amount necessary to deter a future violation, any effort to correct the violation, and any other matter justice requires.

(k) Payment of fines. Each affected publisher shall issue credit to the Texas Education Agency (TEA) in the amount of any penalty imposed under the provisions of this section. When circumstances warrant it, TEA is authorized to require payment of penalties in cash within ten days. Each affected publisher who pays a fine for failure to deliver adopted instructional materials in a timely manner will not be subject to the liquidated damages provision in the publisher's contract for the same failure to deliver adopted instructional materials in a timely manner.

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 February 13, 2012.

TRD-201200809
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 475-1497

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SUBCHAPTER B. STATE ADOPTION OF INSTRUCTIONAL MATERIALS

19 TAC §§66.21, 66.22, 66.27, 66.33, 66.36, 66.45, 66.48, 66.51, 66.54, 66.57, 66.63, 66.66, 66.67, 66.72, 66.73, 66.75, 66.78

The amendments are proposed under the Texas Education Code, §7.102(c), which authorizes the SBOE to adopt rules required by the TEC, Chapter 31, and §31.003, which authorizes the SBOE to adopt rules for the adoption, requisition, distribution, care, use, and disposal of instructional materials.

The amendments implement the Texas Education Code, §7.102(c) and Chapter 31.

§66.21. Review and Adoption Cycles.

(a) The State Board of Education (SBOE) shall adopt a review and adoption cycle for subjects in the foundation curriculum. No more than one-fourth [~~one-sixth~~] of the subjects in the foundation curriculum may be reviewed each biennium. [~~year. Placement of a subject in the cycle shall be based on the need for up-to-date materials due to changes in essential knowledge and skills, changing information, and/or changing technology.~~] Estimated expenditures shall [~~also~~] be considered when determining placement of subjects in the cycle.

(b) In adopting the cycle, the SBOE:

(1) is not required to review and adopt instructional materials for all grade levels in a single year; and

(2) shall give priority to instructional materials in the following subjects:

(A) foundation curriculum subjects for which the essential knowledge and skills have been substantially revised and for which assessment instruments are required under the Texas Education Code (TEC), Chapter 39, Subchapter B, including career and technical education courses that satisfy foundation curriculum requirements as provided by the TEC, §28.002(n);

(B) foundation curriculum subjects for which the essential knowledge and skills have been substantially revised, including career and technical education courses that satisfy foundation curriculum requirements as provided by the TEC, §28.002(n);

(C) foundation curriculum subjects not described by subparagraph (A) or (B) of this paragraph, including career and technical education courses that satisfy foundation curriculum requirements as provided by the TEC, §28.002(n); and

(D) enrichment curriculum subjects.

(c) [~~(b)~~] The SBOE shall adopt a review and adoption cycle for subjects in the enrichment curriculum. Placement of a subject in the cycle shall be based on the need for up-to-date materials due to changes in essential knowledge and skills, changing information, and/or changing technology. Estimated expenditures shall also be considered when determining placement of subjects in the cycle.

§66.22. Midcycle Review and Adoption.

(a) The State Board of Education (SBOE) shall adopt a midcycle review and adoption for instructional materials [~~textbooks~~] for a subject for which instructional materials [~~textbooks~~] are not currently under review by the SBOE under the Texas Education Code (TEC), §31.022.

(b) The SBOE shall establish a fee not to exceed $10,000 for each instructional materials product [~~textbook~~] submitted for midcycle review.

(c) A publisher who intends to offer instructional materials for midcycle review shall submit a statement of intent to bid that includes a commitment from the publisher to provide the instructional materials [~~textbooks~~] to school districts in the manner specified by the publisher, which may include:

(1) providing the instructional materials [~~textbook~~] to any district in a regional education service center area identified by the publisher; or

(2) providing a certain maximum number of instructional materials [~~textbooks~~] specified by the publisher.

(d) Instructional materials submitted for midcycle review shall be placed on the adopted [~~conforming list, non-conforming~~] list[~~,~~] or rejected as specified in the TEC, §31.023 and §31.024.

(e) The publisher of instructional materials [~~a textbook~~] submitted for midcycle review shall enter into a contract with the SBOE for a term that ends at the same time as any contract entered into by the SBOE for instructional materials [~~another textbook~~] for the same subject and grade level.

(f) The publisher of instructional materials [~~a textbook~~] submitted for midcycle review is not required to ship samples to education service centers or school districts as specified in the TEC, §31.027.

(g) The publisher of instructional materials [~~a textbook~~] submitted for midcycle review shall make available up to three examination copies of each submitted instructional materials product [~~textbook~~], including teacher editions and ancillaries, to each SBOE member upon that member's request, beginning on the date in the adoption schedule when publishers file their samples at the Texas Education Agency (TEA). SBOE members may request publishers

through the TEA to ship these items directly to interested citizens. Publishers participating in the midcycle review process are responsible for all expenses incurred by their participation. The state does not guarantee return of these SBOE-requested materials.

(h) Publishers of Internet-based instructional content submitted for midcycle review shall provide the TEA, and SBOE members upon request, with appropriate information, such as locator and login information and passwords, required to ensure public access to their programs throughout the midcycle review period.

(i) The midcycle adoption process shall follow the same procedures as the regular adoption except to the extent specified in this chapter.

(j) The SBOE will implement this section only to the extent the commissioner of education determines that funds are appropriated for that purpose.

§66.27. Proclamation, Public Notice, and Schedule for Adopting Instructional Materials.

(a) The State Board of Education (SBOE) shall issue a proclamation calling for new instructional materials according to the review and adoption cycles for foundation and enrichment subjects adopted by the SBOE. The proclamation shall serve as notice to all publishers and to the public that bids to furnish new materials to the state are being invited. The proclamation shall be issued at least 12 [~~24~~] months before the scheduled adoption of the new instructional materials by the SBOE. The SBOE shall designate a request for the production of instructional materials [~~textbooks~~] in a subject area and grade level by the school year in which the instructional materials [~~textbooks~~] are intended to be made available in classrooms and not by the school year in which the SBOE makes the request for production. [~~The SBOE shall amend a proclamation, as necessary, to conform to the textbook funding levels provided by the General Appropriations Act for the year of implementation.~~]

(b) The proclamation shall contain the following:

(1) specifications for essential knowledge and skills in each subject for which bids are being invited;

(2) the requirement that a publisher of adopted instructional materials for a grade level other than prekindergarten must submit an electronic sample of the instructional materials as required by the Texas Education Code, §31.027(a) and (b), and may not submit a print sample copy;

[~~(2) a maximum cost to the state for adopted instructional materials in each subject for which bids are being invited;~~]

(3) the requirement that the samples filed with the state review panels must match the final format of the materials submitted for adoption. For print materials submitted for adoption, print samples must be filed with the state review panels. For electronic materials submitted for adoption, electronic samples must be filed with the state review panels;

(4) [~~(3)~~] an estimated number of units to be purchased during the first contract year for each subject in the proclamation;

(5) [~~(4)~~] specifications for providing computerized files to produce braille versions of adopted instructional materials; [~~and~~]

(6) [~~(5)~~] a schedule of adoption procedures; and [~~.~~]

(7) instructions for the submission of open-source instructional materials that are available for use by the state without charge on the same basis as instructional materials offered for sale.

(c) The proclamation shall require the instructional materials submitted in response to the proclamation to cover at least 50% of the specific essential knowledge and skills for the subject area and grade level for which the materials are intended at least once [~~a certain number of times~~] in the student text narrative and once in either an [~~in addition to~~] end-of-section review exercise [~~exercises~~], an end-of-chapter activity [~~activities~~], or a unit test [~~tests~~].

(d) A draft copy of the proclamation shall be provided to each member of the SBOE and to representatives of the publishing industry to solicit input regarding the draft proclamation[~~, including maximum costs,~~] prior to the scheduled adoption by the SBOE. The Texas Education Agency may use the Internet to facilitate this process. Any revisions recommended as a result of input from publishers shall be presented to the SBOE along with the subsequent draft of the proclamation.

(e) Under extraordinary circumstances, the SBOE may adopt an emergency, supplementary, or revised proclamation without complying with the timelines and other requirements of this section.

(f) The SBOE may issue a proclamation for instructional materials [~~textbooks~~] eligible for midcycle review. The midcycle proclamation shall contain the following:

(1) specifications for essential knowledge and skills in each subject for which bids are being invited;

(2) specifications for providing computerized files to produce braille versions of adopted instructional materials;

(3) a fee not to exceed $10,000 for each program[~~, textbook,~~] or system of instructional materials intended for a certain subject area and grade level submitted for midcycle review; and

(4) a schedule of midcycle adoption procedures.

§66.33. State Review Panels: Appointment.

(a) The commissioner of education shall determine the number of review panels needed to review instructional materials under consideration for adoption, determine the number of persons to serve on each panel, and determine the criteria for selecting panel members. Each appointment to a state review panel shall be made by the commissioner of education with the advice and consent of the State Board of Education (SBOE) member whose district is to be represented. The commissioner of education shall make appointments to state [~~textbook~~] review panels that ensure participation by academic experts in each subject area for which instructional materials are being considered. The appointments shall include educators, parents, business and industry representatives, and employers.

(b) The commissioner of education shall solicit nominations for possible appointees to state review panels from the SBOE, school districts, open-enrollment charter schools, and educational organizations in the state. Nominations may be accepted from any Texas resident. Nominations shall not be made by or accepted from any publishers; hardware or software providers; authors; depositories; agents for publishers, hardware or software providers, authors, or depositories; or any person who holds any official position with a publisher, hardware or software providers, author, depository, or agent.

(c) The SBOE shall be notified of appointments made by the commissioner of education to state review panels.

(d) Members of a state review panel may be removed at the discretion of the commissioner of education.

§66.36. State Review Panels: Duties and Conduct.

(a) The duties of each member of a state review panel are to:

(1) evaluate all instructional materials submitted for adoption in each subject assigned to the panel to determine if essential knowledge and skills are covered in the student version of the instructional materials [~~textbook,~~] as well as in the teacher version of the instructional materials [~~textbook~~]. Nothing in this rule shall be construed to contravene the Texas Education Code (TEC), §28.004(e)(5), which makes coverage of contraception and condom use optional in both the student and teacher editions of health instructional materials [~~textbooks~~]. Panel members will use State Board of Education-approved procedures for evaluating coverage of the essential knowledge and skills at least once in the student text narrative and once in either an [~~in addition to~~] end-of-section review exercise [~~exercises~~], an end-of-chapter activity [~~activities~~], or a unit test [~~tests as required in the proclamation~~]. The approved procedures include the following.

(A) State review panel members must participate in training to ensure clear and consistent guidelines for determining full Texas essential knowledge and skills [~~Essential Knowledge and Skills~~] (TEKS) coverage within the instructional materials.

(B) State review panel members must participate in a team during the review and reach a consensus to determine if the TEKS have been covered sufficiently in the instructional materials.

(C) Instructional materials shall be evaluated for TEKS coverage at each grade level.

(D) A TEKS standard is considered sufficiently covered if the instructional materials provide one or more of the following:

(i) an opportunity for the teacher to teach the knowledge or skill;

(ii) an opportunity for the student to learn the knowledge or skill; or

(iii) an opportunity for the student to demonstrate the knowledge or practice the skill.

[~~(D) One reference to a TEKS statement is not considered sufficient coverage. At least three examples of each student expectation must be evident in the instructional materials to ensure sufficient coverage.~~]

(E) If a TEKS standard [~~statement~~] has multiple student expectations, the requirements of subparagraph (D) of this paragraph will be applied to [~~at least three examples of~~] each student expectation [~~must be evident in the instructional materials~~] to ensure sufficient coverage.

(F) TEKS standards [~~statements~~] are not considered covered if only included in side bars, captions, or questions [~~one question~~] at the end of a section or chapter.

(G) Each student expectation must be clearly evident in the instructional materials to ensure sufficient coverage.

(H) Coverage of each TEKS standard must be of an appropriate level of complexity for the grade or course.

(I) Whether the instructional materials submitted for adoption sufficiently meet the requirements of subparagraphs (D), (G), and (H) of this paragraph will be determined by the state review panels;

(2) make recommendations to the commissioner of education that each submission assigned to be evaluated by the state review panel be placed on the adopted [~~conforming~~] list[~~, nonconforming list,~~] or rejected;

(3) submit to the commissioner of education a list of any factual errors in instructional materials discovered during the review conducted [~~assigned to be evaluated~~] by the state review panel; and

(4) as appropriate to a subject area and/or grade level, ascertain that instructional materials submitted for adoption do not contain content that clearly conflicts with the stated purpose of the TEC, §28.002(h).

(b) State review panel members shall not accept meals, entertainment, gifts, or gratuities in any form from publishers, authors, or depositories; agents for publishers, authors, or depositories; any person who holds any official position with publishers, authors, depositories, or agents; or any person or organization interested in influencing the selection of instructional materials.

(c) Before presenting recommendations to the commissioner of education, state review panel members shall be given an opportunity to request a meeting with a publisher to obtain responses to questions regarding instructional materials being evaluated by the state review panel. Questions shall be provided to publishers in advance of the meeting.

(d) State [~~textbook~~] review panel members shall be afforded the opportunity to collaborate with other panel members during the official meetings to discuss coverage of TEKS, errors, manufacturing specifications, or any other aspect of instructional materials being evaluated. A member of a state review panel shall have no contact with other members of the panel regarding the instructional materials being reviewed, except during official meetings. State review panel members shall not discuss instructional materials being evaluated with any party having a direct or indirect interest in adoption of instructional materials.

(e) State review panel members shall affix their signatures to all recommendations to the commissioner of education.

(f) [~~(e)~~] Members of each state review panel may be required to be present at the State Board of Education meeting at which instructional materials are adopted.

§66.45. State Review Panels: No-Contact Periods.

(a) State review panel members shall observe a no-contact period that shall begin with the initial communication regarding possible appointment to a state review panel and end after recommendations have been made to the commissioner of education that each submission assigned to be evaluated by the state review panel be placed on the adopted [~~conforming~~] list[~~, nonconforming list,~~] or rejected. During this period, state review panel members shall not be contacted either directly or indirectly by any person having an interest in the adoption process regarding content of instructional materials under evaluation by the panel. This restriction is not intended to prohibit members of the state review panels from seeking advice regarding materials under consideration from the State Board of Education [~~(SBOE)~~].

(b) State review panel members shall report immediately to the commissioner of education any communication or attempted communication by any person regarding instructional materials being evaluated by the panel.

(c) State review panel members shall not discuss content of instructional materials under consideration with any subject area staff member of the Texas Education Agency (TEA), except during the official orientation meeting. Additional requests for information or clarification shall be directed to the commissioner of education or his designee. Copies of all questions from individual members shall be distributed with responses to all members of the appropriate state review panel. This restriction is not intended to prohibit members of the state

review panels from contacting designated staff of the TEA regarding adoption procedures.

§66.48. Statement of Intent to Bid Instructional Materials.

(a) Each publisher who intends to offer instructional materials for adoption shall submit a statement of intent to bid and preliminary price information on or before the date specified in the schedule of adoption procedures. The statement of intent with preliminary price information shall be accompanied by publisher's data submitted in a form approved by the commissioner of education.

(b) A publisher shall indicate the percentage of Texas essential knowledge and skills that it believes are sufficiently covered in the instructional materials.

[~~(b) A publisher shall designate instructional materials submitted as appropriate for placement on the conforming list or nonconforming list.~~]

(c) If a student or teacher component of a submission consists of more than one item, a publisher shall provide complete and correct titles of each item included in the student and/or teacher component at the time the statement of intent is filed.

(d) A publisher shall specify hardware or special equipment needed to review any item included in an instructional materials submission.

(e) Additions to a publisher's submission shall not be accepted after the deadline for filing statements of intent, except as allowed in the schedule of adoption procedures included in the proclamation. A publisher who wishes to withdraw an instructional materials submission after having filed a statement of intent to bid shall notify the commissioner of education in writing on or before the date specified in the schedule of adoption procedures.

(f) A publisher who intends to offer instructional materials for midcycle review shall submit a statement of intent to bid and price information on or before the date specified in the schedule of adoption procedures under midcycle review. The statement of intent to bid must:

(1) specify the manner in which instructional materials [~~textbooks~~] will be provided to school districts, including:

(A) the regional education service center area(s) to be served; or

(B) the certain maximum number of copies of instructional materials [~~textbooks~~] to be provided under the contract; and

(2) include payment of the fee for review of instructional materials submitted for midcycle review.

§66.51. Instructional Materials Ordered Through [~~Purchased by~~] the State.

[~~(a)~~] Instructional materials offered for adoption by the State Board of Education [~~(SBOE)~~].

(1) Publishers may not submit instructional materials for adoption that have been authored by an employee of the Texas Education Agency (TEA).

(2) The official bid price of an instructional material submission may exceed the price included with the statement of intent to bid filed under §66.48 of this title (relating to Statement of Intent to Bid Instructional Materials).

(3) A teacher's component submitted to accompany student instructional materials under consideration for adoption shall be part of the publisher's official bid and shall be provided for the duration of the original contract and any contract extensions at no cost to the school district or open-enrollment charter school as specified in the publisher's bid.

[~~(4) Under the Texas Education Code, §31.025, the official bid price for an instructional material submission may exceed the maximum cost to the state that is established in the proclamation. The state shall only be responsible for payment to the publisher in an amount equal to the maximum cost. A school district ordering instructional materials is responsible for the portion of the cost that exceeds the state maximum.~~]

(4) [~~(5)~~] Any discounts offered for volume purchases of adopted instructional materials shall be included in price information submitted with statement of intent to bid and in the official bid.

(5) [~~(6)~~] The official bid filed by a publisher shall include separate prices for each item included in an instructional material submission. The publisher shall guarantee that individual items included in the student and/or teacher component shall be available for local purchase at the individual prices listed for the entire contract period. (Individual component prices are listed to show school districts the replacement costs of components and not to reflect publisher's bid prices for these components.)

(6) [~~(7)~~] Publishers shall submit to the TEA a signed affidavit certifying that each individual whose name is listed as an author or contributor of the instructional materials [~~a textbook~~] contributed to the development of the instructional materials [~~textbook~~]. The affidavit shall also state in general terms each author's involvement in the development of the instructional materials [~~textbook~~].

(7) [~~(8)~~] Instructional materials submitted for adoption shall be self-sufficient for the period of adoption. Nonconsumable components shall be replaced by the publisher during the warranty period. Consumable materials included in a student or teacher component of a submission shall be clearly marked as consumable. An item not marked as "consumable" is deemed to be "nonconsumable." [~~The cost of such consumables to the state for the entire contract period may exceed the maximum cost established in the proclamation. School districts may be required to pay the difference between the state maximum cost and the actual cost of the materials.~~]

(8) [~~(9)~~] Student materials offered for adoption may include consumable components in subjects and grade levels in which consumable materials are not specifically called for in the proclamation. In such cases, publishers must meet the following conditions.

(A) The per student price of the materials must include the cost of replacement copies of consumable student components for the full term of the adoption and contract, including any extensions of the contract terms, but for no more than 12 [~~nine~~] years. The offer must be set forth in the publisher's official bid.

(B) The publisher's official bid shall contain a clear explanation of the terms of the sale, including the publisher's agreement to supply consumable student materials for the duration of the contract and extensions as noted in subparagraph (A) of this paragraph.

(C) The publisher and the school district shall determine the manner in which consumable student materials are supplied beyond the initial order year.

(9) [~~(10)~~] On or before the deadline established in the schedule of adoption procedures, publishers shall submit correlations of instructional materials submitted for adoption with essential knowledge and skills required by the proclamation. These correlations shall include essential knowledge and skills covered at least once in the student text narrative and once in either an [~~in addition to~~] end-of-section review exercise [~~exercises~~], an end-of-chapter activity [~~activities~~], or

a unit test [tests as required in the proclamation]. Correlations shall be submitted in a format approved by the commissioner of education.

[(11) The SBOE shall reduce the approved maximum cost for each nonconforming instructional material. The reduced maximum cost for each adopted nonconforming instructional material shall be equal to the original maximum cost for that instructional material times a certain percentage. This percentage shall be the same as the percentage of elements of the essential knowledge and skills covered by the instructional material and that was used by the SBOE to determine whether the instructional material should be designated as conforming, nonconforming, or rejected per the Texas Education Code. Each performance description shall count as an independent element of the essential knowledge and skills of the subject. For those courses where a student expectation is not identified, the knowledge and skill will replace the student expectation to determine the percentage of student expectations addressed. The reduced maximum cost for nonconforming instructional materials will apply to both foundation and enrichment courses. For nonconforming instructional materials, the state shall be responsible for payment to the publisher in an amount only equal to the reduced maximum cost. A school district ordering nonconforming instructional materials is responsible for the portion of the cost that exceeds the reduced state maximum cost.]

[(b) Non-adopted instructional materials. A publisher of non-adopted instructional materials selected and purchased by school districts or open-enrollment charter schools and paid for through the Instructional Materials Fund under §66.104(c) - (f) of this title (relating to Selection of Instructional Materials by School Districts) shall meet all applicable requirements of the Texas Education Code, §31.151.]

§66.54. Samples.

(a) Samples of student and teacher components of instructional materials submitted for adoption shall be complete as to content [and representative of finished format]. Electronic instructional materials [textbooks] submitted for adoption, including Internet-based products, must be representative of the final product and completely functional.

(b) The publisher of instructional materials submitted for adoption shall make available up to three examination copies of each submitted student and teacher component to each State Board of Education (SBOE) member upon that member's request, beginning on the date in the adoption schedule when publishers file their samples at the Texas Education Agency (TEA). SBOE members may request publishers through the TEA to ship these items directly to interested citizens. Publishers participating in the adoption process are responsible for all expenses incurred by their participation. The state does not guarantee return of these SBOE-requested materials.

(c) One electronic [Two] sample copy [copies] of the student and teacher components of each instructional materials submission shall be filed with each of the 20 regional education service centers (ESCs) on or before the date specified in the schedule of adoption procedures. All electronic samples must be platform-neutral. The TEA may request additional samples if they are needed. These samples shall be available for public review. Publishers of Internet-based instructional content submitted for review shall provide the ESCs with appropriate information, such as locator and login information and passwords, required to ensure public access to their programs throughout the review period. Samples to ESCs are not required for instructional materials submitted for midcycle review, as specified in §66.22(f) of this title (relating Midcycle Review and Adoption).

(d) If it is determined that good cause exists, the commissioner of education may extend the deadline for filing samples with ESCs [or specify a lesser number of samples a publisher must provide]. At its discretion, the SBOE may remove from consideration any materials proposed for adoption that were not properly deposited with the ESCs, the TEA, or members of the state review panel.

(e) One electronic [official] sample copy of each student and teacher component of an instructional materials submission shall be filed with the TEA on or before the date specified in the schedule of adoption procedures. The TEA may request additional samples if they are needed. All electronic samples must be platform-neutral. In addition, the publisher shall provide a complete description of all items included in a student and teacher component of an instructional materials submission.

(f) On request of a school district, a publisher shall provide an electronic sample of submitted instructional materials. Publishers may not submit print sample copies. All electronic samples must be platform-neutral. A publisher of prekindergarten materials is not required to submit electronic samples of submitted prekindergarten instructional materials. Samples of submitted prekindergarten materials must match the format of the products to be provided to schools upon ordering.

(g) [(f)] One sample copy of each student and teacher component of an instructional materials submission shall be filed with each member of the appropriate state review panel in accordance with instructions provided by the TEA. The samples filed with the state review panels must match the final format of the materials submitted for adoption. For print materials submitted for adoption, print samples must be filed with the state review panels. For electronic materials submitted for adoption, electronic samples must be filed with the state review panels. To ensure that the evaluations of state review panel members are limited to student and teacher components submitted for adoption, publishers shall not provide ancillary materials or descriptions of ancillary materials to state review panel members. Texas Education Code, §31.002, [§31.002(3),] defines instructional materials as content that conveys the essential knowledge and skills of a subject in the public school curriculum through a medium or a combination of media for conveying information to a student. The term includes a book, supplementary materials, a combination of a book, workbook, and supplementary materials, computer software, magnetic media, DVD, CD-ROM, computer courseware, on-line services, or an electronic medium, or other means of conveying information to the student or otherwise contributing to the learning process through electronic means, including open-source instructional material. [a textbook as a book, a system of instructional materials, a combination of a book and supplementary instructional materials that conveys information to the student or otherwise contributes to the learning process, or an electronic textbook.]

(h) [(g)] The TEA, ESCs, and affected publishing companies shall work together to ensure that hardware or special equipment necessary for review of any item included in a student and/or teacher component of an instructional materials submission is available in each ESC. Affected publishers may be required to loan such hardware or special equipment to any member of a state review panel who does not have access to the necessary hardware or special equipment.

(i) [(h)] A publisher shall provide a list of all corrections necessary to each student and teacher component of an instructional materials submission. The list must be in a format designated by the commissioner of education and filed on or before the deadline specified in the schedule of adoption procedures. If no corrections are necessary, the publisher shall file a letter stating this on or before the deadline in the schedule for submitting the list of corrections. On or before the deadline for submitting lists of corrections, publishers shall submit certification that all instructional materials have been edited for accuracy, content, and compliance with requirements of the proclamation.

(j) [(i)] One complete sample copy of each student and teacher component of adopted instructional materials that incorporate all corrections required by the SBOE shall be filed with the commissioner of education on or before the date specified in the schedule of adoption procedures. The complete sample copies filed with the TEA must match the final format of the materials submitted for adoption. For adopted print materials, print samples must be filed with the TEA. For adopted electronic materials, electronic samples must be filed with the TEA. In addition, each publisher shall file an affidavit signed by an official of the company verifying that all corrections required by the commissioner of education and SBOE have been made. Corrected samples shall be identical to materials that will be provided to school districts after purchase.

(k) On request of a school district, a publisher shall provide an electronic sample of adopted instructional materials. Publishers may not submit print sample copies. All electronic samples must be platform-neutral. A publisher of prekindergarten materials is not required to submit electronic samples of adopted prekindergarten instructional materials. Samples of adopted prekindergarten materials must match the format of the products to be provided to schools upon ordering.

(l) [(j)] Publishers participating in the adoption process are responsible for all expenses incurred by their participation. The state does not guarantee return of sample instructional materials.

§66.57. Regional Education Service Centers: Procedures for Handling Samples; Public Access to Samples.

(a) Handling procedures.

(1) Each regional education service center (ESC) executive director shall designate one person to supervise all shipments of instructional materials. The Texas Education Agency (TEA) shall provide to each designated person forms to be used in reporting receipt of sample shipments.

(2) On or before the date specified in the schedule of adoption procedures, each ESC representative shall notify the commissioner of education of all irregularities in sample shipments. The appropriate publisher shall be notified of any sample shipment irregularities reported by the ESCs.

(b) Public access to samples.

(1) One electronic sample of all instructional materials under consideration for adoption shall be retained in each ESC for review by interested persons until notification is received from the TEA. [Any additional samples shall be made available to be checked out according to rules established by each ESC based on demand.] Appropriate information, such as locator and login information and passwords, shall be made available by the ESCs to ensure public access to Internet-based instructional content throughout the review period.

(2) Regional ESCs shall ensure reasonable public access to sample instructional materials, including access outside of normal working hours that shall be scheduled by appointment.

(3) On or before the date specified in the schedule of adoption procedures, each ESC shall issue a news release publicizing the date on which sample instructional materials will be available for review at the center and shall notify all school districts in the region of the schedule.

§66.63. Report of the Commissioner of Education.

(a) The commissioner of education shall review all instructional materials submitted for consideration for adoption. The commissioner's review shall include the following:

(1) evaluations of instructional materials prepared by state review panel members, including recommendations that instructional materials be placed on the adopted [conforming] list [, placed on the nonconforming list,] or rejected. [{] To be adopted, [conforming,] instructional materials must cover at least 50% of the [all] essential knowledge and skills as required by the proclamation at least once in the student text narrative and once in either an [in addition to] end-of-section review exercise [exercises], an end-of-chapter activity [activities], or a unit test [tests.)];

(2) compliance with established manufacturing standards and specifications;

(3) recommended corrections of factual errors identified by state review panels;

(4) prices of instructional materials submitted for adoption; and

(5) whether instructional materials are offered by a publisher who refuses to rebid instructional materials according to §66.24 of this title (relating to Review and Renewal of Contracts).

(b) Based on the review specified in subsection (a) of this section, the commissioner of education shall prepare preliminary recommendations that instructional materials under consideration be placed on the adopted [conforming] list [, placed on the nonconforming list,] or rejected. According to the schedule of adoption procedures, a publisher shall be given an opportunity for a show-cause hearing if the publisher elects to protest the commissioner's preliminary recommendation.

(c) The commissioner of education shall submit to the State Board of Education (SBOE) final recommendations that instructional materials under consideration be placed on the adopted [conforming] list [, placed on the nonconforming list,] or rejected.

(d) The commissioner of education shall submit for SBOE approval a report on corrections of factual errors that should be required in instructional materials submitted for consideration. The report on recommended corrections shall be sent to the SBOE, affected publishers, regional education service centers (ESCs), and other persons, such as braillists, needing immediate access to the information. The commissioner shall obtain written confirmation from publishers that they would be willing to make all identified corrections should they be required by the SBOE.

§66.66. Consideration and Adoption of Instructional Materials by the State Board of Education.

(a) Publishers shall file three copies of the official bid form with the commissioner of education according to the schedule of adoption procedures.

(b) A committee of the State Board of Education (SBOE) shall be designated by the SBOE chair to review the commissioner's report concerning instructional materials recommended for state adoption. The committee shall report the results of its review to the SBOE.

(c) The SBOE shall adopt [both] a list of adopted [conforming and nonconforming] instructional materials in accordance with the Texas Education Code (TEC), §31.023. Instructional materials may be adopted only if they:

(1) meet at least 50% of the Texas essential knowledge and skills (TEKS) for the subject and grade level in the student version of the instructional materials as well as in the teacher version of the instructional materials. [the requisite percentage of Texas Essential Knowledge and Skills (TEKS) required under the TEC, §31.023.] In determining the percentage of elements of the TEKS covered by instructional materials, each student expectation shall count as an independent element of the TEKS of the subject;

(2) meet the established physical specifications adopted by the SBOE;

(3) are free from factual errors; and

(4) receive majority vote of the SBOE. However, no instructional material may be adopted that contains content that clearly conflicts with the stated purpose of the TEC, §28.002(h).

(d) Instructional materials submitted for placement on the adopted [~~a conforming or nonconforming~~] list may be rejected by majority vote of the SBOE in accordance with the TEC, §31.024.

(e) The SBOE shall either adopt or reject each submitted instructional material in accordance with the TEC, §31.024.

(f) The SBOE may allow a publisher to withdraw from the adoption process after the date specified in the proclamation due to recommended placement on the adopted [~~a conforming or nonconforming~~] list or recommended rejection, manufacturing specifications required as a condition of adoption by the SBOE that the publisher states cannot be met, or failure to agree to make corrections required by the SBOE.

§66.67. Adoption of Open-Source Instructional Materials.

(a) "Open-Source Materials" are defined by the Texas Education Code[~~,~~] (TEC)~~,~~ §31.002, as electronic instructional materials [~~textbooks~~] that are available for downloading from the Internet at no charge to a student and without requiring the purchase of an unlock code, membership, or other access or use charge, except for a charge to order an optional printed copy of all or part of the instructional materials [~~textbook~~]. The term includes [~~a~~] state-developed open-source instructional materials [~~textbook~~] purchased under the TEC, Chapter 31, Subchapter B-1.

(b) The State Board of Education (SBOE) shall place [~~an~~] open-source instructional materials [~~textbook~~] submitted for a secondary-level course on the adopted [~~a conforming or nonconforming~~] list if the instructional materials meet [~~textbook meets~~] the criteria outlined in subsections (c) and (d) of this section.

(c) Open-source instructional materials [~~An open-source textbook~~] must be:

(1) submitted by an eligible institution, defined as a public institution of higher education that is designated as a research university or emerging research university under the Texas Higher Education Coordinating Board's accountability system, or a private university located in Texas that is a member of the Association of American Universities, or a public technical institute, as defined by the TEC, §61.003;

(2) intended for a secondary-level course; and

(3) written, compiled, or edited primarily by faculty of an eligible institution who specialize in the subject area of the instructional materials [~~textbook~~].

(d) To submit [~~an~~] open-source instructional materials [~~textbook~~], an eligible institution must:

(1) certify by the board of regents, or corresponding governing body, or president of the university, or by an individual authorized by one of these entities, that the instructional materials qualify [~~textbook qualifies~~] for placement on the adopted [~~a conforming or nonconforming~~] list based on the extent to which the instructional materials cover [~~textbook covers~~] the essential knowledge and skills identified under the TEC, §28.002;

(2) identify each contributing author;

(3) certify by the appropriate academic department of the submitting institution that the instructional materials are [~~textbook is~~] accurate; and

(4) certify that:

(A) for instructional materials [~~a textbook~~] for a senior-level course, a student who successfully completes a course based on the instructional materials [~~textbook~~] will be prepared, without remediation, for entry into the eligible institution's freshman-level course in that subject; or

(B) for instructional materials [~~a textbook~~] for a junior-level and senior-level course, a student who successfully completes the junior-level course based on the instructional materials [~~textbook~~] will be prepared for entry into the senior-level course.

(e) All submissions required by subsection (d) of this section shall be made in a format approved by the SBOE and the commissioner of education.

(f) Technology-based open-source instructional materials [~~textbooks~~] shall be required to comply with the technical standards in the Rehabilitation Act, §508, as applicable.

(g) All university-developed open-source instructional materials [~~textbook~~] submissions shall be reviewed independently by the same process used in §66.36 of this title (relating to State Review Panels: Duties and Conduct) to confirm the content meets the criteria for placement on the adopted [~~conforming or nonconforming~~] list based on the extent to which the instructional materials cover [~~textbook covers~~] the essential knowledge and skills. The SBOE shall notify the submitting institution of any discrepancy with alignment with essential knowledge and skills.

(h) Before placing [~~an~~] open-source instructional materials [~~textbook~~] submitted under subsection (b) of this section on the adopted [~~conforming or nonconforming~~] list, the SBOE shall direct the Texas Education Agency (TEA) to post the materials on the TEA website for 60 days to allow for public comment and the SBOE shall hold a public hearing on the instructional materials [~~textbooks~~].

(i) Not later than the 90th day after the date open-source instructional materials are submitted as provided by the TEC, §31.0241, the SBOE may review the instructional materials. The SBOE shall:

(1) post with the list adopted under the TEC, §31.023, comments made by the SBOE regarding the open-source instructional materials placed on the list; and

(2) distribute SBOE comments to school districts.

[~~(i) With the exception of 1% of sales, all university-developed open-source textbook submissions shall be assessed fines as defined in §66.10(d) - (f) of this title (relating to Procedures Governing Violations of Statutes--Administrative Penalties).~~]

[~~(j) For purposes of this chapter, an entity producing an open-source material shall comply with all duties of publishers in this chapter or in the TEC, Chapter 31, from which such entity is not explicitly exempted.~~]

[~~(k) An open-source textbook defined in the TEC, §31.0241 and §31.071, shall not fulfill the requirement of a classroom set.~~]

§66.72. Preparing and Completing Contracts.

(a) The state contract form shall not be changed or modified without approval of the Texas Education Agency's (TEA) legal counsel.

(b) Contract forms shall be sent to the publishers for signature. Signed contracts returned by the publishers shall be signed by the chair of the State Board of Education (SBOE) and attested to by the com-

missioner of education. Properly signed and attested contracts shall be filed with the TEA.

(c) The publisher of instructional materials [~~a textbook~~] submitted for midcycle review shall:

(1) enter into a contract with the SBOE for a term that ends at the same time as any contract entered into by the SBOE for other instructional materials [~~another textbook~~] for the same subject and grade level; and

(2) commit to provide the instructional materials [~~textbook~~] in the manner specified by the publisher in the statement of intent to bid midcycle materials in §66.48(f) of this title (relating to Statement of Intent to Bid Instructional Materials).

§66.73. Contracts for Printing of Open-Source Instructional Materials [~~Textbooks~~].

(a) The State Board of Education (SBOE) may execute a contract for the printing of [~~an~~] open-source instructional materials [~~textbook~~] listed on the adopted [~~conforming or nonconforming~~] list.

(b) The contract shall allow a school district or an open-enrollment charter school to requisition printed copies of [~~an~~] open-source instructional materials [~~textbook~~] as provided by the Texas Education Code, §31.103.

(c) The contract form shall be approved by, and shall not be changed or modified without approval of, the Texas Education Agency's (TEA) legal counsel.

(d) Contract forms shall be sent to the awarded vendor for signature. Signed contracts returned by the awarded vendor shall be signed by the chair of the SBOE and attested to by the commissioner of education. Properly signed and attested contracts shall be filed with the TEA.

§66.75. Updates.

(a) A publisher may submit a request to the commissioner of education for approval to substitute an updated edition of state-adopted instructional materials. A publisher requesting an update shall provide the request in writing, along with two copies of the updated edition, and one copy of the corresponding state-adopted instructional material. This section includes electronic instructional materials [~~textbooks~~] and Internet products for which all users receive the same updates.

(b) Requests for approval of the updated edition shall provide that there will be no additional cost to the state.

(c) Requests for approval of the updates shall not be approved during the first year of the original contract unless the commissioner of education determines that changes in technology, curriculum, or other reasons warrant the updates.

(d) Publishers submitting requests for approval of the updates must certify in writing that the new material meets the applicable essential knowledge and skills and is free from factual errors.

(e) Responses from the commissioner of education to update requests shall be provided within 30 days after receipt of the request.

(f) All requests for updates involving content in state-adopted instructional materials must be approved by the State Board of Education (SBOE) prior to their introduction into state-adopted instructional materials. The SBOE may assess penalties as allowed by law against publishers who fail to obtain approval for updates to content in state-adopted instructional materials prior to delivery of the materials to school districts.

(g) Publishers shall request approval from the commissioner of education for electronic design changes and/or updates that improve performance, design, and technology capabilities that enhance the operation and usage for students and teachers but do not include changes to Texas essential knowledge and skills coverage or new content.

(h) Publishers must agree to supply the previous version of state-adopted instructional materials [~~textbooks~~] to school districts that choose to continue using the previous version during the duration of the original contract. This subsection does not apply to online instructional materials.

(i) A publisher of instructional materials may provide alternative formats for use by school districts if:

(1) the content is identical to SBOE-approved content;

(2) the alternative formats include the identical revisions and updates as the original product; and

(3) the cost to the state and school is equal to or less than the cost of the original product.

(j) Alternative formats may be developed and introduced at a time when the subject or grade level is not scheduled in the cycle to be considered for at least two years, in conformance with the procedures for adoption of other state-adopted materials.

(k) Publishers must notify the commissioner of education in writing if they are providing SBOE-approved products in alternative formats.

(l) Publishers are responsible for informing districts of the availability of the alternative formats and for accurate fulfillment of these orders.

(m) The commissioner of education may add alternative formats of SBOE-approved products to the list of available products disseminated to school districts.

§66.78. Delivery of Adopted Instructional Materials.

[~~(a) Under the Texas Education Code (TEC), §31.151, each publisher of adopted instructional materials is required to maintain a depository in this state or arrange with a depository in this state to receive and fill orders for textbooks. Publishers whose products are delivered on-line or are warehoused and shipped from a facility less than 300 miles from the Texas border are not required to maintain a depository in Texas. Publishers who do not maintain a depository in Texas in accordance with TEC, §31.151, must deliver textbooks to a school district or open-enrollment charter school without a delivery charge to the school district, open-enrollment charter school, or state.~~]

(a) [~~(b)~~] Each publisher is required to have adopted instructional materials in stock and available for distribution to school districts throughout the entire adoption period. A back order is defined as adopted instructional material not in stock when ordered and not available for delivery to school districts or open-enrollment charter schools on the specified shipment date. The commissioner of education shall report the number of back-ordered materials by publisher to the State Board of Education (SBOE).

(b) [~~(c)~~] Each publisher shall guarantee delivery of instructional materials [~~textbooks~~] at least ten business days before the opening day of school of the year for which the instructional materials [~~textbooks~~] are ordered if the instructional materials [~~textbooks~~] have been ordered by a date specified in the sales contract.

(c) [~~(d)~~] Each publisher with instructional materials on back order shall notify affected school districts of the expected ship dates for each title on back order.

(d) [~~(e)~~] Payments from the Texas Education Agency (TEA) for adopted instructional materials shall be made directly to the publisher or to any agent or trustee designated in writing by the publisher.

(e) [~~(f)~~] Any publisher, at its discretion, and at least 60 days after notifying the TEA in writing, may change from one depository to another approved depository, except with respect to newly adopted instructional materials in the first year of adoption, when at least 120 days written notice to the TEA is required.

[~~(g) Any request to establish a new depository shall be submitted to the commissioner of education by September 1. The effective date for any new depository shall be April 1 of the year following approval. Each party requesting authority to establish a new depository shall:~~]

[~~(1) present evidence of financial viability adequate to ensure performance of obligations under all contracts on an annual basis;~~]

[~~(2) provide specifications for the warehouse; equipment; as appropriate, evidence of a climate-controlled environment for storage of electronic media; plans for staffing of the proposed depository; and computer capability to receive and process orders and communicate in the automated format specified by the TEA;~~]

[~~(3) submit assurances that a proper stock of instructional materials is available; and~~]

[~~(4) submit a list of publishers under contract with the request.~~]

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

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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SUBCHAPTER C. LOCAL OPERATIONS

19 TAC §§66.101, 66.104, 66.105, 66.107

The amendments are proposed under the Texas Education Code, §7.102(c), which authorizes the SBOE to adopt rules required by the TEC, Chapter 31, and §31.003, which authorizes the SBOE to adopt rules for the adoption, requisition, distribution, care, use, and disposal of instructional materials.

The amendments implement the Texas Education Code, §7.102(c) and Chapter 31.

§66.101. Sample Copies of Instructional Materials for School Districts.

(a) According to the schedule of adoption procedures, a [~~A~~] publisher shall provide each school district and open-enrollment charter school with information that fully describes [~~adopted~~] instructional materials submitted for adoption [~~material~~]. Descriptive information provided to each school district or open-enrollment charter school shall be identical.

(b) Upon request by the instructional materials [~~textbook~~] coordinator of a school district or open-enrollment charter school, a publisher shall provide one complete electronic sample of adopted instructional materials. All electronic samples must be platform-neutral. [~~Samples of learning systems and electronic, visual, or auditory media may be provided in demonstration or representative format, provided that identical samples are provided to each school district or open-enrollment charter school.~~] Samples of instructional materials provided to school districts shall be labeled, "Sample Copy - Not for Classroom Use." Samples to schools are not required for materials submitted for midcycle review, as specified in §66.22(f) of this title (relating Midcycle Review and Adoption).

(c) Samples supplied to school districts shall be provided and distributed at the expense of the publisher. No state or local funds shall be expended to purchase, distribute, or ship sample materials. Publishers may make arrangements with school districts or open-enrollment charter schools to retrieve samples after local selections are completed, but the state does not guarantee return of sample instructional materials.

§66.104. Selection of Instructional Materials by School Districts.

(a) Each local board of trustees of a school district or governing body of an open-enrollment charter school shall adopt a policy for selecting instructional materials. Final selections must be recorded in the minutes of the board of trustees or governing body.

[~~(b) If instructional materials priced above the maximum cost to the state established in the proclamation are selected by a school district or open-enrollment charter school, the school district or open-enrollment charter school is responsible for paying to the publisher the portion of the cost above the state maximum.~~]

[~~(c) If instructional materials for subjects in the enrichment curriculum that are not on the conforming or nonconforming lists adopted by the State Board of Education (SBOE) are selected by a school district or open-enrollment charter school, the state shall be responsible for paying the district an amount equal to the lesser of:~~]

[~~(1) 70% of the cost to the district of the instructional materials. The applicable quota for adopted materials in the subject shall be the basis for determining instructional materials needed by the district; or~~]

[~~(2) 70% of the maximum cost to the state established for the subject. The applicable quota for adopted materials in the subject shall be the basis for determining instructional materials needed by the district.~~]

[~~(d) A school district or open-enrollment charter school that selects non-adopted instructional materials for enrichment subjects is responsible for the portion of the cost of the materials not eligible for payment by the state under subsection (c) of this section. The minutes of the board of trustees or governing body meeting at which such a selection is ratified shall reflect the agreement of the school district or open-enrollment charter school to bear responsibility for the portion of the cost not eligible for payment by the state. A school district or open- enrollment charter school that selects non-adopted instructional materials for enrichment subjects also bears responsibility for providing braille and/or large type versions of the non-adopted instructional materials.~~]

[~~(e) Funds paid by the state under subsection (c) of this section shall be used only for purchasing the non-adopted instructional materials selected and ratified by the board of trustees or governing body.~~]

[~~(f) Non-adopted instructional materials selected and purchased under subsection (c) of this section shall be used by the school district or open-enrollment charter school during the contract period~~

for conforming and nonconforming instructional materials adopted by the SBOE in the subject area.]

(b) [(g)] A report listing instructional materials selected for use in a school district or open-enrollment charter school shall be transmitted to the Texas Education Agency (TEA) no later than April 1 each year.

[(h) Only instructional materials ratified by the board of trustees or governing body shall be furnished by the state for use in any school district or open-enrollment charter school. Selections certified to the TEA shall be final and, therefore, shall not be subject to reconsideration during the original contract period or readoption contract periods covering the instructional materials selected.]

[(i) Except as otherwise provided by statute, requisitions submitted before the first day of school shall be approved based on the maximum number of students enrolled in the district or open-enrollment charter school during the previous school year and/or registered to attend the district during the next school year. Requisitions submitted after the first day of school shall be approved based on the actual number of students enrolled in the district when the requisition is submitted. If two or more titles are selected in a subject, requisitions may be made for a combined total of the selected titles.]

[(j) Instructional materials requisitioned by, and delivered to, a school district or an open-enrollment charter school shall be continued in use during the contract period or periods of the materials. A school district may not return copies of one title to secure copies of another title in the same subject.]

[(k) If a school district or open-enrollment charter school does not have a sufficient number of copies of a textbook used by the district or school for use during the following school year, and a sufficient number of additional copies will not be available from the publisher's depository or the publisher within ten business days prior to the opening day of school, the school district or school is entitled to be reimbursed from the state textbook fund at a rate not to exceed the actual cost of the used textbook, or the state maximum cost, whichever is less, for the purchase of a sufficient number of used adopted textbooks.]

(c) [(l)] In making a requisition, a school district or open-enrollment charter school may requisition instructional materials [textbooks] on the [conforming and nonconforming] list adopted under the Texas Education Code, §31.023, for grades above the grade level in which the student is enrolled[, except that the total quantity of textbooks requisitioned may not exceed a school district's eligibility quota for that subject].

(d) [(m)] Adopted instructional materials shall be supplied to a pupil in special education classes as appropriate to the level of the pupil's ability and without regard to the grade for which the instructional material is adopted or the grade in which the pupil is enrolled.

(e) [(n)] A school district or open-enrollment charter school may order replacements for instructional materials [textbooks] that have been lost or damaged directly from the [textbook depository or the textbook] publisher of the instructional materials. [or manufacturer if the textbook publisher or manufacturer does not have a designated textbook depository in this state, in accordance with §66.78(a) of this title (relating to Delivery of Adopted Instructional Materials).]

(f) [(o)] School districts or open-enrollment charter schools shall not be reimbursed from state funds for expenses incurred in local handling of instructional materials [textbooks].

(g) [(p)] Selection and use of ancillary materials provided by publishers under §66.69 of this title (relating to Ancillary Materials) is at the discretion of each local board of trustees or governing body.

[(q) The SBOE shall reduce the approved maximum cost for each nonconforming instructional material according to §66.51(a)(11) of this title (relating to Instructional Materials Purchased by the State). For nonconforming instructional materials, the state shall be responsible for payment to the publisher in an amount only equal to the reduced maximum cost. A school district or open-enrollment charter school ordering nonconforming instructional materials is responsible for the portion of the cost that exceeds the reduced state maximum cost.]

[(r) A school district or open-enrollment charter school that selects from the commissioner's list as specified in the TEC, §31.0231, must purchase a classroom set of textbooks adopted by the SBOE under the TEC, §31.023 or §31.035, for each subject and grade level in the foundation and enrichment curriculum.]

[(s) A classroom set shall be defined as the total count of SBOE-adopted textbooks on the conforming or nonconforming list necessary to provide one copy to each student during the class period. A classroom kit that includes materials for every student in the classroom is considered to be a classroom set.]

[(t) The classroom set requirement shall be implemented as new textbook adoptions become available and are funded. The classroom set requirement will begin with Proclamation 2010.]

§66.105. Certification by School Districts.

Prior to the beginning of each school year, each school district and open-enrollment charter school shall submit to the State Board of Education (SBOE) and commissioner of education certification that for each subject in the required [foundation and enrichment] curriculum under the Texas Education Code, §28.002, other than physical education, and each grade level, the district or charter school provides each student with [textbooks, electronic textbooks, or] instructional materials that cover all elements of the essential knowledge and skills adopted by the SBOE. The certification shall be submitted in a format approved by the commissioner of education.

§66.107. Local Accountability.

(a) Each school district or open-enrollment charter school shall conduct an annual physical inventory of all currently adopted instructional materials that have been requisitioned by, and delivered to, the district. The results of the inventory shall be recorded in the district's files. Reimbursement and/or replacement shall be made for all instructional materials determined to be lost.

[(b) Each textbook, other than an electronic textbook, must be covered by the student under the direction of the teacher.]

[(c) After the beginning of every school year, each school district or open-enrollment charter school shall determine if it has surplus instructional materials for any subject area/grade level, based on its current enrollment for the subject area/grade level. In accordance with the Educational Materials and Textbooks (EMAT) online ordering system, surplus is defined as follows. For courses that use textbooks that are in the first year of adoption, any textbook in excess of 110% of enrollment shall be considered surplus. For courses that use textbooks that are in the second or later years of adoption, any textbook in excess of 120% of enrollment shall be considered surplus. Overages that exceed these definitions should be entered into the EMAT Online Adjust Surplus Screen, except that instructional materials that are needed for the following school year are not considered surplus and should not be entered into the Adjust Surplus Screen. Instructional materials determined by the school district or open-enrollment charter school to be surplus-to-quota shall be reported to the Texas Education Agency (TEA) by October 1 of each year in accordance with instructions provided by the TEA. A school district or open-enrollment charter school is entitled to retain surplus-to-quota instructional materials only when

~~data approved by the TEA indicate that students will be enrolled in the subject and a need for the surplus-to-quota instructional materials exists.]~~

~~[(d) When placing orders for instructional materials, school districts and open-enrollment charter schools shall report enrollments as follows:]~~

~~[(1) Annual orders for instructional materials. Enrollments shall be reported based on the maximum number of students enrolled in the district or open-enrollment charter school during the previous school year and/or registered to attend the district during the next school year; and]~~

~~[(2) Supplemental orders for instructional materials. Enrollments shall be reported based on the actual number of students enrolled in the district when the order is submitted, adjusted for students reported as working above or below grade level.]~~

~~[(e) A school district's enrollment growth or decline for the prior three years shall be used by the TEA as the basis for determining any additional percentage of attendance for which a school district may requisition instructional materials.]~~

~~[(f) The TEA assumes that enrollments reported by a school district or open-enrollment charter school at the time an order for instructional materials is placed are accurate.]~~

~~[(g) A school district or open-enrollment charter school that orders instructional materials in excess of its eligibility by reporting enrollments above enrollments described in subsection (d)(1) and (2) of this section enters into a contract with the state to purchase the instructional materials supplied that exceed the school district or open-enrollment charter school's eligibility for the subject area/grade level. A school district or open-enrollment charter school may cancel the contract to purchase instructional materials supplied in excess of its eligibility by immediately notifying the TEA of the surplus and posting the surplus in accordance with instructions provided by the TEA. If prior approval is received, surplus instructional materials may be returned to the publisher's approved depository or placed into statewide surplus inventory in accordance with instructions from the TEA. A school district or open-enrollment charter school that fails to notify the TEA of surplus instructional materials for more than six months after the beginning of the school year shall reimburse the state at the full price for the surplus instructional materials.]~~

(b) [~~(h)~~] All instructional materials [~~textbooks~~] must be turned in at the end of the school year or when the student withdraws from school.

(c) [~~(i)~~] The board of trustees of a school district may not require an employee of the district to pay for instructional materials [~~a textbook~~] or instructional technology that is stolen, misplaced, or not returned by a student.

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 February 13, 2012.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 475-1497

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19 TAC §66.102

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

The repeal is proposed under the Texas Education Code, §7.102(c), which authorizes the SBOE to adopt rules required by the TEC, Chapter 31, and §31.003, which authorizes the SBOE to adopt rules for the adoption, requisition, distribution, care, use, and disposal of instructional materials.

The repeal implements the Texas Education Code, §7.102(c) and Chapter 31.

§66.102. Textbook Credits.

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. SPECIAL INSTRUCTIONAL MATERIALS

19 TAC §66.121, §66.124

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

The repeal is proposed under the Texas Education Code, §7.102(c), which authorizes the SBOE to adopt rules required by the TEC, Chapter 31, and §31.003, which authorizes the SBOE to adopt rules for the adoption, requisition, distribution, care, use, and disposal of instructional materials.

The repeal implements the Texas Education Code, §7.102(c) and Chapter 31.

§66.121. Special Instructional Materials.

§66.124. Authorizing State 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.

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SUBCHAPTER E. DISPOSITION OF INSTRUCTIONAL MATERIALS

19 TAC §66.131

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

The repeal is proposed under the Texas Education Code, §7.102(c), which authorizes the SBOE to adopt rules required by the TEC, Chapter 31, and §31.003, which authorizes the SBOE to adopt rules for the adoption, requisition, distribution, care, use, and disposal of instructional materials.

The repeal implements the Texas Education Code, §7.102(c) and Chapter 31.

§66.131. Out-of-Adoption Instructional Materials.

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

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CHAPTER 111. TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR MATHEMATICS

The State Board of Education (SBOE) proposes new §§111.1-111.7, 111.25-111.28, and 111.38-111.45 and amendments to §111.51 and §111.59, concerning Texas essential knowledge and skills (TEKS) for mathematics. The proposed new sections would establish revised TEKS for mathematics courses in elementary, middle school, and high school. The proposed amendments would update implementation language for other high school mathematics courses and correct a course title.

Applications for appointment to mathematics TEKS review committees were accepted by the Texas Education Agency (TEA) from October 2010 to early January 2011. Applications received prior to the November 2010 SBOE meeting were provided to SBOE members at the November meeting so that members could begin nominating individuals to serve on these committees. Applications received after the November 2010 SBOE meeting were provided to SBOE members at the January 2011 meeting so that board members could complete the nominations. Nominations for expert reviewers and mathematics TEKS review committee members were made in February 2011.

In anticipation of the review and revision of the mathematics TEKS, the commissioner of education convened a group of advisors to review current research and resources and to offer suggestions regarding the TEKS revision and future professional development. The Commissioner's Mathematics Advisory Group, established in the fall of 2010, included mathematics educators and mathematicians from Texas. The recommendations of the Commissioner's Mathematics Advisory Group regarding the next generation of mathematics standards in Texas were compiled and then reviewed by a panel of national advisors in mathematics known as the National Review Team. The resulting recommendations, known as *The Commissioner's Draft of the Texas Mathematics Standards,* were provided to the SBOE at its April 2011 meeting.

The mathematics TEKS review committees were convened in Austin in May 2011 to begin work on draft recommendations for revisions to the TEKS. The committees met again in July 2011 to complete their initial draft recommendations. In August 2011, the first draft recommendations were provided to the board and to the board-appointed expert reviewers and posted to the TEA website for informal public feedback. These initial drafts were reviewed by the expert reviewers. During the September 2011 Committee of the Full Board meeting, expert reviewers and representatives from the TEKS review committees provided invited testimony on the first draft recommendations.

The mathematics TEKS review committees met again in October 2011 to review feedback and complete recommendations for revisions to the mathematics TEKS. The recommendations from the review committees were provided to the Committee of the Full Board at the November 2011 meeting and were posted on the TEA website.

Proposed revisions to 19 TAC Chapter 111, Subchapters A-D, were presented to the SBOE for first reading and filing authorization at the January 2012 meeting. The SBOE took action to approve proposed revisions as amended, including the addition of contingency language relating to implementation in proposed new §§111.1, 111.25, and 111.38.

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

Anita Givens, associate commissioner for standards and programs, has determined that for the first five-year period the proposed rule actions are in effect there will be fiscal implications for state and local government as a result of enforcing or administering the proposed rule actions.

There are fiscal implications for the TEA in fiscal years (FYs) 2011 and 2012 to reimburse committee members for travel to review and revise the mathematics TEKS. There are also implications for the TEA to create professional development to help teachers and administrators understand the revisions to the TEKS. The estimated cost to the TEA for reviewing and revising the TEKS is $92,060 for FY 2011 and $60,680 for FY 2012 for a total of $152,740 for the two years. The estimated cost for professional development is $4 million for FY 2013 and $500,000 each year for FYs 2013-2016.

There are anticipated fiscal implications for school districts and charter schools to implement the revised TEKS, which may

include the need for professional development and revisions to district-developed databases, curriculum, and scope and sequence documents. Since curriculum and instruction decisions are made at the local district level, it is difficult to estimate the fiscal impact on any given district.

Ms. Givens has determined that for each year of the first five years the proposed rule actions are in effect the public benefit anticipated as a result of enforcing the rule actions would be better alignment of the TEKS and coordination of the standards with the adoption of instructional materials. There is no anticipated economic cost to persons who are required to comply with the proposed rule actions.

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

Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Rulemaking, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-5337. The State Board of Education will hold a public hearing in conjunction with the regularly scheduled April 2012 State Board of Education meeting. Information about the public hearing will be posted at http://www.tea.state.tx.us/index4.aspx?id=3785 once available.

SUBCHAPTER A. ELEMENTARY

19 TAC §§111.1 - 111.7

The new sections are proposed under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to identify by rule the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating instructional materials and addressed on the assessment instruments; and §28.0021(a)(1), which authorizes the SBOE to require instruction in personal financial literacy in the essential knowledge and skills of mathematics instruction in Kindergarten through Grade 8.

The new sections implement the Texas Education Code, §§7.102(c)(4), 28.002, and 28.0021(a)(1).

§111.1. Implementation of Texas Essential Knowledge and Skills for Mathematics, Elementary, Adopted 2012.

(a) The provisions of §§111.2-111.7 of this subchapter shall be implemented by school districts.

(b) No later than August 31, 2013, the commissioner of education shall determine whether instructional materials have been made available to Texas public schools that cover the essential knowledge and skills for mathematics as adopted in §§111.2-111.7 of this subchapter.

(c) If the commissioner makes the determination that instructional materials have been made available under subsection (b) of this section, §§111.2-111.7 of this subchapter shall be implemented beginning with the 2014-2015 school year and apply to the 2014-2015 and subsequent school years.

(d) If the commissioner does not make the determination that instructional materials have been made available under subsection (b) of this section, the commissioner shall determine no later than August 31 of each subsequent school year whether instructional materials have been made available. If the commissioner determines that instructional materials have been made available, the commissioner shall notify the State Board of Education and school districts that §§111.2-111.7 of this subchapter shall be implemented for the following school year.

(e) Sections 111.11-111.17 of this subchapter shall be superseded by the implementation of §§111.1-111.7 under this section.

§111.2. Kindergarten, Adopted 2012.

(a) Introduction.

(1) The desire to achieve educational excellence is the driving force behind the Texas essential knowledge and skills for mathematics, guided by the college and career readiness standards. By embedding statistics, probability, and finance, while focusing on fluency and solid understanding, Texas will lead the way in mathematics education and prepare all Texas students for the challenges they will face in the 21st century.

(2) The process standards describe ways in which students are expected to engage in the content. The placement of the process standards at the beginning of the knowledge and skills listed for each grade and course is intentional. The process standards weave the other knowledge and skills together so that students may be successful problem solvers and use mathematics efficiently and effectively in daily life. The process standards are integrated at every grade level and course. When possible, students will apply mathematics to problems arising in everyday life, society, and the workplace. Students will use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution. Students will select appropriate tools such as real objects, manipulatives, paper and pencil, and technology and techniques such as mental math, estimation, and number sense to solve problems. Students will effectively communicate mathematical ideas, reasoning, and their implications using multiple representations such as symbols, diagrams, graphs, and language. Students will use mathematical relationships to generate solutions and make connections and predictions. Students will analyze mathematical relationships to connect and communicate mathematical ideas. Students will display, explain, or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(3) Students in Kindergarten are expected to perform their work without the use of calculators.

(4) The primary focal areas in Kindergarten are understanding counting and cardinality, understanding addition as joining and subtraction as separating, and comparing objects by measureable attributes.

(A) Students develop number and operations through several fundamental concepts. Students know number names and the counting sequence. Counting and cardinality lay a solid foundation for number. Students apply the principles of counting to make the connection between numbers and quantities.

(B) Students use meanings of numbers to create strategies for solving problems and responding to practical situations involving addition and subtraction.

(C) Students identify characteristics of objects that can be measured and directly compare objects according to these measureable attributes.

(5) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(b) Knowledge and skills.

(1) Mathematical process standards. The student uses mathematical processes to acquire and demonstrate mathematical understanding. The student is expected to:

(A) apply mathematics to problems arising in everyday life, society, and the workplace;

(B) use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution;

(C) select tools, including real objects, manipulatives, paper and pencil, and technology as appropriate, and techniques, including mental math, estimation, and number sense as appropriate, to solve problems;

(D) communicate mathematical ideas, reasoning, and their implications using multiple representations, including symbols, diagrams, graphs, and language as appropriate;

(E) create and use representations to organize, record, and communicate mathematical ideas;

(F) analyze mathematical relationships to connect and communicate mathematical ideas; and

(G) display, explain, and justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(2) Number and operations. The student applies mathematical process standards to understand how to represent and compare whole numbers, the relative position and magnitude of whole numbers, and relationships within the numeration system. The student is expected to:

(A) count forward and backward to at least 20 with and without objects;

(B) read, write, and represent whole numbers from 0 to at least 20 with and without objects or pictures;

(C) count a set of objects up to at least 20 and demonstrate that the last number said tells the number of objects in the set regardless of their arrangement;

(D) recognize instantly the quantity of a small group of objects in organized and random arrangements;

(E) generate a set using concrete and pictorial models that represents a number that is more than, less than, and equal to a given number up to 20;

(F) generate a number that is one more than or one less than another number up to at least 20;

(G) compare sets of objects up to at least 20 in each set using comparative language;

(H) use comparative language to describe two numbers up to 20 presented as written numerals; and

(I) compose and decompose numbers up to 10 with objects and pictures.

(3) Number and operations. The student applies mathematical process standards to develop an understanding of addition and subtraction situations in order to solve problems. The student is expected to:

(A) model the action of joining to represent addition and the action of separating to represent subtraction;

(B) solve word problems using objects and drawings to find sums up to 10 and differences within 10; and

(C) explain the strategies used to solve problems involving adding and subtracting within 10 using spoken words, concrete and pictorial models, and number sentences.

(4) Number and operations. The student applies mathematical process standards to identify coins in order to recognize the need for monetary transactions. The student is expected to identify U.S. coins by name, including pennies, nickels, dimes, and quarters.

(5) Algebraic reasoning. The student applies mathematical process standards to identify the pattern in the number word list. The student is expected to:

(A) recite numbers up to at least 100 by ones and tens beginning with any given number; and

(B) represent addition and subtraction with objects, drawings, situations, verbal explanations, or number sentences.

(6) Geometry and measurement. The student applies mathematical process standards to analyze attributes of two-dimensional shapes and three-dimensional solids to develop generalizations about their properties. The student is expected to:

(A) identify two-dimensional shapes, including circles, triangles, rectangles, and squares as special rectangles;

(B) identify three-dimensional solids, including cylinders, cones, spheres, and cubes, in the real world;

(C) identify two-dimensional components of three-dimensional objects such as the face of a tissue box is a rectangle;

(D) identify attributes of two-dimensional shapes using informal and formal geometric language interchangeably such as number of corners or vertices and number of sides;

(E) classify and sort a variety of regular and irregular two- and three-dimensional figures regardless of orientation or size; and

(F) create two-dimensional shapes using a variety of materials and drawings.

(7) Geometry and measurement. The student applies mathematical process standards to directly compare measureable attributes. The student is expected to:

(A) give an example of a measurable attribute of a given object, including length, capacity, and weight; and

(B) compare two objects with a common measureable attribute to see which object has more of/less of the attribute and describe the difference.

(8) Data analysis. The student applies mathematical process standards to collect and organize data to make it useful for interpreting information. The student is expected to:

(A) collect, sort, and organize data into two or three categories;

(B) use data to create real-object and picture graphs; and

(C) draw conclusions from real-object and picture graphs.

(9) Personal financial literacy. The student applies mathematical process standards to manage one's financial resources effectively for lifetime financial security. The student is expected to:

(A) identify ways to earn income;

(B) differentiate between money received as income and money received as gifts;

(C) list simple skills required for jobs such as bus driver, librarian, cashier, or cook; and

(D) distinguish between wants and needs and identify income as a source to meet one's wants and needs.

§111.3. Grade 1, Adopted 2012.

(a) Introduction.

(1) The desire to achieve educational excellence is the driving force behind the Texas essential knowledge and skills for mathematics, guided by the college and career readiness standards. By embedding statistics, probability, and finance, while focusing on fluency and solid understanding, Texas will lead the way in mathematics education and prepare all Texas students for the challenges they will face in the 21st century.

(2) The process standards describe ways in which students are expected to engage in the content. The placement of the process standards at the beginning of the knowledge and skills listed for each grade and course is intentional. The process standards weave the other knowledge and skills together so that students may be successful problem solvers and use mathematics efficiently and effectively in daily life. The process standards are integrated at every grade level and course. When possible, students will apply mathematics to problems arising in everyday life, society, and the workplace. Students will use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution. Students will select appropriate tools such as real objects, manipulatives, paper and pencil, and technology and techniques such as mental math, estimation, and number sense to solve problems. Students will effectively communicate mathematical ideas, reasoning, and their implications using multiple representations such as symbols, diagrams, graphs, and language. Students will use mathematical relationships to generate solutions and make connections and predictions. Students will analyze mathematical relationships to connect and communicate mathematical ideas. Students will display, explain, or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(3) Students in Grade 1 are expected to perform their work without the use of calculators.

(4) The primary focal areas in Grade 1 are understanding and applying place value, solving problems involving addition and subtraction, and composing and decomposing two-dimensional shapes and three-dimensional solids.

(A) Students use relationships within the numeration system to understand the sequential order of the counting numbers and their relative magnitude.

(B) Students extend their use of addition and subtraction beyond the actions of joining and separating to include comparing and combining. Students use properties of operations and the relationship between addition and subtraction to solve problems. By comparing a variety of solution strategies, students use efficient, accurate, and generalizable methods to perform operations.

(C) Students use basic shapes and spatial reasoning to model objects in their environment and construct more complex shapes. Students are able to identify, name, and describe basic two-dimensional shapes and three-dimensional solids.

(5) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(b) Knowledge and skills.

(1) Mathematical process standards. The student uses mathematical processes to acquire and demonstrate mathematical understanding. The student is expected to:

(A) apply mathematics to problems arising in everyday life, society, and the workplace;

(B) use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution;

(C) select tools, including real objects, manipulatives, paper and pencil, and technology as appropriate, and techniques, including mental math, estimation, and number sense as appropriate, to solve problems;

(D) communicate mathematical ideas, reasoning, and their implications using multiple representations, including symbols, diagrams, graphs, and language as appropriate;

(E) create and use representations to organize, record, and communicate mathematical ideas;

(F) analyze mathematical relationships to connect and communicate mathematical ideas; and

(G) display, explain, and justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(2) Number and operations. The student applies mathematical process standards to represent and compare whole numbers, the relative position and magnitude of whole numbers, and relationships within the numeration system related to place value. The student is expected to:

(A) recognize instantly the quantity of structured arrangements such as seen on a die or a ten frame;

(B) use concrete and pictorial models to compose and decompose numbers up to 120 in more than one way as so many hundreds, so many tens, and so many ones;

(C) use objects, pictures, and expanded and standard forms to represent numbers up to 120;

(D) generate a number that is greater than or less than a given whole number up to 120;

(E) use place value to compare whole numbers up to 120 using comparative language;

(F) order whole numbers up to 120 using place value and open number lines; and

(G) represent the comparison of two numbers to 100 using the symbols >, <, or =.

(3) Number and operations. The student applies mathematical process standards to develop and use strategies for whole number addition and subtraction computations in order to solve problems. The student is expected to:

(A) use concrete and pictorial models to determine the sum of a multiple of 10 and a one-digit number in problems up to 99;

(B) use objects and pictorial models to solve word problems involving joining, separating, and comparing sets within 20 and unknowns as any one of the terms in the problem such as 2 + 4 = [ ]; 3 + [ ] = 7; and 5 = [ ] - 3;

(C) compose 10 with two or more addends with and without concrete objects;

(D) apply basic fact strategies to add and subtract within 20, including making 10 and decomposing a number leading to a 10;

(E) explain strategies used to solve addition and subtraction problems up to 20 using spoken words, objects, pictorial models, and number sentences; and

(F) generate and solve problem situations when given a number sentence involving addition and subtraction of numbers within 20.

(4) Number and operations. The student applies mathematical process standards to identify coins, their values, and the relationships among them in order to recognize the need for monetary transactions. The student is expected to:

(A) identify U.S. coins, including pennies, nickels, dimes, and quarters, by value and describe the relationships among them;

(B) write a number with the cent symbol to describe the value of a coin; and

(C) use relationships to count by twos, fives, and tens to determine the value of pennies, nickels, and dimes.

(5) Algebraic reasoning. The student applies mathematical process standards to identify and apply number patterns within properties of numbers and operations in order to describe relationships. The student is expected to:

(A) recite numbers forward and backward from any given number between 1 and 120;

(B) skip count by twos, fives, and tens to 100;

(C) skip count by twos, fives, and tens to determine the total number of objects up to 120 in a set;

(D) use relationships to determine the number that is 10 more and 10 less than a given number up to 120;

(E) represent word problems involving addition and subtraction of whole numbers up to 20 using concrete and pictorial models and number sentences;

(F) understand that the equal sign represents a relationship where statements on each side of the equal sign are true;

(G) determine the unknown whole number in an addition or subtraction equation when the unknown may be any one of the three or four terms in the equation;

(H) identify relationships between addition facts and related subtraction sentences such as 3 + 2 = 5 and 5 - 2 = 3; and

(I) apply properties of operations as strategies to add and subtract such as if 2 + 3 = 5 is known, then 3 + 2 = 5.

(6) Geometry and measurement. The student applies mathematical process standards to analyze attributes of two-dimensional shapes and three-dimensional solids to develop generalizations about their properties. The student is expected to:

(A) classify and sort regular and irregular two-dimensional shapes based on attributes using informal geometric language;

(B) distinguish between attributes that define a two-dimensional or three-dimensional figure such as a closed figure with three sides is a triangle or a solid with exactly six rectangular faces is a rectangular prism and attributes that do not define the shape such as orientation or color;

(C) create two-dimensional figures, including circles, triangles, rectangles, and squares, as special rectangles, rhombuses, and hexagons;

(D) identify two-dimensional shapes, including circles, triangles, rectangles, and squares, as special rectangles, rhombuses, and hexagons and describe their attributes using formal geometric language such as vertex and side;

(E) identify three-dimensional solids, including spheres, cones, cylinders, rectangular prisms (including cubes), and triangular prisms, and describe their attributes using formal geometric language such as vertex, edge, and face;

(F) compose two-dimensional shapes by joining two, three, or four figures to produce a target shape in more than one way if possible;

(G) partition two-dimensional figures such as circles and rectangles into two and four fair shares or equal parts and describe the parts using words such as "halves," "half of," "fourths," or "quarters"; and

(H) identify examples and non-examples of halves and fourths.

(7) Geometry and measurement. The student applies mathematical process standards to select and use units to describe length and time. The student is expected to:

(A) use measuring tools such as adding machine tape, ribbon, or string to measure the length of objects to reinforce the continuous nature of linear measurement;

(B) demonstrate that the length of an object is the number of same-size units of length that, when laid end-to-end with no gaps or overlaps, reach from one end of the object to the other;

(C) measure the same object/distance with units of two different lengths and describe how and why the measurements differ;

(D) describe a length to the nearest whole unit using a number and a unit such as five craft sticks; and

(E) tell time to the hour and half hour using analog and digital clocks.

(8) Data analysis. The student applies mathematical process standards to organize data to make it useful for interpreting information and solving problems. The student is expected to:

(A) collect, sort, and organize data in up to three categories using models/representations such as tally marks or T-charts;

(B) use data to create picture and bar-type graphs; and

(C) draw conclusions and generate and answer questions using information from picture and bar-type graphs.

(9) Personal financial literacy. The student applies mathematical process standards to manage one's financial resources effectively for lifetime financial security. The student is expected to:

(A) define money earned as income;

(B) explain how human capital is related to work;

(C) identify income as a means of obtaining goods and services, oftentimes making choices between wants and needs;

(D) distinguish between spending and saving; and

(E) consider charitable giving.

§111.4. Grade 2, Adopted 2012.

(a) Introduction.

(1) The desire to achieve educational excellence is the driving force behind the Texas essential knowledge and skills for mathematics, guided by the college and career readiness standards. By embedding statistics, probability, and finance, while focusing on fluency and solid understanding, Texas will lead the way in mathematics education and prepare all Texas students for the challenges they will face in the 21st century.

(2) The process standards describe ways in which students are expected to engage in the content. The placement of the process standards at the beginning of the knowledge and skills listed for each grade and course is intentional. The process standards weave the other knowledge and skills together so that students may be successful problem solvers and use mathematics efficiently and effectively in daily life. The process standards are integrated at every grade level and course. When possible, students will apply mathematics to problems arising in everyday life, society, and the workplace. Students will use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution. Students will select appropriate tools such as real objects, manipulatives, paper and pencil, and technology and techniques such as mental math, estimation, and number sense to solve problems. Students will effectively communicate mathematical ideas, reasoning, and their implications using multiple representations such as symbols, diagrams, graphs, and language. Students will use mathematical relationships to generate solutions and make connections and predictions. Students will analyze mathematical relationships to connect and communicate mathematical ideas. Students will display, explain, or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(3) Students in Grade 2 are expected to perform their work without the use of calculators.

(4) The primary focal areas in Grade 2 are making comparisons within the base-10 place value system, solving problems with addition and subtraction within 100, and building foundations for multiplication.

(A) Students develop an understanding of the base-10 place value system and place value concepts. The students' understanding of base-10 place value includes ideas of counting in units and multiples of thousands, hundreds, tens, and ones and a grasp of number relationships, which students demonstrate in a variety of ways.

(B) Students identify situations in which addition and subtraction are useful to solve problems. Students develop a variety of strategies to use efficient, accurate, and generalizable methods to add and subtract multi-digit whole numbers.

(C) Students use the relationship between skip counting and equal groups of objects to represent the addition or subtraction of equivalent sets, which builds a strong foundation for multiplication and division.

(5) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(b) Knowledge and skills.

(1) Mathematical process standards. The student uses mathematical processes to acquire and demonstrate mathematical understanding. The student is expected to:

(A) apply mathematics to problems arising in everyday life, society, and the workplace;

(B) use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution;

(C) select tools, including real objects, manipulatives, paper and pencil, and technology as appropriate, and techniques, including mental math, estimation, and number sense as appropriate, to solve problems;

(D) communicate mathematical ideas, reasoning, and their implications using multiple representations, including symbols, diagrams, graphs, and language as appropriate;

(E) create and use representations to organize, record, and communicate mathematical ideas;

(F) analyze mathematical relationships to connect and communicate mathematical ideas; and

(G) display, explain, and justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(2) Number and operations. The student applies mathematical process standards to understand how to represent and compare whole numbers, the relative position and magnitude of whole numbers, and relationships within the numeration system related to place value. The student is expected to:

(A) use concrete and pictorial models to compose and decompose numbers up to 1,200 in more than one way as a sum of so many thousands, hundreds, tens, and ones;

(B) use standard, word, and expanded forms to represent numbers up to 1,200;

(C) generate a number that is greater than or less than a given whole number up to 1,200;

(D) use place value to compare whole numbers up to 1,200 using comparative language, numbers, and symbols (>, <, or =);

(E) locate the position of a given whole number on an open number line;

(F) name the whole number that corresponds to a specific point on a number line; and

(G) order whole numbers up to 1,200 using place value and open number lines.

(3) Number and operations. The student applies mathematical process standards to recognize and represent fractional units and communicates how they are used to name parts of a whole. The student is expected to:

(A) partition objects such as strips, lines, regular polygons, and circles into equal parts and name the parts, including halves, fourths, and eighths, using words such as "one-half" or "three-fourths";

(B) explain that the more fractional parts used to make a whole, the smaller the part; and the fewer the fractional parts, the larger the part;

(C) use concrete models to count fractional parts beyond one whole using words such as "one-fourth," "two-fourths," "three-fourths," "four-fourths," "five-fourths," or "one and one-fourth," and recognize how many parts it takes to equal one whole such as four-fourths equals one whole; and

(D) identify examples and non-examples of halves, fourths, and eighths.

(4) Number and operations. The student applies mathematical process standards to develop and use strategies and methods for whole number computations in order to solve addition and subtraction problems with efficiency and accuracy. The student is expected to:

(A) recall basic facts to add and subtract within 20 with automaticity;

(B) use mental strategies, flexible methods, and algorithms based on knowledge of place value and equality to add and subtract two-digit numbers;

(C) solve one-step and multi-step word problems involving addition and subtraction of two-digit numbers using a variety of strategies based on place value, including algorithms; and

(D) generate and solve problem situations for a given mathematical number sentence involving addition and subtraction of whole numbers within 100.

(5) Number and operations. The student applies mathematical process standards to determine the value of coins in order to solve monetary transactions. The student is expected to:

(A) determine the value of a collection of coins up to one dollar; and

(B) use the cent symbol, dollar sign, and the decimal point to name the value of a collection of coins.

(6) Number and operations. The student applies mathematical process standards to connect repeated addition and subtraction to multiplication and division situations that involve equal groupings and shares. The student is expected to:

(A) model, create, and describe contextual multiplication situations in which equivalent sets of concrete objects are joined; and

(B) model, create, and describe contextual division situations in which a set of concrete objects is separated into equivalent sets.

(7) Algebraic reasoning. The student applies mathematical process standards to identify and apply number patterns within properties of numbers and operations in order to describe relationships. The student is expected to:

(A) use relationships and objects to determine whether a number up to 40 is even or odd;

(B) use relationships to determine the number that is 10 or 100 more or less than a given number up to 1,200; and

(C) represent and solve addition and subtraction word problems where unknowns may be any one of the terms in the problem.

(8) Geometry and measurement. The student applies mathematical process standards to analyze attributes of two- and three-dimensional geometric figures to develop generalizations about their properties. The student is expected to:

(A) create two-dimensional shapes based on given attributes, including number of sides and vertices;

(B) identify attributes of a quadrilateral, a pentagon, and an octagon;

(C) classify and sort three-dimensional solids, including cones, cylinders, spheres, triangular and rectangular prisms, and cubes based on attributes using formal geometric language such as vertex, edge, and face;

(D) classify and sort polygons with 12 or fewer sides according to attributes, including identifying the number of sides and number of vertices;

(E) compose two-dimensional shapes and three-dimensional solids with given properties or attributes such as build a rectangle out of unit squares or build a rectangular prism out of unit cubes; and

(F) decompose two-dimensional shapes such as cutting out a square from a rectangle, dividing a shape in half, or partitioning a rectangle into identical triangles and identify the resulting geometric parts.

(9) Geometry and measurement. The student applies mathematical process standards to select and use units to describe length, area, and time. The student is expected to:

(A) find the length of objects using concrete models for standard units of length such as the edges of inch tiles or centimeter cubes;

(B) describe the inverse relationship between the size of the unit and the number of units needed to equal the length of an object such as the longer the unit, the fewer needed and the shorter the unit, the more needed;

(C) represent whole numbers as distances from any given location on a number line;

(D) determine the length of an object to the nearest half unit using rulers, yardsticks, meter sticks, or measuring tapes;

(E) determine a solution to a problem involving length, including estimating lengths;

(F) use concrete models of square units to find the area of a rectangle by covering it with no gaps or overlaps, counting to find the total number of square units, and describing the measurement using a number and the unit such as 24 square units; and

(G) read and write time to the nearest five- and one-minute increments using analog and digital clocks and distinguish between a.m. and p.m.

(10) Data analysis. The student applies mathematical process standards to organize data to make it useful for interpreting information and solving problems. The student is expected to:

(A) explain that the length of a bar in a bar graph or the number of pictures in a pictograph represents the number of data points for a given category;

(B) organize a collection of data with up to four categories using pictographs and bar graphs with intervals of one or more;

(C) write and solve one-step word problems involving addition or subtraction using data represented within pictographs and bar graphs with intervals of one; and

(D) draw conclusions and make predictions from information in a graph.

(11) Personal financial literacy. The student applies mathematical process standards to manage one's financial resources effectively for lifetime financial security. The student is expected to:

(A) calculate how money saved can accumulate into a larger amount over time;

(B) explain that saving is an alternative to spending;

(C) distinguish between a deposit and a withdrawal;

(D) identify examples of borrowing and distinguish between responsible and irresponsible borrowing;

(E) identify examples of lending and use concepts of benefits and costs to evaluate lending decisions; and

(F) differentiate between producers and consumers and calculate the cost to produce a simple item such as a shirt, a pitcher of lemonade, or a class art project.

§111.5. Grade 3, Adopted 2012.

(a) Introduction.

(1) The desire to achieve educational excellence is the driving force behind the Texas essential knowledge and skills for mathematics, guided by the college and career readiness standards. By embedding statistics, probability, and finance, while focusing on fluency and solid understanding, Texas will lead the way in mathematics education and prepare all Texas students for the challenges they will face in the 21st century.

(2) The process standards describe ways in which students are expected to engage in the content. The placement of the process standards at the beginning of the knowledge and skills listed for each grade and course is intentional. The process standards weave the other knowledge and skills together so that students may be successful problem solvers and use mathematics efficiently and effectively in daily life. The process standards are integrated at every grade level and course. When possible, students will apply mathematics to problems arising in everyday life, society, and the workplace. Students will use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution. Students will select appropriate tools such as real objects, manipulatives, paper and pencil, and technology and techniques such as mental math, estimation, and number sense to solve problems. Students will effectively communicate mathematical ideas, reasoning, and their implications using multiple representations such as symbols, diagrams, graphs, and language. Students will use mathematical relationships to generate solutions and make connections and predictions. Students will analyze mathematical relationships to connect and communicate mathematical ideas. Students will display, explain, or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(3) For students to become fluent in mathematics, students must develop a robust sense of number. The National Research Council's report, "Adding It Up," defines procedural fluency as "skill in carrying out procedures flexibly, accurately, efficiently, and appropriately." As students develop procedural fluency, they must also realize that true problem solving may take time, effort, and perseverance. Students in Grade 3 are expected to perform their work without the use of calculators.

(4) The primary focal areas in Grade 3 are place value, operations of whole numbers, and understanding fractional units. These focal areas are supported throughout the mathematical strands of number and operations, algebraic reasoning, geometry and measurement, and data analysis. In Grades 3-5, the number set is limited to positive rational numbers. In number and operations, students will focus on applying place value, comparing and ordering whole numbers, connecting multiplication and division, and understanding and representing fractions as numbers and equivalent fractions. In algebraic reasoning, students will use multiple representations of problem situations, determine missing values in number sentences, and represent real-world relationships using number pairs in a table and verbal descriptions. In geometry and measurement, students will identify and classify two-dimensional figures according to common attributes, decompose composite figures formed by rectangles to determine area, determine the perimeter of polygons, solve problems involving time, and measure liquid volume (capacity) or weight. In data analysis, students will represent and interpret data.

(5) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(b) Knowledge and skills.

(1) Mathematical process standards. The student uses mathematical processes to acquire and demonstrate mathematical understanding. The student is expected to:

(A) apply mathematics to problems arising in everyday life, society, and the workplace;

(B) use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution;

(C) select tools, including real objects, manipulatives, paper and pencil, and technology as appropriate, and techniques, including mental math, estimation, and number sense as appropriate, to solve problems;

(D) communicate mathematical ideas, reasoning, and their implications using multiple representations, including symbols, diagrams, graphs, and language as appropriate;

(E) create and use representations to organize, record, and communicate mathematical ideas;

(F) analyze mathematical relationships to connect and communicate mathematical ideas; and

(G) display, explain, and justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(2) Number and operations. The student applies mathematical process standards to represent and compare whole numbers and understand relationships related to place value. The student is expected to:

(A) compose and decompose numbers up to 100,000 in more than one way as a sum of so many ten thousands, so many thousands, so many hundreds, so many tens, and so many ones using objects, pictorial models, and numbers, including expanded notation as appropriate;

(B) describe the mathematical relationships found in the base-10 place value system through the 100,000s place;

(C) represent a number on a number line as being between two consecutive multiples of 10; 100; 1,000; or 10,000 and use words such as "closer to," "is about," or "is nearly" to describe relative size of numbers in order to round whole numbers; and

(D) compare and order whole numbers up to 100,000 and represent comparisons using the symbols >, <, or =.

(3) Number and operations. The student applies mathematical process standards to represent and explain fractional units. The student is expected to:

(A) represent fractions greater than zero and less than or equal to one with denominators of 2, 3, 4, 6, and 8 using concrete objects and pictorial models, including strip diagrams and number lines;

(B) determine the corresponding fraction greater than zero and less than or equal to one with denominators of 2, 3, 4, 6, and 8 of a specified point on a number line;

(C) explain that the unit fraction 1/*b* represents the quantity formed by one part of a whole that has been partitioned into *b* equal parts where *b* is a non-zero whole number;

(D) compose and decompose a fraction *a/b* with a numerator greater than zero and less than or equal to *b* as a sum of parts 1/*b;*

(E) solve problems involving partitioning an object or a set of objects among two or more recipients using pictorial representations of fractions with denominators of 2, 3, 4, 6, and 8 such as two children share five cookies;

(F) represent equivalent fractions with denominators of 2, 3, 4, 6, and 8 using a variety of objects and pictorial models, including number lines;

(G) explain that two fractions are equivalent if and only if they are both represented by the same point on the number line or represent the same portion of a same size whole for an area model; and

(H) compare two fractions having the same numerator or denominator in problems by reasoning about their sizes and justifying the conclusion using symbols, words, objects, and pictorial models such as comparing the size of pieces when sharing a candy bar equally among four people or equally among three people.

(4) Number and operations. The student applies mathematical process standards to develop and use strategies and methods for whole number computations in order to solve problems with efficiency and accuracy. The student is expected to:

(A) solve with fluency one-step and multi-step problems involving addition and subtraction within 1,000 using strategies based on place value, properties of operations, and the relationship between addition and subtraction;

(B) use strategies, including rounding to the nearest 10 or 100 and compatible numbers, to estimate solutions to addition and subtraction problems;

(C) determine the value of a collection of coins and bills;

(D) determine the total number of objects when equally-sized groups of objects are combined or arranged in arrays up to 10 by 10;

(E) represent multiplication facts by using a variety of approaches such as repeated addition, equal-sized groups, arrays, area models, equal jumps on a number line, and skip counting;

(F) recall facts to multiply up to 10 by 10 with automaticity and recall the corresponding division facts;

(G) use strategies and algorithms, including the standard algorithm, to multiply a two-digit number by a one-digit number. Strategies may include mental math, partial products, and the commutative, associative, and distributive properties;

(H) determine the number of objects in each group when a set of objects is partitioned into equal shares or a set of objects is shared equally;

(I) use divisibility rules to determine if a number is even or odd;

(J) determine a quotient using the relationship between multiplication and division such as the quotient of 40 ÷ 8 can be found by determining what factor makes 40 when multiplied by 8; and

(K) solve one-step and multi-step problems involving multiplication and division within 100 using strategies based on objects; pictorial models, including arrays, area models, and equal groups; properties of operations; or recall of facts.

(5) Algebraic reasoning. The student applies mathematical process standards to analyze and create patterns and relationships. The student is expected to:

(A) represent and solve one- and two-step problems involving addition and subtraction of whole numbers to 1,000 using pictorial models such as strip diagrams and number lines and equations;

(B) represent and solve one- and two-step multiplication and division problems within 100 using arrays, strip diagrams, and equations;

(C) describe a multiplication expression as a comparison such as 3 x 24 represents 3 times as much as 24;

(D) determine the unknown whole number in a multiplication or division equation relating three whole numbers when the unknown is either a missing factor or product such as the value 4 makes 3 x [ ] = 12 a true equation; and

(E) represent real-world relationships using number pairs in a table and verbal descriptions such as 1 insect has 6 legs, 2 insects have 12 legs, and so forth.

(6) Geometry and measurement. The student applies mathematical process standards to analyze attributes of two-dimensional geometric figures to develop generalizations about their properties. The student is expected to:

(A) classify and sort two- and three-dimensional solids, including cones, cylinders, spheres, triangular and rectangular prisms, and cubes, based on attributes using formal geometric language such as vertex, edge, and face;

(B) use attributes to recognize rhombuses, parallelograms, trapezoids, rectangles, and squares as examples of quadrilaterals and draw examples of quadrilaterals that do not belong to any of these subcategories;

(C) determine the area of rectangles with whole number side lengths in problems using multiplication related to the number of rows times the number of unit squares in each row;

(D) decompose composite figures formed by rectangles into non-overlapping rectangles to determine the area of the original figure using the additive property of area; and

(E) decompose two congruent two-dimensional figures into parts with equal areas and express the area of each part as a unit fraction of the whole and recognize that equal shares of identical wholes need not have the same shape.

(7) Geometry and measurement. The student applies mathematical process standards to select appropriate units, strategies, and tools to solve problems involving customary measurement. The student is expected to:

(A) represent fractions of halves, fourths, and eighths as distances from zero on a number line;

(B) determine the perimeter of a polygon or a missing length when given perimeter and remaining side lengths in problems;

(C) determine the solutions to problems involving addition and subtraction of time intervals in minutes using pictorial models or tools such as a 15-minute event plus a 30-minute event equals 45 minutes;

(D) determine when it is appropriate to use measurements of liquid volume (capacity) or weight; and

(E) determine liquid volume (capacity) or weight using appropriate units and tools.

(8) Data analysis. The student applies mathematical process standards to solve problems by collecting, organizing, displaying, and interpreting data. The student is expected to:

(A) summarize a data set with multiple categories using a frequency table, dot plot, pictograph, or bar graph with scaled intervals; and

(B) solve one- and two-step problems using categorical data represented with a frequency table, dot plot, pictograph, or bar graph with scaled intervals.

(9) Personal financial literacy. The student applies mathematical process standards to manage one's financial resources effectively for lifetime financial security. The student is expected to:

(A) explain the connection between human capital and income;

(B) describe the relationship between the availability or scarcity of resources and how that impacts cost;

(C) identify the costs and benefits of planned and unplanned spending decisions;

(D) explain that credit is used when wants exceed the ability to pay and that it is the borrower's responsibility to pay it back to the lender, usually with interest;

(E) list reasons to save and explain the benefit of a savings plan; and

(F) identify decisions involving income, spending, saving, credit, and charitable giving.

§111.6. Grade 4, Adopted 2012.

(a) Introduction.

(1) The desire to achieve educational excellence is the driving force behind the Texas essential knowledge and skills for mathematics, guided by the college and career readiness standards. By embedding statistics, probability, and finance, while focusing on fluency and solid understanding, Texas will lead the way in mathematics education and prepare all Texas students for the challenges they will face in the 21st century.

(2) The process standards describe ways in which students are expected to engage in the content. The placement of the process standards at the beginning of the knowledge and skills listed for each grade and course is intentional. The process standards weave the other knowledge and skills together so that students may be successful problem solvers and use mathematics efficiently and effectively in daily life. The process standards are integrated at every grade level and course. When possible, students will apply mathematics to problems arising in everyday life, society, and the workplace. Students will use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution. Students will select appropriate tools such as real objects, manipulatives, paper and pencil, and technology and techniques such as mental math, estimation, and number sense to solve problems. Students will effectively communicate mathematical ideas, reasoning, and their implications using multiple representations such as symbols, diagrams, graphs, and language. Students will use mathematical relationships to generate solutions and make connections and predictions. Students will analyze mathematical relationships to connect and communicate mathematical ideas. Students will display, explain, or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(3) For students to become fluent in mathematics, students must develop a robust sense of number. The National Research Council's report, "Adding It Up," defines procedural fluency as "skill in carrying out procedures flexibly, accurately, efficiently, and appropriately." As students develop procedural fluency, they must also realize that true problem solving may take time, effort, and perseverance. Students in Grade 4 are expected to perform their work without the use of calculators.

(4) The primary focal areas in Grade 4 are use of operations, fractions, and decimals and describing and analyzing geometry and measurement. These focal areas are supported throughout the mathematical strands of number and operations, algebraic reasoning, geometry and measurement, and data analysis. In Grades 3-5, the number set is limited to positive rational numbers. In number and operations, students will apply place value and represent points on a number line that correspond to a given fraction or terminating decimal. In algebraic reasoning, students will represent and solve multi-step problems involving the four operations with whole numbers with expressions and equations and generate and analyze patterns. In geometry and measurement, students will classify two-dimensional figures, measure angles, and convert units of measure. In data analysis, students will represent and interpret data.

(5) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(b) Knowledge and skills.

(1) Mathematical process standards. The student uses mathematical processes to acquire and demonstrate mathematical understanding. The student is expected to:

(A) apply mathematics to problems arising in everyday life, society, and the workplace;

(B) use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution;

(C) select tools, including real objects, manipulatives, paper and pencil, and technology as appropriate, and techniques, including mental math, estimation, and number sense as appropriate, to solve problems;

(D) communicate mathematical ideas, reasoning, and their implications using multiple representations, including symbols, diagrams, graphs, and language as appropriate;

(E) create and use representations to organize, record, and communicate mathematical ideas;

(F) analyze mathematical relationships to connect and communicate mathematical ideas; and

(G) display, explain, and justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(2) Number and operations. The student applies mathematical process standards to represent, compare, and order whole numbers and decimals and understand relationships related to place value. The student is expected to:

(A) interpret the value of each place-value position as 10 times the position to the right and as one-tenth of the value of the place to its left;

(B) represent the value of the digit in whole numbers through 1,000,000,000 and decimals to the hundredths using expanded notation and numerals such as in the number 3.94, the 3 in the ones place is 3; the 9 in the tenths place is 0.9; and the 4 in the hundredths place is 0.04; and 3.94 is the sum of 3 ones, 9 tenths, and 4 hundredths;

(C) compare and order whole numbers to 1,000,000,000 and represent comparisons using the symbols >, <, or =;

(D) round whole numbers to a given place value through the 100,000s place;

(E) represent decimals, including tenths and hundredths, using concrete and visual models and money;

(F) compare and order decimals using concrete and visual models to the hundredths;

(G) relate decimals to fractions that name tenths and hundredths; and

(H) determine the corresponding decimal to the tenths or hundredths place of a specified point on a number line.

(3) Number and operations. The student applies mathematical process standards to represent and generate fractions to solve problems. The student is expected to:

(A) represent a fraction *a/b* as a sum of fractions 1/*b,* where *a* and *b* are whole numbers and $b > 0$, including when $a > b$;

(B) decompose a fraction in more than one way into a sum of fractions with the same denominator using concrete and pictorial models and recording results with symbolic representations such as 7/8 = 5/8 + 2/8; 7/8 = 3/8 + 4/8; 2 7/8 = 1 + 1 + 7/8; 2 7/8 = 8/8 + 8/8 + 7/8;

(C) determine if two given fractions are equivalent using a variety of methods, including multiplying by a fraction equivalent to one or simplifying a fraction to lowest terms;

(D) generate equivalent fractions to create equal numerators or equal denominators to compare two fractions with unequal numerators and unequal denominators and represent the comparison of two fractions using the symbols >, <, or =;

(E) represent and solve addition and subtraction of fractions with equal denominators and referring to the same whole using objects and pictorial models that build to the number line such as strip diagrams and properties of operations;

(F) estimate the reasonableness of sums and differences using benchmark fractions 0, 1/4, 1/2, 3/4, and 1, referring to the same whole;

(G) represent fractions and decimals to the tenths or hundredths as distances from zero on a number line; and

(H) determine fractional and decimal quantities as being close to 0, 1/2, and 1.

(4) Number and operations. The student applies mathematical process standards to develop and use strategies and methods for whole number computations and decimal sums and differences in order to solve problems with efficiency and accuracy. The student is expected to:

(A) add and subtract whole numbers and decimals to the hundredths place using a variety of methods, including pictorial models, the inverse relationship between operations, concepts of place value, and efficient algorithms;

(B) determine products of a number and 10 or 100 using properties of operations and place value understandings;

(C) represent the product of 2 two-digit numbers using arrays, area models, or equations, including perfect squares through 15 by 15;

(D) use strategies and algorithms, including the standard algorithm, to multiply up to a four-digit number by a one-digit number and to multiply a two-digit number by a two-digit number. Strategies may include mental math, partial products, and the commutative, associative, and distributive properties;

(E) represent the quotient of up to a four-digit whole number divided by a one-digit whole number using arrays, area models, or equations;

(F) use strategies and algorithms, including the standard algorithm, to divide up to a four-digit dividend by a one-digit divisor;

(G) use strategies, including rounding to the nearest 10, 100, or 1,000 and compatible numbers, to estimate solutions; and

(H) solve with fluency one- and two-step problems involving multiplication and division, including interpreting remainders.

(5) Algebraic reasoning. The student applies mathematical process standards to develop concepts of expressions and equations. The student is expected to:

(A) represent multi-step problems involving the four operations with whole numbers using strip diagrams and equations with a letter standing for the unknown quantity;

(B) represent problems using an input-output table and numerical expressions to generate a number pattern that follows a given rule such as given the rule "Add 3" and the starting number 1, use the expressions 1 + 3, 2 + 3, 3 + 3, and so forth to generate a table to represent the relationship of the values in the resulting sequence and their position in the sequence;

(C) use models to determine the formulas for the perimeter of a rectangle $(l + w + l + w$ or $2l + 2w)$, including the special form for perimeter of a square $(4s)$ and the area of a rectangle $(l \times w)$; and

(D) solve problems related to perimeter and area of rectangles where dimensions are whole numbers.

(6) Geometry and measurement. The student applies mathematical process standards to analyze geometric attributes in order to develop generalizations about their properties. The student is expected to:

(A) identify points, lines, line segments, rays, angles, and perpendicular and parallel lines;

(B) identify and draw one or more lines of symmetry, if they exist, for a two-dimensional figure;

(C) apply knowledge of right angles to identify acute, right, and obtuse triangles; and

(D) classify two-dimensional figures based on the presence or absence of parallel or perpendicular lines or the presence or absence of angles of a specified size.

(7) Geometry and measurement. The student applies mathematical process standards to solve problems involving angles less than or equal to 180 degrees. The student is expected to:

(A) illustrate the measure of an angle as the part of a circle whose center is at the vertex of the angle that is "cut out" by the rays of the angle. Angle measures are limited to whole numbers;

(B) illustrate degrees as the units used to measure an angle, where 1/360 of any circle is one degree and an angle that "cuts" *n*/360 out of any circle whose center is at the angle's vertex has a measure of *n* degrees. Angle measures are limited to whole numbers;

(C) determine the approximate measures of angles in degrees to the nearest whole number using a protractor;

(D) draw an angle with a given measure; and

(E) decompose angles such as complementary and supplementary angles into two non-overlapping angles to determine the measure of an unknown angle.

(8) Geometry and measurement. The student applies mathematical process standards to select appropriate customary and metric units, strategies, and tools to solve problems involving measurement. The student is expected to:

(A) identify relative sizes of measurement units within the customary and metric systems;

(B) convert measurements within the same measurement system, customary or metric, from a smaller unit into a larger unit or a larger unit into a smaller unit when given other equivalent measures represented in a table; and

(C) solve problems that deal with measurements of length, intervals of time, liquid volumes, masses, and money using addition, subtraction, multiplication, or division as appropriate.

(9) Data analysis. The student applies mathematical process standards to solve problems by collecting, organizing, displaying, and interpreting data. The student is expected to:

(A) represent data on a frequency table, dot plot, or stem-and-leaf plot marked with whole numbers and fractions; and

(B) solve one- and two-step problems using data in whole number, decimal, and fraction form in a frequency table, dot plot, or stem-and-leaf plot.

(10) Personal financial literacy. The student applies mathematical process standards to manage one's financial resources effectively for lifetime financial security. The student is expected to:

(A) distinguish between fixed and variable expenses;

(B) calculate profit in a given situation;

(C) compare the advantages and disadvantages of various savings options; and

(D) describe how to allocate a weekly allowance among spending, saving, and sharing.

§111.7. Grade 5, Adopted 2012.

(a) Introduction.

(1) The desire to achieve educational excellence is the driving force behind the Texas essential knowledge and skills for mathematics, guided by the college and career readiness standards. By embedding statistics, probability, and finance, while focusing on fluency and solid understanding, Texas will lead the way in mathematics education and prepare all Texas students for the challenges they will face in the 21st century.

(2) The process standards describe ways in which students are expected to engage in the content. The placement of the process standards at the beginning of the knowledge and skills listed for each grade and course is intentional. The process standards weave the other knowledge and skills together so that students may be successful problem solvers and use mathematics efficiently and effectively in daily life. The process standards are integrated at every grade level and course. When possible, students will apply mathematics to problems arising in everyday life, society, and the workplace. Students will use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution. Students will select appropriate tools such as real objects, manipulatives, paper and pencil, and technology and techniques such as mental math, estimation, and number sense to solve problems. Students will effectively communicate mathematical ideas, reasoning, and their implications using multiple representations such as symbols, diagrams, graphs, and language. Students will use mathematical relationships to generate solutions and make connections and predictions. Students will analyze mathematical relationships to connect and communicate mathematical ideas. Students will display, explain, or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(3) For students to become fluent in mathematics, students must develop a robust sense of number. The National Research Council's report, "Adding It Up," defines procedural fluency as "skill in carrying out procedures flexibly, accurately, efficiently, and appropriately." As students develop procedural fluency, they must also realize that true problem solving may take time, effort, and perseverance. Students in Grade 5 are expected to perform their work without the use of calculators.

(4) The primary focal areas in Grade 5 are solving problems involving all four operations with positive rational numbers, determining and generating formulas and solutions to expressions, and extending measurement to area and volume. These focal areas are supported throughout the mathematical strands of number and operations, algebraic reasoning, geometry and measurement, and data analysis. In Grades 3-5, the number set is limited to positive rational numbers. In number and operations, students will apply place value and identify part-to-whole relationships and equivalence. In algebraic reasoning, students will represent and solve problems with expressions and equations, build foundations of functions through patterning, identify prime and composite numbers, and use the order of operations. In geometry and measurement, students will classify two-dimensional figures, connect geometric attributes to the measures of three-dimensional figures, use units of measure, and represent location using a coordinate plane. In data analysis, students will represent and interpret data.

(5) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(b) Knowledge and skills.

(1) Mathematical process standards. The student uses mathematical processes to acquire and demonstrate mathematical understanding. The student is expected to:

(A) apply mathematics to problems arising in everyday life, society, and the workplace;

(B) use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution;

(C) select tools, including real objects, manipulatives, paper and pencil, and technology as appropriate, and techniques, including mental math, estimation, and number sense as appropriate, to solve problems;

(D) communicate mathematical ideas, reasoning, and their implications using multiple representations, including symbols, diagrams, graphs, and language as appropriate;

(E) create and use representations to organize, record, and communicate mathematical ideas;

(F) analyze mathematical relationships to connect and communicate mathematical ideas; and

(G) display, explain, and justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(2) Number and operations. The student applies mathematical process standards to represent, compare, and order positive rational numbers and understand relationships as related to place value. The student is expected to:

(A) represent the value of the digit in decimals through the thousandths using expanded notation and numerals;

(B) compare and order two decimals to thousandths and represent comparisons using the symbols >, <, or =; and

(C) round decimals to tenths or hundredths.

(3) Number and operations. The student applies mathematical process standards to develop and use strategies and methods for positive rational number computations in order to solve problems with efficiency and accuracy. The student is expected to:

(A) estimate to determine solutions to mathematical and real-world problems involving addition, subtraction, multiplication, or division;

(B) use strategies and algorithms, including the standard algorithm, to multiply with fluency a three-digit number by a two-digit number;

(C) use strategies and algorithms, including the standard algorithm, to solve with fluency for quotients of up to a four-digit dividend and a two-digit divisor;

(D) represent multiplication of decimals with products to the hundredths using objects and pictorial models, including area models;

(E) solve for products of decimals to the hundredths, including situations involving money, using strategies based on place-value understandings, properties of operations, and the relationship to the multiplication of whole numbers;

(F) represent quotients of decimals to the hundredths, up to four-digit dividends and two-digit whole number divisors, using objects and pictorial models, including area models;

(G) solve for quotients of decimals to the hundredths, up to four-digit dividends and two-digit whole number divisors, using strategies and algorithms, including the standard algorithm;

(H) represent and solve addition and subtraction of fractions with unequal denominators referring to the same whole using objects and pictorial models such as strip diagrams and properties of operations;

(I) represent and solve multiplication of a whole number and a fraction that refers to the same whole using objects and pictorial models, including area models;

(J) represent division of a unit fraction by a whole number and the division of a whole number by a unit fraction such as $1/3 \div 7$ and $7 \div 1/3$ using objects and pictorial models, including area models;

(K) add and subtract positive rational numbers fluently; and

(L) divide whole numbers by unit fractions and unit fractions by whole numbers.

(4) Algebraic reasoning. The student applies mathematical process standards to develop concepts of expressions and equations. The student is expected to:

(A) identify prime and composite numbers using patterns in factor pairs;

(B) represent and solve multi-step problems involving the four operations with whole numbers using equations with a letter standing for the unknown quantity;

(C) generate a numerical pattern when given a rule in the form $y = ax$ or $y = x + a$ and graph;

(D) recognize the difference between additive and multiplicative numerical patterns given in a table or graph;

(E) describe the meaning of parentheses and brackets in a numeric expression such as 4 (14 + 5) is 4 times as large as (14 + 5);

(F) simplify numerical expressions that do not involve exponents, including up to two levels of grouping such as (3 + 7) / (5 - 3);

(G) use concrete objects and pictorial models to develop the formulas for the volume of a rectangular prism, including the special form for a cube *($V = l \times w \times h$, $V = s \times s \times s$,* and *$V = Bh$);* and

(H) represent and solve problems related to perimeter and/or area such as rectangles and composite figures formed by rectangles and related to volume such as rectangular prisms.

(5) Geometry and measurement. The student applies mathematical process standards to classify two-dimensional figures by attributes and properties. The student is expected to classify two-dimensional figures in a hierarchy of sets and subsets using graphic organizers based on their attributes and properties such as all rectangles have the property that opposite sides are parallel; therefore, every rectangle is a parallelogram.

(6) Geometry and measurement. The student applies mathematical process standards to understand, recognize, and quantify volume. The student is expected to:

(A) recognize a cube with side length of one unit as a unit cube having one cubic unit of volume and the volume of a three-dimensional figure as the number of unit cubes *(n* cubic units) needed to fill it with no gaps or overlaps if possible; and

(B) determine the volume of a rectangular prism with whole number side lengths in problems related to the number of layers times the number of unit cubes in the area of the base.

(7) Geometry and measurement. The student applies mathematical process standards to select appropriate units, strategies, and tools to solve problems involving measurement. The student is expected to solve problems by calculating conversions within a measurement system, customary or metric.

(8) Geometry and measurement. The student applies mathematical process standards to identify locations on a coordinate plane. The student is expected to:

(A) describe the key attributes of the coordinate plane and the process for graphing ordered pairs of numbers in the first quadrant; and

(B) graph in the first quadrant of the coordinate plane ordered pairs of numbers arising from mathematical and real-world problems, including those generated by number patterns or found in an input-output table.

(9) Data analysis. The student applies mathematical process standards to solve problems by collecting, organizing, displaying, and interpreting data. The student is expected to:

(A) represent categorical data with bar graphs or frequency tables and numerical data, including data sets of measurements in fractions or decimals, with dot plots or stem-and-leaf plots;

(B) represent discrete paired data on a scatterplot; and

(C) solve one- and two-step problems using data from a frequency table, dot plot, bar graph, stem-and-leaf plot, or scatterplot.

(10) Personal financial literacy. The student applies mathematical process standards to manage one's financial resources effectively for lifetime financial security. The student is expected to:

(A) distinguish between fixed and variable expenses;

(B) calculate profit in a given situation;

(C) compare the advantages and disadvantages of various savings options; and

(D) describe how to allocate a weekly allowance among spending, saving, and sharing.

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 February 13, 2012.

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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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SUBCHAPTER B. MIDDLE SCHOOL

19 TAC §§111.25 - 111.28

The new sections are proposed under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to identify by rule the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating instructional materials and addressed on the assessment instruments; and §28.0021(a)(1), which authorizes the SBOE to require instruction in personal financial literacy in the essential knowledge and skills of mathematics instruction in Kindergarten through Grade 8.

The new sections implement the Texas Education Code, §§7.102(c)(4), 28.002, and 28.0021(a)(1).

§111.25. Implementation of Texas Essential Knowledge and Skills for Mathematics, Middle School, Adopted 2012.

(a) The provisions of §§111.26-111.28 of this subchapter shall be implemented by school districts.

(b) No later than August 31, 2013, the commissioner of education shall determine whether instructional materials have been made available to Texas public schools that cover the essential knowledge and skills for mathematics as adopted in §§111.26-111.28 of this subchapter.

(c) If the commissioner makes the determination that instructional materials have been made available under subsection (b) of this section, §§111.26-111.28 of this subchapter shall be implemented beginning with the 2014-2015 school year and apply to the 2014-2015 and subsequent school years.

(d) If the commissioner does not make the determination that instructional materials have been made available under subsection (b) of this section, the commissioner shall determine no later than August 31 of each subsequent school year whether instructional materials have been made available. If the commissioner determines that instructional materials have been made available, the commissioner shall notify the State Board of Education and school districts that §§111.26-111.28 of this subchapter shall be implemented for the following school year.

(e) Sections 111.21-111.24 of this subchapter shall be superseded by the implementation of §§111.25-111.28 under this section.

§111.26. Grade 6, Adopted 2012.

(a) Introduction.

(1) The desire to achieve educational excellence is the driving force behind the Texas essential knowledge and skills for mathematics, guided by the college and career readiness standards. By embedding statistics, probability, and finance, while focusing on fluency and solid understanding, Texas will lead the way in mathematics education and prepare all Texas students for the challenges they will face in the 21st century.

(2) The process standards describe ways in which students are expected to engage in the content. The placement of the process standards at the beginning of the knowledge and skills listed for each grade and course is intentional. The process standards weave the other knowledge and skills together so that students may be successful problem solvers and use mathematics efficiently and effectively in daily life. The process standards are integrated at every grade level and course. When possible, students will apply mathematics to problems arising in everyday life, society, and the workplace. Students will use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution. Students will select appropriate tools such as real objects, manipulatives, paper and pencil, and technology and techniques such as mental math, estimation, and number sense to solve problems. Students will effectively communicate mathematical ideas, reasoning, and their implications using multiple representations such as symbols, diagrams, graphs, and language. Students will use mathematical relationships to generate solutions and make connections and predictions. Students will analyze mathematical relationships to connect

and communicate mathematical ideas. Students will display, explain, or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(3) The primary focal areas in Grade 6 are number and operations; proportionality; expressions, equations, and relationships; and measurement and data. Students use concepts, algorithms, and properties of rational numbers to explore mathematical relationships and to describe increasingly complex situations. Students use concepts of proportionality to explore, develop, and communicate mathematical relationships. Students use algebraic thinking to describe how a change in one quantity in a relationship results in a change in the other. Students connect verbal, numeric, graphic, and symbolic representations of relationships, including equations and inequalities. Students use geometric properties and relationships, as well as spatial reasoning, to model and analyze situations and solve problems. Students communicate information about geometric figures or situations by quantifying attributes, generalize procedures from measurement experiences, and use the procedures to solve problems. Students use appropriate statistics, representations of data, and reasoning to draw conclusions, evaluate arguments, and make recommendations. While the use of all types of technology is important, the emphasis on algebra readiness skills necessitates the implementation of graphing technology.

(4) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(b) Knowledge and skills.

(1) Mathematical process standards. The student uses mathematical processes to acquire and demonstrate mathematical understanding. The student is expected to:

(A) apply mathematics to problems arising in everyday life, society, and the workplace;

(B) use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution;

(C) select tools, including real objects, manipulatives, paper and pencil, and technology as appropriate, and techniques, including mental math, estimation, and number sense as appropriate, to solve problems;

(D) communicate mathematical ideas, reasoning, and their implications using multiple representations, including symbols, diagrams, graphs, and language as appropriate;

(E) create and use representations to organize, record, and communicate mathematical ideas;

(F) analyze mathematical relationships to connect and communicate mathematical ideas; and

(G) display, explain, and justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(2) Number and operations. The student applies mathematical process standards to represent and use rational numbers in a variety of forms. The student is expected to:

(A) classify whole numbers, integers, and rational numbers using a visual representation such as a Venn diagram to describe relationships between sets of numbers;

(B) identify a number, its opposite, and its absolute value;

(C) locate, compare, and order integers using a number line;

(D) locate, compare, and order rational numbers using a number line;

(E) order a set of rational numbers arising from mathematical and real-world contexts; and

(F) extend representations for division to include fraction notation such as a/b represents the same number as $a \div b$ where $b \neq 0$.

(3) Number and operations. The student applies mathematical process standards to represent addition, subtraction, multiplication, and division while solving problems and justifying solutions. The student is expected to:

(A) use an area model to represent fraction multiplication and decimal multiplication;

(B) recognize that dividing by a rational number and multiplying by its reciprocal result in equivalent values;

(C) determine, with and without computation, whether a quantity is increased or decreased when multiplied by a fraction, including values greater than or less than one;

(D) represent integer operations with concrete models and connect the actions to algorithms;

(E) use prior knowledge of all four operations, including whole numbers and positive decimals, fractions, and mixed numbers not having fractions and decimals, within the same problem;

(F) add, subtract, multiply, and divide integers fluently; and

(G) multiply and divide positive rational numbers fluently.

(4) Proportionality. The student applies mathematical process standards to develop an understanding of proportional relationships in problem situations. The student is expected to:

(A) compare two rules verbally, numerically, graphically, and symbolically in the form of $y = ax$ or $y = x + a$ in order to differentiate between additive and multiplicative relationships;

(B) apply qualitative and quantitative reasoning to solve prediction and comparison of real-world problems involving ratios and rates;

(C) give examples of ratios as multiplicative comparisons of two quantities describing the same attribute;

(D) give examples of rates as the comparison by division of two quantities having different attributes, including rates as quotients;

(E) represent ratios and percents with concrete models, fractions, and decimals;

(F) represent benchmark fractions and percents such as 1%, 10%, 25%, 33 1/3%, and multiples of these values using 10 by 10 grids, strip diagrams, number lines, and numbers;

(G) generate equivalent forms of fractions, decimals, and percents using real-world problems, including problems that involve money; and

(H) convert units within a measurement system, including the use of proportions and unit rates.

(5) Proportionality. The student applies mathematical process standards to solve problems involving proportional relationships. The student is expected to:

(A) represent mathematical and real-world problems involving ratios and rates using scale factors, tables, graphs, and proportions;

(B) solve real-world problems to find the whole given a part and the percent, to find the part given the whole and the percent, and to find the percent given the part and the whole; and

(C) use equivalent fractions, decimals, and percents to show equal parts of the same whole.

(6) Expressions, equations, and relationships. The student applies mathematical process standards to use multiple representations to describe algebraic relationships. The student is expected to:

(A) identify independent and dependent quantities from tables and graphs;

(B) write an equation that represents the relationship between independent and dependent quantities from a table; and

(C) represent a given situation using verbal descriptions, tables, graphs, and equations in the form $y = kx$ or $y = x + b$.

(7) Expressions, equations, and relationships. The student applies mathematical process standards to develop concepts of expressions and equations. The student is expected to:

(A) generate equivalent numerical expressions using order of operations, including positive exponents and prime factorization;

(B) distinguish between expressions and equations verbally, numerically, and algebraically;

(C) determine if two expressions are equivalent using concrete models, pictorial models, and algebraic representations; and

(D) generate equivalent expressions using the properties of operations such as the inverse, identity, commutative, associative, and distributive properties.

(8) Expressions, equations, and relationships. The student applies mathematical process standards to use geometry to represent relationships and solve problems. The student is expected to:

(A) extend previous knowledge of triangles and their properties to include the sum of angles of a triangle, the relationship between the lengths of sides and measures of angles in a triangle, and determining when three lengths form a triangle;

(B) model area formulas for parallelograms, trapezoids, and triangles by decomposing and rearranging parts of these shapes;

(C) write equations that represent problems related to the area of rectangles, parallelograms, trapezoids, and triangles and volume of right rectangular prisms where dimensions are positive rational numbers; and

(D) determine solutions for problems involving the area of rectangles, parallelograms, trapezoids, and triangles and volume of right rectangular prisms where dimensions are positive rational numbers.

(9) Expressions, equations, and relationships. The student applies mathematical process standards to use equations and inequalities to represent situations. The student is expected to:

(A) write one-variable, one-step equations and inequalities to represent constraints or conditions within problems;

(B) represent solutions for one-variable, one-step equations and inequalities on number lines; and

(C) write corresponding real-world problems given one-variable, one-step equations or inequalities.

(10) Expressions, equations, and relationships. The student applies mathematical process standards to use equations and inequalities to solve problems. The student is expected to:

(A) model and solve one-variable, one-step equations and inequalities that represent problems, including geometric concepts such as complementary and supplementary angles; and

(B) determine if the given value(s) make(s) one-variable, one-step equations or inequalities true.

(11) Measurement and data. The student applies mathematical process standards to use coordinate geometry to identify locations on a plane. The student is expected to graph points in all four quadrants using ordered pairs of rational numbers.

(12) Measurement and data. The student applies mathematical process standards to use numerical or graphical representations to analyze problems. The student is expected to:

(A) represent numeric data graphically, including dot plots, stem-and-leaf plots, histograms, and box plots;

(B) use the graphical representation of numeric data to describe the center, spread, and shape of the data distribution;

(C) summarize numeric data with numerical summaries, including the mean and median (measures of center) and the range and interquartile range (IQR) (measures of spread), and use these summaries to describe the center, spread, and shape of the data distribution; and

(D) summarize categorical data with numerical and graphical summaries, including the mode, the percent of values in each category (relative frequency table), and the percent bar graph, and use these summaries to describe the data distribution.

(13) Measurement and data. The student applies mathematical process standards to use numerical or graphical representations to solve problems. The student is expected to:

(A) interpret numeric data summarized in dot plots, stem-and-leaf plots, histograms, and box plots; and

(B) distinguish between situations that yield data with and without variability such as the question "How tall am I?" which would be answered with a single height versus the question "How tall are the students in my class?" which would be answered based on heights that vary.

(14) Personal financial literacy. The student applies mathematical process standards to develop an economic way of thinking and problem solving useful in one's life as a knowledgeable consumer and investor. The student is expected to:

(A) compare the features and costs of a checking account and a debit card offered by different local financial institutions;

(B) distinguish between debit cards and credit cards;

(C) balance a check register that includes deposits, withdrawals, and transfers;

(D) explain why it is important to establish a positive credit history;

(E) describe the information in a credit report and how long it is retained; and

(F) describe the value of credit reports to borrowers and to lenders.

§111.27. Grade 7, Adopted 2012.

(a) Introduction.

(1) The desire to achieve educational excellence is the driving force behind the Texas essential knowledge and skills for mathematics, guided by the college and career readiness standards. By embedding statistics, probability, and finance, while focusing on fluency and solid understanding, Texas will lead the way in mathematics education and prepare all Texas students for the challenges they will face in the 21st century.

(2) The process standards describe ways in which students are expected to engage in the content. The placement of the process standards at the beginning of the knowledge and skills listed for each grade and course is intentional. The process standards weave the other knowledge and skills together so that students may be successful problem solvers and use mathematics efficiently and effectively in daily life. The process standards are integrated at every grade level and course. When possible, students will apply mathematics to problems arising in everyday life, society, and the workplace. Students will use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution. Students will select appropriate tools such as real objects, manipulatives, paper and pencil, and technology and techniques such as mental math, estimation, and number sense to solve problems. Students will effectively communicate mathematical ideas, reasoning, and their implications using multiple representations such as symbols, diagrams, graphs, and language. Students will use mathematical relationships to generate solutions and make connections and predictions. Students will analyze mathematical relationships to connect and communicate mathematical ideas. Students will display, explain, or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(3) The primary focal areas in Grade 7 are number and operations; proportionality; expressions, equations, and relationships; and measurement and data. Students use concepts, algorithms, and properties of rational numbers to explore mathematical relationships and to describe increasingly complex situations. Students use concepts of proportionality to explore, develop, and communicate mathematical relationships, including number, geometry and measurement, and statistics and probability. Students use algebraic thinking to describe how a change in one quantity in a relationship results in a change in the other. Students connect verbal, numeric, graphic, and symbolic representations of relationships, including equations and inequalities. Students use geometric properties and relationships, as well as spatial reasoning, to model and analyze situations and solve problems. Students communicate information about geometric figures or situations by quantifying attributes, generalize procedures from measurement experiences, and use the procedures to solve problems. Students use appropriate statistics, representations of data, and reasoning to draw conclusions, evaluate arguments, and make recommendations. While the use of all types of technology is important, the emphasis on algebra readiness skills necessitates the implementation of graphing technology.

(4) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(b) Knowledge and skills.

(1) Mathematical process standards. The student uses mathematical processes to acquire and demonstrate mathematical understanding. The student is expected to:

(A) apply mathematics to problems arising in everyday life, society, and the workplace;

(B) use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution;

(C) select tools, including real objects, manipulatives, paper and pencil, and technology as appropriate, and techniques, including mental math, estimation, and number sense as appropriate, to solve problems;

(D) communicate mathematical ideas, reasoning, and their implications using multiple representations, including symbols, diagrams, graphs, and language as appropriate;

(E) create and use representations to organize, record, and communicate mathematical ideas;

(F) analyze mathematical relationships to connect and communicate mathematical ideas; and

(G) display, explain, and justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(2) Number and operations. The student applies mathematical process standards to represent and use rational numbers in a variety of forms. The student is expected to extend previous knowledge of sets and subsets using a visual representation such as a Venn diagram to describe relationships between sets of rational numbers.

(3) Number and operations. The student applies mathematical process standards to add, subtract, multiply, and divide while solving problems and justifying solutions. The student is expected to:

(A) add, subtract, multiply, and divide rational numbers fluently; and

(B) apply and extend previous understandings of operations to solve problems using addition, subtraction, multiplication, and division of rational numbers.

(4) Proportionality. The student applies mathematical process standards to represent and solve problems involving proportional relationships. The student is expected to:

(A) represent constant rates of change in mathematical and real-world problems given pictorial, tabular, verbal, numeric, graphical, and algebraic representations, including $d = rt$;

(B) calculate unit rates from rates in mathematical and real-world problems;

(C) determine the constant of proportionality $(k = y/x)$ within mathematical and real-world problems;

(D) solve problems involving ratios, rates, and percents, including multi-step problems involving percent increase and percent decrease, and financial literacy problems such as tax, tip, discount, simple interest, and commission; and

(E) convert between measurement systems, including the use of proportions and the use of unit rates.

(5) Proportionality. The student applies mathematical process standards to use geometry to describe or solve problems involving proportional relationships. The student is expected to:

(A) generalize the critical attributes of similarity, including ratios within and between similar shapes;

(B) describe π as the ratio of the circumference of a circle to its diameter; and

(C) solve mathematical and real-world problems involving similar shape and scale drawings.

(6) Proportionality. The student applies mathematical process standards to develop concepts of probability for simple and compound events. The student is expected to:

(A) represent sample spaces for simple and compound events using lists and tree diagrams; and

(B) select and use different simulations to represent simple and compound events with and without technology.

(7) Proportionality. The student applies mathematical process standards to make predictions and determine solutions for simple and compound events. The student is expected to:

(A) make predictions and determine solutions using experimental data for simple and compound events; and

(B) make predictions and determine solutions using theoretical probability for simple and compound events.

(8) Proportionality. The student applies mathematical process standards to find solutions in probability and statistics. The student is expected to:

(A) find the probabilities of a simple event and its complement and describe the relationship between the two;

(B) use data from a random sample to make inferences about a population;

(C) solve problems using data represented in bar graphs, dot plots, and circle graphs, including part-to-whole and part-to-part comparisons and equivalents;

(D) solve problems using qualitative and quantitative predictions and comparisons from simple experiments; and

(E) determine experimental and theoretical probabilities related to simple and compound events using data and sample spaces.

(9) Expressions, equations, and relationships. The student applies mathematical process standards to represent linear relationships using multiple representations. The student is expected to represent linear relationships using verbal descriptions, tables, graphs, and equations that simplify to the form $y = mx + b$.

(10) Expressions, equations, and relationships. The student applies mathematical process standards to develop geometric relationships with volume. The student is expected to:

(A) model the relationship between the volume of a rectangular prism and a rectangular pyramid having both congruent bases and heights and connect that relationship to the formulas;

(B) explain verbally and symbolically the relationship between the volume of a triangular prism and a triangular pyramid having both congruent bases and heights and connect that relationship to the formulas; and

(C) use models to determine the approximate formulas for the circumference and area of a circle and connect the models to the actual formulas.

(11) Expressions, equations, and relationships. The student applies mathematical process standards to solve geometric problems. The student is expected to:

(A) solve problems involving the volume of rectangular prisms, triangular prisms, rectangular pyramids, and triangular pyramids;

(B) determine the circumference and area of circles;

(C) determine the area of composite figures containing any combination of rectangles, squares, parallelograms, trapezoids, triangles, semicircles, and quarter circles; and

(D) solve problems involving the lateral and total surface area of a rectangular prism, rectangular pyramid, triangular prism, and triangular pyramid by determining the area of the shape's net.

(12) Expressions, equations, and relationships. The student applies mathematical process standards to use one-variable equations and inequalities to represent situations. The student is expected to:

(A) write one-variable, two-step equations and inequalities to represent constraints or conditions within problems;

(B) represent solutions for one-variable, two-step equations and inequalities on number lines; and

(C) write a corresponding real-world problem given a one-variable, two-step equation or inequality.

(13) Expressions, equations, and relationships. The student applies mathematical process standards to solve one-variable equations and inequalities. The student is expected to:

(A) model and solve one-variable, two-step equations and inequalities;

(B) determine if the given value(s) make(s) one-variable, two-step equations and inequalities true; and

(C) write and solve equations using geometry concepts, including the sum of the angles in a triangle, and angle relationships.

(14) Measurement and data. The student applies mathematical process standards to use statistical representations to analyze data. The student is expected to:

(A) compare two groups of numeric data using comparative dot plots or box plots by comparing their shapes, centers, and spreads;

(B) use data from a random sample to make inferences about a population; and

(C) compare two populations based on data in random samples from these populations, including informal comparative inferences about differences between the two populations.

(15) Personal financial literacy. The student applies mathematical process standards to develop an economic way of thinking and problem solving useful in one's life as a knowledgeable consumer and investor. The student is expected to:

(A) calculate the sales tax for a given purchase and distinguish between sales tax and income tax;

(B) interpret the components of a personal budget, including income, planned savings, taxes, and fixed and variable expenses;

(C) create and organize a financial assets and liabilities record and construct a net worth statement;

(D) calculate percentages for major expense categories;

(E) calculate and compare simple interest and compound interest earnings; and

(F) analyze and compare monetary incentives, including sales, rebates, and coupons.

§111.28. Grade 8, Adopted 2012.

(a) Introduction.

(1) The desire to achieve educational excellence is the driving force behind the Texas essential knowledge and skills for mathematics, guided by the college and career readiness standards. By embedding statistics, probability, and finance, while focusing on fluency and solid understanding, Texas will lead the way in mathematics education and prepare all Texas students for the challenges they will face in the 21st century.

(2) The process standards describe ways in which students are expected to engage in the content. The placement of the process standards at the beginning of the knowledge and skills listed for each grade and course is intentional. The process standards weave the other knowledge and skills together so that students may be successful problem solvers and use mathematics efficiently and effectively in daily life. The process standards are integrated at every grade level and course. When possible, students will apply mathematics to problems arising in everyday life, society, and the workplace. Students will use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution. Students will select appropriate tools such as real objects, manipulatives, paper and pencil, and technology and techniques such as mental math, estimation, and number sense to solve problems. Students will effectively communicate mathematical ideas, reasoning, and their implications using multiple representations such as symbols, diagrams, graphs, and language. Students will use mathematical relationships to generate solutions and make connections and predictions. Students will analyze mathematical relationships to connect and communicate mathematical ideas. Students will display, explain, or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(3) The primary focal areas in Grade 8 are proportionality; expressions, equations, relationships, and foundations of functions; and measurement and data. Students use concepts, algorithms, and properties of real numbers to explore mathematical relationships and to describe increasingly complex situations. Students use concepts of proportionality to explore, develop, and communicate mathematical relationships. Students use algebraic thinking to describe how a change in one quantity in a relationship results in a change in the other. Students connect verbal, numeric, graphic, and symbolic representations of relationships, including equations and inequalities. Students begin to develop an understanding of functional relationships. Students use geometric properties and relationships, as well as spatial reasoning, to model and analyze situations and solve problems. Students communicate information about geometric figures or situations by quantifying attributes, generalize procedures from measurement experiences, and use the procedures to solve problems. Students use appropriate statistics, representations of data, and reasoning to draw conclusions, evaluate arguments, and make recommendations. While the use of all types of technology is important, the emphasis on algebra readiness skills necessitates the implementation of graphing technology.

(4) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(b) Knowledge and skills.

(1) Mathematical process standards. The student uses mathematical processes to acquire and demonstrate mathematical understanding. The student is expected to:

(A) apply mathematics to problems arising in everyday life, society, and the workplace;

(B) use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution;

(C) select tools, including real objects, manipulatives, paper and pencil, and technology as appropriate, and techniques, including mental math, estimation, and number sense as appropriate, to solve problems;

(D) communicate mathematical ideas, reasoning, and their implications using multiple representations, including symbols, diagrams, graphs, and language as appropriate;

(E) create and use representations to organize, record, and communicate mathematical ideas;

(F) analyze mathematical relationships to connect and communicate mathematical ideas; and

(G) display, explain, and justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(2) Number and operations. The student applies mathematical process standards to represent and use real numbers in a variety of forms. The student is expected to:

(A) extend previous knowledge of sets and subsets using a visual representation such as a Venn diagram to describe relationships between sets of real numbers;

(B) approximate the value of an irrational number, including π and square roots of numbers less than 225, and locate that rational number approximation on a number line;

(C) convert between base-10 notation and scientific notation; and

(D) order a set of real numbers arising from mathematical and real-world contexts.

(3) Proportionality. The student applies mathematical process standards to use proportional relationships to describe dilations. The student is expected to:

(A) generalize that the ratio of corresponding sides of similar shapes are proportional, including a shape and its dilation;

(B) compare and contrast the attributes of a shape and its dilation(s) on a coordinate plane; and

(C) use an algebraic representation to explain the effect of a given positive rational scale factor applied to two-dimensional figures on a coordinate plane with the origin as the center of dilation such as $(x, y) \rightarrow (0.5x, 0.5y)$.

(4) Proportionality. The student applies mathematical process standards to explain proportional and non-proportional relationships involving slope. The student is expected to:

(A) use similar right triangles to develop an understanding that slope, m, given as the rate comparing the change in y-values to the change in x-values, $(y_2 - y_1) / (x_2 - x_1)$, is the same for any two points (x_1, y_1) and (x_2, y_2) on the same line;

(B) graph proportional relationships, interpreting the unit rate as the slope of the line that models the relationship; and

(C) use data from a table or graph to determine the rate of change or slope and y-intercept in mathematical and real-world problems.

(5) Proportionality. The student applies mathematical process standards to use proportional and non-proportional relationships to develop foundational concepts of functions. The student is expected to:

(A) represent linear proportional situations with tables, graphs, and equations in the form of $y = kx$;

(B) represent linear non-proportional situations with tables, graphs, and equations in the form of $y = mx + b$, where $b \neq 0$;

(C) contrast bivariate sets of data that suggest a linear relationship with bivariate sets of data that do not suggest a linear relationship from a graphical representation;

(D) use a trend line that approximates the linear relationship between bivariate sets of data to make predictions;

(E) solve problems involving direct variation;

(F) solve directly proportional problems;

(G) distinguish between proportional and non-proportional situations using tables, graphs, and equations in the form $y = kx$ or $y = mx + b$, where $b \neq 0$;

(H) identify functions using sets of ordered pairs, tables, mappings, and graphs;

(I) identify examples of proportional and non-proportional functions that arise from mathematical and real-world problems; and

(J) write an equation in the form $y = mx + b$ to model a linear relationship between two quantities using verbal, numerical, tabular, and graphical representations.

(6) Expressions, equations, and relationships. The student applies mathematical process standards to develop mathematical relationships and make connections to geometric formulas. The student is expected to:

(A) describe the volume formula $V = Bh$ of a cylinder in terms of its base area and its height;

(B) model the relationship between the volume of a cylinder and a cone having both congruent bases and heights and connect that relationship to the formulas; and

(C) use models and diagrams to explain the Pythagorean theorem.

(7) Expressions, equations, and relationships. The student applies mathematical process standards to use geometry to solve problems. The student is expected to:

(A) solve problems involving the volume of cylinders, cones, and spheres;

(B) use previous knowledge of surface area to make connections to the formulas for lateral and total surface area and determine solutions for problems involving rectangular prisms, triangular prisms, and cylinders;

(C) use the Pythagorean Theorem and its converse to solve problems; and

(D) determine the distance between two points on a coordinate plane using the Pythagorean Theorem.

(8) Expressions, equations, and relationships. The student applies mathematical process standards to use one-variable equations in problem situations. The student is expected to:

(A) write one-variable equations with variables on both sides that represent problems using rational number coefficients and constants;

(B) write a corresponding real-world problem when given a one-variable equation with variables on both sides of the equal sign using rational number coefficients and constants;

(C) model and solve one-variable equations with variables on both sides of the equal sign that represent mathematical and real-world problems using rational number coefficients and constants;

(D) write and solve equations using geometry concepts, including the angle relationships when parallel lines are cut by a transversal; and

(E) write and solve equations using geometry concepts, including the properties of side lengths and angles in quadrilaterals.

(9) Expressions, equations, and relationships. The student applies mathematical process standards to use multiple representations to develop foundational concepts of simultaneous linear equations. The student is expected to identify and verify the values of x and y that simultaneously satisfy two linear equations in the form $y = mx + b$ from the intersections of the graphed equations.

(10) Two-dimensional shapes. The student applies mathematical process standards to develop transformational geometry concepts. The student is expected to:

(A) generalize the properties of orientation and congruence of rotations, reflections, translations, and dilations of two-dimensional shapes on a coordinate plane;

(B) differentiate between transformations that preserve congruence and those that do not;

(C) explain the effect of translations, reflections over the x- or y-axis, and rotations limited to 90°, 180°, 270°, and 360° as applied to two-dimensional shapes on a coordinate plane using an algebraic representation such as $(x, y) \rightarrow (x + 2, y + 2)$; and

(D) model the effect on linear and area measurements of dilated two-dimensional shapes.

(11) Measurement and data. The student applies mathematical process standards to use statistical procedures to describe data. The student is expected to:

(A) construct a scatterplot and describe the observed trend such as positive trend, negative trend, and no trend to address questions of association such as linear, non-linear, and no association between bivariate data;

(B) determine the mean absolute deviation and use this quantity as a measure of the average distance data are from the mean using a data set of no more than 10 data points; and

(C) simulate generating random samples of the same size from a population with known characteristics to develop the notion of a random sample being representative of the population from which it was selected.

(12) Personal financial literacy. The student applies mathematical process standards to develop an economic way of thinking and problem solving useful in one's life as a knowledgeable consumer and investor. The student is expected to:

(A) solve real-world problems comparing how interest rate and loan length affect the cost of credit;

(B) calculate the total cost of repaying a loan, including credit cards and easy access loans, under various rates of interest and over different periods using an online calculator;

(C) explain how small amounts of money invested regularly over time grow exponentially;

(D) explain and justify the advantages and disadvantages of different payment methods such as stored-value cards, debit cards, and online payment systems; and

(E) analyze financial situations to determine if the situation is a financially responsible decision and identify the benefits of financial responsibility and the costs of financial irresponsibility.

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 February 13, 2012.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 475-1497

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SUBCHAPTER C. HIGH SCHOOL

19 TAC §§111.38 - 111.45

The new sections are proposed under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to identify by rule the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating instructional materials and addressed on the assessment instruments; and §28.025, which authorizes the SBOE to determine by rule curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with the required curriculum under §28.002.

The new sections implement the Texas Education Code, §§7.102(c)(4), 28.002, and 28.025.

§111.38. Implementation of Texas Essential Knowledge and Skills for Mathematics, High School, Adopted 2012.

(a) The provisions of §§111.39-111.45 of this subchapter shall be implemented by school districts.

(b) No later than August 31, 2013, the commissioner of education shall determine whether instructional materials have been made available to Texas public schools that cover the essential knowledge and skills for mathematics as adopted in §§111.39-111.45 of this subchapter.

(c) If the commissioner makes the determination that instructional materials have been made available under subsection (b) of this section, §§111.39-111.45 of this subchapter shall be implemented beginning with the 2015-2016 school year and apply to the 2015-2016 and subsequent school years.

(d) If the commissioner does not make the determination that instructional materials have been made available under subsection (b) of this section, the commissioner shall determine no later than August 31 of each subsequent school year whether instructional materials have been made available. If the commissioner determines that instructional materials have been made available, the commissioner shall notify the State Board of Education and school districts that §§111.39-111.45 of this subchapter shall be implemented for the following school year.

(e) Sections 111.31-111.37 of this subchapter shall be superseded by the implementation of §§111.38-111.45 under this section.

§111.39. Algebra I, Adopted 2012 (One Credit).

(a) General requirements. Students shall be awarded one credit for successful completion of this course. This course is recommended for students in Grade 8 or 9. Prerequisite: Mathematics, Grade 8 or its equivalent.

(b) Introduction.

(1) The desire to achieve educational excellence is the driving force behind the Texas essential knowledge and skills for mathematics, guided by the college and career readiness standards. By embedding statistics, probability, and finance, while focusing on fluency and solid understanding, Texas will lead the way in mathematics education and prepare all Texas students for the challenges they will face in the 21st century.

(2) The process standards describe ways in which students are expected to engage in the content. The placement of the process standards at the beginning of the knowledge and skills listed for each grade and course is intentional. The process standards weave the other knowledge and skills together so that students may be successful problem solvers and use mathematics efficiently and effectively in daily life. The process standards are integrated at every grade level and course. When possible, students will apply mathematics to problems arising in everyday life, society, and the workplace. Students will use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution. Students will select appropriate tools such as real objects, manipulatives, paper and pencil, and technology and techniques such as mental math, estimation, and number sense to solve problems. Students will effectively communicate mathematical ideas, reasoning, and their implications using multiple representations such as symbols, diagrams, graphs, and language. Students will use mathematical relationships to generate solutions and make connections and predictions. Students will analyze mathematical relationships to connect and communicate mathematical ideas. Students will display, explain, or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(3) In Algebra I, students will build on the knowledge and skills for mathematics in Grades 6-8, which provide a foundation in linear relationships, number and operations, and proportionality. Students will study linear, quadratic, and exponential functions and their related transformations, equations, and associated solutions. Students will connect functions and their associated solutions in both mathematical and real-world situations. Students will use technology to collect and explore data and analyze statistical relationships. In addition, students will study polynomials of degree one and two, radical expressions, sequences, and laws of exponents. Students will generate and solve linear systems with two equations and two variables and will create new functions through transformations.

(4) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(c) Knowledge and skills.

(1) Mathematical process standards. The student uses mathematical processes to acquire and demonstrate mathematical understanding. The student is expected to:

(A) apply mathematics to problems arising in everyday life, society, and the workplace;

(B) use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution;

(C) select tools, including real objects, manipulatives, paper and pencil, and technology as appropriate, and techniques, including mental math, estimation, and number sense as appropriate, to solve problems;

(D) communicate mathematical ideas, reasoning, and their implications using multiple representations, including symbols, diagrams, graphs, and language as appropriate;

(E) create and use representations to organize, record, and communicate mathematical ideas;

(F) analyze mathematical relationships to connect and communicate mathematical ideas; and

(G) display, explain, and justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(2) Linear functions, equations, and inequalities. The student applies the mathematical process standards when using properties of linear functions to write and represent in multiple ways, with and without technology, linear equations, inequalities, and systems of equations. The student is expected to:

(A) determine the domain and range of a linear function in mathematical problems and determine reasonable domain and range values for real-world situations, both continuous and discrete;

(B) write linear equations in two variables in various forms, including $y = mx + b$, $Ax + By = C$, and $y - y_1 = m(x - x_1)$, given one point and the slope and given two points;

(C) write linear equations in two variables given a table of values, a graph, and a verbal description;

(D) write and solve equations involving direct variation;

(E) write linear equations in two variables that contain a given point and are parallel to a given line;

(F) write linear equations in two variables that contain a given point and are perpendicular to a given line;

(G) write linear equations in two variables that are parallel and lines that are perpendicular to the x- and to the y-axis and determine whether their slopes are zero or undefined;

(H) write linear inequalities in two variables given a table of values, a graph, and a verbal description; and

(I) write systems of two linear equations given a table of values, a graph, and a verbal description.

(3) Linear functions, equations, and inequalities. The student applies the mathematical process standards when using graphs of linear functions, key features, and related transformations to represent in multiple ways and solve, with and without technology, equations, inequalities, and systems of equations. The student is expected to:

(A) determine the slope of a line given a table of values, a graph, two points on the line, and an equation written in various forms, including $y = mx + b$, $Ax + By = C$, and $y - y_1 = m(x - x_1)$;

(B) calculate the rate of change of a linear function represented tabularly, graphically, and algebraically over a specified interval within mathematical and real-world problems;

(C) graph linear functions on the coordinate plane and identify key features, including x-intercept, y-intercept, zeros, and slope, in mathematical and real-world problems;

(D) graph the solution set of linear inequalities in two variables on the coordinate plane;

(E) determine the effects on the graph of the parent function $f(x) = x$ when $f(x)$ is replaced by $af(x)$, $f(x) + d$, $f(x - c)$, $f(bx)$ for specific values of a, b, c, and d;

(F) graph systems of two linear equations in two variables on the coordinate plane and determine the solutions if they exist;

(G) estimate graphically the solutions to systems of two linear equations with two variables in real-world problems; and

(H) graph the solution set of systems of two linear inequalities in two variables on the coordinate plane.

(4) Linear functions, equations, and inequalities. The student applies the mathematical process standards to formulate statistical relationships and evaluate their reasonableness based on real-world data. The student is expected to:

(A) calculate, using technology, the correlation coefficient between two quantitative variables and interpret this quantity as a measure of the strength of the linear association;

(B) compare and contrast association and causation in real-world problems; and

(C) write, with and without technology, linear functions that provide a reasonable fit to data to estimate solutions and make predictions for real-world problems.

(5) Linear functions, equations, and inequalities. The student applies the mathematical process standards to solve, with and without technology, linear equations and evaluate the reasonableness of their solutions. The student is expected to:

(A) solve linear equations in one variable, including those for which the application of the distributive property is necessary and for which variables are included on both sides;

(B) solve linear inequalities in one variable, including those for which the application of the distributive property is necessary and for which variables are included on both sides; and

(C) solve, using substitution and Gaussian elimination, systems of two linear equations with two variables for mathematical and real-world problems.

(6) Quadratic functions and equations. The student applies the mathematical process standards when using properties of quadratic functions to write and represent in multiple ways, with and without technology, quadratic equations. The student is expected to:

(A) determine the domain and range of quadratic functions;

(B) write equations of quadratic functions given the vertex and another point on the graph, write the equation in vertex form $f(x) = a(x - h)^2 + k$, and rewrite the equation from vertex form to standard form $f(x) = ax^2 + bx + c$; and

(C) write quadratic functions when given real solutions and graphs of their related equations.

(7) Quadratic functions and equations. The student applies the mathematical process standards when using graphs of quadratic functions and their related transformations to represent in multiple ways and determine, with and without technology, the solutions to equations. The student is expected to:

(A) graph quadratic functions on the coordinate plane and use the graph to identify key attributes, if possible, including x-intercept, y-intercept, zeros, maximum value, minimum values, vertex, and the equation of the axis of symmetry;

(B) describe the relationship between the linear factors of quadratic expressions and the zeros of their associated quadratic functions; and

(C) determine the effects on the graph of the parent function $f(x) = x^2$ when $f(x)$ is replaced by $af(x)$, $f(x) + d$, $f(x - c)$, $f(bx)$ for specific values of a, b, c, and d.

(8) Quadratic functions and equations. The student applies the mathematical process standards to solve, with and without technology, quadratic equations and evaluate the reasonableness of their solutions. The student formulates statistical relationships and evaluates their reasonableness based on real-world data. The student is expected to:

(A) solve quadratic equations having real solutions by factoring, taking square roots, completing the square, and applying the quadratic formula; and

(B) write, using technology, quadratic functions that provide a reasonable fit to data to estimate solutions and make predictions for real-world problems.

(9) Exponential functions and equations. The student applies the mathematical process standards when using properties of exponential functions and their related transformations to write, graph, and represent in multiple ways exponential equations and evaluate, with and without technology, the reasonableness of their solutions. The student formulates statistical relationships and evaluates their reasonableness based on real-world data. The student is expected to:

(A) determine the domain and range of exponential functions of the form $f(x) = ab^x$;

(B) interpret the meaning of the values of a and b in exponential functions of the form $f(x) = ab^x$ in real-world problems;

(C) write exponential functions in the form $f(x) = ab^x$ (where b is a rational number) to describe problems arising from mathematical and real-world situations, including growth and decay;

(D) graph exponential functions that model growth and decay and identify key features, including y-intercept and asymptotes, in mathematical and real-world problems; and

(E) write, using technology, exponential functions that provide a reasonable fit to data and make predictions for real-world problems.

(10) Number and algebraic methods. The student applies the mathematical process standards and algebraic methods to rewrite in equivalent forms and perform operations on polynomial expressions. The student is expected to:

(A) add and subtract polynomials of degree one and degree two;

(B) multiply polynomials of degree one and degree two;

(C) determine the quotient of a polynomial of degree one and polynomial of degree two when divided by a polynomial of degree one and polynomial of degree two;

(D) rewrite polynomial expressions of degree one and degree two in equivalent forms using the distributive property such as rewriting $(4x)(x - 2)$ as $(4x)(x) - (4x)(2)$, then writing the expression as $4x^2 - 8x$, or $4x^2 - 8x$ to $(4x)(x) - (4x)(2)$, and then factoring the result as $(4x)(x - 2)$;

(E) factor, if possible, trinomials with real factors in the form $ax^2 + bx + c$, including perfect square trinomials of degree two; and

(F) decide if a binomial can be written as the difference of two squares and, if possible, use the structure of a difference of two squares to rewrite the binomial such as rewriting the expression $49x^4 - y^4$ to $(7x^2)^2 - (y^2)^2$ and then factoring the binomial as $(7x^2 + y^2)(7x^2 - y^2)$.

(11) Number and algebraic methods. The student applies the mathematical process standards and algebraic methods to rewrite algebraic expressions into equivalent forms. The student is expected to:

(A) simplify numerical radical expressions involving square roots; and

(B) simplify numeric and algebraic expressions using the laws of exponents, including integral and rational exponents.

(12) Number and algebraic methods. The student applies the mathematical process standards and algebraic methods to write, solve, analyze, and evaluate equations, relations, and functions. The student is expected to:

(A) decide whether relations represented verbally, tabularly, graphically, and symbolically define a function;

(B) evaluate functions, expressed in function notation, given one or more elements in their domains;

(C) identify terms of arithmetic and geometric sequences when the sequences are given in function form and given in recursive form;

(D) write a formula for the n^{th} term of arithmetic and geometric sequences, given the value of several of their terms; and

(E) solve mathematic and scientific formulas, and other literal equations, for a specified variable.

§111.40. Algebra II, Adopted 2012 (One-Half to One Credit).

(a) General requirements. Students shall be awarded one-half to one credit for successful completion of this course. Prerequisite: Algebra I.

(b) Introduction.

(1) The desire to achieve educational excellence is the driving force behind the Texas essential knowledge and skills for mathematics, guided by the college and career readiness standards. By embedding statistics, probability, and finance, while focusing on fluency and solid understanding, Texas will lead the way in mathematics education and prepare all Texas students for the challenges they will face in the 21st century.

(2) The process standards describe ways in which students are expected to engage in the content. The placement of the process standards at the beginning of the knowledge and skills listed for each grade and course is intentional. The process standards weave the other knowledge and skills together so that students may be successful problem solvers and use mathematics efficiently and effectively in daily

life. The process standards are integrated at every grade level and course. When possible, students will apply mathematics to problems arising in everyday life, society, and the workplace. Students will use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution. Students will select appropriate tools such as real objects, manipulatives, paper and pencil, and technology and techniques such as mental math, estimation, and number sense to solve problems. Students will effectively communicate mathematical ideas, reasoning, and their implications using multiple representations such as symbols, diagrams, graphs, and language. Students will use mathematical relationships to generate solutions and make connections and predictions. Students will analyze mathematical relationships to connect and communicate mathematical ideas. Students will display, explain, or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(3) In Algebra II, students will build on the knowledge and skills for mathematics in Kindergarten-Grade 8 and Algebra I. Students will broaden their knowledge of quadratic functions, exponential functions, and systems of equations. Students will study logarithmic, square root, cubic, cube root, absolute value, rational functions, and their related equations. Students will connect functions to their inverses and associated equations and solutions in both mathematical and real-world situations. In addition, students will extend their knowledge of data analysis and numeric and algebraic methods.

(4) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(c) Knowledge and skills.

(1) Mathematical process standards. The student uses mathematical processes to acquire and demonstrate mathematical understanding. The student is expected to:

(A) apply mathematics to problems arising in everyday life, society, and the workplace;

(B) use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution;

(C) select tools, including real objects, manipulatives, paper and pencil, and technology as appropriate, and techniques, including mental math, estimation, and number sense as appropriate, to solve problems;

(D) communicate mathematical ideas, reasoning, and their implications using multiple representations, including symbols, diagrams, graphs, and language as appropriate;

(E) create and use representations to organize, record, and communicate mathematical ideas;

(F) analyze mathematical relationships to connect and communicate mathematical ideas; and

(G) display, explain, or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(2) Attributes of functions and their inverses. The student applies mathematical processes to understand that functions have distinct key attributes and understand the relationship between a function and its inverse. The student is expected to:

(A) graph the functions $f(x) = \sqrt{x}$, $f(x) = 1/x$, $f(x) = x^3$, $f(x) = \sqrt[3]{x}$, $f(x) = b^x$, and $f(x) = \log_b(x)$ where b is 2, 10, and e, and, when applicable, analyze the key attributes such as domain, range, intercepts, symmetries, asymptotic behavior, and relative maxima and minima given an interval;

(B) graph and write the inverse of a function;

(C) describe and analyze the relationship between a function and its inverse (quadratic and square root, logarithmic and exponential), including the restrictions on domains and ranges; and

(D) use the composition of two functions, including the necessary restrictions on the domain, to determine if the functions are inverses of each other.

(3) Systems of equations and inequalities. The student applies mathematical processes to formulate systems of equations and inequalities, use a variety of methods to solve, and analyze reasonableness of solutions. The student is expected to:

(A) formulate systems of equations, including systems consisting of three linear equations in three variables and systems consisting of two equations, the first linear and the second quadratic;

(B) solve systems of three linear equations in three variables by methods such as elimination, using technology with matrices, and substitution;

(C) solve, algebraically, systems of two equations in two variables consisting of a linear equation and a quadratic equation;

(D) determine the reasonableness of solutions to systems of a linear equation and a quadratic equation in two variables;

(E) formulate systems of at least two linear inequalities in two variables;

(F) solve systems of two or more linear inequalities in two variables; and

(G) determine possible solutions in the solution set of systems of two or more linear inequalities in two variables.

(4) Quadratic and square root functions, equations, and inequalities. The student applies mathematical processes to understand that quadratic and square root functions and quadratic inequalities can be used to model situations, solve problems, and make predictions. The student is expected to:

(A) write the quadratic function given three specified points in the plane;

(B) write the equation of a parabola using given attributes, including vertex, focus, directrix, axis of symmetry, and direction of opening;

(C) determine the effect on the graph of $f(x) = \sqrt{x}$ when $f(x)$ is replaced by $af(x)$, $f(x) + d$, $f(bx)$, and $f(x - c)$ for specific positive and negative values of a, b, c, and d;

(D) transform a quadratic function $f(x) = ax^2 + bx + c$ to the form $f(x) = a(x - h)^2 + k$ to identify the different attributes of $f(x)$;

(E) formulate quadratic and square root equations;

(F) solve quadratic and square root equations;

(G) identify extraneous solutions of square root equations; and

(H) solve quadratic inequalities.

(5) Exponential and logarithmic functions and equations. The student applies mathematical processes to understand that expo-

nential and logarithmic functions can be used to model situations and solve problems. The student is expected to:

(A) determine the effects on the key attributes on the graphs of $f(x) = b^x$ and $f(x) = \log_b(x)$ where b is 2, 10, and e when $f(x)$ is replaced by $af(x)$, $f(x) + d$, and $f(x - c)$ for specific positive and negative values of a, c, and d;

(B) formulate exponential and logarithmic equations that model real-world situations;

(C) rewrite exponential equations as their corresponding logarithmic equations and logarithmic equations as their corresponding exponential equations;

(D) solve exponential equations of the form $y = ab^x$ where a is a nonzero real number and b is greater than zero and not equal to one and single logarithmic equations have real solutions; and

(E) determine the reasonableness of a solution to a logarithmic equation.

(6) Cubic, cube root, absolute value and rational functions, equations, and inequalities. The student applies mathematical processes to understand that cubic, cube root, absolute value and rational functions, equations, and inequalities can be used to model situations, solve problems, and make predictions. The student is expected to:

(A) analyze the effect on the graphs of $f(x) = x^3$ and $f(x) = \sqrt[3]{x}$ when $f(x)$ is replaced by $af(x)$, $f(bx)$, $f(x - c)$, and $f(x) + d$ for specific positive and negative values of a, b, c, and d;

(B) solve cube root equations;

(C) analyze the effect on the graphs of $f(x) = |x|$ when $f(x)$ is replaced by $af(x)$, $f(bx)$, $f(x - c)$, and $f(x) + d$ for specific positive and negative values of a, b, c, and d;

(D) formulate absolute value linear equations that model real-world situations;

(E) solve absolute value linear equations;

(F) solve absolute value linear inequalities;

(G) analyze the effect on the graphs of $f(x) = 1/x$ when $f(x)$ is replaced by $af(x)$, $f(bx)$, $f(x - c)$, and $f(x) + d$ for specific positive and negative values of a, b, c, and d;

(H) formulate rational equations that model real-world situations;

(I) solve rational equations that have real solutions;

(J) determine the reasonableness of a solution to a rational equation;

(K) determine the restrictions on the domain of a rational function; and

(L) formulate and solve equations involving inverse variation.

(7) Number and algebraic methods. The student applies mathematical processes to simplify and perform operations on expressions and to solve equations. The student is expected to:

(A) add, subtract, and multiply complex numbers;

(B) add, subtract, and multiply polynomials;

(C) determine the quotient of a polynomial of degree three and of degree four when divided by a polynomial of degree one and of degree two;

(D) determine the linear factors of a polynomial function of degree three and of degree four using algebraic methods such as the Remainder Theorem;

(E) determine linear and quadratic factors of a polynomial expression of degree three and of degree four, including factoring the sum and difference of two cubes and factoring by grouping;

(F) determine the sum, difference, product, and quotient of rational expressions with integral exponents of degree one and of degree two;

(G) rewrite radical expressions that contain variables to equivalent forms;

(H) solve equations involving rational exponents; and

(I) write the domain and range of a function in interval notation.

(8) Data. The student applies mathematical processes to analyze data, select appropriate models, write corresponding functions, and make predictions. The student is expected to:

(A) analyze data to select the appropriate model from among linear, quadratic, and exponential models;

(B) use regression methods available through technology to write a linear function, a quadratic function, and an exponential function from a given set of data; and

(C) predict and make decisions and critical judgments from a given set of data using linear, quadratic, and exponential models.

§111.41. Geometry, Adopted 2012 (One Credit).

(a) General requirements. Students shall be awarded one credit for successful completion of this course. Prerequisite: Algebra I.

(b) Introduction.

(1) The desire to achieve educational excellence is the driving force behind the Texas essential knowledge and skills for mathematics, guided by the college and career readiness standards. By embedding statistics, probability, and finance, while focusing on fluency and solid understanding, Texas will lead the way in mathematics education and prepare all Texas students for the challenges they will face in the 21st century.

(2) The process standards describe ways in which students are expected to engage in the content. The placement of the process standards at the beginning of the knowledge and skills listed for each grade and course is intentional. The process standards weave the other knowledge and skills together so that students may be successful problem solvers and use mathematics efficiently and effectively in daily life. The process standards are integrated at every grade level and course. When possible, students will apply mathematics to problems arising in everyday life, society, and the workplace. Students will use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution. Students will select appropriate tools such as real objects, manipulatives, paper and pencil, and technology and techniques such as mental math, estimation, and number sense to solve problems. Students will effectively communicate mathematical ideas, reasoning, and their implications using multiple representations such as symbols, diagrams, graphs, and language. Students will use mathematical relationships to generate solutions and make connections and predictions. Students will analyze mathematical relationships to connect and communicate mathematical ideas. Students will display, explain,

or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(3) In Geometry, students will build on the knowledge and skills for mathematics in Kindergarten-Grade 8 and Algebra I to strengthen their mathematical reasoning skills in geometric contexts. Within the course, students will begin to focus on more precise terminology, symbolic representations, and the development of proofs. Students will explore concepts covering coordinate and transformational geometry; logical argument and constructions; proof and congruence; similarity, proof, and trigonometry; two- and three-dimensional figures; circles; and probability. Students will connect previous knowledge from Algebra I to Geometry through the coordinate and transformational geometry strand. In the logical arguments and constructions strand, students are expected to create formal constructions using a straight edge and compass. Though this course is primarily Euclidean geometry, students should complete the course with an understanding that non-Euclidean geometries exist. In proof and congruence, students will use deductive reasoning to justify, prove and apply theorems about geometric figures. Throughout the standards, the term "prove" means a formal proof to be shown in a paragraph, a flow chart, or two-column formats. Proportionality is the unifying component of the similarity, proof, and trigonometry strand. Students will use their proportional reasoning skills to prove and apply theorems and solve problems in this strand. The two- and three-dimensional figure strand focuses on the application of formulas in multi-step situations since students have developed background knowledge in two- and three-dimensional figures. Using patterns to identify geometric properties, students will apply theorems about circles to determine relationships between special segments and angles in circles. Due to the emphasis of probability and statistics in the college and career readiness standards, standards dealing with probability have been added to the geometry curriculum to ensure students have proper exposure to these topics before pursuing their post-secondary education.

(4) These standards are meant to provide clarity and specificity in regards to the content covered in the high school geometry course. These standards are not meant to limit the methodologies used to convey this knowledge to students. Though the standards are written in a particular order, they are not necessarily meant to be taught in the given order. In the standards, the phrase "to solve problems" includes both contextual and non-contextual problems unless specifically stated.

(5) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(c) Knowledge and skills.

(1) Mathematical process standards. The student uses mathematical processes to acquire and demonstrate mathematical understanding. The student is expected to:

(A) apply mathematics to problems arising in everyday life, society, and the workplace;

(B) use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution;

(C) select tools, including real objects, manipulatives, paper and pencil, and technology as appropriate, and techniques, including mental math, estimation, and number sense as appropriate, to solve problems;

(D) communicate mathematical ideas, reasoning, and their implications using multiple representations, including symbols, diagrams, graphs, and language as appropriate;

(E) create and use representations to organize, record, and communicate mathematical ideas;

(F) analyze mathematical relationships to connect and communicate mathematical ideas; and

(G) display, explain, and justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(2) Coordinate and transformational geometry. The student uses the process skills to understand the connections between algebra and geometry and uses the one- and two-dimensional coordinate systems to verify geometric conjectures. The student is expected to:

(A) determine the coordinates of a point that is a given fractional distance less than one from one end of a line segment to the other in one- and two-dimensional coordinate systems, including finding the midpoint;

(B) derive and use the distance, slope, and midpoint formulas to verify geometric relationships, including congruence of segments and parallelism or perpendicularity of pairs of lines; and

(C) determine an equation of a line parallel or perpendicular to a given line that passes through a given point.

(3) Coordinate and transformational geometry. The student uses the process skills to generate and describe rigid transformations (translation, reflection, and rotation) and non-rigid transformations (dilations that preserve similarity and reductions and enlargements that do not preserve similarity). The student is expected to:

(A) describe and perform transformations of figures in a plane using coordinate notation such as $(x, y) \rightarrow (-x, y)$;

(B) determine the image or pre-image of a given two-dimensional figure under a composition of rigid transformations, a composition of non-rigid transformations, and a composition of both, including dilations where the center can be any point in the plane;

(C) identify the sequence of transformations that will carry a given pre-image onto an image on and off the coordinate plane; and

(D) identify and distinguish between reflectional and rotational symmetry in a plane figure.

(4) Logical argument and constructions. The student uses the process skills with inductive reasoning to understand geometric relationships. The student is expected to:

(A) distinguish between undefined terms, definitions, postulates, conjectures, and theorems;

(B) identify and determine the validity of the converse, inverse, and contrapositive of a conditional statement and recognize the connection between a biconditional statement and a true conditional statement with a true converse;

(C) verify that a conjecture is false using a counterexample; and

(D) compare geometric relationships between Euclidean and spherical geometries, including parallel lines and the sum of the angles in a triangle.

(5) Logical argument and constructions. The student uses constructions to validate conjectures about geometric figures. The student is expected to:

(A) investigate patterns to make conjectures about geometric relationships, including angles formed by parallel lines cut by a transversal, criteria required for triangle congruence, special segments of triangles, diagonals of quadrilaterals, interior and exterior angles of polygons, and special segments and angles of circles choosing from a variety of tools such as compass and straightedge, paper folding, and dynamic geometric software;

(B) construct congruent segments, congruent angles, a segment bisector, an angle bisector, perpendicular lines, the perpendicular bisector of a line segment, and a line parallel to a given line through a point not on a line using a compass and a straightedge;

(C) use the constructions of congruent segments, congruent angles, angle bisectors, and perpendicular bisectors to make conjectures about geometric relationships; and

(D) verify the Triangle Inequality theorem using constructions and apply the theorem to solve problems.

(6) Proof and congruence. The student uses the process skills with deductive reasoning to prove and apply theorems by using a variety of methods such as coordinate, transformational, and axiomatic and formats such as two-column, paragraph, and flow chart. The student is expected to:

(A) prove theorems about angles formed by the intersection of lines and line segments, including vertical angles, angles formed by parallel lines cut by a transversal, and equidistance between the endpoints of a segment and points on its perpendicular bisector, and apply these relationships to solve problems;

(B) prove two triangles are congruent by applying the Side-Angle-Side, Angle-Side-Angle, Side-Side-Side, Angle-Angle-Side, and Hypotenuse-Leg congruence conditions;

(C) apply the definition of congruence, in terms of rigid transformations, to identify congruent figures and their corresponding sides and angles;

(D) prove theorems about the relationships in triangles, including the sum of interior angles, base angles of isosceles triangles, midsegments, and medians, and apply these relationships to solve problems; and

(E) prove a quadrilateral is a parallelogram, rectangle, square, or rhombus using opposite sides, opposite angles, or diagonals and apply these relationships to solve problems.

(7) Similarity, proof, and trigonometry. The student uses the process skills in applying similarity to solve problems. The student is expected to:

(A) apply the definition of similarity in terms of a dilation to identify similar figures and their proportional sides and the congruent corresponding angles; and

(B) apply the Angle-Angle criterion to verify similar triangles and apply the proportionality of the corresponding sides to solve problems.

(8) Similarity, proof, and trigonometry. The student uses the process skills with deductive reasoning to prove and apply theorems by using a variety of methods such as coordinate, transformational, and axiomatic and formats such as two-column, paragraph, and flow chart. The student is expected to:

(A) prove theorems about similar triangles, including the Triangle Proportionality theorem, and apply these theorems to solve problems; and

(B) identify and apply the relationships that exist when an altitude is drawn to the hypotenuse of a right triangle, including the geometric mean, to solve problems.

(9) Similarity, proof, and trigonometry. The student uses the process skills to understand and apply relationships in right triangles. The student is expected to:

(A) determine the lengths of sides and measures of angles in a right triangle by applying the trigonometric ratios sine, cosine, and tangent to solve problems; and

(B) apply the relationships in special right triangles 30°-60°-90° and 45°-45°-90° and the Pythagorean theorem, including Pythagorean triples, to solve problems.

(10) Two-dimensional and three-dimensional figures. The student uses the process skills to recognize characteristics and dimensional changes of two- and three-dimensional figures. The student is expected to:

(A) identify the shapes of two-dimensional cross-sections of prisms, pyramids, cylinders, cones, and spheres and identify three-dimensional objects generated by rotations of two-dimensional shapes; and

(B) determine and describe how changes in the linear dimensions of a shape affect its perimeter, area, surface area, or volume, including proportional and non-proportional dimensional change.

(11) Two-dimensional and three-dimensional figures. The student uses the process skills in the application of formulas to determine measures of two- and three-dimensional figures. The student is expected to:

(A) apply the formula for the area of regular polygons to solve problems using appropriate units of measure;

(B) determine the area of composite two-dimensional figures comprised of a combination of triangles, parallelograms, trapezoids, kites, regular polygons, or sectors of circles to solve problems using appropriate units of measure;

(C) apply the formulas for the total and lateral surface area of three-dimensional figures, including prisms, pyramids, cones, cylinders, spheres, and composite figures, to solve problems using appropriate units of measure; and

(D) apply the formulas for the volume of three-dimensional figures, including prisms, pyramids, cones, cylinders, spheres, and composite figures, to solve problems using appropriate units of measure.

(12) Circles. The student uses the process skills to understand geometric relationships and apply theorems and equations about circles. The student is expected to:

(A) apply theorems about circles, including relationships among angles, radii, chords, tangents, and secants, to solve non-contextual problems;

(B) apply the proportional relationship between the measure of an arc length of a circle and the circumference of the circle to solve problems;

(C) apply the proportional relationship between the measure of the area of a sector of a circle and the area of the circle to solve problems;

(D) describe radian measure of an angle as the ratio of the length of an arc intercepted by a central angle and the radius of the circle; and

(E) show that the equation of a circle with center at the origin and radius r is $x^2 + y^2 = r^2$ and determine the equation for the graph of a circle with radius r and center (h, k), $(x - h)^2 + (y - k)^2 = r^2$.

(13) Probability. The student uses the process skills to understand probability in real-world situations and how to apply independence and dependence of events. The student is expected to:

(A) develop strategies to use permutations and combinations to solve contextual problems;

(B) determine probabilities based on area to solve contextual problems;

(C) identify whether two events are independent and compute the probability of the two events occurring together with or without replacement;

(D) apply conditional probability in contextual problems; and

(E) apply independence in contextual problems.

§111.42. Precalculus, Adopted 2012 (One-Half to One Credit).

(a) General requirements. Students shall be awarded one-half to one credit for successful completion of this course. Prerequisites: Algebra I, Geometry, and Algebra II.

(b) Introduction.

(1) The desire to achieve educational excellence is the driving force behind the Texas essential knowledge and skills for mathematics, guided by the college and career readiness standards. By embedding statistics, probability, and finance, while focusing on fluency and solid understanding, Texas will lead the way in mathematics education and prepare all Texas students for the challenges they will face in the 21st century.

(2) The process standards describe ways in which students are expected to engage in the content. The placement of the process standards at the beginning of the knowledge and skills listed for each grade and course is intentional. The process standards weave the other knowledge and skills together so that students may be successful problem solvers and use mathematics efficiently and effectively in daily life. The process standards are integrated at every grade level and course. When possible, students will apply mathematics to problems arising in everyday life, society, and the workplace. Students will use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution. Students will select appropriate tools such as real objects, manipulatives, paper and pencil, and technology and techniques such as mental math, estimation, and number sense to solve problems. Students will effectively communicate mathematical ideas, reasoning, and their implications using multiple representations such as symbols, diagrams, graphs, and language. Students will use mathematical relationships to generate solutions and make connections and predictions. Students will analyze mathematical relationships to connect and communicate mathematical ideas. Students will display, explain, or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(3) Precalculus is the preparation for calculus. The course approaches topics from a function point of view, where appropriate, and is designed to strengthen and enhance conceptual understanding and mathematical reasoning used when modeling and solving mathematical and real-world problems. Students systematically work with functions and their multiple representations. The study of Precalculus deepens students' mathematical understanding and fluency with algebra and trigonometry and extends their ability to make connections and apply concepts and procedures at higher levels. Students investigate and explore mathematical ideas, develop multiple strategies for analyzing complex situations, and use technology to build understanding, make connections between representations, and provide support in solving problems.

(4) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(c) Knowledge and skills.

(1) Mathematical process standards. The student uses mathematical processes to acquire and demonstrate mathematical understanding. The student is expected to:

(A) apply mathematics to problems arising in everyday life, society, and the workplace;

(B) use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution;

(C) select tools, including real objects, manipulatives, paper and pencil, and technology as appropriate, and techniques, including mental math, estimation, and number sense as appropriate, to solve problems;

(D) communicate mathematical ideas, reasoning, and their implications using multiple representations, including symbols, diagrams, graphs, and language as appropriate;

(E) create and use representations to organize, record, and communicate mathematical ideas;

(F) analyze mathematical relationships to connect and communicate mathematical ideas; and

(G) display, explain, and justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(2) Functions. The student uses process standards in mathematics to explore, describe, and analyze the attributes of functions. The student makes connections between multiple representations of functions and algebraically constructs new functions. The student analyzes and uses functions to model real-world problems. The student is expected to:

(A) use the composition of two functions to model and solve real-world problems;

(B) demonstrate that function composition is not always commutative;

(C) represent a given function as a composite function of two or more functions;

(D) describe symmetry of graphs of even and odd functions;

(E) determine an inverse function, when it exists, for a given function over its domain or a subset of its domain and represent the inverse using multiple representations;

(F) graph exponential, logarithmic, rational, polynomial, power, trigonometric, inverse trigonometric, and piecewise defined functions, including step functions;

(G) graph functions, including exponential, logarithmic, sine, cosine, rational, polynomial, and power functions and their transformations, including *af(x), f(x) + d, f(x - c), f(bx)* for specific values of *a, b, c,* and *d,* in mathematical and real-world problems;

(H) graph arcsin *x* and arccos *x* and describe the limitations on the domain;

(I) determine and analyze the key features of exponential, logarithmic, rational, polynomial, power, trigonometric, inverse trigonometric, and piecewise defined functions, including step functions such as domain, range, symmetry, relative maximum, relative minimum, zeros, asymptotes, and intervals over which the function is increasing or decreasing;

(J) analyze and describe end behavior of functions, including exponential, logarithmic, rational, polynomial, and power functions, using infinity notation to communicate this characteristic in mathematical and real-world problems;

(K) analyze characteristics of rational functions and the behavior of the function around the asymptotes, including horizontal, vertical, and oblique asymptotes;

(L) determine various types of discontinuities in the interval $(-\infty, \infty)$ as they relate to functions such as rational and piecewise defined functions and explore the limitations of the graphing calculator as it relates to the behavior of the function around discontinuities;

(M) describe the left-sided behavior and the right-sided behavior of the graph of a function around discontinuities;

(N) analyze situations modeled by functions, including exponential, logarithmic, rational, polynomial, and power functions, to solve real-world problems such as problems involving growth and decay and optimization;

(O) develop and use a sinusoidal function that models a situation in mathematical and real-world problems; and

(P) determine the values of the trigonometric functions at the special angles and relate them in mathematical and real-world problems.

(3) Relations and geometric reasoning. The student uses the process standards in mathematics to model and make connections between algebraic and geometric relations. The student is expected to:

(A) graph a set of parametric equations;

(B) convert parametric equations into rectangular relations and convert rectangular relations into parametric equations;

(C) use parametric equations to model and solve mathematical and real-world problems;

(D) graph points in the polar coordinate system and convert between rectangular coordinates and polar coordinates;

(E) graph polar equations such as cardiods, limaçons, or lemniscates by plotting points and using technology;

(F) determine the conic section formed when a plane intersects a double-napped cone;

(G) make connections between the locus definition of conic sections and their equations in rectangular coordinates;

(H) use the characteristics of an ellipse to write the equation of an ellipse with center *(h, k);* and

(I) use the characteristics of a hyperbola to write the equation of a hyperbola with center *(h, k).*

(4) Number and measure. The student uses process standards in mathematics to apply appropriate techniques, tools, and formulas to calculate measures in mathematical and real-world problems. The student is expected to:

(A) determine the relationship between the unit circle and the definition of a periodic function to evaluate trigonometric functions in mathematical and real-world problems;

(B) describe the relationship between degree and radian measure on the unit circle;

(C) represent angles in radians or degrees based on the concept of rotation and find the measure of reference angles and angles in standard position;

(D) represent angles in radians or degrees based on the concept of rotation in mathematical and real-world problems, including linear and angular velocity;

(E) determine the value of trigonometric ratios of angles and solve problems involving trigonometric ratios in mathematical and real-world problems;

(F) use trigonometry in mathematical and real-world problems, including directional bearing;

(G) use the Law of Sines in mathematical and real-world problems;

(H) use the Law of Cosines in mathematical and real-world problems;

(I) use vectors to model situations involving magnitude and direction;

(J) represent the addition of vectors and the multiplication of a vector by a scalar geometrically and symbolically; and

(K) apply vector addition and multiplication of a vector by a scalar in mathematical and real-world problems.

(5) Algebraic reasoning. The student uses process standards in mathematics to evaluate expressions, describe patterns, formulate models, and solve equations and inequalities using properties, procedures, or algorithms. The student is expected to:

(A) represent finite sums and infinite series using sigma notation;

(B) evaluate finite sums and geometric series, when possible, written in sigma notation;

(C) represent arithmetic sequences and geometric sequences using recursive formulas;

(D) calculate the n^{th} term and the n^{th} partial sum of an arithmetic series in mathematical and real-world problems;

(E) represent arithmetic series and geometric series using sigma notation;

(F) calculate the n^{th} term of a geometric series, the n^{th} partial sum of a geometric series, and sum of an infinite geometric series when it exists;

(G) apply the Binomial Theorem for the expansion of $(a + b)^n$ in powers of a and b for a positive integer n, where a and b are any numbers;

(H) use the properties of logarithms to evaluate or transform logarithmic expressions;

(I) generate and solve logarithmic equations in mathematical and real-world problems;

(J) generate and solve exponential equations in mathematical and real-world problems;

(K) solve polynomial equations with real coefficients by applying a variety of techniques such as factoring, graphical methods, or technology in mathematical and real-world problems;

(L) solve polynomial inequalities with real coefficients by applying a variety of techniques such as factoring, graphical methods, or technology and write the solution set of the polynomial inequality in interval notation in mathematical and real-world problems;

(M) solve rational inequalities with real coefficients by applying a variety of techniques such as factoring, graphical methods, or technology and write the solution set of the rational inequality in interval notation in mathematical and real-world problems;

(N) use trigonometric identities such as reciprocal, quotient, Pythagorean, cofunctions, even/odd, and sum and difference identities for cosine and sine to simplify trigonometric expressions; and

(O) generate and solve trigonometric equations in mathematical and real-world problems.

§111.43. Mathematical Models with Applications, Adopted 2012 (One-Half to One Credit).

(a) General requirements. Students can be awarded one-half to one credit for successful completion of this course. Prerequisite: Algebra I. This course must be taken before receiving credit for Algebra II.

(b) Introduction.

(1) The desire to achieve educational excellence is the driving force behind the Texas essential knowledge and skills for mathematics, guided by the college and career readiness standards. By embedding statistics, probability, and finance, while focusing on fluency and solid understanding, Texas will lead the way in mathematics education and prepare all Texas students for the challenges they will face in the 21st century.

(2) The process standards describe ways in which students are expected to engage in the content. The placement of the process standards at the beginning of the knowledge and skills listed for each grade and course is intentional. The process standards weave the other knowledge and skills together so that students may be successful problem solvers and use mathematics efficiently and effectively in daily life. The process standards are integrated at every grade level and course. When possible, students will apply mathematics to problems arising in everyday life, society, and the workplace. Students will use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution. Students will select appropriate tools such as real objects, manipulatives, paper and pencil, and technology and techniques such as mental math, estimation, and number sense to solve problems. Students will effectively communicate mathematical ideas, reasoning, and their implications using multiple representations such as symbols, diagrams, graphs, and language. Students will use mathematical relationships to generate solutions and make connections and predictions. Students will analyze mathematical relationships to connect and communicate mathematical ideas. Students will display, explain, or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(3) Mathematical Models with Applications is designed to build on the knowledge and skills for mathematics in Kindergarten-Grade 8 and Algebra I. This mathematics course provides a path for students to succeed in Algebra II and prepares them for various post-secondary choices. Students learn to apply mathematics through experiences in personal finance, science, engineering, fine arts, and social sciences. Students use algebraic, graphical, and geometric reasoning to recognize patterns and structure, model information, solve problems, and communicate solutions. Students will select from tools such as physical objects; manipulatives; technology, including graphing calculators, data collection devices, and computers; and paper and pencil and from methods such as algebraic techniques, geometric reasoning, patterns, and mental math to solve problems.

(4) In Mathematical Models with Applications, students will use a mathematical modeling cycle to analyze problems, understand problems better, and improve decisions. A basic mathematical modeling cycle is summarized in this paragraph. The student will:

(A) represent:

(i) identify the variables in the problem and select those that represent essential features; and

(ii) formulate a model by creating and selecting from representations such as geometric, graphical, tabular, algebraic, or statistical that describe the relationships between the variables;

(B) compute: analyze and perform operations on the relationships between the variables to draw conclusions;

(C) interpret: interpret the results of the mathematics in terms of the original problem;

(D) revise: confirm the conclusions by comparing the conclusions with the problem and revising as necessary; and

(E) report: report on the conclusions and the reasoning behind the conclusions.

(5) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(c) Knowledge and skills.

(1) Mathematical process standards. The student uses mathematical processes to acquire and demonstrate mathematical understanding. The student is expected to:

(A) apply mathematics to problems arising in everyday life, society, and the workplace;

(B) use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution;

(C) select tools, including real objects, manipulatives, paper and pencil, and technology as appropriate, and techniques, including mental math, estimation, and number sense as appropriate, to solve problems;

(D) communicate mathematical ideas, reasoning, and their implications using multiple representations, including symbols, diagrams, graphs, and language as appropriate;

(E) create and use representations to organize, record, and communicate mathematical ideas;

(F) analyze mathematical relationships to connect and communicate mathematical ideas; and

(G) display, explain, and justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(2) Mathematical modeling in personal finance. The student uses mathematical processes with graphical and numerical techniques to study patterns and analyze data related to personal finance. The student is expected to:

(A) use rates and linear functions to solve problems involving personal finance and budgeting, including compensations and deductions;

(B) solve problems involving personal taxes; and

(C) analyze data to make decisions about banking, including options for online banking, checking accounts, overdraft protection, processing fees, and debit card/ATM fees.

(3) Mathematical modeling in personal finance. The student uses mathematical processes with algebraic formulas, graphs, and amortization modeling to solve problems involving credit. The student is expected to:

(A) use formulas to generate tables to display series of payments for loan amortizations resulting from financed purchases;

(B) analyze personal credit options in retail purchasing and compare relative advantages and disadvantages of each option;

(C) use technology to create amortization models to investigate home financing and compare buying a home to renting a home; and

(D) use technology to create amortization models to investigate automobile financing and compare buying a vehicle to leasing a vehicle.

(4) Mathematical modeling in personal finance. The student uses mathematical processes with algebraic formulas, numerical techniques, and graphs to solve problems related to financial planning. The student is expected to:

(A) analyze and compare coverage options and rates in insurance;

(B) investigate and compare investment options, including stocks, bonds, annuities, certificates of deposit, and retirement plans; and

(C) analyze types of savings options involving simple and compound interest and compare relative advantages of these options.

(5) Mathematical modeling in science and engineering. The student applies mathematical processes with algebraic techniques to study patterns and analyze data as it applies to science. The student is expected to:

(A) use proportionality and inverse variation to describe physical laws such as Hook's Law, Newton's Second Law of Motion, and Boyle's Law;

(B) use exponential models available through technology to model growth and decay in areas such as population, biology, ecology, and chemistry, including radioactive decay; and

(C) use quadratic functions to model motion such as an object dropped, bounced, thrown, or kicked.

(6) Mathematical modeling in science and engineering. The student applies mathematical processes with algebra and geometry to study patterns and analyze data as it applies to architecture and engineering. The student is expected to:

(A) use similarity, geometric transformations, symmetry, and perspective drawings to describe mathematical patterns and structure in architecture;

(B) use scale factors with two-dimensional and three-dimensional objects to demonstrate proportional and non-proportional changes in surface area and volume as applied to fields such as engineering drawing, architecture, and construction;

(C) use the Pythagorean Theorem and special right-triangle relationships to calculate distances; and

(D) use trigonometric ratios to calculate distances and angle measures as applied to fields such as surveying, navigation, and orienteering.

(7) Mathematical modeling in fine arts. The student uses mathematical processes with algebra and geometry to study patterns and analyze data as it applies to fine arts. The student is expected to:

(A) use trigonometric ratios and functions available through technology to model periodic behavior in art and music;

(B) use similarity, geometric transformations, symmetry, and perspective drawings to describe mathematical patterns and structure in art and photography;

(C) use geometric transformations, proportions, and periodic motion to describe mathematical patterns and structure in music; and

(D) use scale factors with two-dimensional and three-dimensional objects to demonstrate proportional and non-proportional changes in surface area and volume as applied to fields such as painting, sculpture, and photography.

(8) Mathematical modeling in social sciences. The student applies mathematical processes to determine the number of elements in a finite sample space and compute the probability of an event. The student is expected to:

(A) determine the number of ways an event such as a sports tournament may occur using combinations, permutations, and the Fundamental Counting Principle;

(B) compare theoretical to empirical probability such as determining if a particular game of chance is fair; and

(C) use experiments to determine the reasonableness of a theoretical model such as binomial or geometric.

(9) Mathematical modeling in social sciences. The student applies mathematical processes and mathematical models to analyze data as it applies to social sciences. The student is expected to:

(A) interpret information from various graphs, including line graphs, bar graphs, circle graphs, histograms, scatterplots, dot plots, stem-and-leaf plots, and box and whisker plots, to draw conclusions from the data and determine the strengths and weaknesses of conclusions;

(B) analyze numerical data using measures of central tendency (mean, median, and mode) and variability (range, interquartile range or IQR, and standard deviation) in order to make inferences with normal distributions;

(C) distinguish the purposes and differences among types of research, including surveys, experiments, and observational studies;

(D) use data from a sample to estimate population mean or population proportion;

(E) analyze marketing claims based on graphs and statistics from electronic and print media and justify the validity of stated or implied conclusions; and

(F) use regression methods available through technology to model linear and exponential functions, interpret correlations, and make predictions.

(10) Mathematical modeling in social sciences. The student applies mathematical processes to design a study and use graphical, numerical, and analytical techniques to communicate the results of the study. The student is expected to:

(A) formulate a meaningful question, determine the data needed to answer the question, gather the appropriate data, analyze the data, and draw reasonable conclusions; and

(B) communicate methods used, analyses conducted, and conclusions drawn for a data-analysis project through the use of one or more of the following: a written report, a visual display, an oral report, or a multi-media presentation.

§111.44. Advanced Quantitative Reasoning, Adopted 2012 (One-Half to One Credit).

(a) General requirements. Students shall be awarded one-half to one credit for successful completion of this course. Prerequisites: Geometry and Algebra II.

(b) Introduction.

(1) The desire to achieve educational excellence is the driving force behind the Texas essential knowledge and skills for mathematics, guided by the college and career readiness standards. By embedding statistics, probability, and finance, while focusing on fluency and solid understanding, Texas will lead the way in mathematics education and prepare all Texas students for the challenges they will face in the 21st century.

(2) The process standards describe ways in which students are expected to engage in the content. The placement of the process standards at the beginning of the knowledge and skills listed for each grade and course is intentional. The process standards weave the other knowledge and skills together so that students may be successful problem solvers and use mathematics efficiently and effectively in daily life. The process standards are integrated at every grade level and course. When possible, students will apply mathematics to problems arising in everyday life, society, and the workplace. Students will use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution. Students will select appropriate tools such as real objects, manipulatives, paper and pencil, and technology and techniques such as mental math, estimation, and number sense to solve problems. Students will effectively communicate mathematical ideas, reasoning, and their implications using multiple representations such as symbols, diagrams, graphs, and language. Students will use mathematical relationships to generate solutions and make connections and predictions. Students will analyze mathematical relationships to connect and communicate mathematical ideas. Students will display, explain, or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(3) In Advanced Quantitative Reasoning, students will develop and apply skills necessary for college, careers, and life. Course content consists primarily of applications of high school mathematics concepts to prepare students to become well-educated and highly informed 21st century citizens. Students will develop and apply reasoning, planning, and communication to make decisions and solve problems in applied situations involving numerical reasoning, probability, statistical analysis, finance, mathematical selection, and modeling with algebra, geometry, trigonometry, and discrete mathematics.

(4) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(c) Knowledge and skills.

(1) Mathematical process standards. The student uses mathematical processes to acquire and demonstrate mathematical understanding. The student is expected to:

(A) apply mathematics to problems arising in everyday life, society, and the workplace;

(B) use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution;

(C) select tools, including real objects, manipulatives, paper and pencil, and technology as appropriate, and techniques, including mental math, estimation, and number sense as appropriate, to solve problems;

(D) communicate mathematical ideas, reasoning, and their implications using multiple representations, including symbols, diagrams, graphs, and language as appropriate;

(E) create and use representations to organize, record, and communicate mathematical ideas;

(F) analyze mathematical relationships to connect and communicate mathematical ideas; and

(G) display, explain, and justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(2) Numeric reasoning. The student applies the process standards in mathematics to generate new understandings by extending existing knowledge. The student generates new mathematical understandings through problems involving numerical data that arise in everyday life, society, and the workplace. The student extends existing knowledge and skills to analyze real-world situations. The student is expected to:

(A) use precision and accuracy in real-life situations related to measurement and significant figures;

(B) apply and analyze published ratings, weighted averages, and indices to make informed decisions;

(C) solve problems involving quantities that are not easily measured using proportionality such as packing problems, crowd estimation, and white blood cell count;

(D) solve geometric problems involving indirect measurement, including similar triangles, the Pythagorean Theorem, Law of Sines, Law of Cosines, and the use of dynamic geometry software;

(E) solve problems involving large quantities using combinatorics such as numbers of unique license plates and telephone numbers;

(F) use arrays to efficiently manage large collections of data and add, subtract, and multiply matrices to solve applied problems, including geometric transformations;

(G) analyze various voting and selection processes to compare results in given situations such as at-large versus single-member districts and plurality versus majority voting; and

(H) select and apply an algorithm of interest to solve real-life problems such as problems using recursion or iteration involving population growth or decline, fractals, and compound interest; the validity in recorded and transmitted data using checksums and hashing; sports rankings, weighted class rankings, and search engine rankings; and problems involving scheduling or routing situations using vertex-edge graphs, critical paths, Euler paths, and minimal spanning trees and communicate to peers the application of the algorithm in precise mathematical and nontechnical language.

(3) Algebraic reasoning (expressions, equations, and generalized relationships). The student applies the process standards in mathematics to create and analyze mathematical models of everyday situations to make informed decisions related to earning, investing, spending, and borrowing money by appropriate, proficient, and efficient use of tools, including technology. The student uses mathematical relationships to make connections and predictions. The student judges the validity of a prediction and uses mathematical models to represent, analyze, and solve dynamic real-world problems. The student is expected to:

(A) collect numerical bivariate data to create a scatterplot, select a function to model the data, justify the model selection, and use the model to interpret results and make predictions;

(B) describe the degree to which uncorrelated variables may or may not be related and analyze situations where correlated variables do or do not indicate a cause-and-effect relationship;

(C) determine or analyze an appropriate growth or decay model for problem situations, including linear, exponential, and logistic functions;

(D) determine or analyze an appropriate cyclical model for problem situations that can be modeled with periodic functions;

(E) determine or analyze an appropriate piecewise model for problem situations;

(F) create, represent, and analyze mathematical models for various types of income calculations to determine the best option for a given situation;

(G) create, represent, and analyze mathematical models for expenditures, including those involving credit, to determine the best option for a given situation; and

(H) create, represent, and analyze mathematical models and appropriate representations, including formulas and amortization tables, for various types of loans and investments to determine the best option for a given situation such as cell phone plans and buying versus leasing a car.

(4) Probabilistic and statistical reasoning. The student uses the process standards in mathematics to generate new understandings of probability and statistics. The student analyzes statistical information and evaluates risk and return to connect mathematical ideas and make informed decisions. The student applies a problem-solving model and statistical methods to design and conduct a study that addresses one or more particular question(s). The student uses multiple representations to communicate effectively the results of student-generated statistical studies and the critical analysis of published statistical studies. The student is expected to:

(A) use a two-way frequency table as a sample space to identify whether two events are independent and to interpret the results;

(B) use the Addition Rule, $P(A \text{ or } B) = P(A) + P(B) - P(A \text{ and } B)$, in mathematical and real-world problems;

(C) calculate conditional probabilities and probabilities of compound events using tree diagrams, Venn diagrams, area models, and formulas such as Bayes' Theorem;

(D) interpret conditional probabilities and probabilities of compound events by analyzing representations to make decisions in problem situations;

(E) use probabilities to make and justify decisions about risks in everyday life such as the lottery, weather forecasts, and insurance costs;

(F) calculate expected value to analyze mathematical fairness, payoff, and risk;

(G) determine the validity of logical arguments that include compound conditional statements by constructing truth tables;

(H) identify limitations and lack of relevant information in studies reporting statistical information, especially when studies are reported in condensed form;

(I) interpret and compare statistical results using appropriate technology given a margin of error in situations such as polls, quality control, and measurements;

(J) identify potential misuses of statistics to justify particular conclusions, including assertions of a cause-and-effect relationship rather than an association, and missteps or fallacies in logical reasoning such as confounding variables and hasty generalizations;

(K) describe strengths and weaknesses of sampling techniques, data and graphical displays, and interpretations of summary statistics and other results appearing in a study, including reports published in the media;

(L) determine the need for and purpose of a statistical investigation and what type of statistical analysis can be used to answer a specific question or set of questions;

(M) identify the population of interest for a statistical investigation, select an appropriate sampling technique, and collect data;

(N) identify the variables to be used in a study;

(O) determine possible sources of statistical bias in a study and how bias may affect the validity of the results;

(P) create data displays for given data sets to investigate, compare, and estimate center, shape, spread, and unusual features of the data;

(Q) analyze possible sources of data variability, including those that can be controlled and those that cannot be controlled;

(R) report results of statistical studies to a particular audience, including selecting an appropriate presentation format, creating graphical data displays, and interpreting results in terms of the question studied;

(S) justify the design and the conclusion(s) of statistical studies, including the methods used; and

(T) communicate statistical results in oral and written formats using appropriate statistical and nontechnical language.

§111.45. Independent Study in Mathematics, Adopted 2012 (One-Half to One Credit).

(a) General requirements.

(1) Students shall be awarded one-half to one credit for successful completion of this course. Prerequisites: Geometry and Algebra II.

(2) Students may repeat this course with different course content for up to three credits.

(3) The requirements for each course must be approved by the local district before the course begins.

(4) If this course is being used to satisfy requirements for the Distinguished Achievement Program, student research/products must be presented before a panel of professionals or approved by the student's mentor.

(b) Introduction.

(1) The desire to achieve educational excellence is the driving force behind the Texas essential knowledge and skills for mathematics, guided by the college and career readiness standards. By embedding statistics, probability, and finance, while focusing on fluency and solid understanding, Texas will lead the way in mathematics education and prepare all Texas students for the challenges they will face in the 21st century.

(2) The process standards describe ways in which students are expected to engage in the content. The placement of the process standards at the beginning of the knowledge and skills listed for each grade and course is intentional. The process standards weave the other knowledge and skills together so that students may be successful problem solvers and use mathematics efficiently and effectively in daily life. The process standards are integrated at every grade level and course. When possible, students will apply mathematics to problems arising in everyday life, society, and the workplace. Students will use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution. Students will select appropriate tools such as real objects, manipulatives, paper and pencil, and technology and techniques such as mental math, estimation, and number sense to solve problems. Students will effectively communicate mathematical ideas, reasoning, and their implications using multiple representations such as symbols, diagrams, graphs, and language. Students will use mathematical relationships to generate solutions and make connections and predictions. Students will analyze mathematical relationships to connect and communicate mathematical ideas. Students will display, explain, or justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

(3) In Independent Study in Mathematics, students will extend their mathematical understanding beyond the Algebra II level in a specific area or areas of mathematics such as theory of equations, number theory, non-Euclidean geometry, linear algebra, advanced survey of mathematics, or history of mathematics.

(4) Statements that contain the word "including" reference content that must be mastered, while those containing the phrase "such as" are intended as possible illustrative examples.

(c) Knowledge and skills: mathematical process standards. The student uses mathematical processes to acquire and demonstrate mathematical understanding. The student is expected to:

(1) apply mathematics to problems arising in everyday life, society, and the workplace;

(2) use a problem-solving model that incorporates analyzing given information, formulating a plan or strategy, determining a solution, justifying the solution, and evaluating the problem-solving process and the reasonableness of the solution;

(3) select tools, including real objects, manipulatives, paper and pencil, and technology as appropriate, and techniques, including mental math, estimation, and number sense as appropriate, to solve problems;

(4) communicate mathematical ideas, reasoning, and their implications using multiple representations, including symbols, diagrams, graphs, and language as appropriate;

(5) create and use representations to organize, record, and communicate mathematical ideas;

(6) analyze mathematical relationships to connect and communicate mathematical ideas; and

(7) display, explain, and justify mathematical ideas and arguments using precise mathematical language in written or oral communication.

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 February 13, 2012.

TRD-201200817
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 475-1497

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SUBCHAPTER D. OTHER HIGH SCHOOL MATHEMATICS COURSES

19 TAC §111.51, §111.59

The amendments are proposed under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to identify by rule the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate and that will be used in evaluating textbooks and addressed on the assessment instruments; and §28.025, which authorizes the SBOE to determine by rule curriculum requirements for the minimum, recommended, and advanced high school programs that are consistent with the required curriculum under §28.002.

The amendments implement the Texas Education Code, §§7.102(c)(4), 28.002, and 28.025.

§111.51. Implementation of Texas Essential Knowledge and Skills for Mathematics, Other High School Mathematics Courses.

The provisions of this subchapter shall be implemented by school districts [~~beginning September 1, 1998, and at that time shall supersede §75.63(o), (q) - (u), and (cc) of this title (relating to Mathematics)~~].

§111.59. IB Further Mathematics Higher [~~Standard~~] Level (One-Half to One Credit).

(a) General requirements. Students can be awarded one-half to one credit for successful completion of IB Further Mathematics Higher [~~Standard~~] Level. To offer this course, the district must meet all requirements of the International Baccalaureate Organization, including

teacher training/certification and IB assessment. Recommended prerequisite: IB Mathematics Higher Level.

(b) Content requirements. Content requirements for IB Further Mathematics Higher [~~Standard~~] Level are prescribed by the International Baccalaureate Organization. Curriculum guides may be obtained from International Baccalaureate of North America.

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 February 13, 2012.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 475-1497

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PART 8. WINDHAM SCHOOL DISTRICT

CHAPTER 300. GENERAL PROVISIONS

19 TAC §300.1

The Windham School District proposes amendments to 19 TAC §300.1, Public Presentations and Comments to the Windham School District Board of Trustees. The proposed amendments are necessary to conform to current style.

Linda Goerdel, Chief Financial Officer for the Windham School District, has determined that for 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.

Ms. Goerdel has also determined that there will not be an economic impact on persons required to comply with the rule. There will not be an effect on small or micro businesses. The anticipated public benefit, as a result of enforcing the rule, will be to provide access and opportunity for public presentations and comments to the Windham School District Board of Trustees.

Comments should be directed to Michael Mondville, General Counsel, Windham School District, P.O. Box 40, Huntsville, Texas 77342, michael.mondville@wsdtx.org. Written comments from the general public should be received within 30 days of the publication of this rule.

The amendments are proposed under Texas Government Code Chapter 551.

Cross Reference to Statutes: Texas Government Code Chapter 551.

§300.1. Public Presentations and Comments to the Windham School District Board of Trustees.

(a) Policy. The Windham School District (WSD) Board of Trustees (board [~~Board~~]) is committed to providing access and opportunity for public presentations and comments as provided for in this section [~~rule~~]. Persons not employed by or under contract with the WSD who wish to have items placed on the board's [~~Board~~] posted agenda, shall follow the procedures set forth in subsection (h) of this section [~~rule~~]. Public presentations and comments shall be:

(1) subject to the requirements and restrictions of subsections (b), (c), (d), (e), (f), and (g) of this section [~~rule~~];

(2) pertinent to issues under the jurisdiction of the board [~~Board~~], as determined by the board chairman [~~Board Chairman~~] and the WSD superintendent [~~Superintendent~~]; and

(3) pertinent to policies, procedures, standards, and rules of the WSD. Disputes that are appropriately the subject of the appeals process for contract non-renewal or employee termination, the employee grievance system, the employee disciplinary system, or comments regarding pending litigation shall be addressed through those processes.

(b) Definitions.

(1) Public presentations are [~~--~~] presentations made by the public to the board [~~Board~~] regarding topics posted on the board [~~Board~~] meeting agenda that has been filed with and published by the *Texas Register* and as provided for in subsection (c) of this section [~~rule~~].

(2) Public comments are [~~--~~] comments made by the public on non-posted board [~~Board~~] agenda topics and as provided for in subsection (d) of this section [~~rule~~].

(c) Public presentations. Persons who desire to make public presentations to the board [~~Board~~] on posted agenda topics shall provide, on the date of the meeting, a completed registration card to onsite board [~~Board~~] office staff at least 10 [~~ten (10)~~] minutes prior to the meeting's posted start time. Registration cards shall be made available at the entry to the room where the board's [~~Board's~~] scheduled meeting is held.

(1) Pre-registration is available for public presentations through first class mail at [~~(~~]P.O. Box 13084, Austin, Texas 78711[~~)~~] or e-mail at [~~email (~~]tbcj@tdcj.state.tx.us[~~)~~]. Pre-registration shall be received by the board [~~Board~~] office staff no later than four [~~(4)~~] calendar days prior to the posted meeting date of the presentation. In addition to the information required in subsection (c)(2) of this section, pre-registration submissions shall include appropriate contact information, such as a [~~(~~]daytime phone number [~~and/~~]or e-mail [~~email~~] address,[~~)~~] for the individual who is registering to speak.

(2) Registration cards and pre-registration submissions shall disclose:

(A) the name of the person who will make the presentation;

(B) a statement as to whether the person is being remunerated for the presentation and if so, by whom; and if applicable, the name of the person or entity on whose behalf the presentation will be made;

(C) a statement as to whether the presenter has registered as a lobbyist in relation to the agenda topic being addressed;

(D) a reference to the agenda topic on which the person wants [~~wishes~~] to present;

(E) an indication as to whether the presenter will speak for or against the proposed agenda topic; and

(F) a statement verifying that all information that will be presented is factual, true, and correct to the best of the speaker's knowledge.

(3) The board chairman [Board Chairman] shall have discretion in setting reasonable limits on the time allocated for public presentations on posted agenda topics. If several persons have registered to address the board [Board] on the same agenda topic, it shall be within the discretion of the board chairman [Board Chairman] to request that those persons [to] select a representative amongst themselves to express such remarks[,] or [to] limit their presentations to an expression of support for views previously articulated.

(4) The board chairman [Board Chairman] shall provide an opportunity for public presentations to occur prior to the board [Board] taking action on the topic denoted on the presenter's registration card. If a person who is registered to speak on a posted agenda item is not present when called upon, that person's opportunity to speak prior to action being taken on that [such] topic shall be forfeited.

(5) A presenter may submit documentation pertaining to the public presentation to the board [Board] office staff. Documents shall be submitted no later than three [(3)] calendar days prior to the posted meeting date where the presentation is to occur. Such documentation shall then be distributed to the board [Board]. Any documentation submitted after the above-referenced date will not be distributed to the board [Board] until after the presentation. A minimum of 12 copies of any such documentation shall be submitted to the board [Board] office staff or distribution may [will] not occur.

(d) Public comments.

(1) [The Board defines its areas of jurisdiction in BP-2.00, which is available through the Board office at the address listed in subsection (c) of this rule, or on the Internet at http://tdcj.state.tx.us/policy/policy-home.htm.] Twice a year, at the second and fourth regular called meetings of the board [Board], an opportunity shall be provided for public comment on issues that are not part of the board's [Board's] posted agenda but are within the board's [Board's] jurisdiction. Special called meetings are not counted toward [towards] the requirement of this subsection.

(2) Persons who desire to make public comments to the board [Board] at these meetings shall provide, on the date of the meeting, a completed registration card to onsite board [Board] office staff at least 10 [ten (10)] minutes prior to the meeting's posted start time. Registration cards shall be made available at the entry to the room where the board's [Board's] scheduled meeting is held.

(3) Pre-registration is available for public comments through first class mail at [(]P.O. Box 13084, Austin, Texas 78711[)] or e-mail at [email (]tbcj@tdcj.state.tx.us[)]. Pre-registration shall be received by the board [Board] office staff no earlier than the first day of the month preceding the board [Board] meeting for which the registration is intended and no later than four [(4)] calendar days prior to the posted meeting date where the comments are to occur. In addition to the information required in subsection (d)(4) of this section, pre-registration submissions shall include appropriate contact information, such as a [(]daytime phone number [and/]or e-mail [email] address,[)] for the individual who is registering to speak.

(4) Registration cards and pre-registration submissions shall disclose:

(A) the name of the person who will make the comments;

(B) a statement as to whether the person is being remunerated for the comments and if so, by whom; and, if applicable, the name of the person or entity on whose behalf the comments will be made;

(C) a statement as to whether the presenter has registered as a lobbyist in relation to the topic being addressed;

(D) the topic on which the person shall speak and whether the person will speak for or against the topic; and

(E) a statement verifying that all information that will be presented is factual, true, and correct to the best of the speaker's knowledge.

(5) The board chairman [Board Chairman] shall have discretion in setting reasonable limits on the time allocated for public comments. If several persons have registered to address the board [Board] on the same topic, it shall be within the discretion of the board chairman [Board Chairman] to request that those persons select a representative amongst themselves to express such comments, or limit their comments to an expression of support for views previously articulated.

(6) Public comments shall be heard just prior to the conclusion of the board [Board] meeting, with deviation from this practice within the discretion of the board chairman [Board Chairman]. If a person who is registered to speak on a non-posted topic is not present when called upon, that person shall be called once more following all other registered speakers. If that person is not present at that time, their opportunity to speak at that meeting shall be forfeited.

(7) A presenter [Presenters] may submit documentation pertaining to the public comments to the board [Board] office staff. Documentation shall be submitted no later than three [(3)] calendar days prior to the posted meeting date where the comments are to occur. Such documentation shall then be distributed to the board [Board]. Any documentation submitted after the above-referenced date will not be distributed to the board [Board] until after the comments. A minimum of 12 copies of any such documentation shall be submitted to the board [Board] office staff or distribution may [will] not occur.

(e) Disability accommodations. Persons with disabilities who have special communication or accommodation needs and who plan to attend a meeting may contact the board [Board] office at 512- [(512)] 475-3250. Requests for accommodations shall be made at least two [(2)] calendar days prior to a posted meeting. The board [Board] shall make every reasonable effort to accommodate these needs.

(f) Conduct and decorum. The board [Board] shall receive public presentations and comments as authorized by this section, [rule,] subject to the following additional guidelines:

(1) Due to requirements of the *Open Meetings Act,* questions shall only occur on public presentations as defined in subsection (b) of this section as they [herein (not as to public comments as defined herein) that] are associated with posted agenda topics. Questions [and they] shall be reserved for board [Board] members and staff recognized by the board chairman. [Board Chairman;]

(2) Presentations and comments shall remain pertinent to the issues denoted on the registration cards. [;]

(3) A presenter who is determined by the board chairman [Board Chairman] to be disrupting a meeting shall immediately cease the disruptive activity or leave the meeting room if ordered to do so by the board chairman. [Board Chairman; and]

(4) A presenter may not assign a portion of his or her allotted presentation time to another speaker.

(5) Signs and placards shall not be carried or displayed in the meeting room.

(g) A presenter may not carry or possess a prohibited weapon, [(]as defined in Texas Penal Code §46.05, [Section 46.05, Texas Penal

Code),] an illegal knife, a club, or a handgun, to include a licensed concealed handgun, during any meeting of the board [Board].

(h) Requests for issues to be placed on an agenda. Persons not employed by or under contract with the WSD who wish to propose an agenda item for discussion at [on] a board [Board] meeting shall address the request in writing to the chairman, [Chairman,] Windham School District Board of Trustees, P.O. Box 13084, Austin, Texas 78711. Such requests shall be titled, "Proposed Agenda Topic" and shall be submitted no later than the first day of the month preceding the board [Board] meeting for which the request is intended. Such requests are subject to the requirements of the registration card in subsection (c) of this section [rule]. The decision as to whether to calendar a matter for discussion before the board, [Board] a board [Board] committee, a board [Board] liaison, or with a designated staff member shall be within the discretion of the board chairman [Board Chairman]. Public presentations on topics placed on a board [Board] agenda, at the request of an individual, shall be in accordance with subsection (c) of this section [rule].

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 February 13, 2012.

TRD-201200797
Michael Mondville
General Counsel
Windham School District
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 463-9693

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19 TAC §300.2

The Windham School District proposes amendments to 19 TAC §300.2, Windham School District Board of Trustees Operating Procedures. The proposed amendments are necessary for clarification and to conform to current style.

Linda Goerdel, Chief Financial Officer for the Windham School District, has determined that for 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.

Ms. Goerdel has also determined that there will not be an economic impact on persons required to comply with the rule. There will not be an effect on small or micro businesses. The anticipated public benefit, as a result of enforcing the rule, will be to establish operating procedures for the Windham School District Board of Trustees to conduct business.

Comments should be directed to Michael Mondville, General Counsel, Windham School District, P.O. Box 40, Huntsville, Texas 77342, michael.mondville@wsdtx.org. Written comments from the general public should be received within 30 days of the publication of this rule.

The amendments are proposed under Texas Government Code Chapter 551.

Cross Reference to Statutes: Texas Government Code Chapter 551.

§300.2. Windham School District Board of Trustees Operating Procedures.

(a) General. This section establishes operating procedures for the Windham School District (WSD) Board of Trustees (board) to conduct business.

(b) Organization.

(1) The Texas Board of Criminal Justice (TBCJ) serves as the WSD board [Board of Trustees (WSD Board)], pursuant to Chapter 19, Texas Education Code. The TBCJ is a nine [(9)-] member body appointed by the governor [Governor] to oversee the Texas Department of Criminal Justice (TDCJ [or Agency]). The TBCJ chairman [Chairman], who serves as the board chairman [WSD Board Chairman], is designated by and serves at the request [pleasure] of the governor [Governor] pursuant to [Section 492.005,] Texas Government Code §492.005.

(2) The board [WSD Board] operates utilizing the same officers and structure established by the TBCJ.

(3) The chairman, on behalf of the board, is empowered to appoint members of the board to be members or chairs of standing or limited-purpose committees, or to serve as liaisons to the WSD on particular subject areas within WSD's jurisdiction. The purpose of a committee, if appointed, is to have certain members become particularly familiar with various issues and to facilitate discussion and recommend potential strategies as appropriate.

[(3) The TBCJ Education Committee shall provide WSD one (1) reporting avenue to the WSD Board. The TBCJ Education Committee shall operate in accordance with TBCJ practices pursuant to Title 37, Part 6, Texas Administrative Code, Section 151.3.]

(c) Meetings.

(1) The board [WSD Board] shall hold its regular meetings in conjunction with those of the TBCJ. Special called meetings of the board [WSD Board] can be held at the discretion of the board chairman [WSD Board Chairman].

(2) The TBCJ and the board [WSD Board] shall attempt to hold regular meetings at least every other [odd-numbered] month of the year, but shall meet at least once each quarter of the calendar year pursuant to [Section 492.006,] Texas Government Code §492.006. These meetings shall be held in Austin[, Texas, or under exceptional circumstances in] or Huntsville, Texas[, pursuant to the General Appropriations Act]. If the board [WSD Board] uses video conference technology to convene a meeting, at least one conference site must be located in Huntsville or Austin. To convene a video conference meeting, a quorum of the board must be present at one of the video conference sites [at least three (3) members shall convene at the Austin video conference site, or under exceptional circumstances, the Huntsville video conference site]. The other members may convene using the technology from remote sites.

(3) The agenda and date for the board [WSD Board] meetings shall be set by the board chairman in consultation with the WSD superintendent [WSD Board Chairman].

(4) The agenda for committee meetings shall be set by the board chairman in consultation with the committee's chairman and the WSD superintendent. If the board committee uses video conference technology to convene a meeting, at least a quorum of the committee shall convene in one location. The other member(s) may convene using the technology from remote sites.

(5) [(4)] A majority of the board, or a committee of the board, [WSD Board] constitutes a quorum for the convening of and

transaction of business at any meeting. A quorum of a committee with two members consists of both members.

(6) [~~(5)~~] Meetings of the board [~~WSD Board~~] shall be conducted according to standard parliamentary procedures.

(7) [~~(6)~~] Meetings of the board [~~WSD Board~~] are governed by the *Texas Open Meetings Act* (Texas Government Code[~~,~~] Chapter 551).

(8) [~~(7)~~] The WSD superintendent, [~~Superintendent,~~] in coordination with appropriate TDCJ staff, shall ensure members are provided the materials necessary to conduct the business of the board and its committees [~~WSD Board~~] well in advance of the meetings.

(9) [~~(8)~~] The WSD superintendent, [~~Superintendent,~~] in coordination with appropriate TDCJ staff, shall ensure the minutes of each meeting are prepared, retained and filed with the Legislative Reference Library, and made available to the public. The minutes shall state the subject matter of each deliberation and shall indicate each vote, order, decision, or other action taken by the board [~~WSD Board~~].

(10) [~~(9)~~] Requests by the public to make presentations or comments to the board [~~WSD Board~~] are governed by 19 Texas Administrative Code §300.1 [~~Section 300.1 of this title~~], pursuant to [~~Section 551.042,~~] Texas Government Code §551.042.

(11) The board shall approve meeting minutes for any committees deleted, renamed, or for which their limited purpose has concluded.

(12) Prior to each regularly scheduled meeting, the board shall offer the opportunity for:

(A) The WSD superintendent to present any items relating to the WSD as determined by the superintendent or the board chairman.

(B) The board chairman to present any items relating to the board or the WSD as determined by the board chairman in consultation with the WSD superintendent.

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 February 13, 2012.

TRD-201200798
Michael Mondville
General Counsel
Windham School District
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 463-9693

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 99. OCCUPATIONAL DISEASES

25 TAC §99.1

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes an amendment to §99.1, concerning the reporting and control of occupational conditions.

BACKGROUND AND PURPOSE

The amended section complies with Health and Safety Code, Chapter 84, which requires the department to adopt a rule concerning the reporting and control of occupational conditions or diseases which are caused by or are related to exposures in the workplace. The reportable occupational conditions are asbestos, silicosis, blood lead levels in persons 15 years of age or older, and acute pesticide poisoning.

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 99.1 has been reviewed and the department has determined that reasons for adopting the section continue to exist because a rule on this subject is needed.

SECTION-BY-SECTION SUMMARY

The amendments to §99.1 update unit and section names to reflect the department's reorganization of division operations. The department's mailing address is corrected to a P.O. Box address and the delivery "by courier" is deleted. Also, the department's Pesticide Poisoning Report form number has been revised.

FISCAL NOTE

Lucina Suarez, Ph.D., Director, Environmental Epidemiology and Disease Registries Section, has determined that for each year of the first five years that the section will be in effect, there will be no fiscal implications to the state or local governments as a result of enforcing or administering the section as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Dr. Suarez has determined that there will be no adverse impact on small businesses or micro-businesses required to comply with the section as proposed because their business practices will not be altered.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

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

PUBLIC BENEFIT

In addition, Dr. Suarez also has determined that for each year of the first five years the section is in effect, the public will benefit from the adoption of the section as proposed by eliminating possible confusion caused by outdated information in the rule.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Susan L. Prosperie, Environmental and Injury Epidemiology and Toxicology Unit, Environmental Epidemiology and Disease Registries Section, Division for Prevention and Preparedness, Department of State Health Services, Mail Code 1964, P.O. Box 149347, Austin, Texas 78714-9347, (512) 776-7269 or by email to susan.prosperie@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

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

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, §84.003, which requires rules on the reporting of occupational conditions, and §84.004 which requires the department to prescribe the form and method of reporting; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the rule implements Government Code, §2001.039.

The amendment affects the Health and Safety Code, Chapters 84 and 1001; and Government Code, Chapter 531.

§99.1. General Provisions.

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

(c) Reporting requirements.

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

(4) The local health authority shall collect the reports and transmit the information at weekly intervals to the Environmental and Injury Epidemiology and Toxicology Unit [~~Branch~~], Environmental Epidemiology and Disease Registries Section [~~Surveillance Unit~~], Department of State Health Services, Mail Code 1964, P.O. Box 149347, Austin, Texas, 78714-9347 [~~1100 West 49th Street, Austin, Texas 78756~~]. Transmission may be made by mail[~~, courier,~~] or electronic transfer.

(A) If by mail [~~or courier,~~] the reports shall be placed in a sealed envelope addressed to the attention of the Environmental and Injury Epidemiology and Toxicology Unit [~~Branch~~], Environmental Epidemiology and Disease Registries Section [~~Surveillance Unit~~], Department of State Health Services, Mail Code 1964, P.O. Box 149347, Austin, Texas, 78714-9347 [~~1100 West 49th Street, Austin, Texas 78756~~], and marked "Confidential Medical Records."

(B) (No change.)

(5) (No change.)

(d) Reportable conditions and information to be reported.

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

(4) Reports for acute pesticide poisoning shall include all information collected by the reporting person and required to complete the most recent version of the department's Pesticide Poisoning Report Form EF09-11927 [~~F09-11625~~].

(e) - (f) (No change.)

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

Filed with the Office of the Secretary of State on February 10, 2012.

TRD-201200769
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 776-6972

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CHAPTER 441. GENERAL PROVISIONS SUBCHAPTER D. MEASURING THE EFFECTIVENESS OF THE STATE'S SUBSTANCE ABUSE PREVENTION SERVICES

25 TAC §441.401

(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 Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §441.401, concerning measuring the effectiveness of the state's substance abuse prevention services.

BACKGROUND AND PURPOSE

The repeals in Chapters 441, 447, and 448, and new sections in Chapter 447 are necessary to implement the primary prevention strategies set forth in 45 Code of Federal Regulations (CFR), §96.125; prescribe standards for measuring the effectiveness of state-funded prevention programs and annual reporting requirements from House Bill 3126, 76th Legislature, Regular Session, 1999; and establish requirements and standards for department-funded contractors providing substance abuse services. The rules proposed for repeal were formerly under the Texas Commission on Drugs and Alcohol and was transferred and consolidated with the department on September 1, 2004. The proposed repeals will remove duplication and unnecessary rules from the department's rule base.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 441.401, 447.101 - 447.116, 447.201 - 447.204, 447.301 - 447.304, 447.401, 447.402, 447.501, 447.502, 447.601 - 447.604, 447.701, and

448.301 have been reviewed and the department has determined that reasons for adopting some of the sections continue to exist because rules on this subject are needed. Separate rulemaking actions for Chapters 447 and 448 are published in this issue of the *Texas Register.*

SECTION-BY-SECTION SUMMARY

The repeal of §441.401, concerning interagency agreement, allows the consolidation of rules concerning the standards of care concerning substance abuse prevention, intervention, and treatment services into one chapter at 25 TAC Chapter 447.

FISCAL NOTE

Mike Maples, Assistant Commissioner for Mental Health and Substance Abuse Services, has determined that for each year of the first five years that the repeal will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the repeal as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Maples, as required by Government Code, §2006.002, Agency Actions Affecting Small Businesses, Adoption of Rules with Adverse Economic Effect, has also determined that the proposed repeal will not have an adverse economic effect on small or micro-businesses. Under the terms of the grant that funds substance abuse prevention and intervention services contracts, no contractor may be a for-profit entity. Therefore, no person or entity funded by the grant meets the statutory definition of small or micro-business. Although, there are some substance abuse treatment contractors that are for-profit entities that are funded with general revenue and may meet the definition of small or micro-business, the department has not added any requirements that would result in additional costs to small or micro-businesses.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

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

PUBLIC BENEFIT

In addition, Mr. Maples has determined that for each year of the first five years the repeal is in effect, the public will benefit from adoption of the repeal. The public benefit anticipated as a result of enforcing or administering the repeal and new sections is to protect the health and safety of people receiving substance abuse services and their families, as well as provide consistent evidence-based strategies for all contractors providing department-funded substance abuse services.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Laura Czepiel, Mental Health Substance Abuse Program, Department of State Health Services, Mail Code 2018, P.O. Box 149347, Austin, Texas 78714-9347, or by email to mhsarules@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

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

STATUTORY AUTHORITY

The repeal is authorized by Health and Safety Code, §461.0128, that requires the department to develop and adopt rules for model program standards for substance abuse services for use by each agency that provides or pays for substance abuse services; House Bill 3126, 76th Texas Legislature, 1999, requires the department, among other agencies, to establish by rule a uniform set of criteria for evaluating the effectiveness of a drug abuse prevention program; 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. Review of the rule implements Government Code, §2001.039.

The repeal affects the Health and Safety Code, Chapters 461 and 1001; and Government Code, Chapter 531.

§441.401. Interagency 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 February 13, 2012.

TRD-201200819
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 776-6972

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CHAPTER 447. CONTRACT PROGRAM REQUIREMENTS

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §§447.101 - 447.116, 447.201 - 447.204, 447.301 - 447.304, 447.401, 447.402, 447.501, 447.502, 447.601 - 447.604, and 447.701, concerning

contract program requirements; and new §§447.101 - 447.105, 447.201 - 447.204, and 447.301 - 447.304, concerning department-funded substance abuse prevention, intervention and treatment services. The name of Chapter 447 will change from "Contract Program Requirements" to "Department-Funded Substance Abuse Programs."

BACKGROUND AND PURPOSE

The repeals in Chapters 441, 447, and 448; and new sections in Chapter 447 are necessary to implement the primary prevention strategies set forth in 45 Code of Federal Regulations (CFR), §96.125; prescribe standards for measuring the effectiveness of state-funded prevention programs and annual reporting requirements from House Bill 3126, 76th Legislature, Regular Session, 1999; and establish requirements and standards for department-funded contractors providing substance abuse services. The rules proposed for repeal were formerly under the Texas Commission on Drugs and Alcohol and were transferred and consolidated with the department on September 1, 2004. The proposed repeals will remove duplication and unnecessary rules from the department's rule base.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 441.401, 447.101 - 447.116, 447.201 - 447.204, 447.301 - 447.304, 447.401, 447.402, 447.501, 447.502, 447.601 - 447.604, 447.701, and 448.301 have been reviewed and the department has determined that reasons for adopting some of the sections continue to exist because rules on this subject are needed. Separate rulemaking actions for Chapters 441 and 448 are published in this issue of the *Texas Register.*

SECTION-BY-SECTION SUMMARY

The repeal of §§447.101 - 447.116, 447.201 - 447.204, 447.301 - 447.304, 447.401, 447.402, 447.501, 447.502, 447.601 - 447.604, and 447.701, allows the consolidation of rules concerning the standards of care concerning substance abuse prevention, intervention, and treatment services into one chapter at 25 TAC Chapter 447.

New §447.101 sets forth that the purpose of this subchapter is to specify the requirements for department-funded prevention services providers to implement the primary prevention strategies set forth in 45 CFR, §96.125, and to establish criteria for measuring the effectiveness of state agency-funded substance abuse prevention services providers.

New §447.102 sets forth that the subchapter applies to providers of department-funded services for the prevention of substance abuse.

New §447.103 sets forth new definitions, relating to prevention services, for the terms "ATOD," "department," "participant," "protective factors," "risk factors," and "substance abuse prevention program provider."

New §447.104 sets forth program descriptions for universal, selective and indicated prevention programs, community coalition partnership programs, and prevention resource center programs. The primary prevention programs include activities and strategies appropriate for the target group that are provided in a variety of settings for both the general population, as well as targeted sub-groups who are at high risk for substance abuse.

New §447.105 implements the requirement in House Bill 3126, 76th Legislature, Regular Session, 1999, for the department, Texas Juvenile Probation Commission, Texas Youth Commission, and Department of Protective and Regulatory Services to agree to measures for determining state-funded providers' effectiveness in providing substance abuse prevention services and to require those providers to report annually. On September 1, 2004, the Department of Protective and Regulatory Services transferred to the Department of Family and Protective Services. As of December 1, 2011, the Texas Juvenile Probation Commission and the Texas Youth Commission merged into the new agency named the Texas Juvenile Justice Department as a result of Senate Bill 653, 82nd Legislature, Regular Session, 2011, which added Title 12 to the Human Resources Code.

New §447.201 sets forth the purpose of the subchapter, which is to describe program services and requirements for all department-funded substance abuse intervention programs.

New §447.202 specifies that the subchapter applies to contractors providing department-funded intervention services.

New §447.203 sets forth new definitions, relating to intervention services, for the terms "behavioral health services," "brief intervention," "case management," "colonias," "contract," "department," "indicated target population," "outreach," "program provider," "protocol-based counseling," "referral," "rural border," "screening," "selective target population," and "service coordination."

New §447.204 sets forth program descriptions for rural border intervention services, human immunodeficiency virus (HIV) outreach services; HIV early intervention services; pregnant and postpartum intervention services; and outreach, screening, assessment and referral services.

New §447.301 sets forth the purpose of the subchapter, which is to describe the program services and requirements for department-funded substance abuse treatment programs and providers.

New §447.302 specifies that the subchapter applies to providers of department-funded treatment services.

New §447.303 sets forth new definitions, relating to treatment services, for the terms "contract," "case management," "department," "medication-assisted therapies," "program provider," and "substance use disorder."

New §447.304 sets forth program descriptions for adult services programs, youth services programs, pregnant and parenting women services programs, and persons with co-occurring psychiatric and substance use disorders services programs.

FISCAL NOTE

Mike Maples, Assistant Commissioner for Mental Health and Substance Abuse Services, has determined that for each year of the first five years that the repeals and new sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the repeals and new sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Maples, as required by Government Code, §2006.002, Agency Actions Affecting Small Businesses, Adoption of Rules with Adverse Economic Effect, has also determined that the proposed repeals and new rules will not have an adverse economic effect on small or micro-businesses. Under the

terms of the grant that funds substance abuse prevention and intervention services contracts, no contractor may be a for-profit entity. Therefore, no person or entity funded by the grant meets the statutory definition of small or micro-business. Although, there are some substance abuse treatment contractors that are for-profit entities that are funded with general revenue and may meet the definition of small or micro-business, the department has not added any requirements that would result in additional costs to small or micro-businesses.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

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

PUBLIC BENEFIT

In addition, Mr. Maples has determined that for each year of the first five years the repeals and new sections are in effect, the public will benefit from adoption of the proposal. The public benefit anticipated as a result of enforcing or administering the repeals and new sections is to protect the health and safety of people receiving substance abuse services and their families, as well as provide consistent evidence-based strategies for all contractors providing department-funded substance abuse services.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed repeals and new rules do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Laura Czepiel, Mental Health Substance Abuse Program, Department of State Health Services, Mail Code 2018, P.O. Box 149347, Austin, Texas 78714-9347, or by email to mhsarules@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

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

SUBCHAPTER A. PREVENTION AND INTERVENTION

25 TAC §§447.101 - 447.116

(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 Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §461.0128, that requires the department to develop and adopt rules for model program standards for substance abuse services for use by each agency that provides or pays for substance abuse services; House Bill 3126, 76th Texas Legislature, 1999, requires the department, among other agencies, to establish by rule a uniform set of criteria for evaluating the effectiveness of a drug abuse prevention program; 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. Review of the rules implements Government Code, §2001.039.

The repeals affect the Health and Safety Code, Chapters 461 and 1001; and Government Code, Chapter 531.

§447.101. Applicability and Definitions.
§447.102. Youth Prevention Programs.
§447.103. Program Design and Implementation.
§447.104. Key Performance and Activity Measures.
§447.105. Performance Measure Review.
§447.106. Staff Training.
§447.107. Information Dissemination.
§447.108. Prevention Education and Skills Training.
§447.109. Alternative Activities.
§447.110. Problem Identification and Referral.
§447.111. Community-Based Process.
§447.112. Environmental and Social Policy.
§447.113. Intervention Services.
§447.114. Community Coalitions.
§447.115. Prevention Resource Centers.
§447.116. Pregnant and Parenting Adult and Adolescent Female Prevention Services.

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

Filed with the Office of the Secretary of State on February 13, 2012.

TRD-201200852
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 776-6972

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SUBCHAPTER B. STANDARDS OF CARE FOR HIV PROGRAMMING

25 TAC §§447.201 - 447.204

(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 Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §461.0128, that requires the department to develop and adopt rules for model program standards for substance abuse services for use by each agency that provides or pays for substance abuse services; House Bill 3126, 76th Texas Legislature, 1999, requires the department, among other agencies, to establish by rule a uniform set of criteria for evaluating the effectiveness of a drug abuse prevention program; 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. Review of the rules implements Government Code, §2001.039.

The repeals affect the Health and Safety Code, Chapters 461 and 1001; and Government Code, Chapter 531.

§447.201. Applicability.

§447.202. HIV Required Services.

§447.203. Minimum Operational Requirements for HIV Outreach Programs.

§447.204. Minimum Operational Requirements for HIV Early Intervention (HEI) Programs.

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 February 13, 2012.

TRD-201200841
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 776-6972

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SUBCHAPTER C. NARCOTIC TREATMENT PROGRAMS PROVIDING PHARMACOTHERAPY SERVICES

25 TAC §§447.301 - 447.304

(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 Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §461.0128, that requires the department to develop and adopt rules for model program standards for substance abuse services for use by each agency that provides or pays for substance abuse services; House Bill 3126, 76th Texas Legislature, 1999, requires the department, among other agencies, to establish by rule a uniform set of criteria for evaluating the effectiveness of a drug abuse prevention program; 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. Review of the rules implements Government Code, §2001.039.

The repeals affect the Health and Safety Code, Chapters 461 and 1001; and Government Code, Chapter 531.

§447.301. Applicability.

§447.302. Program Objectives.

§447.303. Required Services.

§447.304. Minimum Operational Requirements.

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

Filed with the Office of the Secretary of State on February 13, 2012.

TRD-201200842
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 776-6972

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SUBCHAPTER D. OUTREACH, SCREENING, ASSESSMENT AND REFERRAL (OSAR) SERVICES

25 TAC §447.401, §447.402

(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 Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §461.0128, that requires the department to develop and adopt rules for model program standards for substance abuse services for use by each agency that provides or pays for substance abuse services; House Bill 3126, 76th Texas Legislature, 1999, requires the department, among other agencies, to establish by rule a uniform set of criteria for evaluating the effectiveness of a drug abuse prevention program; 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. Review of the rules implements Government Code, §2001.039.

The repeals affect the Health and Safety Code, Chapters 461 and 1001; and Government Code, Chapter 531.

§447.401. Applicability.

§447.402. Standards for OSAR Service Provision.

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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Lisa Hernandez
General Counsel
Department of State Health Services
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SUBCHAPTER E. TREATMENT PERFORMANCE STANDARDS

25 TAC §447.501, §447.502

(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 Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §461.0128, that requires the department to develop and adopt rules for model program standards for substance abuse services for use by each agency that provides or pays for substance abuse services; House Bill 3126, 76th Texas Legislature, 1999, requires the department, among other agencies, to establish by rule a uniform set of criteria for evaluating the effectiveness of a drug abuse prevention program; 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. Review of the rules implements Government Code, §2001.039.

The repeals affect the Health and Safety Code, Chapters 461 and 1001; and Government Code, Chapter 531.

§447.501. Applicability.

§447.502. Select Performance Measure 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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SUBCHAPTER F. TREATMENT FOR PREGNANT AND POST PARTUM WOMEN WITH DEPENDENT CHILDREN

25 TAC §§447.601 - 447.604

(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 Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

STATUTORY AUTHORITY

The repeals are authorized by Health and Safety Code, §461.0128, that requires the department to develop and adopt rules for model program standards for substance abuse services for use by each agency that provides or pays for substance abuse services; House Bill 3126, 76th Texas Legislature, 1999, requires the department, among other agencies, to establish by rule a uniform set of criteria for evaluating the effectiveness of a drug abuse prevention program; 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. Review of the rules implements Government Code, §2001.039.

The repeals affect the Health and Safety Code, Chapters 461 and 1001; and Government Code, Chapter 531.

§447.601. Applicability.

§447.602. Purpose of Program.

§447.603. Availability of Services.

§447.604. Individualized Plan of Services.

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

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SUBCHAPTER G. CAPACITY MANAGEMENT AND INTERIM SERVICES

25 TAC §447.701

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The repeal is authorized by Health and Safety Code, §461.0128, that requires the department to develop and adopt rules for

model program standards for substance abuse services for use by each agency that provides or pays for substance abuse services; House Bill 3126, 76th Texas Legislature, 1999, requires the department, among other agencies, to establish by rule a uniform set of criteria for evaluating the effectiveness of a drug abuse prevention program; 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. Review of the rule implements Government Code, §2001.039.

The repeal affects the Health and Safety Code, Chapters 461 and 1001; and Government Code, Chapter 531.

§447.701. Waiting List and Interim Services.

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

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CHAPTER 447. DEPARTMENT-FUNDED SUBSTANCE ABUSE PROGRAMS
SUBCHAPTER A. PREVENTION

25 TAC §§447.101 - 447.105

The new sections are authorized by Health and Safety Code, §461.0128, that requires the department to develop and adopt rules for model program standards for substance abuse services for use by each agency that provides or pays for substance abuse services; House Bill 3126, 76th Texas Legislature, 1999, requires the department, among other agencies, to establish by rule a uniform set of criteria for evaluating the effectiveness of a drug abuse prevention program; 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. Review of the rules implements Government Code, §2001.039.

The new sections affect the Health and Safety Code, Chapters 461 and 1001; and Government Code, Chapter 531.

§447.101. Purpose.

The purpose of this subchapter is to specify the requirements for department-funded prevention services providers to implement the primary prevention strategies set forth in 45 Code of Federal Regulations (CFR), §96.125, and to establish criteria for measuring the effectiveness of state agency-funded substance abuse preventions providers. In this subchapter, the term "prevention services" includes prevention activities.

§447.102. Application.

This subchapter applies to providers of department-funded services for the prevention of substance abuse.

§447.103. Definitions.

The following words and phrases when used in this subchapter shall have the following meanings unless the context clearly indicates otherwise.

(1) ATOD--Alcohol, tobacco, and/or other drugs.

(2) Department--The Department of State Health Services.

(3) Participant--A person receiving substance abuse prevention services funded by a state agency.

(4) Protective factors--Elements that serve to reduce the influence of risk factors and may have a positive effect on a person, group, or geographic area, thereby building resilience and decreasing the likelihood for developing risky behaviors that could lead to a substance abuse problem; e.g., parent or guardian involvement or safe living environment.

(5) Risk factors--Elements that may have a negative effect on a person, group, or geographic area, thereby increasing the likelihood for developing risky behaviors that could lead to a substance abuse problem; e.g., living in a high crime or gang area, family history of ATOD problems, lack of a supportive adult, or poor academic performance.

(6) Substance abuse prevention program provider--A person or entity who contracts with a state agency listed in §447.105 of this title (relating to Interagency Collaboration and Reporting) to provide substance abuse prevention services.

§447.104. Program Description.

A comprehensive prevention program includes a broad array of prevention strategies directed at individuals who have not been identified as needing treatment for substance abuse. The comprehensive prevention programs shall include activities and strategies appropriate for the target group and are provided in a variety of settings for both the general population, as well as targeted sub-groups who are at high risk for substance abuse.

(1) Universal Prevention. Universal prevention programs promote a proactive process that addresses the health and wellness of individuals, families, and communities by enhancing their protective factors. Services are designed to deter the use of ATOD and to foster the development of social and physical environments that facilitate healthy ATOD-free lifestyles. This program type is designed to target a very large audience or population, such as community, school or neighborhood that has not been identified on the basis of individual risk. The required strategies are as follows:

(A) information dissemination;

(B) education;

(C) alternative activities;

(D) problem identification and referral;

(E) community-based process; and

(F) environmental, as defined in 42 CFR, §96.125(b).

(2) Selective Prevention. Selective prevention programs promote a proactive process to address and promote the health and wellness of individuals, families, and communities by enhancing protective factors and by averting factors that place an individual at risk for

substance abuse. Services target individuals or subgroups of the general population who are determined to be at risk for substance abuse, such as children of substance abusers. This program type is designed to target individuals whose risk of developing a substance use or abuse disorder is significantly higher than average. The required strategies are as follows:

(A) information dissemination;

(B) education;

(C) alternative activities;

(D) problem identification and referral;

(E) community-based process; and

(F) environmental, as defined in 42 CFR, §96.125(b).

(3) Indicated Prevention. Indicated prevention programs identify individuals who are experiencing early signs of substance abuse and other related problem behaviors associated with substance abuse. These individuals have not reached the point where a clinical diagnosis of substance abuse can be made. This program type is designed to target youth who are showing early warning signs of substance use, such as experimenting or abuse, and/or exhibiting other problem behaviors that may lead to substance use or abuse if not addressed. The required strategies are as follows:

(A) information dissemination;

(B) education;

(C) alternative activities;

(D) problem identification and referral;

(E) community-based process; and

(F) environmental, as defined in 42 CFR, §96.125(b).

(4) Community Coalition Partnership. A community coalition partnership is a collaborative partnership of individuals and/or organizations that strives to prevent and reduce illegal and harmful use of ATOD by implementing community- and evidence-based environmental prevention strategies designed to affect the social, cultural, political, and economic processes of communities. The required strategies are as follows:

(A) information dissemination;

(B) community-based process; and

(C) environmental, as defined in 42 CFR, §96.125(b).

(5) Prevention Resource Center (PRC). A prevention resource center is a regional prevention education materials clearinghouse, book and video lending library, and regional prevention training coordinating entity within each of the eleven Health and Human Services Commission's public health regions. The required strategies are as follows:

(A) information dissemination;

(B) community-based process; and

(C) environmental, as defined in 42 CFR, §96.125(b).

§447.105. Interagency Collaboration and Reporting.

(a) The department, the Texas Juvenile Justice Department, and the Department of Family and Protective Services have agreed on the following criteria as measures of the effectiveness of substance abuse prevention program providers' programs. In accordance with House Bill 3126, 76th Texas Legislature, Regular Session, 1999, all state agency-funded substance abuse prevention program providers shall:

(1) target problems that are specific to a given community or school.

(A) The substance abuse prevention program provider shall determine what population(s) the substance abuse prevention program provider's program is designed to serve: universal, selective or indicated.

(i) Universal substance abuse prevention program providers reach the general population (such as all students in a school).

(ii) Selective substance abuse prevention program providers target a subset of the general population that is at high risk for substance abuse (such as children of substance users).

(iii) Indicated substance abuse prevention program providers target those who may already be experimenting with substances or who exhibit other related problem behaviors associated with substance abuse.

(B) The substance abuse prevention program provider shall identify and describe the primary and secondary target populations including specific information about:

(i) age, gender, and ethnicity;

(ii) risk and protective factors;

(iii) patterns of substance use;

(iv) social and cultural characteristics;

(v) knowledge, beliefs, values, and attitudes; and

(vi) linguistic needs.

(C) The substance abuse prevention program provider shall identify long-range goals that:

(i) address identified risks, needs and/or problems of the primary and secondary target populations;

(ii) are designed to enhance protective factors;

(iii) clearly describe behavioral and/or societal changes to be achieved; and

(iv) are realistic in relation to available resources.

(D) The substance abuse prevention program provider shall establish objectives for each contract period that are linked to the goals specified in its contract with a state agency listed in this subsection. Objectives shall be realistic, outcome-oriented, measurable and time-specific.

(2) provide social services to youth participants who have a family member with a substance addiction.

(A) The substance abuse prevention program provider shall identify needs that cannot be met by the substance abuse prevention program provider and help the participant gain access to appropriate support systems and community resources. The substance abuse prevention program provider shall maintain a current list of referral resources, including other services provided by the substance abuse prevention program provider's organization.

(B) The substance abuse prevention program provider shall provide information and referrals for a participant and/or family whose needs cannot be met by the substance abuse prevention program provider.

(C) use strategies that are appropriate for youth of different ages. The substance abuse prevention program provider's program design, content, communications and materials shall:

(i) be available in the primary language of the target population;

(ii) be appropriate to the literacy level, gender, race, ethnicity, sexual orientation, age and developmental level of the target population; and

(iii) recognize the cultural identification (context) of the family unit.

(3) provide continuity in prevention services for all grade levels as stipulated in its contracts with a state agency listed in this subsection.

(A) The substance abuse prevention program provider's program shall be designed to build on and support other related prevention and intervention efforts in the community. The substance abuse prevention program provider shall secure and maintain the support of key decision-makers and leaders and shall establish formal linkages and coordinate with other community resources.

(B) Each substance abuse prevention program provider that provides activities within this strategy shall work with other service providers, organizations, individuals and families to promote substance abuse services and improve the community's ability to prevent substance abuse and other related problem behaviors associated with substance abuse.

(C) The substance abuse prevention program provider shall use existing community services and resources effectively to enhance the substance abuse prevention program provider's program.

(D) The substance abuse prevention program provider shall establish formal linkages with other service providers to build a continuum of substance abuse services in the community. The substance abuse prevention program provider shall document active participation in collaborations to support community resource development.

(b) In addition, in accordance with House Bill 3126, 76th Texas Legislature, Regular Session, 1999, each state agency listed in subsection (a) of this section shall require the substance abuse prevention program provider to submit an annual report that describes the substance abuse prevention program provider's effectiveness in meeting established criteria.

(1) The substance abuse prevention program provider shall perform self-evaluation to verify, document and quantify the substance abuse prevention provider's program activities and effectiveness.

(2) The substance abuse prevention program provider shall submit a written evaluation report using the format specified by a state agency listed in subsection (a) of this section at the end of each period of the contract between the state agency and the substance abuse prevention program provider.

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 B. INTERVENTION

25 TAC §§447.201 - 447.204

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §461.0128, that requires the department to develop and adopt rules for model program standards for substance abuse services for use by each agency that provides or pays for substance abuse services; House Bill 3126, 76th Texas Legislature, 1999, requires the department, among other agencies, to establish by rule a uniform set of criteria for evaluating the effectiveness of a drug abuse prevention program; 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. Review of the rules implements Government Code, §2001.039.

The new sections affect the Health and Safety Code, Chapters 461 and 1001; and Government Code, Chapter 531.

§447.201. Purpose.

The purpose of this subchapter is to describe department-funded substance abuse intervention services programs. In general, interventions services are designed to address specific problems that, if left unresolved, can lead to substance abuse or dependence. Intervention services are designed to be flexible and responsive to changing community needs and budgetary constraints.

§447.202. Application.

This subchapter applies to providers of department-funded substance abuse intervention services.

§447.203. Definitions.

The following words and phrases when used in this subchapter shall have the following meanings unless the context clearly indicates otherwise.

(1) Behavioral health services--Services that consist of mental health services and services for the prevention, intervention, and treatment of substance abuse.

(2) Brief interventions--Practices designed to initiate resolution of a problem and motivate a person receiving services from a program provider to begin to do something about his or her substance abuse. Brief interventions are described in "Brief Interventions and Brief Therapies for Substance Abuse" (Treatment Improvement Protocol 34), published by the United States Department of Health and Human Services Center for Substance Abuse Treatment.

(3) Case management--Services that assist and support persons receiving services from a program provider in developing skills to gain access to and obtain services from needed medical, social, educational and other service providers essential to meeting basic human needs. This function consists of assessment of needs, appropriate referrals, follow-up on referrals, and a plan of action with clear goals.

(4) Colonias--A residential area along the Texas-Mexico border that lacks basic living needs, such as potable water and sewer systems, electricity, paved roads, and safe and sanitary housing. Colonias, while frequently found in unincorporated areas of the counties, are also found within city limits.

(5) Contract--A written agreement between the department and a program provider providing intervention services.

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

(7) Indicated target population--Indicated services include youth who are showing early warning signs of substance use, such as experimenting, or abuse and/or exhibiting other problem behaviors. This service targets youth in difficult situations resulting in problem behaviors that, if not addressed, may lead to substance use or abuse.

(8) Outreach--The provision of health- and substance abuse-related information, activities, and services to a specified group that has traditionally been underserved. Outreach is a strategy for taking services and activities where the group resides and works.

(9) Program provider--A person or entity that contracts with the department to provide substance abuse intervention services.

(10) Protocol-Based Counseling (PBC)--The State of Texas human immunodeficiency virus (HIV) antibody counseling and testing protocol, which is used as a tool to guide the discussion with a person receiving services from a program provider about his/her risk(s) as it relates to HIV, sexually transmitted disease (STD), hepatitis C virus (HCV), his/her most recent risk, and the development of incremental steps to reduce the person's risk for acquiring or transmitting HIV/STD/HCV. The PBC training is required for all program providers performing HIV testing/counseling.

(11) Referral--The process of identifying appropriate services and providing the information and assistance needed to obtain access to them.

(12) Rural border--The area that extends 62 miles north of the Texas-Mexico border and encompasses 32 counties as described in the United States-Mexico La Paz agreement of 1983.

(13) Screening--The process through which the program provider, person receiving services from the program provider, and available family determine the most appropriate initial course of action given the needs and characteristics of the person receiving services from the program provider and the available resources within the community. Screening includes determining whether a person receiving services from a program provider is appropriate and eligible for admission to a particular treatment service type.

(14) Selective target population--The target population for selective prevention services is those individuals whose risk of developing a substance use or abuse disorder is significantly higher than average. These services target individuals or subgroups of the general population who are determined to be at risk for substance abuse, such as children of substance abusers.

(15) Service coordination--Administrative, clinical, and evaluative activities that bring the person receiving services from the program provider, treatment services, community agencies, and other resources together to focus on issues and needs identified in the plan for treatment of the person receiving services. Service coordination, which includes case management and advocacy for the person receiving services, establishes a framework of action for the person receiving services to achieve specified goals. It involves collaboration with the person receiving services, and family and/or significant others; coordination of treatment and referral services, liaison activities with community resources and managed care systems, advocacy for the person receiving services, and ongoing evaluation of treatment progress and needs of the person receiving services.

§447.204. Program Descriptions.

Intervention services programs may include, but are not limited to the following.

(1) Rural Border Intervention (RBI).

(A) Purpose. The purpose of the RBI program is to provide access to a continuum of substance use- or abuse-related services to eligible persons.

(B) Eligibility. To be eligible for RBI services, a person must be a resident of a rural border area and/or colonia who is at high risk of substance abuse or the family members of the person.

(C) Essential Activities. The program provider shall provide the culturally and linguistically appropriate RBI services, and any substance abuse prevention services, that are required in the contract, which may include but are not limited to:

(i) participating in community outreach activities;

(ii) providing linkages to behavioral health services;

(iii) using intervention techniques to reduce risks and enhance behavior change relating to substance abuse;

(iv) implementing evidence-based substance abuse prevention curricula for selective and indicated target populations; and

(v) providing post-treatment, community-based follow-up for youth and adults.

(2) Human Immunodeficiency Virus (HIV) Outreach.

(A) Purpose. The purpose of the HIV Outreach program is to increase opportunities for active substance abusers and their partners at risk for communicable diseases to make positive behavior changes that reduce or eliminate the potential for HIV infection. The program shall provide culturally relevant information, activities, HIV testing, referrals, and education directed toward informing the eligible population about the relationship between substance use, HIV, and other communicable diseases, including Hepatitis C virus (HCV) and tuberculosis (TB).

(B) Eligibility. The eligible population for HIV Outreach consists of persons who are:

(i) injecting substance users and their partners who are at risk of being infected with HIV and HCV;

(ii) women, adolescents, and ethnic minorities at risk of infection from HIV and other communicable diseases through substance use or unprotected sexual activity; or

(iii) other substance users at risk of HIV and other communicable diseases.

(C) Essential Activities. Program providers shall provide the HIV outreach services described in the contract, which may include but are not limited to:

(i) providing HIV antibody counseling and testing provided by staff who are registered with the department as protocol-based counseling counselors;

(ii) providing access to screening for TB, HCV, and sexually transmitted diseases (STDs); and

(iii) providing counseling that promotes behavior changes that reduce the risk of infection from HIV or other communicable diseases.

(D) Annual agreements. Program providers shall establish annual service agreements to provide a comprehensive resource network that includes healthcare services, social services, and department-sponsored community or regional planning groups, such as:

(i) HIV and STD medical care;

(ii) housing programs; and

(iii) transportation services.

(3) HIV Early Intervention (HEI).

(A) Purpose. The purpose of the HEI program is to improve the health status of substance abusers infected with HIV and other communicable diseases by promoting linkages between community-based substance abuse treatment programs, health care services, and other social services.

(B) Eligibility. The eligible population consists of persons with HIV who are identified as having a problem with or history of substance abuse and their significant others and/or family members.

(C) Essential Activities. The program provider shall provide the HEI services described in the contract including, but not limited to:

(i) developing and implementing strategies to identify persons with HIV infection by increasing awareness of HEI services within the eligible populations, other HIV outreach programs, other HIV service organizations, substance abuse treatment programs, and related health organizations; and

(ii) implementing service coordination and case management as specified in the contract for persons with HIV infection that accommodate needs associated with treatment for HIV and substance abuse services.

(4) Pregnant and Postpartum Intervention (PPI).

(A) Purpose. The purpose of the PPI program is to provide services that intervene in the substance use cycle of pregnant or post-partum women, and serve to prevent fetal and infant exposure to alcohol, tobacco, and other drugs.

(B) Eligibility. The eligible population consists of women of any age who are Texas residents and are pregnant, or whose youngest child is 18 months old or younger (and any additional populations identified in the contract as being eligible).

(C) Essential Activities. The program provider shall provide the services required by its contract and applicable requirements of the federal Block Grant for the Prevention and Treatment of Substance Abuse including, but not limited to:

(i) 42 USC, §300x-27, concerning the capacity for treatment services for pregnant women;

(ii) 45 CFR, §96.121, concerning interim services;

(iii) 45 CFR, §96.124, concerning priority populations and specific services for women; and

(iv) 45 CFR, §96.131, concerning priority admissions for pregnant women.

(D) Service Sites. The program provider shall provide PPI services at sites where women who are pregnant or post-partum are served, including prenatal clinics, hospitals, social service and assistance offices, in addition to the program provider's place of business as described in the contract. Program services as described in the contract may include, but are not limited to:

(i) referral to formal treatment services;

(ii) case management;

(iii) parenting classes; and

(iv) domestic violence awareness.

(5) Outreach, Screening, Assessment, and Referral (OSAR).

(A) Purpose. The purpose of the OSAR program is to provide coordinated access to a continuum of substance abuse services by assessing both the clinical and financial eligibility of persons, thus ensuring appropriate placement.

(B) Eligibility. A person must be a Texas resident to be eligible for OSAR services.

(C) Essential Activities. The program provider shall deliver OSAR services in specified regions across the state. Services as required by the contract may include, but are not limited to:

(i) outreach;

(ii) screening;

(iii) brief intervention;

(iv) referral; and

(v) service coordination.

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SUBCHAPTER C. TREATMENT

25 TAC §§447.301 - 447.304

STATUTORY AUTHORITY

The new sections are authorized by Health and Safety Code, §461.0128, that requires the department to develop and adopt rules for model program standards for substance abuse services for use by each agency that provides or pays for substance abuse services; House Bill 3126, 76th Texas Legislature, 1999, requires the department, among other agencies, to establish by rule a uniform set of criteria for evaluating the effectiveness of a drug abuse prevention program; 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. Review of the rules implements Government Code, §2001.039.

The new sections affect the Health and Safety Code, Chapters 461 and 1001; and Government Code, Chapter 531.

§447.301. Purpose.

The purpose of this subchapter is to describe department-funded substance abuse treatment programs and program providers.

§447.302. Application.

This subchapter applies to providers of department-funded substance abuse treatment services.

§447.303. Definitions.

The following words and phrases when used in this subchapter shall have the following meanings unless the context clearly indicates otherwise.

(1) Contract--A written agreement between the department and a program provider to provide substance abuse treatment services.

(2) Case management--Services that assist and support persons receiving services from a program provider in developing skills to gain access to and obtain services from needed medical, social, educational and other service providers essential to meeting basic human needs. This function consists of assessment of needs, appropriate referrals, follow-up on referrals, and a plan of action with clear goals.

(3) Department--The Department of State Health Services.

(4) Medication-assisted therapies--Medications used in any treatment for addictions that includes a medication approved by the U.S. Food and Drug Administration for addiction detoxification or maintenance treatment.

(5) Program provider--A person or entity that contracts with the department to provide substance abuse treatment services.

(6) Substance use disorder--A broad term that includes substance abuse, substance dependence, substance withdrawal, substance intoxication, and other related disorders as described in the Diagnostic and Statistical Manual of Mental Disorders.

§447.304. Program Description.

Department-funded substance abuse treatment services consist of an array of services that are designed to treat substance use disorders of specific populations.

(1) Program providers must comply with relevant standards set forth in Chapter 448 of this title, concerning licensed substance abuse treatment facilities, as well as requirements set forth in the contract. In addition, the program provider shall adhere to applicable requirements of the federal Block Grant for the Prevention and Treatment of Substance Abuse including, but not limited to:

(A) 42 USC, §300x-27, concerning the capacity for treatment services for pregnant women;

(B) 45 CFR, §96.121, concerning interim services;

(C) 45 CFR, §96.124, concerning priority populations and specific services for women; and

(D) 45 CFR, §96.131, concerning priority admissions for pregnant women.

(2) Services may include, but are not limited to, detoxification, outpatient and residential treatment, medication-assisted therapies, counseling and case management.

(A) Adult Services. Contracted substance abuse treatment services for adults include an array of services such as ambulatory detoxification, residential detoxification, outpatient treatment, intensive and supportive residential treatment, residential treatment for persons with human immunodeficiency virus, and medication-assisted therapies (such as opioid substitution). Opioid substitution program providers must also comply with standards set forth in Chapter 229 of this title, regarding the minimum standards for narcotic treatment programs.

(B) Youth Services. Contracted substance abuse treatment services for youth include outpatient treatment and intensive and supportive residential treatment.

(C) Pregnant and Parenting Women Services. Contracted substance abuse treatment services for pregnant and parenting women include an array of services such as ambulatory detoxification, residential detoxification, outpatient treatment, intensive and supportive residential treatment, and intensive and supportive residential treatment for women and children.

(D) Persons with Co-occurring Psychiatric and Substance Use Disorders (COPSD) Services. Contracted COPSD services are services provided by a program provider to persons with a substance use disorder who also have problems related to mental health. COPSD services are adjunct and do not replace substance abuse treatment or mental health treatment. Services include, but are not limited to, counseling and case management, and other activities described in the contract that facilitate a person's access to mental health and substance abuse services.

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CHAPTER 448. STANDARD OF CARE
SUBCHAPTER C. STANDARDS FOR EVIDENCE-BASED PREVENTION PROGRAMS

25 TAC §448.301

(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 Department of State Health Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes the repeal of §448.301, concerning standards for evidence-based prevention programs.

BACKGROUND AND PURPOSE

The repeals in Chapters 441, 447, and 448, and new sections in Chapter 447 are necessary to implement the primary prevention strategies set forth in 45 Code of Federal Regulations (CFR), §96.125; prescribe standards for measuring the effectiveness of state-funded prevention programs and annual reporting requirements from House Bill 3126, 76th Legislature, Regular Session, 1999; and establish requirements and standards for department-funded contractors providing substance abuse services. The rules proposed for repeal were formerly under the

Texas Commission on Drugs and Alcohol and were transferred and consolidated with the department on September 1, 2004. The proposed repeals will remove duplication and unnecessary rules from the department's rule base.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 441.401, 447.101 - 447.116, 447.201 - 447.204, 447.301 - 447.304, 447.401, 447.402, 447.501, 447.502, 447.601 - 447.604, 447.701, and 448.301 have been reviewed and the department has determined that reasons for adopting some of the sections continue to exist because rules on this subject are needed. Separate rulemaking actions for Chapters 441 and 447 are published in this issue of the *Texas Register.*

SECTION-BY-SECTION SUMMARY

The repeal of §448.301, concerning standards for evidence-based prevention programs, allows the consolidation of rules concerning the standards of care concerning substance abuse prevention, intervention, and treatment services into one chapter at 25 TAC Chapter 447.

FISCAL NOTE

Mike Maples, Assistant Commissioner for Mental Health and Substance Abuse Services, has determined that for each year of the first five years that the repeal will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the repeal as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Mr. Maples, as required by Government Code, §2006.002, Agency Actions Affecting Small Businesses, Adoption of Rules with Adverse Economic Effect, has also determined that the proposed repeal will not have an adverse economic effect on small or micro-businesses. Under the terms of the grant that funds substance abuse prevention and intervention services contracts, no contractor may be a for-profit entity. Therefore, no person or entity funded by the grant meets the statutory definition of small or micro-business. Although, there are some substance abuse treatment contractors that are for-profit entities that are funded with general revenue and may meet the definition of small or micro-business, the department has not added any requirements that would result in additional costs to small or micro-businesses.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

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

PUBLIC BENEFIT

In addition, Mr. Maples has determined that for each year of the first five years the repeal is in effect, the public will benefit from adoption of the repeal. The public benefit anticipated as a result of enforcing or administering the repeal and new sections is to protect the health and safety of people receiving substance abuse services and their families, as well as provide consistent evidence-based strategies for all contractors providing department-funded substance abuse services.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Laura Czepiel, Mental Health Substance Abuse Program, Department of State Health Services, Mail Code 2018, P.O. Box 149347, Austin, Texas 78714-9347, or by email to mhsarules@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

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

STATUTORY AUTHORITY

The repeal is authorized by Health and Safety Code, §461.0128, that requires the department to develop and adopt rules for model program standards for substance abuse services for use by each agency that provides or pays for substance abuse services; House Bill 3126, 76th Texas Legislature, 1999, requires the department, among other agencies, to establish by rule a uniform set of criteria for evaluating the effectiveness of a drug abuse prevention program; 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. Review of the rule implements Government Code, §2001.039.

The repeal affects the Health and Safety Code, Chapters 461 and 1001; and Government Code, Chapter 531.

§448.301. Standards for Evidence-Based Prevention Programs.

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 February 13, 2012.

TRD-201200822

Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 776-6972

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 1. GENERAL ADMINISTRATION

The Texas Department of Insurance (Department) proposes repeal of §1.207 and §1.208, concerning rule making procedures; §1.415, concerning assessment of maintenance taxes and fees; and §§1.1301 - 1.1306, concerning rules of practice and procedure for industry-wide benchmark rate proceedings.

The repeal of §1.207 is necessary because the Department does not receive public petitions to initiate rulemaking with enough frequency to merit weekly updating and posting of a list of such petitions. The public may instead obtain information regarding petitions and arrange to view such petitions by contacting the Office of the Chief Clerk.

The repeal of §1.208 is necessary because the public has multiple ways of contacting the Commissioner without a need for bi-weekly public meetings solely to allow persons to speak to the Commissioner on issues within the Commissioner's jurisdiction. The public regularly uses mail and e-mail to bring issues to the attention of the Commissioner or the Commissioner's Ombudsman. Additionally, the repeal of §1.207 and §1.208 will free the Department's staff and facility resources for more efficient use.

The repeal of §1.415 is necessary because the maintenance tax surcharge levied under this section only applies for 1999 and supports bonds that have been paid. Also, §1.415 implements Insurance Code art. 5.76-5, which was repealed under House Bill 2017, SECTION 18, 79th Regular Legislative Session, effective April 1, 2007. Currently applicable maintenance taxes are addressed in other sections of the Insurance Code.

The repeal of §§1.1301 - 1.1306 is necessary because these sections implement Insurance Code art. 5.101(a) and (d), but art. 5.101 expired on December 1, 2004, pursuant to §7 of the article.

FISCAL NOTE. Stanton Strickland, Associate Commissioner, Legal Section, has determined that during each year of the first five years that the proposed repeal is in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the sections. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Mr. Strickland also has determined that for each year of the first five years the repeal of the sections is in effect, the public benefit expected as a result of administration and enforcement of the repealed sections will be the deletion of unnecessary and outdated rules from Title 28 Texas Administrative Code. There is no expected economic cost to persons who are required to comply with the proposed repeal. There is no expected difference in cost of compliance between small and large businesses as a result of the proposed repeal.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. In accordance with Government Code §2006.002(c), the Department has determined that this proposed repeal will not have an adverse economic effect on small or micro businesses because it is simply a repeal of obsolete and unnecessary rules. Therefore, in accordance with Government Code §2006.002(c), the Department is not required to prepare a regulatory flexibility analysis.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on March 26, 2012, to Sara Waitt, General Counsel, Mail Code 113-1C, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Stanton Strickland, Associate Commissioner, Legal Section, Mail Code 110-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing must be submitted separately to the Office of Chief Clerk, Mail Code 113-1C, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

SUBCHAPTER A. RULES OF PRACTICE AND PROCEDURE

DIVISION 2. RULE MAKING PROCEDURES

28 TAC §1.207, §1.208

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

STATUTORY AUTHORITY. The repeal of §1.207 and §1.208, is proposed pursuant to Insurance Code §2054.006 and §36.001, and Government Code §2001.004(1).

Section 2054.006 authorizes the commissioner to regulate the Texas Mutual Insurance Company, previously referred to as the Texas Workers' Compensation Insurance Fund, to the same extent that the commissioner may regulate a mutual insurance company.

Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

Government Code §2001.004(1) specifies that, in addition to other requirements under law, a state agency shall adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

CROSS REFERENCE TO STATUTE. The proposed repeal affects regulation pursuant to the following statutes: Statute Government Code §2001.004(1) and Insurance Code §36.001.

§1.207. List and Copies of Pending Petitions for Rule Proposals.
§1.208. Regular Commissioner Meetings.

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 February 7, 2012.

TRD-201200622
Sara Waitt
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 463-6327

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SUBCHAPTER C. ASSESSMENT OF MAINTENANCE TAXES AND FEES

28 TAC §1.415

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

STATUTORY AUTHORITY. The repeal of §1.415 is proposed pursuant to Insurance Code §2054.006 and §36.001, and Government Code §2001.004(1).

Section 2054.006 authorizes the commissioner to regulate the Texas Mutual Insurance Company, previously referred to as the Texas Workers' Compensation Insurance Fund, to the same extent that the commissioner may regulate a mutual insurance company.

Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

Government Code §2001.004(1) specifies that, in addition to other requirements under law, a state agency shall adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

CROSS REFERENCE TO STATUTE. The proposed repeal affects regulation pursuant to the following statutes: Statute Government Code §2001.004(1) and Insurance Code §36.001.

§1.415. Maintenance Tax Surcharge for the Texas Workers' Compensation Insurance Fund, 1999.

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 February 7, 2012.

TRD-201200621
Sara Waitt
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 463-6327

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SUBCHAPTER L. RULES OF PRACTICE AND PROCEDURE FOR INDUSTRY-WIDE BENCHMARK RATE PROCEEDINGS

28 TAC §§1.1301 - 1.1306

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

STATUTORY AUTHORITY. The repeal of §§1.1301- 1.1306 is proposed pursuant to Insurance Code §2054.006 and §36.001, and Government Code §2001.004(1).

Section 2054.006 authorizes the commissioner to regulate the Texas Mutual Insurance Company, previously referred to as the Texas Workers' Compensation Insurance Fund, to the same extent that the commissioner may regulate a mutual insurance company.

Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

Government Code §2001.004(1) specifies that, in addition to other requirements under law, a state agency shall adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

CROSS REFERENCE TO STATUTE. The proposed repeal affects regulation pursuant to the following statutes: Statute Government Code §2001.004(1) and Insurance Code §36.001.

§1.1301. Scope.

§1.1302. Definitions.

§1.1303. Recommendations for Benchmark Rate Changes.

§1.1304. Proposed Rule to Change the Benchmark Rates.

§1.1305. Procedures for Hearing on the Departments Proposed Rule.

§1.1306. Adoption of Benchmark Rates.

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 February 7, 2012.

TRD-201200620
Sara Waitt
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 463-6327

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PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 110. REQUIRED NOTICES OF COVERAGE

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) proposes amendments to §110.1 and §110.101 and proposes new §§110.7, 110.103, and 110.105. This proposal affects existing Division rules that implement statutes in Labor Code Chapter 406 that require employers to report certain workers' compensation insurance coverage information to the Division and its employees. Specifically, this proposal relates to the following employer reporting requirements: (1) the requirement to notify the Division when the employer elects not to obtain workers' compensation insurance coverage (Labor Code §406.004); (2) the requirement to notify the Division when the employer terminates workers' compensation insurance coverage (Labor Code §406.007); and (3) the requirement to notify each employee on whether or not the employer has workers' compensation insurance coverage (Labor Code §406.005). The proposed amendments and new rules reorganize, clarify, and update Division rules associated with these reporting requirements in order to improve understanding of these reporting requirements. This proposal is not intended to substantively affect or otherwise change any reporting requirement in Labor Code Chapter 406 and associated Division rules that applies to insurance carriers.

This proposal also proposes new §110.7 which will require a self-insured political subdivision that provides medical benefits to its employees in accordance with Labor Code §504.053(b)(2) to notify the Division when it elects to provide medical benefits in that manner. The Division proposes this new rule in order to streamline its collection of this type of data.

Other amendments are proposed to correct non-substantive typographical, grammatical, and punctuation errors in the current rule text; and to re-letter and renumber rule text.

The Division published an informal draft of these proposed amendments and new rules on the Division's website on November 8, 2011. The informal comment period closed December 5, 2011 and there were five written informal comments received. The Division made changes to the proposal as a result of the informal comments.

The Division proposes these rules in conjunction with proposed amendments to §160.2 and §160.3 and proposed new §160.1 of this title, concerning employer reports of injury, which are proposed elsewhere in this issue of the *Texas Register.* Those proposed amendments and new rules relate to Division rules that require subscribing and non-subscribing employers to submit reports of injury to the Division.

Proposed Amendments to §110.1.

Section 110.1 governs various reporting requirements placed upon insurance carriers and employers. The proposed amendments to §110.1 primarily remove from this rule provisions relating to employer reporting requirements to the Division, specifically provisions relating to an employer's notice to the Division of non-subscriber status and an employer's notice to the Division when it terminates workers' compensation insurance coverage. These employer duties are proposed for recodification in Subchapter B of this chapter as proposed new §110.103 and §110.105. The Division is proposing to recodify these two employer reporting requirements into their own respective rules in order to more clearly delineate these reporting requirements. Additionally, these rules are better located in Subchapter B of Chapter 110 which is titled "Employer Notices." The Division also is proposing amendments to these recodified rules, and these amendments are more fully discussed later in this proposal. The remaining provisions in §110.1 govern various reporting requirements placed upon insurance carriers such as proof of coverage reporting and notice of cancellation or nonrenewal by an insurance company.

The Division is proposing amendments to §110.1(h), redesignated in this proposal as §110.1(e), to clarify the applicability of provisions relating to coverage information reporting to the Division. Current proposed §110.1(e) replaces the term "insurance carrier" and lists in each paragraph the specific entities subject to each requirement. The Division is proposing these amendments in order to update terminology used in these reporting rules with terminology used in each rule's respectively statutory authority in Labor Code Chapter 406, Subchapter A. Except as discussed more fully below, these proposed amendments align with current Division processes for reports of coverage information under this rule. Current proposed §110.1(e)(1) requires an insurance company, certified self-insurer, workers' compensation self-insurance group under Chapter 407A, and a political subdivision to report workers' compensation coverage information to the Division within 10 days after the effective date of coverage and annually thereafter no later than 10 days after the anniversary date of coverage. This paragraph includes coverage reporting when a political subdivision moves from self-insurance to a policy, or from a policy to self-insurance, and when a political subdivision moves from individual self-insurance to a pool, or vice-versa. This amended paragraph is consistent with current reporting practices under §110.1(e), except for reporting by political subdivisions which will now have to report no later than 10 days after the coverage change, instead of current practice of 30 days prior to any change in coverage. This will give political subdivisions additional time to report changes, and the Division believes extending this reporting time will not change the effectiveness or efficiency of the Division's information collection and utility to interested parties. Proposed (e)(2) - (4) will govern reporting of insurance companies and are consistent with current reporting practices by political subdivisions under §110.1.

The Division is proposing amendments to §110.1(i), redesignated in this proposal as §110.1(f), to clarify that these provisions regarding effective date of a cancellation or non-renewal of a policy applies in situations involving an insurance company's cancellation or non-renewal of a policy. Similar provisions regarding effective date of a termination of a policy are proposed for recodification in §110.105(c), which apply in situations involving an employer's termination of a policy. There may be situations where both of these provisions are implicated; and in such cases, the provision that provides the earlier effective end date of coverage controls.

Additionally, proposed amendments to this section make several nonsubstantive changes for the purpose of bringing clarity to Division rules. This includes clarifications in terminology such as changing the term "commission" to "division," clarification that the terms "insurance coverage" and "policy" refers to workers' compensation insurance coverage and workers' compensation insurance policy, respectively, and the elimination of unnecessary and repetitive statutory language pointers. The proposed amendments also add clarifying language in respect to the applicability of other rules to self-insurance groups and political subdivisions. Finally, the Division has throughout this rule proposed more specific terminology, changing "insurance carrier" to "insurance company, certified self-insurer, workers' compensation self-insurance group under Chapter 407A, and a political subdivision" and, where appropriate "insurance carrier" to "insurance company." These proposed changes are intended as clarifica-

tions, specifically to track statutory language and authority in Labor Code §406.006 and §406.008.

Proposed New §110.7.

Proposed new §110.7 delineates specific reporting requirements for a self-insured political subdivision to notify the Division when it elects to provide medical benefits in the manner described by Labor Code §504.053(b)(2).

Labor Code §504.018(a) requires a political subdivision to notify the Division of the method by which its employees will receive benefits, the approximate number of employees covered, and the estimated amount of payroll. Much of the required information is already reported to the Division. Accordingly, this rule requires only the information required by §504.018(a) that is not already reported to the Division. Specifically, the Division is proposing this new rule because it currently does not have a process that allows it to effectively gather information concerning the method by which self-insured political subdivisions that provide medical benefits in accordance with Labor Code §504.053(b)(2).

The prescribed notice under this proposed section shall be filed in writing or electronically and shall include (1) the name, address, and the federal employer identification number (FEIN) of the political subdivision; (2) the political subdivision's contact information; (3) the name of the health plan elected under Labor Code §504.053(b)(2); (4) the contact information for the health plan elected under Labor Code §504.053(b)(2); and (5) the beginning and ending date(s) of the election to provide medical benefits under Labor Code §504.053(b)(2). The proposed rule will require this notice to be provided to the Division not later than the 30th day after the date the self-insured political subdivision begins to provide the medical benefits in the manner described by Labor Code §504.053(b)(2). If a self-insured political subdivision is providing medical benefits in accordance with Labor Code §504.053(b)(2) as of the effective date of this rule, the political subdivision must provide the Division with the required notice not later than the 30th day after the effective date of this rule. The proposed rule will also require a self-insured political subdivision to report any changes in the reported information not later than the 30th day after the date of the change. These provisions are necessary in order to both provide a political subdivision with adequate time to gather and report the information and to provide the Division with up-to-date data regarding self-insured political subdivisions that provide medical benefits under Labor Code §504.053(b)(2). The proposed rule also contains clarifying language in respect to the applicability of other reporting rules to self-insured political subdivisions, specifically §110.1. The proposed effective date of the rule is July 1, 2012.

Proposed Amended §110.101.

The proposed amendments to §110.101 relate to employer notice requirements under Labor Code §406.005. Labor Code §406.005 requires an employer to notify each employee as required by that section whether or not the employer has workers' compensation insurance coverage. This statute requires the employer to notify a new employee of the existence or absence of workers' compensation insurance coverage at the time the employee is hired. This statute also requires an employer to post a notice in the workplace of whether the employer has workers' compensation insurance coverage. The Commissioner is authorized by this section to adopt rules relating to the form and content of the notice.

The proposed amendments to §110.101 clarify that employers who provide workers' compensation insurance coverage as a member of a self-insurance group under Labor Code Chapter 407A are subject to this rule. Labor Code Chapter 407A was added to the Texas Workers' Compensation Act (Act) after the initial adoption of §110.101 and these amendments update this rule to reflect this addition. The proposed amendments to §110.101(a)(2) - (3) change the time deadlines for employers to provide notice to employees to conform rule language with Labor Code requirements under §406.005(d). Specifically, proposed amendments to §110.101(a)(2) provide that employers whose workers' compensation insurance coverage is terminated or cancelled shall provide notice to employees of their workers' compensation status not later than the 15th day after the date on which the termination or cancellation takes effect. Proposed amendments to §110.101(a)(3) provide that employers who obtain workers' compensation insurance coverage shall provide notice to employees of their workers' compensation status not later than the 15th day after the date on which the coverage takes effect.

Proposed amendments to §110.101(a)(5) replace "certified self-insurer" with "self-insurance" to clarify that this rule covers both certified self-insureds and employers in a self-insurance group; accordingly these terms are subsequently updated through the remainder of this rule.

Proposed amendments to §110.101(a) eliminate the terms "covered" and "non-covered" from the text of the rule and replaces the terms with a directional pointer to the definition of an employer in Labor Code §406.001 as it applies to this chapter. The proposed amendments also make several non-substantive changes in terminology for purposes of clarity in Division rules.

Proposed amendments to §110.101(b)(2) recodify and clarify former requirements contained in former §110.101(b)(2) and (b)(3), to provide one subsection prescribing when employers terminating workers' compensation insurance coverage must post required notice to employees. Proposed amendments to §110.101(b)(3) remove employer notice requirements, now contained in new §110.103(b)(2) and provide notice requirements for self-insurers under the Act.

The proposed amendments to §110.101(e) update the language in the statutorily mandated employee notice postings. To maintain consistency between existing and proposed posting notices and to minimize costs associated with updating posted notices, the Division is also proposing a moderate reduction in the mandated font size to ensure that the proposed new information on the posted notice may be contained on 8.5 X 11 piece of paper. Proposed amendments to paragraphs (1) and (2) of this subsection update the required notices for employers insured through a commercial insurance company and those employers who become certified self-insurers under Labor Code Chapter 407. Proposed amendments to paragraph (4) of this subsection update the notice for employers not covered by workers' compensation insurance coverage. The notice updates for paragraphs (1), (2), and (4) of this include: (1) the removal of the undefined term illness from the posting notice and replacing it with occupational disease, a term defined in Labor Code §401.011, which is intended to provide increased accuracy of information communicated to employees through the posting notices; (2) the update of agency resource information, including contact information for the Division and the Office of Injured Employee Counsel; and (3) removes unnecessary terminology such as "protect." The proposed amendments also provide for a new employee no-

tice posting for use by employers who are members of a self-insurance group. The new notice proposed in paragraph (3) for employers in a self-insurance group under Labor Code Chapter 407A of this section mirrors the updated notices in proposed paragraphs (1) and (2).

Finally, the proposed amendments to §110.101(f) update administrative violation language to conform to current statutory language and to be consistent with other similar provisions throughout Division rules.

Proposed New §110.103.

Proposed new §110.103 relates to required notices by non-subscribing employers under Labor Code §406.004. Labor Code §406.004 requires an employer who does not obtain workers' compensation insurance coverage to notify the Division in writing, in the time and as prescribed by Commissioner rule, that the employer elects not to obtain coverage. This statute provides that the Commissioner shall prescribe forms to be used for the employer notification and shall require the employer to provide reasonable information to the Division about the employer's business. Labor Code §406.004(d) requires this notice to be filed with the Division in accordance with Labor Code §406.009 which authorizes the Commissioner to adopt rules as necessary to enforce Labor Code, Chapter 406, Subchapter A, and to establish the form, manner, and procedure for the transmission of information to the Division.

Proposed new §110.103 encompasses statutorily mandated reporting requirements for non-subscribing employers and is primarily a recodification of rule language proposed for removal from §110.1. In addition to a recodification, the Division is proposing amendments to the rule, a principal new element of which is the provision of new reporting timelines in response to employer requests for more clarity and ease in complying with the statutorily mandated notification of non-coverage.

Proposed new §110.103(a) is a recodification of current §110.1(c) - (d) and requires employers electing not to obtain workers' compensation insurance coverage (non-subscribers) to provide the Division with notice of non-coverage in the form and manner prescribed by the Division. Proposed new §110.103(a)(1) and (2) are a recodification of former §110.1(e)(1)(A) and (B) and sets out the frequency and reporting triggers of when an employer must provide notice of non-coverage to the Division.

Proposed new §110.103(b) prescribes the applicability of this subsection and delineates the new reporting timelines for non-subscribers which will apply on or after January 1, 2013. Proposed new §110.103(b)(1) provides a new annual reporting period for notices of non-coverage to the Division which is proposed to be annually between February 1st and not later than April 30th of each calendar year. Additionally, proposed new §110.103(b)(1) defines that notice provided by April 30th satisfies the reporting requirement under this subsection from May 1st of the same year through April 30th of the subsequent year. The proposed delayed effective date for the new reporting timelines is being proposed by the Division based on non-subscriber input during the development of these rules. The delayed effective date is to facilitate the transition to statutory compliance by non-subscribing employers and is anticipated to allow non-subscribers ample time to alter business practices or develop business practices that ensure their compliance with this statutorily mandated reporting duty.

This proposed new static reporting period for all non-subscribers coupled with delineated notice period is in response to non-subscriber comment received by the Division during the development of these rules. Multiple commenters expressed a desire for a change from the current annual notice requirement based on the original filing date or hiring a new employee subject to the Act. Instead, non-subscribers requested both a static reporting period and a defined period covered by the notice to provide ease of compliance with this statutorily mandated reporting requirement.

Proposed new §110.103(b)(2) provides that a non-subscriber must also submit notice to the Division of non-coverage status not later than the 30th day after the date the non-subscriber hired its first employee subject to the Act, unless this due date is covered by the notice provided in proposed new §110.103(b)(1) and the employer submits the notice within that time period. This provision will provide the Division with data regarding new employers that elect to non-subscribe. Additionally, proposed new §110.103(b)(2) partially removes, recodifies, and expands former §110.1(e)(3), now providing that all non-subscribers shall provide a notice of non-coverage not later than the 10th day, instead of within 30 days as formerly required, after receipt of a Division request for the information. This new, shortened response time to Division requests for notice of non-coverage information from non-subscribers provides one clear, consistent response deadline for all non-subscribers.

Proposed new §110.103(b)(3) provides notice of filing with the Division in writing or electronically and delineates specific information required in the notice to provide clarity to non-subscribers as to the specific notice content required in compliance with this statutorily mandated reporting requirement. The data elements in this proposed rule are consistent with data elements non-subscribers already report to the Division on current Division forms.

Proposed new §110.103(c) clarifies employer responsibility for timely and accurate notice under this section and that notice required by this section is considered timely filed with the Division only when it contains all of the data elements specified in this section, contains accurate information, and is received by the Division.

Proposed New §110.105.

Proposed new §110.105 relates to required notices by employers under Labor Code §406.007. Labor Code §406.007 requires an employer who terminates workers' compensation insurance coverage to file a written notice with the Division by certified mail not later than the 10th day after the date on which the employer notified the insurance carrier to terminate the coverage. This notice must include a statement certifying the date that notice was provided or will be provided to affected employees under Labor Code §406.005. Labor Code §406.007(b) requires the notice to be filed with the Division in accordance with Labor Code §406.009 which authorizes the Commissioner to adopt rules as necessary to enforce Labor Code, Chapter 406, Subchapter A, and to establish the form, manner, and procedure for the transmission of information to the Division.

Proposed new §110.105 is largely a recodification of requirements proposed for deletion in current §110.1. Proposed new §110.105(a) requires an employer who terminates workers' compensation insurance to file written notice of the termination with the Division not later than the 10th day on which the employer notified the insurance carrier under Labor Code §406.007. Proposed new §110.105(b) allows the notice required by subsection

(a) to be filed by certified mail or, as authorized by Labor Code §401.024, electronically. These proposed provisions are consistent with practices under the current rule and are to provide clarity in the manner in which these reports may be provided to the Division. The proposed amendments also delineate the specific data elements that must be in the notice, replacing former "form and manner" language from §110.1(d). This proposed rule is consistent with current practices and is intended to provide increased clarity regarding required information from employers notifying the Division of coverage termination. Proposed new §110.105(c) provides the effective date of termination when an employer terminates coverage and is consistent with Labor Code §406.007. Proposed new 110.105(d) updates language to provide clarity to ensure all system participants are cognizant of the fact that workers' compensation insurance coverage shall be extended until the date on which the termination of coverage takes effect and that the employer remains obligated for premiums due for that period. This proposed provision is also consistent with current statutes. Proposed new §110.105(e), also still contained in proposed new §110.1(i), specifies (1) that in the event of an employer switching workers' compensation insurance carriers, the original policy is considered cancelled as of the date the new coverage takes effect; and (2) requires employers to notify the prior insurance carrier of the original policy's cancellation date in writing within 10 days of the effective date. This is a recodification of §110.1(l) and a non-substantive change to ensure this provision, concerning original policy cancellation dates when an employer switches workers' compensation insurance carriers, remains applicable to both insurance carriers and employers now that related requirements are recodified in separate rules.

Patricia Gilbert, Executive Deputy Commissioner of Operations, has determined that for each year of the first five years the proposed rules will be in effect there will be fiscal implications to state or local government as a result of enforcing or administering the proposed rules. Fiscal implications to state or local governments are limited to self-insured political subdivisions that provide medical benefits in accordance with Labor Code §504.053(b)(2) under proposed new §110.7 and are estimated later in this preamble. There also will be no measurable effect on local employment or the local economy as a result of the proposed rules.

Division Costs

Ms. Gilbert has determined that the proposed rules will have minimal impact on the cost of the Division's intake of employer information (1) that notifies the Division when an employer does not have workers' compensation insurance coverage and (2) that notifies the Division when an employer terminates workers' compensation insurance coverage because the proposed rules primarily codify existing procedures, form requirements, and current requirements found in the Labor Code and current Division rules under §110.1. The Division anticipates an increase in the volume of non-subscriber employers reporting workers' compensation insurance coverage; however, the increased volume of reports in respect to workers' compensation insurance coverage status is not expected to be at a level beyond what can be absorbed by current Division resources.

Division costs associated with streamlining efforts to intake information (1) that notifies the Division when an employer elects not to obtain workers' compensation insurance coverage and (2) that notifies the Division when an employer terminates workers' compensation insurance coverage include nominal programming, training, and form changes, which will also be absorbed by current Division resources.

Costs to the Division associated with self-insured political subdivisions reporting the provision of medical benefits under Labor Code §504.053(b)(2) for injured employees under proposed new §110.7 are expected to neither increase nor decrease based on the streamlining of the collection of this information. The resources currently expended to collect this information are anticipated to be offset by the resources that have been required for the programming, training, and form changes developed by the Division in conjunction with the proposal of new §110.7.

Self-Insured Political Subdivisions That Provide Medical Benefits Under Labor Code §504.053(b)(2) Costs.

The purpose of proposed new §110.7 is to codify a reporting process to conform to current statutory reporting requirements for self-insured political subdivisions that provide medical benefits under Labor Code §504.053(b)(2) for injured employees. The Division estimates that the cost for a self-insured political subdivision that provides medical benefits under Labor Code §504.053(b)(2) to report the required information to the Division to be estimated between of $1.81 to $48.08. This range is based on reporting the information (1) via the internet to the Division once procedures are established and (2) that it will take one individual 15 minutes to a maximum of 30 minutes to report the information. This range is based on the individual reporting the information to the Division being an hourly employee earning the current minimum wage of $7.25 to an exempt employee receiving total compensation of $200,000.00 annually with 15 minutes (.25 of one hour) multiplied by $7.25 (hourly minimum wage) and 30 minutes (.5 of one hour) multiplied by $96.15 (hourly wage based on $200,000.00 annual compensation). The Division provides cost estimates based on ranges because business operations and processes may vary among all political subdivisions in the state of Texas.

Ms. Gilbert has determined that for each year of the first five years the proposed rules are in effect, the public benefit as a result of the proposed rules will be: (1) increased awareness of the Division's procedures for employers to notify the Division when an employer does not have workers' compensation insurance coverage and the deadline in which to report this information; (2) increased awareness of the Division's procedures for employers to notify the Division when an employer terminates workers' compensation insurance coverage; (3) increased awareness of the requirement to notify each employee of the employer's workers' compensation insurance coverage status; and (4) clarification as to which political subdivisions are providing medical benefits under Labor Code §504.053(b)(2) which allows for more complete data in which to analyze the delivery and outcome of medical benefits to injured employees.

Ms. Gilbert has determined that the costs of compliance associated with the proposed codification and clarification of processes, which comprise the majority of this proposal, are a result of existing statutory duties under the Labor Code, primarily Labor Code §§406.004, 406.005 and 406.007 and existing Division rules implementing these statutes. Any costs associated with compliance of the associated statutory provisions and rules are typically considered costs that are anticipated with compliance and are likely a component of the "standard cost" of ongoing business operations and are planned for and included in annual budgets. If there is a resultant cost incurred by entities based on the proposed codification and clarification portions of this proposal, it is a cost incurred by entities not currently in compliance

with current reporting requirements. These resultant costs would be incurred at the time an entity made efforts to come under compliance and thus are not a result of the codification and clarification portions of this proposal or new duties being imposed by the Division.

Many entities will likely experience no increase in costs due to the proposal because the cost of updating processes and procedures in order to be in compliance with statutory and rule provisions, are generally anticipated costs and budgeted for as part of the standard cost of ongoing business operations. Entities that do not budget training needs and updates, or budget insufficient amounts for such needs as part of their standard cost of ongoing business operations may experience some increased costs associated with complying with the current statutory duties and rules provided for in this proposal; and, accordingly, the Division has provided estimates on the potential costs in this scenario.

The Division estimates the cost of updating material at a range of $1.00 to $50.00 based on an average of 10 pages of updates to material, with a cost of $.10 to $5.00 per page; or 10 pages multiplied by $.10 and $5.00 respectively. The low of $.10 per page is based on updates and distribution made via established electronic means and the high of $5.00 is based on: (1) extensive updates, paper copy distribution, in-person training sessions; (2) the prorated cost of implementing electronic distribution and training where none had previously existed based on the presumed small allocation of resources utilized for this specific initiative; or (3) a varying combination of establishing electronic training means, in-person training sessions, etc.

The estimates on material updates include: (1) updates to reference training materials for staff regarding the definitions and requirements under the Labor Code; (2) updating processes/paperwork to notice employees at the time of hire; (3) updating processes/paperwork in respect to required posting of notice information for employees; and (4) staff training to ensure staff do not inadvertently submit incorrect information to the Division and do not provide incorrect information to employees.

This proposal will require employers to update the posted notice in the workplace that are required by Labor Code §406.005 and §110.101 of this title. The Division notes that a posting notice may be printed on one 8.5 X 11 piece of paper, with an estimated cost of $.10 per page, and the Division will provide on its website a compliant posting notice that employers may download, print, and use to comply with the posted notice requirements.

The Division estimates that the cost for employers to report the required information and to update the required employee notices per employer to be between $1.81 to $96.15. This range is based on (1) reporting the information via the internet to the Division (2) that once procedures are established, one individual will take 15 minutes to a maximum of one hour to report the information to the Division. The salary range for the individual reporting coverage status has been estimated based on an hourly employee earning the current minimum wage of $7.25 to an exempt employee earning $200,000.00 annually with 15 minutes (.25 of one hour) multiplied by $7.25 (hourly minimum wage) and one hour multiplied $96.15 (hourly wage based on $200,000.00 annual salary). If an employer chooses to mail this information to the Division the employer would incur the printing cost of the form, the cost of an envelope, possible travel time to a post office, and the postage which is estimated to be as low as $1.50 to $10.00 which includes the option for certified mail and mileage and travel time costs to a post office.

The Division provides cost estimates based on ranges because business operations and processes may vary among all employers operating in the state of Texas.

As required by the Government Code §2006.002(c), the Division has determined that proposed §110.7 will not have an adverse economic effect on small and micro-businesses because that proposed rule applies exclusively to self-insured political subdivisions that provide medical benefits in the manner described by Labor Code §504.53(b)(2) and not to small and micro businesses. Additionally, the Division has determined that the proposed amendments to §110.1 and proposed new §110.103 and §110.105 will not have an adverse economic effect on small and micro businesses. These proposed amendments and new rules are primarily designed to recodify and clarify existing reporting processes and forms currently in effect under existing statutes and rules associated with employer reporting of termination of coverage and non-subscriber status. These proposed amendments and new rules do not make any significant changes in the form and manner in which this information is reported to the Division; therefore employers who are small or micro business will not incur any additional costs associated with reporting this information to the Division. Proposed new §110.103 does change the reporting period for non-subscriber reporting; however affected stakeholders have requested a more definitive reporting period for these reports and the proposed new reporting period is designed to provide a more definitive reporting period. The Division anticipates a more definitive reporting period will make compliance with the statutory reporting requirement easier and less costly for all employers.

The proposed amendments to §110.101 may have an adverse economic effect on approximately 400,000 employers that are small and micro-businesses required to comply with the proposed amendments. Adverse economic impact may result from the costs associated with updating the posted notices and updating procedures concerning personal notices provided to employees at the time of hire as required by Labor Code §406.005. This cost will not vary between large businesses and small or micro businesses, and the Division's cost analysis in the Public Benefit/Cost Note portion of this proposal is equally applicable to small or micro businesses. Again, the new posted notice employers will be required to use pay be printed on one 8.5 X 11 piece of paper at an estimated cost of $.10 per page, and the Division will provide on its website a compliant posting notice that employers may download, print, and use to comply with the posted notice requirements.

The total cost of compliance to large businesses and small or micro businesses is not dependent upon the size of the business.

The Division considered other regulatory methods to accomplish the objectives of the proposed amendments that will minimize any adverse impact on small and micro businesses. The primary purpose of these proposed amendments is to update the notices employers are required to provide to its employees under Labor Code §406.005, and prescribing the notice employers who are a member of a self insurance group are to use. The Division considered not adopting these amendments; however it rejected this approach because of the need to update employee notices with current and more informative information. The Division also considered different reporting processes for small and micro businesses. The Division rejected this approach because of the need for a rule designed to uniformly implement and efficiently apply requirements related to employee notice required under Labor Code §406.005 to all employers. Finally, the Di-

vision considered exempting small and micro businesses from the notice requirements. The Division rejected this approach because this approach would be contrary to statutory requirements.

The Division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. CST on March 26, 2012. Comments may be submitted via the internet through the Division's website at www.tdi.texas.gov/wc/rules/proposedrules/index.html, by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Office of Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. Comments received after the close of comment will not be considered.

Any request for a public hearing must be submitted separately to the Texas Department of Insurance, Division of Workers' Compensation, Office of Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Austin, Texas 78744 by 5:00 p.m. CST by the close of the comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

SUBCHAPTER A. CARRIER NOTICES

28 TAC §110.1, §110.7

The amendment and new rule are proposed under Labor Code §§406.006, 406.008, 406.009, 504.018, 504.053(b)(2), 401.024, 406.001, 504.001, 402.00128(b)(10), 402.00128(b)(12), and under the general authority of §402.061.

Labor Code §406.006 provides, in relevant part, that an insurance company from which an employer has obtained workers' compensation insurance coverage, a certified self-insurer, a workers' compensation self-insurance group under Labor Code Chapter 407A, and a political subdivision shall file notice of coverage and claim administration contact information with the Division not later than the 10th day after the date on which the coverage or claim administration agreement takes place, unless the Commissioner adopts a rule establishing a later date for filing. Labor Code §406.008 provides timelines for when an insurance company that cancels or does not renew a policy of workers' compensation must deliver notice of the cancellation or nonrenewal to the employer and the Division. Additionally, Labor Code §406.008 requires the notice required under this section to be filed with the Division and determines failure of the insurance company to give notice as required by this section extends the policy until the date on which the required notice is provided to the employer and the Division. Labor Code §406.009 requires the Division to collect and maintain the information required under Labor Code Chapter 406, Subchapter A, adopt rules as necessary to enforce that subchapter, and monitor compliance with the requirements contained therein. Labor Code §504.018 requires a political subdivision to notify the Division of the method by which its employees will receive benefits, the approximate number of employees covered, and the estimated amount of payroll, and to notify its employees of the method by which the employees will receive benefits and the effective date of the coverage. Labor Code §504.053(b)(2) authorizes a self-insured political subdivision that does not provide medical benefits through a workers' compensation health care network certified under Insurance Code Chapter 1305 to provide medical benefits to its employees by directly contracting with health care providers or by contracting through a health benefits pool established under Chapter 172, Local Government Code. Labor Code §401.024 provides the Commissioner the authority to permit or require the use of electronic transmission to transmit information. Labor Code §406.001 provides the definition of employer, for purposes of Labor Code Chapter 406, Subchapter A as a person who employs one or more employees. Labor Code § 504.001 provides the definition of a political subdivision. Labor Code §402.00128(b)(10) authorizes the Commissioner or the Commissioner's designee to prescribe the form, manner, and procedure for the transmission of information to the Division. Labor Code §402.00128(b)(12) authorizes the Commissioner or the Commissioner's designee to exercise other powers and perform other duties as necessary to implement and enforce Labor Code Title 5. Labor Code §402.061 provides that the Commissioner shall adopt rules as necessary for the implementation and enforcement of Labor Code Title 5, Subtitle A.

The following statutes are affected by this proposal: §110.1 - Labor Code §§401.024, 402.061, 406.001, 406.006, 406.008, and 406.009; and §110.7 - Labor Code §§401.024, 402.00128, 504.001, 504.018, and 504.053(b)(2).

§110.1. Insurance Carrier Requirements for Notifying the Division [~~Commission~~] of Insurance Coverage.

(a) An approved workers' compensation insurance policy, as referenced in [~~Texas~~] Labor Code §401.011(44)(A), includes a binder, which serves as evidence of a temporary agreement that legally provides workers' compensation insurance coverage until the approved insurance policy is issued or the binder is canceled.

(b) As used in this section, "workers' compensation insurance coverage information" includes information regarding whether or not an employer has workers' compensation insurance coverage and, if so, information about the means of workers' compensation insurance coverage used.

(c) This rule applies to an insurance company, certified self-insurer, workers' compensation self-insurance group under Chapter 407A, and a political subdivision. [~~employers whose employees are not exempt from coverage under the Workers' Compensation Act (the Act), and to insurance carriers. It does not apply to employers whose only employees are exempt from coverage under the Act.~~] Certified Self-Insurers are also subject to requirements specified in Chapter 114 of this title (relating to Self-Insurance). Self-Insurance Groups are also subject to requirements specified in Chapter 5, Subchapter G, Division 2 of this title (relating to Group Self-Insurance Coverage). Self-insured political subdivisions are also subject to requirements specified in §110.7 of this title (relating to Self-Insured Political Subdivision Requirements for Notifying the Division of Election to Provide Medical Benefits).

(d) An insurance company, certified self-insurer, workers' compensation self-insurance group under Chapter 407A, and a political subdivision [~~Employers and insurance carriers~~] shall submit to the division [~~commission~~], or its designee, workers' compensation insurance coverage information in the form and manner prescribed by the division [~~commission~~]. The division [~~commission~~] may designate and contract with a data collection agency to collect and maintain insurance coverage information.

[~~(e) Employers who do not have workers' compensation insurance coverage are required to provide insurance coverage information~~

in the form of a notice of non-coverage, in accordance with subsection (d) of this section as follows:]

[(1) if the employer elects not to be covered by workers' compensation insurance, the earlier of the following:]

[(A) 30 days after receiving a commission request for the filing of a notice of non-coverage and annually thereafter on the anniversary date of the original filing;]

[(B) 30 days after hiring an employee who is subject to coverage under the Act, and annually thereafter on the anniversary date of the original filing;]

[(2) if the employer cancels coverage without purchasing a new policy or becoming a certified self-insurer, within ten days after notifying the insurance carrier and annually thereafter on the anniversary of the cancellation date of the workers' compensation policy; or]

[(3) if the employer is principally located outside of Texas, within ten days after receiving a written request from the commission for information about the coverage status of its Texas operations.]

[(f) When an employer elects to cancel coverage, the effective date of that cancellation shall be the later of:]

[(1) 30 days after filing the notice of non-coverage with the commission; or]

[(2) the cancellation date of the policy.]

[(g) The workers' compensation insurance coverage shall be extended until the effective date of withdrawal as established in subsection (f) of this section, and the employer is obligated to pay premiums which accrue during this period.]

(e) [(h)] Workers' compensation [Insurance carriers are required to provide] insurance coverage information for insured Texas employers shall be provided to the division in accordance with subsection (d) of this rule as follows:

(1) by the insurance company, certified self-insurer, workers' compensation self-insurance group under Chapter 407A, and political subdivision, within 10 [ten] days after the effective date of coverage or endorsement and annually thereafter no later than 10 [ten] days after the anniversary date of coverage;

(2) by the insurance company, 30 days prior to the date on which cancellation or non-renewal becomes effective if the insurance company [carrier] cancels the workers' compensation insurance coverage, does not renew the workers' compensation insurance coverage on the anniversary date, or cancels a binder before it issues a workers' compensation insurance policy;

(3) by the insurance company, 10 [ten] days prior to the date on which the cancellation becomes effective if the insurance company [carrier] cancels an employer's workers' compensation insurance coverage in accordance with [Texas] Labor Code, §406.008(a)(2); or

(4) by the insurance company, within 10 [ten] days after receiving notice of the effective date of termination [cancellation] from the covered employer because the employer switched workers' compensation insurance carriers.

(f) [(i)] Cancellation or non-renewal of a workers' compensation insurance policy by an insurance company takes effect on [Workers' compensation insurance coverage remains in effect until] the later of:

(1) the end of the workers' compensation insurance policy period, or

(2) the date the division [commission] and the employer receive the notification from the insurance company [carrier] of coverage cancellation or non-renewal and the later of:

(A) the date 30 days after receipt of the notice required by [Texas] Labor Code, §406.008(a)(1);

(B) the date 10 [ten] days after receipt of the notice required by [Texas] Labor Code, §406.008(a)(2); or

(C) the effective date of the cancellation if later than the date in paragraphs (1) or (2) of this subsection.

(g) [(j)] "Claim administration contact" as it applies to this chapter is the person responsible for identifying or confirming an employer's coverage information with the division [commission]. An insurance company, a certified self-insurer, a workers' compensation self-insurance group under Labor Code Chapter 407A, and a political subdivision [Each insurance carrier] shall file a notice with the division [commission] of their designated claim administration contact not later than the 10th day after the date on which the coverage or claim administration agreement takes effect. A single administration address for the purpose of identifying or confirming an employer's coverage status shall be provided. If the single claims administration contact address changes, the [insurance carrier shall provide the] new address shall be provided to the division [commission] at least 30 days in advance of the change taking effect. This information shall be filed in the form and manner prescribed by the division [commission].

(h) [(k)] An insurance company, certified self-insurer, workers' compensation self-insurance group under Chapter 407A, and a political subdivision [An insurance carrier] may elect to have a servicing agent process and file all coverage information, but the insurance company, certified self-insurer, workers' compensation self-insurance group under Chapter 407A, or political subdivision [insurance carrier] remains responsible for meeting all filing requirements of this rule.

(i) [(l)] Notwithstanding the other provisions of this section, if an employer switches workers' compensation insurance carriers, the original policy is considered canceled as of the date the new coverage takes effect. Employers shall notify the prior insurance carrier of the cancellation date of the original policy, in writing, within 10 [ten] days of the effective date.

§110.7. Self-Insured Political Subdivision Requirements for Notifying the Division of Election to Provide Medical Benefits.

(a) A political subdivision as defined by Labor Code §504.001(3) that self-insures either individually or collectively and that pursuant to Labor Code §504.053(b)(2) elects to provide medical benefits to its injured employees by directly contracting with health care providers or by contracting through a health benefits pool established under Local Government Code Chapter 172 shall provide to the division notice of the method by which its employees will receive medical benefits. Political subdivisions are also subject to requirements specified in §110.1 of this title (relating to Insurance Carrier Requirements for Notifying the Division of Insurance Coverage).

(b) The notice of the method by which its employees will receive medical benefits required by subsection (a) of this section shall be filed with the division in writing or electronically and in the form and manner prescribed by the division. The notice shall include:

(1) the name, address, and the federal employer identification number (FEIN) of the political subdivision;

(2) the political subdivision's contact information;

(3) the name of the health plan elected under Labor Code §504.053(b)(2) for the political subdivision;

(4) the contact information for the health plan elected under Labor Code §504.053(b)(2); and

(5) the beginning and ending date(s) of the election under subsection (a) of this section, as applicable.

(c) A self-insured political subdivision that provides medical benefits to its injured employees in the manner described by Labor Code §504.053(b)(2) as of the effective date of this section shall provide the notice required by this section not later than the 30th day after the effective date of this section.

(d) A self-insured political subdivision that begins to provide medical benefits to its injured employees in the manner described by Labor Code §504.053(b)(2) after the effective date of this section shall provide the notice required by this section not later than the 30th day after the date the political subdivision begins to provide the medical benefits in that manner.

(e) A self-insured political subdivision shall notify the division of any change in any information required by this section not later than the 30th day after the date of the change.

(f) This section is effective July 1, 2012.

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 February 13, 2012.

TRD-201200799
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 804-4703

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SUBCHAPTER B. EMPLOYER NOTICES

28 TAC §§110.101, 110.103, 110.105

The amendments and new rules are proposed under Labor Code §§406.004, 406.005, 406.007, 406.008, 406.009, 411.081, 401.024, 406.001, 402.00128(b)(10), 402.00128(b)(12), and under the general authority of §402.061.

Labor Code §406.004 provides notification requirements for employers who do not obtain workers' compensation insurance coverage. Labor Code §406.005 requires an employer to post coverage information at the employer's place of business to provide reasonable notice to employees. Additionally this section requires employers to notify each employee as to their workers' compensation status, specifically requiring new employees to be notified of the existence or absence of workers' compensation insurance coverage at the time the employee is hired. Labor Code §406.007 requires an employer who terminates workers' compensation insurance coverage obtained under the Texas Workers' Compensation Act to file a written notice with the Division by certified mail not later than the 10th day after the date on which the employer notified the insurance carrier to terminate the coverage. Labor Code §406.008 provides timelines for when an insurance company that cancels or does not renew a policy of workers' compensation must deliver notice of the cancellation or nonrenewal to the employer and the Division. Additionally, Labor Code §406.008 requires the notice required under this section to be filed with the Division and determines failure of the insurance company to give notice as required by that section extends the policy until the date on which the required notice is provided to the employer and the Division. Labor Code §406.009 requires the Division to collect and maintain the information required under Labor Code Chapter 406, Subchapter A, adopt rules as necessary to enforce that subchapter, and monitor compliance with the requirements contained therein. Labor Code §411.081 requires employers to provide posted notice of the telephone hotline in the manner prescribed by the Division. Labor Code §401.024 provides the Commissioner the authority to permit or require the use of electronic transmission to transmit information. Labor Code §406.001 provides the definition of employer, for purposes of Labor Code Chapter 406, Subchapter A as a person who employs one or more employees. Labor Code §402.00128(b)(10) authorizes the Commissioner or the Commissioner's designee to prescribe the form, manner, and procedure for the transmission of information to the Division. Labor Code §402.00128(b)(12) authorizes the Commissioner or the Commissioner's designee to exercise other powers and perform other duties as necessary to implement and enforce Labor Code Title 5. Labor Code §402.061 provides that the Commissioner shall adopt rules as necessary for the implementation and enforcement of Labor Code Title 5, Subtitle A.

The following statutes are affected by this proposal: §110.101 - Labor Code §§402.061, 406.001, 406.005, 406.021, 406.034 and 411.081; §110.103 - Labor Code §§401.024, 402.00128, 402.061, 406.001, 406.004, 406.008, and 406.009; and §110.105 - Labor Code §§401.024, 402.00128, 402.061, 406.001, 406.008, and 406.009.

§110.101. Covered and Non-Covered Employer Notices to Employees.

(a) In addition to the posted notice required by subsection (e) of this section, [~~covered and non-covered~~] employers, as defined by Labor Code §406.001, shall notify their employees of workers' compensation insurance coverage status, in writing. This additional notice:

(1) shall be provided at the time an employee is hired, meaning when the employee is required by federal law to complete both a W-4 form and an I-9 form or when a break in service has occurred and the employee is required by federal law to complete a W-4 form on the first day the employee reports back to duty;

(2) shall be provided to each employee, by an employer whose workers' compensation insurance coverage is terminated or cancelled, not later than the 15th day after the date on which the termination or cancellation of coverage takes effect [~~at the time the employer notifies the insurance carrier that the employer is dropping coverage if there will be a period during which the employees will not be covered~~];

(3) shall be provided to each employee, by an employer who obtains workers' compensation insurance coverage, not later than the 15th day after the date on which coverage takes effect [~~at the time an employer obtains coverage~~], as necessary to allow the employee to elect to retain common law rights under Labor Code Chapter 406;

(4) shall include the text required in the posted notice; and

(5) if the employer is covered by workers' compensation insurance (subscriber) or becomes covered, whether by commercial insurance or through self-insurance as provided by the Texas Workers' Compensation Act (Act) [~~by becoming a certified self-insurer~~], shall include the following statement: "You may elect to retain your common law right of action if, no later than five days after you begin employment or within five days after receiving written notice from the employer that the employer has obtained workers' compensation insur-

ance coverage, you notify your employer in writing that you wish to retain your common law right to recover damages for personal injury. If you elect to retain your common law right of action, you cannot obtain workers' compensation income or medical benefits if you are injured."

(b) Notices required to be posted by this rule shall be posted:

(1) by the non-subscribing employer as provided in subsection (c) of this section;

(2) by the employer who is terminating [~~opting out of~~] workers' compensation insurance coverage, at the time the employer notifies the insurance carrier of the termination, unless a new policy will maintain continuous coverage in which case the employees will be notified at the time the new workers' compensation insurance policy takes effect [~~cancellation~~];

(3) by the [~~employer or certified~~] self-insurer as provided by the Act, who is withdrawing [~~elects to cancel their policy or withdraw~~] from self-insurance, at the time [~~the insurance carrier is notified of the cancellation or~~] the division [~~Commission~~] is notified of the withdrawal [~~,unless a new policy will maintain continuous coverage in which case the employees will be notified at the time the new policy takes effect~~];

(4) by the employer who becomes covered either by a workers' compensation [~~an~~] insurance policy or through self-insurance as provided by the Act [~~by certified self-insurance~~], at the time coverage or certification takes effect; and

(5) by the employer whose workers' compensation insurance policy is canceled by the insurance carrier, at the time the cancellation becomes effective if no new workers' compensation insurance policy is obtained.

(c) Notices posted or provided on and after July 1, 2012 [~~the effective date of this rule~~] shall contain the specific text required by this rule. Notices posted prior to July 1, 2012 [~~the effective date of this rule~~] shall be replaced with the text required by this rule. Any time the information regarding workers' compensation insurance coverage status, insurance carrier, [~~safety hotline number,~~] or third party administrator changes, the notice shall be updated to reflect current information.

(d) An employer who recruits an employee in Texas to perform services outside of Texas, actually hires outside of Texas, and has notices of workers' compensation insurance coverage posted conspicuously at the place of hire and at the business location where the employee will perform services, is not required to provide the additional notice required in subsection (a) of this section to the employee.

(e) Employers [~~Covered and non-covered employers~~] shall post notices in the workplace to inform employees about workers' compensation issues as required by this rule. These notices shall be posted in the personnel office, if the employer has a personnel office, and in the workplace where each employee is likely to see the notice on a regular basis. The notices shall be printed with a title in at least 26 [~~30~~] point bold type, subject in at least 18 [~~20~~] point bold type, and text in at least 16 [~~19~~] point normal type, and shall include ENGLISH, SPANISH, and any other LANGUAGE common to the employer's employee population. The text for the notices shall be the text provided by the division [~~Commission~~] on the sample notice without any additional words or changes.

(1) Employers insured through a commercial insurance company shall post the following notice:
Figure: 28 TAC §110.101(e)(1)
[~~Figure: 28 TAC §110.101(e)(1)~~]

(2) Employers who become certified self-insurers under Labor Code Chapter 407 shall post the following notice:
Figure: 28 TAC §110.101(e)(2)
[~~Figure: 28 TAC §110.101(e)(2)~~]

(3) Employers who are a member of a self-insurance group under Labor Code Chapter 407A shall post the following notice:
Figure: 28 TAC §110.101(e)(3)

(4) [~~(3)~~] Employers who are not [~~elect not to be~~] covered by workers' compensation (non-subscriber), [~~or who cancel or terminate coverage~~] shall post the following notice:
Figure: 28 TAC §110.101(e)(4)
[~~Figure: 28 TAC §110.101(e)(3)~~]

(f) Failure to post or to provide notice as required in this rule is an administrative [~~a~~] violation [~~of the Act and Commission rules and the violator may be subject to administrative penalties~~].

§110.103. Employer Requirements for Notifying the Division of Non-Coverage.

(a) Applicability. This subsection applies to notices required to be submitted by non-subscribing employers to the division before January 1, 2013. An employer, as defined by Labor Code §406.001, that does not have workers' compensation insurance coverage (non-subscriber) and whose employees are not exempt from coverage under the Workers' Compensation Act (Act) shall provide the division a notice of non-coverage, in the form and manner prescribed by the division. The notice required by this subsection shall be provided, the earlier of the following:

(1) 30 days after receiving a division request for the filing of a notice of non-coverage and annually thereafter on the anniversary date of the original filing; or

(2) 30 days after hiring an employee who is subject to coverage under the Act, and annually thereafter on the anniversary date of the original filing.

(b) Applicability. This subsection applies to notices required to be submitted by non-subscribing employers to the division on or after January 1, 2013.

(1) A non-subscriber whose employees are not exempt from workers' compensation insurance coverage under the Act shall submit a notice of non-coverage to the division annually between February 1st and not later than April 30th of each calendar year. The period of the notice shall cover from May 1st of the same year the notice is submitted through the end of April of the subsequent year.

(2) In addition to the notice required by paragraph (1) of this subsection, a non-subscriber shall submit to the division a notice of non-coverage not later than the 30th day after the date the employer hired its first employee who is subject to coverage under the Act, unless this due date falls within the same time period described by paragraph (1) of this section and the employer submits the notice within that time period. A non-subscriber shall also provide the division with a notice of non-coverage not later than the 10th day after receipt of a division request for the information.

(3) The notices required by paragraphs (1) and (2) of this section shall be filed with the division in writing or electronically in the form and manner prescribed by the division and shall contain:

(A) a statement that the employer does not have workers' compensation insurance coverage;

(B) a statement of whether the employer had a death, injuries that resulted in the injured employee's absence from work for more than one day, or knowledge of an occupational disease since the last report of no coverage;

(C) the employer's business name;

(D) the federal employer identification number (FEIN);

(E) the employer's business mailing address;

(F) the employer's business type;

(G) the employer's North American Industry Classification System (NAICS) code;

(H) additional business locations (including name, FEIN, and address concerning each additional location); and

(I) the date the form was completed and the name, title, telephone number, email address, and signature of the person providing the information required by this subsection.

(c) Employers are responsible for timely and accurate notice under this section. A notice required by this section is considered timely filed with the division only when it contains all of the data elements specified under subsection (b) of this section, contains accurate information, and is received by the division.

§110.105. Employer Requirements for Notifying the Division of Termination of Coverage.

(a) An employer, as defined by Labor Code §406.001, who terminates workers' compensation insurance coverage shall file written notice of the termination of coverage with the division not later than the 10th day after the date on which the employer notified the insurance carrier under Labor Code §406.007 to terminate the coverage.

(b) The employer shall file the notice of termination required by subsection (a) of this section by certified mail or electronically on the form prescribed by the division. The notice shall contain:

(1) a statement of no workers' compensation insurance coverage, including policy termination effective date, policy number, insurance company name, date the termination notice was sent to the insurance company, and date employees were or will be notified;

(2) a statement of whether the employer had a death, injuries that resulted in the injured employee's absence from work for more than one day, or knowledge of an occupational disease since the last report of no coverage;

(3) the employer business name;

(4) the federal employer identification number (FEIN);

(5) the employer's business mailing address;

(6) the employer's business type;

(7) the employer's North American Industry Classification System (NAICS) code;

(8) additional business locations (including name, FEIN, and address concerning each additional location); and

(9) the signature date and the name, title, telephone number, email address, and signature of the person providing the information required by this subsection.

(c) Termination of coverage by an employer takes effect on the later of:

(1) the 30th day after the date of filing the notice with the division under this section; or

(2) the cancellation date of the policy.

(d) Coverage shall be extended until the date on which the termination of coverage takes effect and the employer is obligated for premiums due for that period.

(e) Notwithstanding the other provisions of this section, if an employer switches workers' compensation insurance carriers, the original policy is considered canceled as of the date the new coverage takes effect. Employers shall notify the prior insurance carrier of the cancellation date of the original policy, in writing, within 10 days of the effective date.

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 February 13, 2012.

TRD-201200800
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
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For further information, please call: (512) 804-4703

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CHAPTER 127. DESIGNATED DOCTOR PROCEDURES AND REQUIREMENTS

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) proposes amendments to §§127.1, 127.5, 127.10, 127.20, and 127.25 under Subchapter A, Chapter 127 of this title (relating to Designated Doctor Scheduling and Examinations), and proposes new §§127.100, 127.110, 127.120, 127.130, 127.140, 127.200, 127.210, and 127.220 under new Subchapters B and C, Chapter 127 of this title (relating to Designated Doctor Certification, Recertification, and Qualifications and Designated Doctor Duties and Responsibilities, respectively). These proposed new and amended sections primarily implement the amendments made to Labor Code §408.0041 and §408.1225 made by House Bill 2605, 82nd Legislature, Regular Session, effective September 1, 2011 (HB 2605). Additionally, these proposed new and amended sections also recodify the provisions of proposed repealed §130.6 of this title (relating to Designated Doctor Examinations for Maximum Medical Improvement and/or Impairment Ratings) and proposed repealed §180.21 of this title (relating to Division Designated Doctor List). The proposed repeals of §130.6 of this title and §180.21 of this title are published elsewhere in this issue of the *Texas Register.* Lastly, these proposed new and amended sections also clarify or improve a number of the Division's existing designated doctor procedures in order to facilitate a more efficient designated doctor scheduling, certification, and examination process.

HB 2605 added several amendments to §408.0041 and §408.1225 of the Labor Code that will substantially affect the Division's regulation of designated doctors in the workers' compensation system. First, HB 2605 amended Labor Code §408.1225(a-1) - (a-5) and §408.1225(b-2) to specifically require the Division to develop a certification and recertification process for designated doctors, including adopting eligibility requirements specific to designated doctor duties under Labor Code §408.0041 and standardized training and testing. Second, HB 2605 amended Labor Code §408.1225(f) to require designated doctors to continue providing services related to a claim assigned to the designated doctor, including performing subsequent examinations and acting as a resource for Division

disputes, unless the Division authorizes the designated doctor to stop providing services on the claim. Lastly, HB 2605 amended Labor Code §408.0041(b) and (b-1) (1) to require that, except as provided by Labor Code §408.1225(f), a medical examination under Labor Code §408.0041 shall be performed by the next designated doctor on the Division's list of certified designated doctors whose credentials are appropriate for the area of the body affected by the injury and the injured employee's diagnosis; and (2) to provide that if either Labor Code §408.0043 or §408.0045 conflict with Labor Code §408.0041, Labor Code §408.0041 controls. Taken together, these amendments affect nearly every aspect of the Division's designated doctor program, including designated doctor examination scheduling, designated doctor selection, and designated doctor certification and recertification, and the Division has proposed these amended and new sections primarily in response to these amendments as described below.

The Division has also recodified portions of §130.6 of this title and §180.21 of this title, in part, to implement the amendments made by HB 2605 described above. The Division has also elected to recodify these two sections to ensure that substantially all rules applicable to designated doctors and designated doctor examinations can be found in Chapter 127. This recodification enhances the usability and logical structure of the Division's framework for designated doctor regulation, and, furthermore, it harmonizes with the rationale of the Division's similar recodification of former §126.7 of this title (relating to Designated Doctor Examinations: Requests and General Procedures) into §§127.1, 127.5, 127.10, 127.15, 127.20, and 127.25 of this title published in the December 17, 2010, issue of the *Texas Register* (35 TexReg 11324). A description of the proposed recodified provisions of §130.6 and §180.21 of this title is provided below, and the proposed repeals of these sections is published elsewhere in this issue of the *Texas Register.*

The Division has also proposed new and amended sections that will clarify or improve a number of the Division's existing designated doctor procedures in order to facilitate a more efficient designated doctor scheduling, certification, and examination process. These proposed new or amended sections are described throughout this proposal and include, but are not limited to, a clarification of Division requirements for all designated doctor examination narrative reports, a new Designated Doctor Examination Data Report to be filed after certain examinations, and limitations on the availability of designated doctor examinations for claims on which the insurance carrier has denied compensability or otherwise denied liability. A complete description of these changes and other proposed new or amended sections is provided below.

An informal draft of this proposal was published on the Division's website from October 14, 2011 to November 4, 2011, and the Division received 78 informal comments on the draft. Additionally, the Division posted an informal draft of proposed new §127.130(b) on its website from December 17, 2011 to January 11, 2012, and the Division received 29 comments on this draft. Subsequent changes were made to the draft based on the informal comments and are reflected in this proposal. There have also been nonsubstantive changes made to these sections to conform to current nomenclature, reformatting, consistency, clarity, editorial reasons, and to correct typographical and/or grammatical errors in respect to the recodified language from proposed repeals of §130.6 and §180.21 of this title.

Proposed Amended §127.1.

Proposed amended subsection (b)(3) replaces "medical condition and type of health care the injured employee is currently receiving" with "diagnosis or diagnoses and part of the body affected by the injury." This change is necessary to comply with the similar amendment made by HB 2605 to Labor Code §408.0041(b) described above. Proposed amended subsection (b)(5) deletes the requirement that a person requesting a designated doctor examination include the injured employee's statutory date of maximum medical improvement (MMI) in every request for a designated doctor examination; instead, requestors will only need to include this information when requesting an MMI examination under proposed amended subsection (b)(11)(A). Proposed new subsection (b)(6) and (7) require requestors to, respectively, identify the workers' compensation health care network certified under Chapter 1305, Insurance Code through which the injured employee is receiving treatment, if applicable, or to identify whether the claim involves medical benefits provided through a political subdivision under Labor Code §504.053(b)(2) and the name of the health plan, if applicable. These proposed new sections are necessary to assist the Division, designated doctors, and all other parties in determining whether a designated doctor has any disqualifying associations relevant to the injured employee's claim.

Proposed amended subsection(b)(4) provides that requestors must also list all injuries claimed to be compensable by the injured employee and not disputed by the insurance carrier in addition to all injuries determined to be compensable by the Division or accepted as compensable as the insurance carrier. This amendment is necessary to ensure that designated doctors receive full information regarding an injured employee's current medical condition without also requiring requestors to misconstrue an insurance carrier's lack of dispute as an express acceptance (such as through stipulation or agreement).

Proposed amended subsection (b)(8) provides that requestors must also state whether the injured employee has attended any other designated doctor examinations on this claim and, if so, the dates of the examinations and the name of the examining designated doctor. This information is necessary to ensure that the Division has full information when assigning a designated doctor to a claim.

Proposed new subsection (b)(10) requires a person requesting a designated doctor examination to submit the request to the Division and a copy of the request to each other party listed in subsection (a) of this section. This proposed new subsection is necessary to provide non-requesting parties increased opportunity and information to dispute the examination or selected designated doctor should the Division approve the request.

Proposed amended subsection (b)(11)(A) requires requestors to submit the injured employee's statutory date of MMI when requesting an MMI examination and deletes the requirement that requestors submit the dates of MMI, if any, other than statutory MMI; the date of certification of MMI, if any; the name of the certifying doctor, if any, and whether the certifying doctor was a treating doctor, required medical examination doctor, or referral doctor. Proposed amended subsection (b)(11)(B) requires a person who requests an impairment rating (IR) examination to provide the date of MMI that has been determined to be valid by a final decision of Division or court or by agreement of the parties, if any, and deletes the requirement that requestors submit the date of certification of MMI and prior assigned impairment rating, if any, and the name of the certifying doctor, if any; and whether the certifying doctor was a treating doctor, required

medical examination doctor, or referral doctor. These amendments are necessary to ensure that designated doctors receive only necessary information that is not in dispute when accepting and performing a designated doctor examination.

Proposed amended subsection (b)(11)(E) provides that if requestors seek an examination regarding the injured employee's ability to return to work in any capacity and what activities the injured employee can perform, the requestors only need to include the beginning and ending dates for the periods to be addressed if the requestor is requesting the designated doctor to examine the injured employee's work status at a time other than the present. Proposed amended subsection (b)(11)(E) also deletes the requirement that requestors submit a job description for job offers the employer intends to offer the injured employee. These amendments are necessary to minimize costs and administrative processes by only requiring information to be submitted in a request that a designated doctor needs to complete the doctor's examination.

Proposed amended subsection (b)(11)(F) clarifies that if a requestor seeks an examination to determine whether or not an injured employee entitled to supplemental income benefits may return to work in any capacity for the identified period, the requestor must include in the request the beginning and ending dates for the qualifying periods to be addressed. Previously, this provision did not state that only "qualifying" periods were to be addressed by the designated doctor, and this clarification is necessary to ensure designated doctors only making return-to-work determinations under this subsection for "qualifying periods" as that term is defined by §130.101(4) of this title (relating to Definitions).

Proposed amended subsection (d)(4) provides that the Division shall deny a request for a designated doctor examination if the insurance carrier has denied the compensability of the claim and reported the denial to the Division in accordance with §124.2 of this title (relating to Carrier Reporting and Notification Requirements), unless the requestor seeks an examination under subsection (a)(6) of this section to determine whether the claimed incident caused the claimed injury. This amendment is necessary to reduce system costs by prohibiting potentially unnecessary designated doctor examinations for claims on which the insurance carrier has denied compensability while still ensuring that injured employees may obtain medical causation opinions from a Division designated doctor that will facilitate a more informed dispute resolution process for the disputed claim.

Proposed amended subsection (d)(5) provides that the Division shall deny a request for a designated doctor examination if the insurance carrier has denied liability for the claim under Labor Code §§406.032, 409.002 or 409.004 and reported that denial to the Division in accordance with §124.2 of this title. This amendment is also necessary to reduce system costs by prohibiting potentially unnecessary designated doctor examinations for claims on which the insurance carrier has denied liability on a basis that would preclude liability even if the injured employee suffered an injury that was both subject to the Texas Workers' Compensation Act (Act) at the time of the injury and the injury arose of out and in the course and scope of employment.

Proposed amended subsection (e) provides that parties may not dispute a designated doctor examination request or any information on the request until the Division has either approved or denied the request. This amendment clarifies that though pursuant to proposed amended subsection (b)(10) requestors will submit their designated doctor requests to all other parties in addition to the Division, the Division only intends for parties to use these exchanged requests to inform their disputes regarding Division action on the request. The Division will not, therefore, hear disputes regarding the information provided on a request until it has either approved or denied the request, because such a dispute is not ripe for adjudication before the Division.

Proposed amended subsection (e) also provides that parties may request an expedited contested case hearing for denied requests for a designated doctor examination in addition to approved requests. This amendment clarifies requestors' preexisting right to dispute these denials in an expedited contested case hearing under Chapter 410, Labor Code and Chapter 140 of this title (relating to Dispute Resolution--General Provisions). Lastly, proposed amended subsection (e) provides that the Division will only automatically stay a designated doctor examination if a request for the stay and expedited proceedings is timely received and approved.

Proposed Amended §127.5.

Proposed amended subsection (c)(2) deletes the current provision that states that a designated doctor is available to perform an initial examination on claim if the designated doctor has credentials appropriate to the issue in question, the injured employee's medical condition, and as required by Labor Code §§408.0043, 408.0044, 408.0045, and applicable rules. Proposed amended subsection (c)(2) replaces this proposed deleted language with "is appropriately qualified to perform the examination in accordance with §127.130 of this title (relating to Qualification Standards for Designated Doctor Examinations)." This change is necessary to correspond with proposed new §127.130, which addresses the appropriate qualifications for designated doctors performing examinations.

Proposed amended subsection (c)(3) provides that the Division will only select a designated doctor to perform an initial examination of an injured employee if, among other factors, the designated doctor has not failed to timely file for recertification under proposed new §127.110, if applicable. This amendment is necessary to correspond with proposed new subsections §127.110(a) - (c), which provide that the Division shall not offer any new examinations to a designated doctor who fails to file materials required for recertification within the timeframes required by those subsections.

Proposed amended subsection (d) provides that if the Division has previously assigned a designated doctor to the claim at the time a request is made, the Division shall use that doctor again unless the Division has authorized or required the doctor to stop providing services on the claim in accordance with proposed new §127.130. This amendment is necessary to correspond with proposed new subsections §127.130(e) - (g), which provide the circumstances under which the Division may authorize or compel a designated doctor to stop providing services on a claim to which the designated doctor had been previously assigned.

Proposed amended subsection (e) provides that if both the designated doctor and the injured employee agree to reschedule the examination, the rescheduled examination shall be set to occur no later than 21 days after the date of the originally scheduled examination and may not be rescheduled to occur before the originally scheduled examination. This amendment is necessary to clarify that designated doctor examination dates or times may only be rescheduled through an agreement between the designated doctor and the injured employee and also to ensure that examinations are not rescheduled to occur before the originally

ordered examination. Permitting parties to reschedule examinations to occur before the date of the originally scheduled designated doctor examination can, in some cases, interfere with the ability of the insurance carrier and the treating doctor to timely submit medical records and analyses to the designated doctor.

Proposed amended subsection (e) also provides that within one working day of rescheduling, the designated doctor shall contact the injured employee's treating doctor with the time and date of the rescheduled examination in addition to the Division and the insurance carrier. Furthermore, this amendment to subsection (e) deletes the requirement that a designated doctor must inform the injured employee and injured employee's representative of the rescheduled examination. These amendments are necessary both to ensure that treating doctors are informed of rescheduled examinations and, therefore, of the appropriate deadlines for submitting medical records and to remove the redundant requirement that designated doctors inform the injured employee of a rescheduled examination the injured employee agreed to reschedule.

Lastly, proposed amended subsection (e) provides that if an examination cannot be rescheduled to occur on a date no later than 21 days after the scheduled date of the originally scheduled examination or if the injured employee fails to attend the rescheduled examination, the designated doctor shall notify the Division as soon as possible but not later than 21 days after the date of the originally scheduled examination. This amendment simply clarifies that if neither the originally scheduled examination nor a rescheduled examination can timely occur, the designated doctor must inform the Division as soon as possible but no later than 21 days after the date of the originally scheduled examination. This deadline to notify the Division extends to 21 days because, in some circumstances, the designated doctor may not know that an examination cannot occur until the date of the rescheduled examination.

Proposed Amended §127.10.

Proposed amended subsection (a)(3) provides that if the designated doctor does not timely receive medical records from either the insurance carrier or the treating doctor, the designated doctor shall not conduct the examination and shall report this violation to the Division within one working day of not timely receiving the records. It further provides that, once notified, the Division shall take action necessary to ensure that the designated doctor receives the records, and the designated doctor shall reschedule the examination to occur no later than 21 days after receipt of the records. This amendment is necessary to reduce the likelihood that a designated doctor will perform an examination without all necessary medical records, which was an outcome sometimes permitted under the Division's previous rule.

Proposed amended subsection (b) contains two clarifying amendments. First, proposed subsection (b) provides that designated doctors must review submitted medical records, analyses, and materials submitted by the Division before the designated doctor examination in order to ensure that not only the report but also the examination is informed by those documents. Second, proposed amended subsection (b) also provides that designated doctors shall accept medical records provided by injured employees. This amendment is consistent with both current Division policy and expectations.

Proposed amended subsection (c) clarifies that designated doctors shall, not may, refer an injured employee to other health care providers when the referral is necessary to resolve the issue in question and the designated doctor is not qualified to fully resolve the issue in question. This amendment is necessary both to conform to the corresponding standard for designated doctor referrals for testing and to ensure that designated doctors do not perform examinations for which they are not qualified but are still able to obtain all necessary information to answer the question(s) at issue. Proposed amended subsection (c) also clarifies any additional testing or examinations requested by the designated doctor shall not be denied retrospectively based on medical necessity, extent of injury, or compensability. This amendment is necessary to clarify that though insurance carriers may not deny designated doctor requested testing or examinations for the listed reasons, the bills submitted for these referrals must still comply with Division billing and fee requirements, and insurance carriers may still retrospectively review these bills for those purposes.

Proposed amended subsection (c) also provides that any additional testing or referral examination and the designated doctor's report must be completed within 15 working days of the designated doctor's physical examination of the injured employee unless the designated doctor receives Division approval for additional time before the expiration of the 15 working days. This amendment is necessary to ensure that designated doctors have sufficient time to provide their reports in situations in which testing or appropriate referral examinations cannot be scheduled promptly. Lastly, proposed amended subsection (c) provides that if the injured employee fails or refuses to attend the designated doctor's requested additional testing or referral examination within 15 working days or within the additional time approved by the Division, the designated doctor shall complete the doctor's report based on the designated doctor's examination of the injured employee, the medical records, and other information available to the doctor and indicate the injured employee's failure or refusal to attend the testing or referral examination in the report.

Proposed amended subsection (d) provides that any evaluation relating to either MMI, an IR, or both, shall be conducted in accordance with §130.1 of this title. This amendment simply recodifies §130.6(a) of this title, which is proposed to be repealed elsewhere in this issue of the *Texas Register.* Proposed amended subsection (d) further provides that if a designated doctor is simultaneously requested to address MMI and/or IR and the extent of the compensable injury in a single examination, the designated doctor shall provide multiple certifications of MMI and IRs that take into account each possible outcome for the extent of the injury. This proposed amendment updates a previous requirement of proposed repealed §130.6(b)(4) of this title in light of the 2005 amendment to Labor Code §408.0041(a) that provided the designated doctor the ability to examine the extent of an injured employee's compensable injury. To correspond with this proposed amendment, the Division has also proposed to amend subsection (d) to state that if the designated doctor provides multiple certifications of MMI and IRs, the designated doctor must file a Report of Medical Evaluation under §130.1(d) of this title for each IR assigned and a Designated Doctor Examination Data Report pursuant to proposed new §127.220 for the doctor extent of injury determination. The designated doctor, however, shall only submit one narrative report required by §130.1(d)(1)(B) of this title for all IRs assigned and extent of injury findings. Lastly, proposed amended subsection (d) also clarifies that all designated doctor narrative reports submitted under this subsection shall also comply with the requirements of proposed new §127.220(a), which primarily recodifies all Divi-

sion required elements for designated doctor narrative reports included in current §127.10(f) and also expands upon those requirements. The Division has also proposed a parallel requirement for any narrative report submitted by a designated doctor under proposed amended subsection (e), which governs reports filed by a designated doctor who examines an injured employee pursuant to any question relating to return-to-work.

Proposed amended subsection (f) deletes the current requirements for reports filed by designated doctors on issues other than those listed in §127.10(d) - (e). As discussed above, the Division has recodified and expanded upon these requirements in proposed new §127.220(a). Proposed amended subsection (f) also provides that designated doctors who file narrative reports under this subsection must also file a Report of Designated Doctor Examination as described by proposed new §127.220(c). This amendment is necessary to conform to the Division's new requirements for this form under that section and is further described below in relation to that proposed new section.

Proposed amended subsection (h) requires that if the designated doctor provides multiple certifications of MMI/IR s under proposed subsection (d), the insurance carrier shall pay benefits based on the conditions to which the designated doctor determines the compensable injury extends. This proposed amendment corresponds with the Division's proposed amendments to proposed amended subsection (d) and also updates the requirement of proposed repealed §130.6(f) of this title. Specifically, this amendment takes into account the fact that, pursuant to Labor Code §408.0041(f), an insurance carrier must pay benefits in accordance with the designated doctor's report, which under this circumstance would also include the designated doctor finding on the extent of the injured employee's compensable injury.

Proposed amended subsection (i)(2) provides that a designated doctor must maintain documentation of the agreement of the designated doctor and the injured employee to reschedule the examination and the notice that the designated doctor provided to the injured employee's treating doctor within one working day of rescheduling the examination. These proposed amendments are necessary to ensure compliance with the Division's other proposed amendments to §127.5(e).

Proposed Amended §127.20.

Proposed amended subsection (a) provides that the Division will not approve a request for clarifications that asks a designated doctor to reconsider the designated doctor's decision or to issue a new or amended decision unless the designated doctor failed to address an issue the designated doctor was ordered to address. This proposed amended subsection further provides that a designated doctor shall not reconsider the doctor's decision or issue a new or amended decision in response to a request for clarification unless the designated doctor failed to address an issue the designated doctor was ordered to address. This amendment is necessary to prevent overlapping determinations by a designated doctor that can both muddle the presumptive weight given to a designated doctor's initial report and confuse an insurance carrier's entitlement to reimbursement from the subsequent injury fund for benefits paid by the insurance carrier pursuant to an overturned designated doctor report. Furthermore, the Division also notes that this new standard for appropriate requests for clarification of a designated doctor parallels the standard for requests for clarification of an independent review organization's decision under §133.308(t)(B)(iv) of this title (relating to MDR by Independent Review Organizations).

Proposed Amended §127.25.

Proposed amended subsection (c) provides that if, after the insurance carrier suspends temporary income benefits (TIBs) pursuant to this section, the injured employee who failed to attend a designated doctor examination contacts the designated doctor within 21 days of the scheduled date of the missed examination to reschedule the examination, the designated doctor shall schedule the examination to occur as soon as possible, but not later than the 21st day after the injured employee contacted the doctor. Proposed amended subsection (d) provides that if, after the insurance carrier suspends TIBs pursuant to this section, the injured employee fails to contact the designated doctor within 21 days of the scheduled date of the missed examination but wishes to reschedule the examination, the injured employee must request a new examination under §127.1. These two amendments are necessary to ensure that a rescheduled designated doctor examination of an injured employee who failed to attend an examination does not occur at a time so distant from the originally scheduled examination that injured employee's condition or other dispositive circumstances may have changed.

Proposed New §127.100.

Proposed new subsection (a) provides the requirements a doctor who is not a designated doctor must meet in order to become certified as a designated doctor. This subsection, in part, recodifies provisions of proposed repealed §180.21(d)(1) - (4) of this title, which addressed the minimum requirements for admission to the Division's designated doctor list on or after September 1, 2007. Proposed new subsection (a) also expands upon these recodified sections by including new requirements for a doctor applying to become certified as a designated doctor. Specifically, proposed new subsection (a) also modifies the Division's standard for "active practice" by requiring that the doctor who is not currently a designated doctor has during the previous 10 years maintained an active practice for at least three years, as opposed to three years out of the doctor's entire career. Furthermore, proposed new subsection (a) provides that a doctor is considered having maintained an "active practice" if the doctor maintains or has maintained routine office hours of at least 20 hours per week for 40 weeks per year for the treatment of patients. This enhanced standard is necessary to increase the likelihood that a doctor applying for certification as a designated doctor is familiar with current clinical practices, and this standard is consistent with the definition of active practice under Texas Medical Board rule 22 Texas Administrative Code §163.11 (relating to the Active Practice of Medicine).

Lastly, proposed new subsection (a) also requires a doctor applying for certification as a designated doctor to own or subscribe to, for the duration of the doctor's term as a certified designated doctor, the edition of the American Medical Association Guides to Evaluation of Permanent Impairment adopted by the Division for the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the Division. This new subsection is necessary to ensure that a doctor applying to become certified as a designated doctor has the ability to perform the specific designated doctor duties described by Labor Code §408.0041 as required by Labor Code §408.1225(a-2).

Proposed new subsection (b) provides elements of a complete application for designated doctor certification and that the application must be submitted on the Division's required form. This subsection primarily recodifies the elements of a complete application for admission to the Division's designated doctor list under proposed repealed §180.21(g) of this title.

Proposed new subsection (b) also requires doctors applying for certification to disclose any affiliations the doctor has with a workers' compensation health care network certified under Chapter 1305, Insurance Code or political subdivision under Labor Code §504.053(b)(2). This information is necessary for the Division to monitor possible disqualifying associations related to the doctor and particular claim if the Division certifies the doctor.

Proposed new subsection (b) also requires applicants for certification as a designated doctor to provide the identities of any person(s) with whom the doctor has contracted to assist in performance or administration of the doctor's designated doctor duties. This information is necessary for the Division to monitor and enforce other proposed or current regulations, including monitoring disqualifying associations of a designated doctor.

Lastly, proposed new subsection (b) requires applicants to attest not only to the accuracy of the information submitted and that the information is and will be update as required by proposed new §127.200(a)(8). Furthermore, subsection (b) requires applicants to attest that the doctor shall consent to any on-site visits, as provided by proposed new §127.200(a)(15), by the Division at facilities used or intended to be used by the designated doctor to perform designated doctor examinations for the duration of the doctor's certification, regardless of whether the Division is alleging a violation has occurred. This proposed new provision is necessary to ensure that the Division has sufficient means to monitor the quality of facilities used by designated doctors for designated doctor examinations and to otherwise ensure that designated doctor comply with all required duties imposed upon them by the Act or other applicable Division rules. Furthermore, it is necessary to correspond with the related requirement of the Division's proposed new subsection §127.200(a)(15).

Proposed new subsection (c) primarily recodifies the provisions of proposed repealed §180.21(j) of this title. Additionally, proposed new subsection (c) also provides that approvals of certification by the Division shall also include the effective and expiration dates of the certification and that a designated doctor's certification shall only be for a term of two years. This amendment is necessary to implement the recertification process for designated doctors required by Labor Code §408.1225(b)(2). The Division fully provides for this process, however, in proposed new §127.110, which is described below.

Proposed new subsection (d) recodifies the provisions of proposed repealed §180.21(i) of this title; however, while these standards for denial previously applied to admission to the Division's designated doctor list, they now apply to the denial of a doctor's application for certification as a designated doctor.

Proposed new subsection (e) recodifies the majority of proposed repealed §180.21(j) of this title and describes the written appeal process through which a doctor whose application for certification as a designated doctor is denied may dispute that denial.

Proposed new subsection (f) provides that designated doctors whose application for certification is approved, but that wish to dispute the examination qualification criteria under §127.130 that the Division assigned to the doctor may do so through the procedures described in proposed new subsection (e). Designated doctors must include in their response to the Division the specific criteria they believe should be modified and documentation to justify the requested change. This new provision is necessary to ensure that designated doctor whose applications for certification are approved still have the opportunity to dispute the terms of that approval, if necessary.

Proposed new subsection (g) provides that designated doctors who are designated doctors on the effective date of proposed new §127.100 shall be considered certified for the duration of the designated doctor's current certification. Proposed new subsection (g) further provides that before the expiration of the designated doctor's current certification, the designated doctor must timely apply for recertification under the applicable requirements of §127.110. This provision is necessary to permit the Division to phase in proposed new certification requirements over a two year period. This phase-in period is necessary to comply with §41(b) of HB 2605, which provides that a designated doctor is not required to obtain designated doctor certification until January 1, 2013. Lastly, the Division clarifies that, for the purposes of this subsection, a designated doctor's "current certification" expires on the date by which the designated doctor would have been required to renew the doctor's application pursuant to proposed repealed §180.21(e) of this title.

Proposed New §127.110.

Proposed new subsection (a) describes the process through a designated doctor may apply for recertification as a designated doctor if the doctor's certification expires before January 1, 2013. The Division clarifies that for the purposes of proposed new subsection (a) a designated doctor's "certification" is considered to have expired on the date by which the designated doctor would have been required to renew the doctor's application pursuant to proposed repealed §180.21(e) of this title.

Proposed new subsection (a)(1) primarily recodifies the application renewal provision of proposed repealed §180.21(e) of this title. Specifically, it provides that designated doctors must renew their applications status by submitting to the Division verification that the doctor has completed a minimum of 12 additional hours of Division required training. Proposed new subsection (a)(1), however, expands upon this requirement to also require designated doctors to pass all Division required examinations under §127.100 and to submit to the Division an application for certification under proposed new §127.100(b). The Division clarifies that the substance of this required information will not be used to approve or deny a designated doctor seeking recertification under proposed new subsection (a); instead, the Division is only requiring this information to ensure its background information on each designated doctor is fully updated, and the Division has the designated doctor's consent to perform on-site inspections in accordance with proposed new §127.200 in order to ensure compliance with the Act and applicable Division rules. Lastly, proposed new subsection (a)(1) provides that designated doctors who submit the materials required by this subsection will be recertified as designated doctors if the materials are submitted before January 1, 2013.

Proposed new subsection (a)(2) provides the process through which the Division will notify a designated doctor of its receipt of the required information in proposed new subsection (a)(1) and of the effective and expiration dates of the designated doctor's new certification.

Proposed new subsection (a)(3) provides that a designated doctor who neither informs the Division prior to the expiration of the designated doctor's certification that the doctor does not wish to renew the doctor's certification as a designated doctor nor renews the doctor's application status under subsection (a)(1) prior to the expiration of the designated doctor's certification commits an administrative violation and will be prohibited from performing designated doctor examinations until the doctor renews the doctor's application status. This requirement is necessary to en-

sure that designated doctors maintain current training and testing and are still qualified to perform all designated doctor duties under Labor Code §408.0041 and other applicable statutes and Division rules.

Lastly, proposed new subsection (a)(4) provides that designated doctors who fail to renew their application status before January 1, 2013 must instead apply for recertification under the procedures described under subsection (b) of this section.

Proposed new subsection (b) provides the requirements for a designated doctor to be recertified as a designated doctor if the designated doctor's certification expires on or after January 1, 2013. The requirements under this proposed new subsection do not substantially differ from the requirements for a doctor applying for certification under proposed new §127.100(a) and are required for the same reasons as described above in reference to that subsection. The Division further clarifies that for the purposes of this subsection a designated doctor's "certification" expires either on the date by which the designated doctor would have been required to renew the doctor's application pursuant to proposed repealed §180.21(e) of this title or on the expiration date specified by the Division under proposed new subsection (d) of this section.

Proposed new subsection (c) provides that the Division will not assign examinations to a designated doctor during the 45 days prior to the expiration of the designated doctor's certification if the Division fails to receive the required information in subsection (b)(1) - (3) from the designated doctor before that time. Proposed new subsection (c) provides further that a designated doctor who neither informs the Division 45 days prior to the expiration of the designated doctor's certification that the doctor does not wish to renew the doctor's certification as a designated doctor nor renews the doctor's application status under subsection (b)(1) - (3), 45 days prior to the expiration of the designated doctor's certification commits an administrative violation. A designated doctor who fails to apply for recertification under this section within 30 days after the expiration of the designated doctor's certification may no longer apply for recertification and must instead apply for certification of §127.100. This proposed new requirement parallels the analogous requirement in proposed new subsection (a)(3) for designated doctors whose certifications expire before January 1, 2013, and this requirement is necessary for the same reasons described above in reference to that proposed new subsection.

Proposed new subsection (d) provides the process through which the Division will notify a designated doctor of approval or denial of the designated doctor's application for recertification, the effective and expiration dates of the designated doctor's new certification, and the designated doctor's examination qualification criteria under proposed new §127.130 that the Division has assigned to the doctor as part of the doctor's recertification. The Division emphasizes that proposed new subsection (d) differs from the notification process provided in proposed new subsection (a)(2), because under proposed new subsection (d) the Division will either approve or deny a designated doctor's application for recertification based on several different factors, including the quality of the designated doctor's decisions and reviews during the previous two years, and a denial of recertification will lead to a designated doctor's removal from the Division's designated doctor list. This process differs from the recertification process under proposed new subsection (a)(2), because the recertification process under that subsection entitles a designated doctor to recertification if all required information is timely submitted to the Division. The recertification process under proposed new subsection (d), however, implements Labor Code §408.1225(b), which requires the Division to actively monitor designated doctors and permits the Division to deny renewal of a designated doctor's certification to ensure the quality of designated doctor decisions and reviews. Furthermore, this enhanced recertification process is necessary, because of the Division's required phase-in of the certification requirements of Labor Code §408.1225(a-1) - (a-4) and proposed new §127.100 over the next two years. This recertification process will ensure that a designated doctor approved for recertification meets all those required certification standards.

Proposed new subsection (e) provides the reasons for which the Division may deny a designated doctor's application for recertification under proposed new subsection (b). These reasons include all the reasons for which the Division would deny a doctor's application for certification as a designated doctor under proposed new §127.100. Proposed new subsection (e)(4), however, expands upon those denial reasons with several other performance-based factor that the Division will review when deciding whether to deny or approve a designated doctor's application for recertification. This expansion is necessary, because a complete biannual review of a designated doctor's performance, both from an administrative and quality of review perspective, provides the Division with the critical information that can help determine whether a particular designated doctor can still meet the duties of a designated doctor under Labor Code §408.0041 and other applicable provisions of the Act and Division rules. Additionally, this review meets the Division's obligation to have a recertification process that ensures the quality of designated doctor decisions and reviews under Labor Code §408.1225(b)(2).

Proposed new subsection (f) describes the process through which a designated doctor may dispute the Division's denial of the doctor's application for recertification. This proposed subsection provides a designated doctor with two options. First, the designated doctor may provide a written response to a denial under proposed new subsection (f)(2). This process parallels the written response process under proposed new §127.100(e) for denials of an application for certification as a designated doctor. Alternatively, however, a designated doctor whose application for recertification was denied may also seek reconsideration this denial through an informal hearing before a panel of Commissioner of Workers' Compensation (Commissioner) designated representatives, and proposed new subsection (f)(3) describes the process for this informal hearing, which includes the right for a designated doctor to have an attorney present at the informal hearing. These informal processes are necessary to ensure that designated doctors have a fair opportunity to dispute a denied application for recertification and to ensure the quality and accuracy of the Division's determinations in its proposed recertification process after January 1, 2013, which often may involve detailed or complex facts and analysis.

Proposed new subsection (g) provides that designated doctors whose application for recertification under subsection (b) is approved but wish to dispute the examination qualification criteria under proposed new §127.130 that the Division assigned to the doctor may do so through the written appeal procedures described in subsection (f)(2) of this section. Designated doctors must include in their response to the Division the specific criteria they wish to be modified and documentation to justify the requested change. This new provision is necessary to ensure that designated doctor whose applications for recertification are

approved still have the opportunity to dispute the terms of that approval, if necessary.

Proposed New §127.120.

Proposed new §127.120 recodifies proposed repealed §180.21(k) of this title and provides that when necessary because the injured employee is temporarily located or is residing out-of-state, the Division may waive any of the requirements as specified in this chapter for an out-of-state doctor to serve as a designated doctor to facilitate a timely resolution of the dispute or perform a particular examination. This recodification is necessary to ensure the availability of designated doctor examinations for out-of-state employees who may not be able to locate or travel to a certified designated doctor in Texas or another state.

Proposed New §127.130.

Proposed new subsection (a) provides that for examinations that will occur before January 1, 2013, a designated doctor is qualified to perform an designated doctor examination on an injured employee if the designated doctor has credentials that are appropriate to the issue in question and the injured employee's medical condition and that meet the requirements of Labor Code §408.0043 and §408.0045, and applicable Division rules, and the designated doctor has no applicable disqualifying associations under proposed new §127.140. This proposed new subsection is necessary to codify the Division's current policy for assigning designated doctors to approved examinations, and this policy will remain in effect until January 1, 2013. This proposed new subsection creates no substantive change in the Division's current practices and ensures that the Division's designated doctor selection process will continue to comply with Labor Code §§408.0041, 408.0043, 408.0045, and 408.1225 and other applicable Division rules until January 1, 2013.

Proposed new subsection (b) provides the qualification standard for selecting a designated doctor for an examination that will occur on or after January 1, 2013. The selection criteria under this new qualification standard will create a substantive change in the Division's designated doctor selection process, but this substantive change is necessary to comply with two amendments to Labor Code §408.0041 made by HB 2605 that will apply to all designated doctor examinations on or after January 1, 2013. Specifically, HB 2605, as discussed above, amended §408.0041(b) to provide that a medical examination under Labor Code §408.0041 shall be performed by the next designated doctor on the Division's list of certified designated doctors whose credentials are appropriate for "the area of the body affected by the injury and the injured employee's diagnosis" and deletes the requirement that a designated doctor's credentials must be appropriate for the "issue in question" and the injured employee's "medical condition."

Additionally, however, HB 2605 also amended §408.0041(b-1) to provide that while Labor Code §408.0043 and §408.0045 still apply to a designated doctor performing an examination, if either Labor Code §408.0043 or §408.0045 conflict with Labor Code §408.0041, Labor Code §408.0041 controls. This conflict provision will substantially limit the application of Labor Code §408.0043 and §408.0045 to a designated doctor selected to perform an examination under Labor Code §408.0041 on or after January 1, 2013. Specifically, though both Labor Code §408.0043 and §408.0045 still apply to a designated doctor performing a designated doctor examination, Labor Code §408.0041 requires designated doctor examinations to be performed by the next available designated doctor who meets the Labor Code §408.0041 criteria.

To implement these amendments, the Division has proposed new subsection (b)(1) - (8). Proposed new subsection (b)(1) - (7) provide the substantive core of the Division's new qualification standard. Each of these proposed new paragraphs governs injuries and diagnoses relating to a different area of the body (such as hand and upper extremity or feet, including the toes and heel) and matches that area of the body to particular doctor license types the Division has determined to be qualified and appropriate to examine the injuries and diagnoses of that area of the body. Generally, the Division's based its rationale for these determinations on the fact that for the vast majority of diagnoses seen in the Texas workers' compensation system, any doctor who is trained to be a designated doctor and who can evaluate the area of the body at issue within the scope of the doctor's license will be appropriately qualified for the purposes of Labor Code §408.0041 to perform a designated doctor examination of any injury or diagnosis relating to that area of the body.

The Division recognizes that the broad categories of proposed new subsection (b)(1) - (7) could potentially in some circumstances permit a designated doctor to evaluate a particular injury or diagnosis that would exceed the scope of the doctor's license or require the doctor to examine an uncommon, complex diagnosis that may require a higher level of expertise in a particular medical specialty; therefore, the Division has proposed new subsection (b)(8)(A) - (H) and, in part, proposed new subsection (f)(5) and proposed new §127.200 to prevent these outcomes.

Proposed new subsection (b)(8)(A) - (H) address the necessary qualifications of designated doctors to examine certain complex diagnoses less frequently seen in the workers' compensation system. The Division estimates an overwhelming majority of designated doctor examinations will be requested to evaluate injuries and diagnoses addressed by proposed new subsection (b)(1) - (7); however, the Division has determined that there also exists a relatively infrequently seen but nonetheless sufficiently impactful subset of diagnoses or injuries in the workers' compensation system that because of their infrequency and complexity require additional qualification criteria. The Division, therefore, has in proposed new subsection (b)(8)(A) - (H) divided these diagnoses or injuries (such as traumatic brain injuries or chemical exposures) into eight subcategories and for each subcategory determined which medical doctors or doctors of osteopathy who are board certified by either the American Board of Medical Specialties or American Osteopathic Association Bureau of Osteopathic Specialists would be appropriate to evaluate that subcategory of diagnoses or injuries. These proposed new subparagraphs thus ensure that these subcategories of diagnoses and injuries are evaluated by appropriately qualified individuals with objectively demonstrable expertise while also preventing designated doctors who could not evaluate these conditions within the scope of their license or who may not have the appropriate training and specialty from examining these conditions by separating them from proposed new subsection (b)(1) - (7).

Proposed new subsection (c) provides that "[t]o be qualified to perform an initial examination on an injured employee, a designated doctor, other than a chiropractor, must be qualified under Labor Code §408.0043. A designated doctor who is a chiropractor must be qualified to perform an initial designated doctor examination under Labor Code §408.0045. If, however, the requirements of this subsection would disqualify a designated doctor otherwise qualified under subsection (b), this subsection,

pursuant to Labor Code §408.0041(b-1), does not apply." This proposed new subsection is necessary to both clarify and reiterate the impact of the HB 2605 amendment to Labor Code §408.0041(b-1) discussed above.

Proposed new subsection (d) provides that the Division may not offer a qualified designated doctor an examination if it is reasonably probable that the designated doctor will not be qualified on the date of the examination. This proposed new subsection is necessary to ensure the Division has administrative flexibility to select an appropriate designated doctor in uncommon circumstances, such as when a qualified doctor may not be qualified on the date of the examination because of various external factors, including pending disciplinary action by the doctor's licensing board.

Proposed new subsection (e) provides that a designated doctor who performs an initial designated doctor examination of an injured employee and had the appropriate selection criteria to perform that examination under either subsection (a) or (b) of this section, as applicable, shall remain assigned to that claim and perform all subsequent examinations of that injured employee unless the Division authorizes or requires the designated doctor to discontinue providing services on that claim. This proposed new subsection simply codifies the requirements of the HB 2605 amendment to Labor Code §408.1225(f).

Proposed new subsection (f) provides the reasons for which the Division would authorize a designated doctor to leave a claim to which the designated doctor had been previously assigned. These reasons include, but are not limited to, a decision by the doctor to leave the workers' compensation system or a determination by the doctor that examining the injured employee would require the designated doctor to exceed the scope of the doctor's license. The Division notes that this last reason serves as an additional precaution to ensure that a designated doctor does not perform examinations on an injured employee the doctor previously examined if the injured employee's medical condition has developed in such a manner during the life of the claim that it now exceeds the scope of the designated doctor's license.

Proposed new subsection (g) provides the reasons for which the Division would compel a designated doctor to leave a claim to which the designated doctor had been previously assigned. The reasons include the following uncommon circumstances: the doctor has failed to become recertified as a designated doctor under either subsection (a) or (b) of §127.110; the doctor no longer has the appropriate qualification criteria under either subsection (a) or (b) of this section, as applicable, to perform examinations on the claim; the doctor has a disqualifying association, as specified in proposed new §127.140, relevant to the claim; the doctor has repeatedly failed to respond to Division appointment, clarification, or document requests regarding the claim; or the doctor's continued service on the claim could endanger the health, safety, or welfare of either the injured employee or doctor. This proposed new subsection is necessary, because these circumstances either would violate other provisions of the Labor Code or other law or would create administratively unworkable outcomes.

Proposed new subsection (h) provides that the Division will prohibit a designated doctor from performing examinations on all new or existing claims if the designated doctor has had the doctor's license revoked or suspended and the suspension has not been probated by an appropriate licensing authority. This amendment is necessary to clarify that no other circumstances will permit a doctor to perform a designated doctor examination if the doctor is wholly unable to practice within the scope of the doctor's license.

Proposed New §127.140.

Proposed new subsection (a) relates to designated doctor disqualifying associations and primarily recodifies proposed repealed §180.21(a)(2) of this title. Additionally, however, it also adds that a contract with the same political subdivision or political subdivision health plan under Labor Code §504.053(b)(2) that is responsible for the provision of medical benefits to the injured employee may also constitute a disqualifying association.

Proposed new subsection (b) provides that, for an examination performed on or after January 1, 2013, a designated doctor shall also have a disqualifying association relevant to a claim if an agent of the designated doctor has an association relevant to the claim that would constitute a disqualifying association under subsection (a) of this section. This amendment is necessary as a logical extension of the Division's current standard of prohibiting any association by a designated doctor with the injured employee, the employer, or insurance carrier that may give the appearance of preventing the designated doctor from rendering an unbiased opinion and to implement the requirement of Labor Code §408.1225(d) that requires the Division to develop rules that ensure a designated doctor has no conflicts of interest relevant to a claim for which the designated doctor will perform an examination. For without this proposed new subsection, the Division would have no express prohibition of certain potentially inappropriate system practices, such as when the same third party is both requesting a designated doctor examination on behalf of an insurance carrier while also on the same claim accepting and scheduling designated doctor examinations on behalf of a designated doctor. The Division emphasizes, however, that these potential disqualifying associations must still be examined on a case by case basis in order to determine whether or not the association could reasonably be perceived as having the potential to influence the conduct or decision of a designated doctor. Lastly, the Division has elected to delay implementation of this requirement until January 1, 2013, so that system participants may have time to prepare for its effect on their practices and so that it may be implemented simultaneously with the Division's other designated doctor selection changes.

Proposed new subsection (c) substantially recodifies proposed repealed §180.21(m)(9) of this title but also adds that a designated doctor commits an administrative violation if the designated doctor performs an examination when the designated doctor has a disqualifying association relevant to that claim. This amendment is necessary to ensure diligence on the part of the designated doctor in review of both offered appointments and other documents relating to accepted examination for any possible disqualifying association.

Proposed new subsection (d) provides that insurance carriers shall notify the Division of any disqualifying associations between the designated doctor and injured employee because of the network affiliations described under subsection (a)(6) of this section within five days of receiving the Division's order of designated doctor examination under §127.5(a) of this title (relating to Scheduling Designated Doctor Appointments). This proposed new subsection is necessary to help ensure that injured employees are not subject to nor insurance carriers liable for designated doctor examinations for which the selected designated doctor has disqualifying association because of an affiliation with a Chapter 1305, Insurance Code workers' compensation health care network or a contract with a political

subdivision or political subdivision health plan under Labor Code §504.053(b)(2).

Proposed new subsection (e) provides that if the Division determines that a designated doctor with a disqualifying association performed a designated doctor examination, all reports produced by that designated doctor as a result of that examination shall be stripped of their presumptive weight. This proposed new subsection is necessary to harmonize this proposed new section with current §127.10(g), which provides that the report of the designated doctor is given presumptive weight regarding the issue(s) in question the designated doctor was properly appointed to address.

Proposed new subsection (f) provides that a party that seeks to dispute the selection of a designated doctor for a particular examination based on a disqualifying association or to dispute the presumptive weight of a designated doctor's report based on a disqualifying association must do so through the Division's dispute resolution processes in Chapter 410, Labor Code and Chapters 140 - 144 and 147 of this title (relating to Dispute Resolution processes, proceedings, and procedures). This proposed new subsection is necessary to clarify that only the Division may make a final determination regarding the existence of a designated doctor's disqualifying association related to a claim, and parties wishing to raise this issue must do so through the Division's dispute resolution processes.

Proposed New §127.200.

Proposed new subsection (a) lists certain duties of designated doctors. Proposed new subsection (a)(1) provides that a designated doctor must perform designated doctor examinations in a facility currently used and properly equipped for medical examinations or other similar health care services and that ensures safety, privacy, and accessibility for injured employees and injured employee medical records and other records containing confidential claim information. This proposed new subsection is necessary to clarify that designated doctor examination facilities meet basic standards of medical appropriateness and to be consistent with the general system goal expressed in Labor Code §402.021(a) that injured employees shall have access to high-quality medical care under the Act.

Proposed new subsection (a)(2) provides that designated doctors must ensure the confidentiality of medical records, analyses, and forms provided to or generated by the designated doctor in the doctor's capacity as a designated doctor for the duration of the retention period specified in §127.10(i) and ensure the destruction of these medical records after both this retention period expires and the designated doctor determines the information is no longer needed. This proposed new subsection is necessary to clarify and ensure that designated doctors must comply with confidentially provisions of the Act, including, but not limited to, Labor Code §402.083.

Proposed new subsection (a)(3) provides that designated doctors must ensure that all agreements with a person or persons that permit those parties to perform designated doctor administrative duties, including but not limited to billing and scheduling duties, on the designated doctor's behalf are in writing and signed by the designated doctor and the person(s) with whom the designated doctor is contracting; define the administrative duties that the person may perform on behalf of the designated doctor; require the person or persons to comply with all confidentiality provisions of the Act and other applicable laws; comply with all medical billing and payment requirements under Chapter 133 of this title (relating to Medical Benefits); do not constitute an improper inducement relating to the delivery of benefits to and injured employee under Labor Code §415.0036 and §180.25 of this title (relating to Improper Inducements, Influence and Threats); and are made available to the Division upon request. This proposed new subsection is necessary to ensure that the agents of a designated doctor are authorized to perform administrative duties on the designated doctor's behalf, that those person(s) comply with the confidentiality provisions of the Act, and to assist the Division in monitoring the disqualifying associations imputed to designated doctors by these third parties.

Proposed new subsection (a)(4) provides that designated doctors must notify the Division in writing and in advance if the designated doctor voluntarily decides to defer the designated doctor's availability to receive any offers of examinations for personal or other reasons and specify the duration of and reason for the deferral. This proposed new subsection is necessary for the Division to be able to administratively prepare for these deferrals. The Division also notes that while the Division has elected to leave the frequency and extent of these deferrals to the discretion of the designated doctor, excessive or unnecessary deferrals will be a factor considered if the designated doctor applies for recertification under proposed new §127.110(b).

Proposed new subsection (a)(5) provides that a designated doctor must notify the Division in writing and in advance if the designated doctor no longer wishes to practice as a designated doctor; a designated doctor who no longer wishes to practice as a designated doctor must expressly surrender the designated doctor's certification in a signed, written statement to the Division. This amendment is necessary to ensure the Division is fully aware and can document that a designated doctor has elected to withdraw from practice a designated doctor before the expiration of the doctor's certification as a designated doctor.

Proposed new subsection (a)(6) provides that designated doctors must be physically present in the same room as the injured employee for the designated doctor examination or any other health care service provided to the injured employee that is not referred to another health care provider under §127.10(c). The proposed new subsection is necessary to ensure that designated doctors either perform or directly supervise all elements of a designated doctor examination that are not referred to another health care provider under §127.10(c).

Proposed new subsection (a)(7) provides that designated doctors must apply the appropriate edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment* and Division-adopted return-to-work guidelines and consider Division-adopted treatment guidelines or other evidence-based medicine when appropriate. This proposed new subsection is necessary to clarify that designated doctors must utilize these guidelines as required by the Act and other Division rules.

Proposed new subsection (a)(8) requires that all designated doctors must provide the Division with updated information within 10 working days of a change in any of the information provided to the Division on the doctor's application for certification or recertification as a designated doctor. This proposed new subsection primarily recodifies proposed repealed §180.21(l) of this title but also reduces the timeframe for submitting these updates from 30 days to 10 working days in order to limit the administrative errors caused by inaccurate designated doctor profile information.

Proposed new subsection (a)(9) requires that designated doctors must maintain a professional and courteous demeanor when

performing the duties of a designated doctor, including, but not limited to, explaining the purpose of a designated doctor examination to an injured employee at the beginning of the examination and using non-inflammatory, appropriate language in all reports and documents produced by the designated doctor. This proposed new subsection is necessary to ensure that designated doctor examinations meet the express system goal of Labor Code §402.021(a) that all injured employees shall be treated with dignity and respect when injured on the job and to maintain the objectivity of the designated doctor process.

Proposed new subsection (a)(10) provides that designated doctors must bill for designated doctor examinations and receive payment in accordance with Chapter 133 of this title and 134 of this title (relating to Benefits--Guidelines for Medical Services, Charges, and Payments). This proposed new subsection is necessary simply to reiterate and clarify the application of those chapters to designated doctor billing. Proposed new subsection (a)(10) is similarly for clarification purposes.

Proposed new subsection (a)(12) provides that designated doctors must notify the Division if a designated doctor's continued participation on a claim to which the designated doctor has already been assigned would required the doctor to exceed the scope of practice authorized by the doctor's license. This proposed new subsection is necessary to conform with the requirements of proposed new §127.130 and ensure that designated doctors do not perform examinations that are not permitted within the scope of their license.

Proposed new subsection (a)(13) provides that designated doctors must not perform required medical examinations, utilization reviews, or peer reviews on a claim to which the designated doctor has been assigned as a designated doctor. This proposed new subsection is necessary to ensure that designated doctors do not intentionally or negligently disqualify themselves from claims to which they have already been assigned.

Proposed new subsection (a)(14) provides that designated doctors must identify themselves at the beginning of every designated doctor examination and present photo identification upon the request of the injured employee. This requirement is necessary to ensure that injured employees can verify that the designated doctor performing examination is the designated doctor that was ordered to perform the examination.

Proposed new subsection (a)(15) provides that designated doctors must consent to and cooperate during any on-site visits by the Division pursuant to §180.4 of this title (relating to On-Site Visits); notwithstanding §180.4(e)(2) of this title, the Division purpose for these visits will be to ensure the designated doctor's compliance with the Act and applicable Division rules, and the notice provided to the designated doctor in accordance with §180.4(e) of this title, either in advance of or at the time of the on-site visit, will specify the duties being investigated by the Division during that visit. This amendment is necessary to ensure that the Division has sufficient means to monitor the quality of facilities used by designated doctors for designated doctor examinations and to otherwise ensure that designated doctor comply with all required duties imposed upon them by the Act or other applicable Division rules. The Division further notes that though these on-site visits generally shall comply with the requirements of §180.4 of this title, the Division will not necessarily be alleging a specific violation at the time of the on-site visit; instead, the Division may, in some cases, simply be inspecting a designated doctor on a random basis to ensure compliance with the Act and applicable Division rules. The Division will, however, provide the designated doctor notice of the specific duties being investigated during the on-site visit at the time of (for unannounced on-site visits) or in advance of the visit (for announced on-site visits).

Proposed new subsection (b) provides that for the purposes of Chapter 127, Chapter 180 of this title (relating to Monitoring and Enforcement), and all other applicable laws and Division rules, any person with whom a designated doctor contracts or otherwise permits to perform designated doctor administrative duties on behalf of the designated doctor qualifies as the doctor's "agent" as defined under §180.1 of this title (relating to Definitions). This proposed new subsection is necessary to harmonize this proposed new section with the Division's rules regarding agents in Chapter 180 of this title.

Proposed New §127.210.

Proposed new subsection (a) primarily recodifies proposed repealed §180.21(m) of this title and provides a non-exhaustive list of designated doctor administrative violations that are not necessarily expressed in any other Division rule. Proposed new subsection (a)(3) also clarifies that any refusal to accept or perform a Division offered appointment or ordered appointment that relates to a claim which the doctor has been previously assigned is an administrative violation. This proposed new violation is necessary to implement the HB 2605 amendment to Labor Code §408.1225(f) described above.

Proposed new subsection (a)(6) provides that it is an administrative violation for a designated doctor to order or perform unnecessary testing of an injured employee as part of a designated doctor's examination. This new subsection is necessary to clarify that testing should only be performed when necessary to resolve the issue(s) in question and to conform to the analogous standard for health care provider referrals in proposed new subsection (a)(5), which recodifies current §180.21(m)(3).

Additionally, proposed new subsection (a)(12) provides that it is an administrative violation for a designated doctor to behave in an abusive or assaultive manner toward an injured employee. This proposed new subsection is necessary to correspond with the Division's professionalism standard under proposed new §127.200(a)(8) and to ensure injured employee safety and dignity during designated doctor examinations.

Lastly, proposed new subsection (a)(14) provides that designated doctors may not perform examinations that the designated doctor was not ordered to perform. This amendment is necessary to clarify that only the designated doctor assigned to the claim may perform the designated doctor examination of the injured employee.

Proposed new subsection (b) provides that designated doctors are liable for all administrative violations committed by their agents on the designated doctor's behalf under this section, other Division rules, or any other applicable law. This amendment is necessary to harmonize this proposed new section with the definition of "agent" in §180.1 of this title.

Proposed new subsection (c) recodifies proposed repealed §180.21(n) of this title.

Proposed New §127.220.

Proposed new subsection (a) primarily recodifies proposed repealed subsection §127.10(f)(1) - (8) and also expands upon those subsections in order to both help ensure medical and legal sufficiency of designated doctor narrative reports and to pro-

vide the Division with information necessary for the monitoring of designated doctor reviews and administrative functions. The majority of these required provisions are either recodified provisions or are necessary in order for the designated doctor to document compliance with other Division rules. The Division also notes that the new proposed requirement that designated doctors must document the time the designated doctor began taking the medical history of the injured employee, physically examining the employee, and engaging in medical decision making and the time the designated doctor completed these tasks is primarily necessary for informational purposes and to assist in the investigation of complaints of injured employee maltreatment or possible fraud. The Division recognizes, however, that the time spent performing these tasks may not necessarily have any bearing on the quality of a designated doctor's review and intends to make no definitive implication of that nature by imposing this requirement.

Proposed new subsection (b) provides that designated doctors who perform examinations under §127.10(d) or (e) shall also complete and file the Division forms required by those subsections with their narrative reports. Designated doctors shall complete and file these forms in manner required by applicable Division rules

Proposed new subsection (c) provides that designated doctors who perform examinations under §127.10(f) must, in addition to filing a narrative report that complies with proposed new subsection (a) of this section, also file a Designated Doctor Examination Data Report in the form and manner required by the Division. Proposed new subsection (c) then further provides for the required elements of a Report of Designated Doctor Examination. This purpose of this report is intended to be analogous to the purpose of the Division's DWC-069 form for MMI/IR examinations and is necessary to ensure that the Division has uniform report format for these examination suitable for data harvesting. The elements of this report do not substantially differ from the requirements of designated doctor narrative reports except that they do not require a designated doctor to include any of the narrative elements on the form. The designated doctor's rationale and other narrative elements are only to be included in the designated doctor's narrative report as described by proposed new subsection (a) of this section.

Additionally, however, proposed new subsection (c)(2) also requires that Reports of Designated Doctor Examination list all injuries determined to be compensable by the Division; accepted as compensable by the insurance carrier; or claimed to be compensable by the injured employee and not disputed by the insurance carrier. Designated doctors must obtain this information from the Division's DWC-032. Furthermore, designated doctors must also assign a single or multiple diagnosis codes for each list injury or medical condition. The Division emphasizes, however, that this translation to a diagnosis code does not constitute a finding of the designated doctor for the purposes benefit payments or presumptive weight under the Act or §127.10(g) or (h). Instead, the Division only requires these codes for informational purposes, because they are necessary for mass data collection. Proposed new subsection (c) also provides a similar requirement for the disputed conditions examined by a designated doctor to determine the extent of the compensable injury, and, similarly, the diagnosis code requirement is only for informational purposes and has no other effect.

Patricia Gilbert, Executive Deputy Commissioner of Operations, has determined that for each year of the first five years the proposed new and amended rules will be in effect there will be minimal fiscal implications to state or local government as a result of enforcing or administering the sections. There also will be no measurable effect on local employment or the local economy as a result of the proposed rules.

Ms. Gilbert has determined that the proposed rules will have some impact on the cost of the Division's designated doctor certification process. Specifically, Ms. Gilbert has determined that the Division's designated doctor recertification process on or after January 1, 2013, as described in proposed new §127.110, will likely require the Division to employ one to two more full-time employees to assist in the new review process. Ms. Gilbert has also determined that there will be no other costs for the Division and there will be no fiscal implication to local governments as a result of enforcing or administering the proposed amendments.

Local Government and State Government as a Covered Entity. Local government and state government as a covered entity will be impacted in the same manner as persons required to comply with the proposed amendments as described later in the preamble.

Ms. Gilbert has determined that for each year of the first five years the sections are in effect, the public benefit as a result of these proposed new rules will be a more informed and efficient dispute resolution process and fewer improperly approved designated doctor examinations or incorrectly selected designated doctors due to the exchange of designated doctor examination requests required by proposed amended §127.1(b)(10). Ms. Gilbert has also determined that these proposed new and amended rules will lead to an increased quality of designated doctor examinations due to the Division's new increased standards for and monitoring of prospective and existing designated doctors through the Division's proposed new certification and recertification processes and clarification of designated doctor duties and report expectations in §§127.100, 127.110, 127.200, and 127.220. Lastly, Ms. Gilbert has also determined that the proposed new rules will also result in increased designated doctor and general stakeholder awareness of the Division's scheduling and certification procedures because the proposed new rules clarify or codify a number of the Division's current designated doctor scheduling procedures and examination expectations.

Furthermore, while Ms. Gilbert has determined that the costs of compliance associated with the proposal primarily result from requirements in Labor Code §408.0041 and §408.1225, and existing Division rules and policies, she has also determined that certain provisions of these new and amended rules will impose quantifiable costs upon stakeholders. Specifically, Ms. Gilbert has determined that proposed new §127.100(b) and §127.110(b) requirements for designated doctors to own or maintain a subscription to the *American Medical Association Guides to Evaluation of Permanent Impairment* and Division-adopted treatment or return-to-work guidelines for the duration of their certification as designated doctor shall, if the designated doctor does not already own or subscribe to these guidelines, amount to a one-time cost of approximately $125.00 to purchase the *American Medical Association Guides to Evaluation of Permanent Impairment* and an annual cost of $390.00 to $780.00 to subscribe to the Division's currently adopted treatment and return-to-work guidelines. Additionally, Ms. Gilbert has also determined that the proposed new §127.110(a) - (b) requirement that designated doctors take and pass all Division required testing shall amount to approximately a $500 cost to designated doctors every two years based on the cost of all currently required Division test-

ing. The Division notes, however, that this cost could increase or decrease based on any changes to the required testing in the future. Lastly, Ms. Gilbert has determined that the proposed new §127.1(b)(10) requirement that parties exchange their designated doctor examination request forms may impose an additional $.30 - $.40 upon each requestor per request based on a calculation of $.06 - $.08 cents per page copied and five pages per request.

Ms. Gilbert has also determined that other new requirements of these proposed new and amended rules may impose additional costs upon stakeholders but the costs are dependent on the case-by-case circumstances of each affected stakeholder to quantify the amount of the cost. Specifically, Ms. Gilbert has determined that the new requirement under proposed amended §127.10(a) that treating doctors and insurance carriers shall not send duplicate or billing records to a designated doctor may impose costs upon those persons depending on the extent to which they were previously submitting these types of records. Similarly, Ms. Gilbert has determined that the new provision of proposed new §127.140(b) that potentially imputes the disqualifying associations of the agents of a designated doctor to the designated doctor may impose costs upon designated doctors to the extent that they have already contracted with third parties to perform administrative duties on their behalf, and those third parties have associations with other system participants that could potentially create a disqualifying association.

As required by the Government Code §2006.002(c), the Division has determined that the proposal will have an adverse economic effect on the small and micro-businesses that may be required to comply with the proposed new sections, because the vast majority of the approximately 1,200 designated doctors in the workers' compensation system will have practices that constitute a small or micro-business. Thus, the Division can have no feasible alternative to its currently proposed regulatory requirements for these small or micro-businesses, because the primary focus of these proposed regulations is, by statutory mandate, small or micro-business. For instance, exempting designated doctor's whose practices may qualify as small or micro-businesses from the requirement to obtain a subscription to Division-adopted treatment guidelines for the duration of the doctor's certification as a designated doctor would lead to this critically important requirement not applying to the vast majority of the Division's designated doctors and, therefore, frustrate the purpose of the regulation. The same logic would apply to offering an alternative certification process, for instance. Specifically, an "alternative" certification process for designated doctors whose practices could qualify as a small or micro-business would become the standard certification process because it would apply to the vast majority of the Division's designated doctors.

These proposed rules will, however, have an adverse economic impact on the approximately 30 insurance carriers who qualify as a small or micro-business under Government Code §2006.001. Specifically, proposed new §127.1(b)(10) requires small or micro-business insurance carriers, like all other insurance carriers, to submit a copy of their request for a designated doctor examination to all other parties under §127.1(a). This requirement will impose a cost of $.40 - $.30 upon each insurance carrier requestor per request based on a calculation of $.08 - $.06 cents per page copied and five pages per request. The Division, however, can offer no alternative or exemption from this procedure, because of the critical nature this request exchange will play in the Division's dispute resolution process regarding the appropriate approval or denial of designated doctor examination requests and the appropriate selection of the designated doctor. The Division also emphasizes, however, that even without an exemption or alternative, the cost imposed by this requirement is relatively minimal and possibly nonexistent, depending on how often a small or micro-business insurance carrier requests a designated doctor examination.

Inasmuch as any of the Division's current or prospective designated doctors or any other system participant are affected by this proposal could constitute a large business, the cost of compliance with the proposal will not vary between large businesses and small or micro-businesses, and the Division's cost analysis and resulting estimated costs in the Public Benefit/Cost Note portion of this proposal is equally applicable to small or micro-businesses and large businesses.

The Division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. CST on March 26, 2012. Comments may be submitted via the internet through the Division's website at www.tdi.texas.gov/wc/rules/proposedrules/index.html, by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Office of Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. Comments received after the close of comment will not be considered.

A public hearing on this proposal will be held on March 26, 2012 at 9:30 a.m. in the Tippy Foster Conference Room of the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Austin, Texas 78744-1645. The Division provides reasonable accommodations for persons attending meetings, hearings, or educational events, as required by the Americans with Disabilities Act. If you require accommodations in order to attend the hearing please contact Idalia Salazar at (512) 804-4403 at least two business days prior to the confirmed hearing date.

The hearing will also be audio streamed; to listen to the audio stream, access the Public Outreach Events/Training Calendar website at www.tdi.texas.gov/wc/events/index.html. Audio streaming will begin approximately five minutes before the scheduled time of the hearing.

The public hearing date, time, and location should be confirmed by those interested in attending or listening via audio stream; the hearing may be confirmed by visiting the Division's Public Outreach Events/Training Calendar website at www.tdi.texas.gov/wc/events/index.html. Written and oral comments presented at the hearing will be considered.

SUBCHAPTER A. DESIGNATED DOCTOR SCHEDULING AND EXAMINATIONS

28 TAC §§127.1, 127.5, 127.10, 127.20, 127.25

The amendments are proposed under the Labor Code §408.0041 and §408.1225 and under the general authority of Labor Code §402.00128 and §402.061. Section 408.0041 provides the general requirements and procedures for designated doctor examinations. Section 408.1225 provides, in relevant

part, that a designated doctor shall continue providing services related to a case assigned to the designated doctor, including performing subsequent examinations or acting as a resource for Division disputes, unless the Division authorizes the designated doctor to discontinue providing services.

Section 402.00128 lists the general powers of the Commissioner, including the power to hold hearings. Section 402.061 provides that the Commissioner shall adopt rules as necessary for the implementation and enforcement of this subtitle.

The following statute is affected by this proposal: §127.1 - Labor Code §408.0041; §127.5 - Labor Code §408.0041 and §408.1225; §127.10 - Labor Code §§408.0041; §127.20 - Labor Code §408.0041; and §127.25 - Labor Code §408.0041.

§127.1. Requesting Designated Doctor Examinations.

(a) At the request of the insurance carrier, an injured employee, the injured employee's representative, or on its own motion, the division may order a medical examination by a designated doctor to resolve questions about the following:

(1) the impairment caused by the injured employee's compensable injury;

(2) the attainment of maximum medical improvement (MMI);

(3) the extent of the injured employee's compensable injury;

(4) whether the injured employee's disability is a direct result of the work-related injury;

(5) the ability of the injured employee to return to work; or

(6) issues similar to those described by paragraphs (1) - (5) of this subsection.

(b) To request a designated doctor examination a requestor must:

(1) provide a specific reason for the examination;

(2) explain any change of condition if the requestor indicates that the injured employee's medical condition has changed since a previous designated doctor examination on the same claim;

(3) report the injured employee's current diagnosis or diagnoses and part of the body affected by the injury [~~medical condition and the type of health care the injured employee is currently receiving~~];

(4) provide a list of all injuries determined to be compensable by the division; [~~or~~] accepted as compensable by the insurance carrier; or claimed to be compensable by the injured employee and not disputed by the insurance carrier;

(5) provide general information regarding the identity of the requestor, injured employee, employer, treating doctor, insurance carrier[~~, as well as the statutory date of maximum medical improvement, if any~~];

(6) identify the workers' compensation health care network certified under Chapter 1305, Insurance Code through which the injured employee is receiving treatment, if applicable;

(7) identify whether the claim involves medical benefits provided through a political subdivision under Labor Code §504.053(b)(2) and the name of the health plan, if applicable;

(8) state whether the injured employee has attended any other designated doctor examinations on this claim and, if so, the dates of the examinations and the name of the examining designated doctor;

(9) [~~(6)~~] submit the request on the form prescribed by the division under this section. A copy of the prescribed form can be obtained from:

(A) the division's website at www.tdi.texas.gov/wc/indexwc.html [~~www.tdi.state.tx.us/wc/indexwc.html~~]; or

(B) the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744 or any local division field office location;

(10) submit the request to the division and a copy of the request to each party listed in subsection (a) of this section who did not request the designated doctor examination;

(11) [~~(7)~~] provide all information listed in subparagraphs (A) - (G) of this paragraph [~~below~~] applicable to the type of examination the requestor seeks:

(A) if the requestor seeks an examination on the attainment of MMI, include the statutory date of maximum medical improvement, if any [~~date of MMI if any; the date of certification of MMI if any; and the name of the certifying doctor, if any, and whether the certifying doctor was a treating doctor, required medical examination doctor, or referral doctor~~];

(B) if the requestor seeks an examination on the impairment rating of the injured employee, include the date of MMI that has been determined to be valid by a final decision of division or court or by agreement of the parties, if any [~~, the date of certification of MMI and prior assigned impairment rating, if any, and the name of the certifying doctor, if any, and whether the certifying doctor was a treating doctor, required medical examination doctor, or referral doctor~~];

(C) if the requestor seeks an examination on the extent of the compensable injury or an examination regarding the causation of the claimed injury, include a description of the accident or incident that caused the claimed injury[~~;~~] and a list of all injuries in question;

(D) if the requestor seeks an examination on whether the injured employee's disability is a direct result of the work-related injury, include the beginning and ending dates for the claimed periods of disability; state if the injured employee is either not working or is earning less than pre-injury wages as defined by Labor Code §401.011(16); [~~and list all injuries determined to be compensable by the division or accepted as compensable by the insurance carrier;~~]

(E) if the requestor seeks an examination regarding the injured employee's ability to return to work in any capacity and what activities the injured employee can perform, include the beginning and ending dates for the periods to be addressed if the requestor is requesting for the designated doctor to examine the injured employee's work status during a period other than the current period; [~~and a job description for job offers the employer intends to offer the injured employee;~~]

(F) if the requestor seeks an examination to determine whether or not an injured employee entitled to supplemental income benefits may return to work in any capacity for the identified period, include the beginning and ending dates for the qualifying periods to be addressed and whether or not this period involves the ninth quarter or a subsequent quarter of supplemental income benefits;

(G) if the requestor seeks an examination on topics under subsection (a)(6) of this section, specify the issue in sufficient detail for the doctor to answer the question(s); and

(12) [~~(8)~~] provide a signature to attest that every reasonable effort has been made to ensure the accuracy and completeness of the information provided in the request.

(c) If a party submits a request for a designated doctor examination under subsection (b) of this section that would require the division to schedule an examination within 60 days of a previous examination of the injured employee that party must provide good cause for scheduling that designated doctor examination in order for the division to approve the party's request. For the purposes of this subsection, the commissioner or the commissioner's designee shall determine good cause on a case by case basis and will require at a minimum:

(1) if that requestor also requested the previous examination, a showing by the requestor that the submitted questions could not have reasonably been included in the prior examination and a designated doctor examination is reasonably necessary to resolve the submitted question(s) and will affect entitlement to benefits; or

(2) if that requestor did not request the previous examination, a showing by the requestor a designated doctor examination is reasonably necessary to resolve the submitted question(s) and will affect entitlement to benefits.

(d) The division shall deny a request for a designated doctor examination:

(1) if the request does not comply with any of the requirements of subsections (b) or (c) of this section;

(2) if the request would require the division to schedule an examination in violation of Labor Code §§408.0041, 408.123, or 408.151; [~~or~~]

(3) if the commissioner or the commissioner's designee determines the request to be frivolous because it lacks either any legal or any factual basis that would merit approval;

(4) if the insurance carrier has denied the compensability of the claim and reported the denial to the division in accordance with §124.2 of this title (relating to Carrier Reporting and Notification Requirements) and the dispute is not yet resolved, unless the requestor seeks an examination under subsection (a)(6) of this section to determine whether the claimed incident caused the claimed injury; or

(5) if the insurance carrier has denied liability for the claim under Labor Code §§406.032, 409.002 or 409.004 and reported that denial to the division in accordance with §124.2 of this title and this dispute is not yet resolved.

(e) A party may dispute the division's approval or denial of a designated doctor request through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title (relating to Dispute Resolution processes, proceedings, and procedures). Parties may not dispute a designated doctor examination request or any information on the request until the division has either approved or denied the request. Additionally, a party is entitled to seek an expedited contested case hearing under §140.3 of this title (relating to Expedited Proceedings) to dispute an approved or denied request for a designated doctor examination. The division, upon timely receipt and approval of the request for expedited proceedings, shall stay the disputed examination pending the decision and order of the expedited contested case hearing. Parties seeking expedited proceedings and the stay of an ordered examination must file their request for expedited proceedings with the division within three days of receiving the order of designated doctor examination under §127.5(a) of this title (relating to Scheduling Designated Doctor Appointments).

[~~(f) This section becomes effective on February 1, 2011.~~]

§127.5. Scheduling Designated Doctor Appointments.

(a) The division, within 10 days after approval of a valid request, shall issue an order that assigns a designated doctor and shall notify the designated doctor, the treating doctor, the injured employee, the injured employee's representative, if any, and the insurance carrier that the designated doctor will be directed to examine the injured employee. The order shall:

(1) indicate the designated doctor's name, license number, examination address and telephone number, and the date and time of the examination or the date range for the examination to be conducted;

(2) explain the purpose of the designated doctor examination;

(3) require the injured employee to submit to an examination by the designated doctor;

(4) require the designated doctor to perform the examination at the indicated examination address; and

(5) require the treating doctor, if any, and insurance carrier to forward all medical records in compliance with §127.10(a)(3) of this title (relating to General Procedures for Designated Doctor Examinations).

(b) The examination address indicated on the order in subsection (a)(4) of this section may not be changed by any party or by an agreement of any parties without good cause and the approval of the division.

(c) Except as provided in subsection (d) of this section, the division shall select the next available doctor on the designated doctor list for a medical examination requested under §127.1 of this title (relating to Requesting Designated Doctor Examinations). A designated doctor is available to perform an examination at any address the doctor has filed with the division if the doctor:

(1) does not have any disqualifying associations as described in §127.140 of this title (relating to Disqualifying Associations) [~~§180.21 of this title (relating to Division Designated Doctor List)~~];

(2) is appropriately qualified to perform the examination in accordance with §127.130 of this title (relating to Qualification Standards for Designated Doctor Examinations) [~~has credentials appropriate to the issue in question, the injured employee's medical condition, and as required by Labor Code §§408.0043, 408.0044, 408.0045, and applicable rules~~];

(3) is a certified designated doctor [~~on the designated doctor list~~] on the day the examination is offered and has not failed to timely file for recertification under §127.110 of this title (relating to Designated Doctor Recertification), if applicable; and

(4) has not treated or examined the injured employee in a non-designated doctor capacity within the past 12 months and has not examined or treated the injured employee in a non-designated doctor capacity with regard to a medical condition being evaluated in the designated doctor examination.

(d) If the division has previously assigned a designated doctor to the claim at the time a request is made, the division shall [~~may~~] use that doctor again unless the division has authorized or required the doctor to stop providing services on the claim in accordance with §127.130 of this title [~~if the doctor meets the requirements of subsection (c)(1) - (4) of this section~~]. Examinations under this subsection must be conducted at the same examination address as the designated doctor's previous examination of the injured employee [~~claimant~~] or at another examination address approved by the division.

(e) The designated doctor's office and the injured employee shall contact each other if there exists a scheduling conflict for the designated doctor appointment. The designated doctor or the injured employee who has the scheduling conflict must make the contact at least one working day [~~24 hours~~] prior to the appointment. The one work-

ing day [~~24 hour~~] requirement will be waived in an emergency situation. If both the designated doctor and the injured employee agree to reschedule the examination, the [~~The~~] rescheduled examination shall be set to occur no later than [~~within~~] 21 days after [~~of~~] the scheduled date of the originally scheduled examination and may not be rescheduled to occur before the originally scheduled examination. Within one working day [~~24 hours~~] of rescheduling, the designated doctor shall contact the division [~~division's field office~~], the injured employee or the injured employee's representative, if any, the injured employee's treating doctor, and the insurance carrier with the time and date of the rescheduled examination. If the examination cannot be rescheduled no later than [~~within~~] 21 days after [~~of~~] the scheduled date of the originally scheduled examination or if the injured employee fails to attend the rescheduled examination, the designated doctor shall notify the division as soon as possible but not later than 21 days after the scheduled date of the originally scheduled examination After receiving this notice, [~~immediately, and~~] the division may select a new designated doctor.

~~[(f) This section becomes effective on February 1, 2011.]~~

§127.10. General Procedures for Designated Doctor Examinations.

(a) The designated doctor is authorized to receive the injured employee's confidential medical records and analyses of the injured employee's medical condition, functional abilities, and return-to-work opportunities to assist in the resolution of a dispute under this subchapter without a signed release from the injured employee. The following requirements apply to the receipt of medical records and analyses by the designated doctor:

(1) The treating doctor and insurance carrier shall provide to the designated doctor copies of all the injured employee's medical records in their possession relating to the medical condition to be evaluated by the designated doctor. For subsequent examinations with the same designated doctor, only those medical records not previously sent must be provided. The cost of copying shall be reimbursed in accordance with §134.120 of this title (relating to Reimbursement for Medical Documentation).

(2) The treating doctor and insurance carrier may also send the designated doctor an analysis of the injured employee's medical condition, functional abilities, and return-to-work opportunities. The analysis may include supporting information such as videotaped activities of the injured employee, as well as marked copies of medical records. If the insurance carrier sends an analysis to the designated doctor, the insurance carrier shall send a copy to the treating doctor, the injured employee, and the injured employee's representative, if any. If the treating doctor sends an analysis to the designated doctor, the treating doctor shall send a copy to the insurance carrier, the injured employee, and the injured employee's representative, if any. The analysis sent by any party may only cover the injured employee's medical condition, functional abilities, and return-to-work opportunities as provided in Labor Code §408.0041.

(3) The treating doctor and insurance carrier shall ensure that the required records and analyses (if any) are received by the designated doctor no later than three working days prior to the date of the designated doctor examination. If the designated doctor has not received the medical records or any part thereof at least three working days prior to the examination, the designated doctor shall not conduct the examination and shall report this violation to the division within one working day of not timely receiving the records. Once notified, the division shall take action necessary to ensure that the designated doctor receives the records, and the designated doctor shall reschedule the examination to occur no later than 21 days after receipt of the records [~~and reschedule the examination. The doctor shall conduct the rescheduled examination regardless of whether or not the injured employee's complete medical records have been timely received~~].

(b) Before examining an injured employee, the [~~The~~] designated doctor shall review the injured employee's medical records, including any analysis of the injured employee's medical condition, functional abilities and return to work opportunities provided by the insurance carrier and treating doctor in accordance with subsection (a) of this section, and any materials submitted to the doctor by the division. The designated doctor shall also review [~~, as well as~~] the injured employee's medical condition and history as provided by the injured employee, any medical records provided by the injured employee, and shall perform a complete physical examination of the injured employee. The designated doctor shall give the medical records reviewed the weight the designated doctor determines to be appropriate.

(c) The designated doctor shall perform additional testing when necessary to resolve the issue in question. The designated doctor shall [~~may~~] also refer an injured employee to other health care providers when the referral is necessary to resolve the issue in question and the designated doctor is not qualified to fully resolve the issue in question. Any additional testing or referral required for the evaluation is not subject to preauthorization requirements nor shall those services be denied retrospectively based on medical necessity, extent of injury, or compensability [~~or retrospective review requirements~~] in accordance with the Labor Code §408.027 and §413.014, Insurance Code Chapter 1305, or Chapters 10, 19, 133, or 134 of this title (relating to Workers' Compensation Health Care Networks, Agents' Licensing, General Medical Provisions, and Benefits--Guidelines for Medical Services, Charges, and Payments, respectively) but is subject to the requirements of §180.24 of this title (relating to Financial Disclosure). Any additional testing or referral examination and the designated doctor's report must be completed within 15 working days of the designated doctor's physical examination of the injured employee unless the designated doctor receives division approval for additional time before the expiration of the 15 working days. If the injured employee fails or refuses to attend the designated doctor's requested additional testing or referral examination within 15 working days or within the additional time approved by the division, the designated doctor shall complete the doctor's report based on the designated doctor's examination of the injured employee, the medical records received, and other information available to the doctor and indicate the injured employee's failure or refusal to attend the testing or referral examination in the report.

(d) Any evaluation relating to either maximum medical improvement (MMI), an impairment rating, or both, shall be conducted in accordance with §130.1 of this title (relating to Certification of Maximum Medical Improvement and Evaluation of Permanent Impairment). If a designated doctor is simultaneously requested to address maximum medical improvement (MMI) and/or impairment rating and the extent of the compensable injury in a single examination, the designated doctor shall provide multiple certifications of MMI and impairment ratings that take into account each possible outcome for the extent of the injury. A designated doctor who determines the injured employee has reached maximum medical improvement (MMI) or who assigns an impairment rating, or who determines the injured employee has not reached MMI, shall complete and file a [~~the~~] report as required by §130.1of this title and §130.3 of this title (relating to [~~Certification of Maximum Medical Improvement and Evaluation of Permanent Impairment and~~] Certification of Maximum Medical Improvement and Evaluation of Permanent Impairment by a Doctor Other than the Treating Doctor[~~, respectively~~]). If the designated doctor provided multiple certifications of MMI and impairment ratings, the designated doctor must file a Report of Medical Evaluation under §130.1(d) for each impairment rating assigned and a Designated Doctor Examination Data Report pursuant to §127.220 of this title (relating to the Designated Doctor Reports) for the doctor extent of injury determination. The designated doctor, however, shall only submit one narrative report required by §130.1(d)(1)(B) for

all impairment ratings assigned and extent of injury findings. All designated doctor narrative reports submitted under this subsection shall also comply with the requirements of §127.220(a) of this title (relating to Designated Doctor Reports).

(e) A designated doctor who examines an injured employee pursuant to any question relating to return to work is required to file a Work Status Report that meets the required elements of these reports described in §129.5 of this title (relating to Work Status Reports) and a narrative report that complies with the requirements of §127.220(a) of this title within seven working days of the date of the examination of the injured employee. This report shall be filed with the treating doctor, the division, and the insurance carrier by facsimile or electronic transmission. In addition, the designated doctor shall file the reports with the injured employee and the injured employee's representative (if any) by facsimile or by electronic transmission if the designated doctor has been provided with a facsimile number or email address for the recipient, otherwise, the designated doctor shall send the report by other verifiable means.

(f) A designated doctor who resolves questions on issues other than those listed in subsections (d) and (e) of this section, shall file a Designated Doctor Examination Data Report that complies with §127.220(c) of this title (relating to Designated Doctor Reports) and a narrative report that complies with §127.220(a) of this title [~~report~~] within seven working days of the date of the examination of the injured employee. These reports [~~This report~~] shall be filed with the treating doctor, the division, and the insurance carrier by facsimile or electronic transmission. In addition, the designated doctor shall provide these reports [~~the report~~] to the injured employee and the injured employee's representative (if any) by facsimile or by electronic transmission if the designated doctor has been provided with a facsimile number or email address for the recipient, otherwise, the designated doctor shall send the reports [~~report~~] by other verifiable means. [~~Reports under this subsection be filed in the form and manner prescribed by the division and must contain at a minimum:~~]

[~~(1) identification of the question(s) addressed by the designated doctor evaluation;~~]

[~~(2) general information regarding the identity of the designated doctor, injured employee, employer, treating doctor, insurance carrier, as well as the identity of the certified workers' compensation health care network, if applicable;~~]

[~~(3) general information regarding the designated doctor's evaluation, including the date and address where the examination took place;~~]

[~~(4) a summary of any additional testing conducted as part of the evaluation, including the identity of any referral health care providers utilized to perform additional testing, the types of tests conducted and the dates the testing occurred;~~]

[~~(5) a narrative description of the physical examination itself as well as a description of what medical records or other information the designated doctor reviewed as part of the evaluation; and~~]

[~~(6) a summary of the designated doctor's response(s) to each of the questions addressed during the designated doctor's evaluation, including an explanation of the findings and conclusions used to support the designated doctor's response;~~]

[~~(7) a statement that there is no known disqualifying association as described in §180.21 of this title (relating to Division Designated Doctor List) between the designated doctor and the injured employee, the injured employee's treating doctor, the insurance carrier or the insurance carrier's certified workers' compensation health care network, if applicable; and~~]

[~~(8) a certification by the designated doctor of the date that the report was sent to all of the recipients as required by this subsection and that the report was sent in the manner required by this subsection.~~]

(g) The report of the designated doctor is given presumptive weight regarding the issue(s) in question the designated doctor was properly appointed to address, unless the preponderance of the evidence is to the contrary.

(h) The insurance carrier shall pay all benefits, including medical benefits, in accordance with the designated doctor's report for the issue(s) in dispute. If the designated doctor provides multiple certifications of MMI/impairment ratings under subsection (d) of this section, the insurance carrier shall pay benefits based on the conditions to which the designated doctor determines the compensable injury extends. For medical benefits, the insurance carrier shall have 21 days from receipt of the designated doctor's report to reprocess all medical bills previously denied for reasons inconsistent with the findings of the designated doctor's report. By the end of this period, insurance carriers shall tender payment on these medical bills in accordance with the Act and Chapters 133 and 134 of this title. For all other benefits, the insurance carrier shall tender payment no later than five days after receipt of the report.

(i) The designated doctor shall maintain accurate records for, at a minimum, five years from the anniversary date of the date of the designated doctor's last examination of the injured employee. This requirement does not reduce or replace any other record retention requirements imposed upon a designated doctor by an appropriate licensing board. These records shall include the injured employee's medical records, any analysis submitted by the insurance carrier or treating doctor (including supporting information), reports generated by the designated doctor as a result of the examination, and narratives provided by the insurance carrier and treating doctor, to reflect:

(1) the date and time of any designated doctor appointments scheduled with an injured employee;

(2) the circumstances regarding a cancellation, no-show or other situation where the examination did not occur as initially scheduled or rescheduled and, if applicable, documentation of the agreement of the designated doctor and the injured employee to reschedule the examination and the notice that the doctor provided to the division, the injured employee's treating doctor, and the insurance carrier within 24 hours of rescheduling an appointment;

(3) the date of the examination;

(4) the date medical records were received from the treating doctor or any other person;

(5) the date reports described in subsections (d), (e) and (f) of this section were submitted to all required parties and documentation that these reports were submitted to the division, treating doctor, and insurance carrier by facsimile or electronic transmission and to other required parties by verifiable means;

(6) the name(s) of any referral health care providers used by the designated doctor, if any; the date of appointments by referral health care providers; and the reason for referral by the designated doctor; and

(7) the date, if any, the doctor contacted the division for assistance in obtaining medical records from the insurance carrier or treating doctor.

(j) Parties may dispute any entitlement to benefits affected by a designated doctor's report through the dispute resolution processes outlined in Chapters 140 - 144 and 147 of this title (relating to Dispute Resolution processes, proceedings, and procedures).

[(k) This section becomes effective on February 1, 2011.]

§127.20. Requesting a Letter of Clarification Regarding Designated Doctor Reports.

(a) Parties may file a request with the division for clarification of the designated doctor's report. A copy of the request must be provided to the opposing party. The division may contact the designated doctor if it determines that clarification is necessary to resolve an issue regarding the designated doctor's report. Parties may only request clarification on issues already addressed by the designated doctor's report or on issues that the designated doctor was ordered to address but did not address. The division will not approve a request that asks a designated doctor to reconsider the doctor's decision or to issue a new or amended decision unless the designated doctor failed to address an issue the designated doctor was ordered to address. Additionally, a designated doctor shall not reconsider the doctor's decision or issue a new or amended decision in response to a request for clarification unless the designated doctor failed to address an issue the designated doctor was ordered to address.

(b) Requests for clarification must:

(1) include the name of the designated doctor, the reason for the designated doctor's examination, the date of the examination, and the name and signature of the requestor;

(2) explain why clarification of the designated doctor's report is necessary and appropriate to resolve a future or pending dispute;

(3) include questions for the designated doctor to answer that are neither inflammatory nor leading; and

(4) provide any medical records that were not previously provided to the designated doctor and explain why these records are necessary for the designated doctor to respond to the request for clarification.

(c) The division, at its discretion, may also request clarification from the designated doctor on issues the division deems appropriate.

(d) To respond to the request for clarification, the designated doctor must be on the division's designated doctor list at the time the request is received by the division. The designated doctor shall respond, in writing, to the request for clarification within five working days of receipt and send copies of the response to the parties listed in §127.10(f) of this title (relating to General Procedures for Designated Doctor Examinations). If, in order to respond to the request for clarification, the designated doctor has to reexamine the injured employee, the doctor shall:

(1) respond, in writing, to the request for clarification advising of the need for an additional examination within five working days of receipt of the request and provide copies of the response to the parties specified in §127.10(f) of this title;

(2) if the division orders the reexamination, conduct the reexamination within 21 days from the date the order is issued by the division at the same examination address as the original examination; and

(3) respond, in writing, to the request for clarification based on the additional examination within seven working days of the examination and provide copies of the response to the parties specified in §127.10(f) of this title.

(e) Any refusal or failure by a designated doctor to conduct a reexamination that is necessary to respond to a request for clarification is an administrative violation.

[(f) This section becomes effective on February 1, 2011.]

§127.25. Failure to Attend a Designated Doctor Examination.

(a) An insurance carrier may suspend temporary income benefits (TIBs) if an injured employee, without good cause, fails to attend a designated doctor examination.

(b) In the absence of a finding by the division to the contrary, an insurance carrier may presume that the injured employee did not have good cause to fail to attend the examination if by the day the examination was originally scheduled to occur the injured employee has both:

(1) failed to submit to the examination; and

(2) failed to contact the designated doctor's office to reschedule the examination.

(c) If, after the insurance carrier suspends TIBs pursuant to this section [subsection], the injured employee contacts the designated doctor within 21 days of the scheduled date of the missed examination to reschedule the examination, the designated doctor shall schedule the examination to occur as soon as possible, but not later than the 21st day after the injured employee contacted the doctor.

(d) If, after the insurance carrier suspends TIBs pursuant to this section, the injured employee fails to contact the designated doctor within 21 days of the scheduled date of the missed examination but wishes to reschedule the examination, the injured employee must request a new examination under §127.1 of this title (relating to Requesting a Designated Doctor Examination).

(e)The insurance carrier shall reinstate TIBs effective as of the date the injured employee submitted to the rescheduled examination under subsection (c) of this section or the examination scheduled pursuant to the injured employee's request under subsection (d) of this section unless the report of the designated doctor indicates that the injured employee has reached MMI or is otherwise not eligible for income benefits. The re-initiation of TIBs shall occur no later than the seventh day following:

(1) the date the insurance carrier was notified that the injured employee submitted to the examination; or

(2) the date that the insurance carrier was notified that the division found that the injured employee had good cause for not attending the examination.

(f) [(d)] An injured employee is not entitled to TIBs for a period during which the insurance carrier suspended benefits pursuant to this section [subsection] unless the injured employee later submits to the examination and the division finds or the insurance carrier determines that the injured employee had good cause for failure to attend the examination.

[(e) This section becomes effective on February 1, 2011.]

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 February 13, 2012.

TRD-201200802
Dirk Johnson
General Counsel
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For further information, please call: (512) 804-4703

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SUBCHAPTER B. DESIGNATED DOCTOR CERTIFICATION, RECERTIFICATION, AND QUALIFICATIONS

28 TAC §§127.100, 127.110, 127.120, 127.130, 127.140

The new sections are proposed under the Labor Code §§408.0041, 408.0043, 408.0045, and 408.1225 and under the general authority of Labor Code §402.00128 and §402.061. Section 408.0041 provides the general requirements and procedures for designated doctor examinations. In relevant part, Section 408.0043 requires designated doctors, other than dentists and chiropractors, who review a specific workers' compensation case to meet certain professional specialty requirements. Section 408.0045 provides, in relevant part, that a designated doctor who reviews a chiropractic service in conjunction with a specific workers' compensation case must be licensed to engage in the practice of chiropractic. Section 408.1225 provides that the Commissioner by rule shall develop a process for the certification of a designated doctor and that the Division may deny renewal of a designated doctor's certification. Section 408.1225 also provides that a designated doctor shall continue providing services related to a case assigned to the designated doctor, including performing subsequent examinations or acting as a resource for division disputes, unless the division authorizes the designated doctor to discontinue providing services.

Section 402.00128 lists the general powers of the Commissioner, including the power to hold hearings. Section 402.061 provides that the Commissioner shall adopt rules as necessary for the implementation and enforcement of this subtitle.

The following statute is affected by this proposal: §127.100 - Labor Code §408.1225; §127.110 - Labor Code §408.1225; §127.120 - Labor Code §408.0041; §127.130 - Labor Code §§408.0041, 408.0043, 408.0045, and 408.1225; and §127.140 - Labor Code §408.1225.

§127.100. Designated Doctor Certification.

(a) In order to serve as a designated doctor, a doctor who is not a designated doctor must be certified as a designated doctor. To be certified as a designated doctor, a doctor who is not a designated doctor must:

(1) submit a complete designated doctor certification application as described by subsection (b) of this section;

(2) submit a certificate or certificates certifying that the doctor has successfully completed all division required trainings and passed all division required testing on the specific duties of a designated doctor under the Act and division rules, including demonstrated proficient knowledge of the currently adopted edition of the American Medical Association Guides to Evaluation of Permanent Impairment and the division's adopted treatment and return-to-work guidelines;

(3) be licensed in Texas;

(4) have maintained during three of the past ten years an active practice for at least three years during the previous ten years. For the purposes of this subsection, a doctor has an active practice if the doctor maintains or has maintained routine office hours of at least 20 hours per week for 40 weeks per year for the treatment of patients; and

(5) own or subscribe to, for the duration of the doctor's term as a certified designated doctor, the current edition of the American Medical Association Guides to Evaluation of Permanent Impairment adopted by the division for the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the division.

(b) For the purposes of subsection (a) of this section, a complete designated doctor certification application must be completed on the division's required form for certification applications and must include:

(1) contact information for the doctor;

(2) information on the doctor's education;

(3) a description of the doctor's license(s), certifications, and professional specialty, if any;

(4) a description of the doctor's work history and hospital or other health care provider affiliations;

(5) a description of any affiliations the doctor has with a workers' compensation health care network certified under Chapter 1305, Insurance Code or political subdivision under Labor Code §504.053(b)(2);

(6) information regarding the doctor's current practice locations;

(7) disclosure questions regarding the doctor's professional background, education, training, and fitness to perform the duties of a designated doctor, including disclosure and summary of any disciplinary actions taken against the doctor by any state licensing board or other appropriate state or federal agency;

(8) the identities of any person(s) with whom the doctor has contracted to assist in performance or administration of the doctor's designated doctor duties;

(9) an attestation that:

(A) all information provided in the application is accurate and complete to the best of the doctor's knowledge;

(B) the doctor will inform the division of any changes to this information as required by §127.200(a)(8) of this title (relating to Designated Doctor Duties); and

(C) the doctor shall consent to any on-site visits, as provided by §127.200(a)(15) of this title, by the division at facilities used or intended to be used by the designated doctor to perform designated doctor examinations for the duration of the doctor's certification.

(c) The division shall notify a doctor of the commissioner's approval or denial of the doctor's application to be certified as a designated doctor in writing. Denials will include the reason(s) for the denial. Approvals only certify a doctor for a term of two years and will include the effective date and expiration date of the certification. Approvals will also include the examination qualification criteria under §127.130 of this title (relating to Qualification Standards for Designated Doctor Examinations) that the division has assigned to the designated doctor as part of the doctor's certification.

(d) Doctors shall be denied certification as a designated doctor:

(1) if the doctor did not submit the information required by subsection (a) of this section, including having completed all division required training and passed all division required examinations;

(2) if the doctor did not submit a complete application for certification as required by subsection (b) of this section;

(3) for having a relevant restriction on their practice imposed by a state licensing board, certification authority, or other appropriate state or federal agency, including the division; or

(4) for other activities that warrant denial of a doctor's application for certification as a designated doctor, such as grounds that would allow the division to sanction a health care provider under the Act or division rules.

(e) Within 15 working days after receiving a denial, a doctor may file a written response with the division, which addresses the reasons given to the doctor for denial.

(1) If a written response is not received by the 15th working day after the date the doctor received the notice, the denial will be final effective the following day. No further notice will be sent.

(2) If a written response which disagrees with the denial is timely received, the division shall review the response and shall notify the doctor of the commissioner's final decision. If the final decision is still a denial, the division's final notice shall provide the reason(s) why the doctor's response did not change the commissioner's decision to deny the doctor's application for certification as a designated doctor. The denial will be effective the day following the date the doctor receives notice of the denial unless otherwise specified in the notice.

(f) Designated doctors whose application for certification is approved but wish to dispute the examination qualification criteria under §127.130 of this title that the division assigned to the doctor may do so through the procedures described in subsection (e) of this section. Designated doctors must include in their response to the division the specific criteria they believe should be modified and documentation to justify the requested change.

(g) Designated doctors who are designated doctors on the effective date of this section shall be considered certified for the duration of the designated doctor's current certification. Before the expiration of the designated doctor's current certification, the designated doctor timely must apply for recertification under the applicable requirements of §127.110 of this title (relating to Designated Doctor Recertification).

§127.110. Designated Doctor Recertification.

(a) If a designated doctor's certification expires before January 1, 2013:

(1) A doctor previously admitted to the division's designated doctor list who seeks to remain on the list must renew the doctor's application status by submitting to division verification that the doctor has completed a minimum of 12 additional hours of division required training and passed all division required testing described under §127.100(a) of this title (relating to Designated Doctor Certification) since the effective date of the designated doctor's last certification or recertification. Designated doctors must also submit a complete application that meets the requirements of §127.100(b) of this title. Designated doctors who submit the materials required by this subsection will be recertified as designated doctors if the materials are submitted before January 1, 2013.

(2) The division shall notify a designated doctor of its receipt of this submitted information in writing, and this notice will renew the designated doctor's certification for a period of two years. The notice will also include the effective and expiration dates of that certification.

(3) A designated doctor who neither informs the division prior to the expiration of the designated doctor's certification that the doctor does not wish to renew the doctor's certification as a designated doctor nor renews the doctor's application status under paragraph (1) of this subsection prior to the expiration of the designated doctor's certification commits an administrative violation and will be prohibited from performing designated doctor examinations until the doctor renews the doctor's application status.

(4) Designated doctors who fail to renew their application status before January 1, 2013 must instead apply for recertification under the procedures described under subsection (b) of this section.

(b) If a designated doctor's certification expires on or after January 1, 2013, the designated doctor must apply for recertification. Designated doctor seeking recertification after this date must:

(1) submit to the division certificate(s) evidencing that the doctor has, within the past 18 months, successfully completed all division required trainings and passed all division required testing on the specific duties of a designated doctor under the Act and division rules, including demonstrated proficient knowledge of the current division adopted edition of the American Medical Association Guides to the Evaluation of Permanent Impairment and the division's adopted treatment and return-to-work guidelines;

(2) own or subscribe to, for the duration of the doctor's term as a certified designated doctor, the current edition of the American Medical Association Guides to Evaluation of Permanent Impairment adopted by the division for the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the division; and

(3) submit to the division a complete application for recertification that meets the requirements of §127.100(b) of this title (relating to Designated Doctor Certification).

(c) The division will not assign examinations to a designated doctor during the 45 days prior to the expiration of the designated doctor's certification if the division fails to receive the required information in subsection (b)(1) - (3) of this section from the designated doctor before that time. A designated doctor who neither informs the division 45 days prior to the expiration of the designated doctor's certification that the doctor does not wish to renew the doctor's certification as designated doctor nor renews the doctor's application status under subsection (b)(1) - (3), 45 days prior to the expiration of the designated doctor's certification commits an administrative violation. A designated doctor who fails to apply for recertification under this section within 30 days after the expiration of the designated doctor's certification may no longer apply for recertification and must instead apply for certification of §127.100 of this title.

(d) The division will notify a doctor in writing of the commissioner's approval or denial of the doctor's application to be recertified as a designated doctor under subsection (b) of this section. Denials will include the reason(s) for the denial. Approvals recertify a doctor for a term of two years and will include the effective date and expiration date of the certification. Approvals will also include the designated doctor's examination qualification criteria under §127.130 of this title (relating to Qualification Standards for Designated Doctor Examinations) that the division has assigned to the doctor as part of the doctor's recertification.

(e) The division may deny an application for recertification under subsection (b) of this section for the following reasons:

(1) the doctor did not submit the information required by subsection (b) of this section, including verification of having timely completed all division-required training and passed all division-required examinations;

(2) if the doctor failed to properly update the doctor's initial application for certification under §127.100(b) of this title;

(3) for having a relevant restriction on their practice imposed on the doctor by a state licensing board, certification authority, or other appropriate state or federal agency, including the division; or

(4) for other activities that warrant denial of a doctor's application for recertification as a designated doctor, including but not limited to:

(A) the quality of the designated doctor's past reports;

(B) the designated doctor's history of complaints;

(C) excess requests for deferral from the designated doctor list by the doctor;

(D) a pattern of overturned reports by the division and/or a court;

(E) a demonstrated lack of ability to apply or properly consider the American Medical Association Guides to Evaluation of Permanent Impairment adopted by the division for the assignment of impairment ratings and all return-to-work and treatment guidelines adopted by the division;

(F) a demonstrated lack of ability to consistently perform designated doctor examinations in a timely manner;

(G) a demonstrated failure to identify disqualifying associations;

(H) a demonstrated lack of ability to ensure the confidentiality of injured employee medical records and claim information provided to or generated by the designated doctor; or

(I) any other grounds that would allow the division to sanction a health care provider under the Act or division rules.

(f) Within 15 working days after receiving a denial, a doctor may file a written response with the division that addresses the reasons given to the doctor for denial or may submit a written request an informal hearing before the division to address the reasons given for the denial.

(1) If neither a response nor a written request for informal hearing is received by the 15th working day after the date the doctor received the notice, the denial will be final effective the following day. No further notice will be sent.

(2) If a written response which disagrees with the denial is timely received, the division will review the response and will notify the doctor of the commissioner's final decision in writing. If the final decision is still a denial, the division's final notice shall provide the reason(s) why the doctor's response did not change the Commissioner's decision to deny the doctor's application for recertification as a designated doctor. The denial will be effective the day following the date the doctor receives notice of the denial unless otherwise specified in the notice.

(3) If a written request for informal hearing is timely received, the division will set the informal hearing to occur no later than 31 days after the request is received. At the informal hearing, the designated doctor may present evidence that addresses the reasons the doctor was denied recertification to the commissioner's designated representatives. The designated doctor may have an attorney present. At the conclusion of the informal hearing, the designated representatives will provide the designated doctor with their final recommendation regarding the doctor's recertification. If the final recommendation is still a denial, the designated representatives will provide the reason(s) why they decided not to recertify the doctor as a designated doctor. After the informal hearing, the designated representatives will forward their recommendation to the commissioner who will review the final recommendation and all evidence presented at the informal hearing and make a final decision. The division shall notify the designated doctor of the commissioner's final decision in writing. The decision will be effective the day following the date the doctor receives notice of the decision unless otherwise specified in the notice.

(g) Designated doctors whose application for recertification under subsection (b) of this section is approved but wish to dispute the examination qualification criteria under §127.130 of this title that the division assigned to the doctor may do so through the procedures described in subsection (f) of this section. Designated doctors must include in their response to the division or present at the informal hearing the specific criteria they wish to be modified and documentation to justify the requested change.

§127.120. Exception to Certification as a Designated Doctor for Out-of-State Doctors.

When necessary because the injured employee is temporarily located or is residing out-of-state, the division may waive any of the requirements as specified in this chapter for an out-of-state doctor to serve as a designated doctor to facilitate a timely resolution of the dispute or perform a particular examination.

§127.130. Qualification Standards for Designated Doctor Examinations.

(a) For examinations performed before January 1, 2013, a designated doctor is qualified to perform a designated doctor examination on an injured employee if the designated doctor has credentials that are appropriate to the issue in question, the injured employee's medical condition, that meet the requirements of Labor Code §408.0043, §408.0045, and applicable division rules, and the designated doctor has no applicable disqualifying associations under §127.140 of this title (relating to Disqualifying Associations).

(b) For examinations performed on or after January 1, 2013, a designated doctor is qualified to perform a designated doctor examination on an injured employee if the designated doctor meets the appropriate qualification criteria for the area of the body affected by the injury and the injured employee's diagnosis and has no disqualifying associations under §127.140 of this title. A designated doctor's qualification criteria are determined as follows:

(1) To examine injuries and diagnoses relating to the hand and upper extremities, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of chiropractic.

(2) To examine injuries and diagnoses relating to the lower extremities excluding feet, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of chiropractic.

(3) To examine injuries and diagnoses relating to the spine and torso, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of chiropractic.

(4) To examine injuries and diagnoses relating to the feet, including the toes and heel, a designated doctor must be a licensed medical doctor, doctor of osteopathy, doctor of chiropractic, or doctor of podiatric medicine.

(5) To examine injuries and diagnoses relating to the teeth and jaws, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of dental surgery.

(6) To examine injuries and diagnoses relating to the eyes, including the eye and adnexal structures of the eye, a designated doctor must be a licensed medical doctor, doctor of osteopathy, or doctor of optometry.

(7) To examine injuries and diagnoses relating to other body areas or systems, including but not limited to internal systems; ear, nose, and throat; head and face; skin; and mental and behavioral disorders, a designated doctor must be a licensed medical doctor or doctor of osteopathy.

(8) Notwithstanding paragraphs (1) - (7) of this subsection, a designated doctor must be a licensed medical doctor or doctor of osteopathy who has the required board certification to examine any of the following diagnoses. For purposes of this section, a designated doctor is "board certified" in a required specialty or subspecialty, as applicable, if the designated doctor holds a general certificate in the required specialty or a subspecialty certificate in the required subspecialty from the American Board of Medical Specialties (ABMS) or if the designated doctor holds a primary certificate in the required specialty and a certificate of special qualifications or certificate of added qualifications in the required subspecialty from the American Osteopathic Association Bureau of Osteopathic Specialists (AOABOS).

(A) To examine traumatic brain injuries, a designated doctor must be board certified in neurological surgery, neurology, or psychiatry by the ABMS or board certified in neurological surgery, neurology, or psychiatry by the AOABOS.

(B) To examine spinal cord injuries, including spinal fractures with documented neurological deficit, and profound peripheral neuropathy, a designated doctor must be board certified in neurological surgery, neurology, physical medicine and rehabilitation, orthopaedic surgery, or occupational medicine by the ABMS or board certified in neurological surgery, neurology, physical medicine and rehabilitation, orthopedic surgery, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(C) To examine severe burns, including chemical burns, defined as 3rd or 4th degree burns over 9 percent or greater of the body, a designated doctor must be board certified in dermatology, physical medicine and rehabilitation, plastic surgery, orthopaedic surgery, or occupational medicine by the ABMS or board certified in dermatology, physical medicine and rehabilitation, plastic and reconstructive surgery, orthopedic surgery, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(D) To examine complex regional pain syndrome (reflex sympathetic dystrophy), a designated doctor must be board certified in neurological surgery, neurology, orthopaedic surgery, anesthesiology with a subspecialty in pain medicine, occupational medicine, or physical medicine and rehabilitation by the ABMS or board certified in neurological surgery, neurology, orthopedic surgery, preventive medicine/occupational-environmental medicine, preventive medicine/occupational, anesthesiology with certificate of added qualifications in pain management, or physical medicine and rehabilitation by the AOABOS.

(E) To examine dislocations, tendon lacerations, or multiple bone fractures, excluding spinal fractures, a designated doctor must be board certified in emergency medicine, orthopaedic surgery, plastic surgery, physical medicine and rehabilitation, or occupational medicine by the ABMS or board certified in emergency medicine, orthopedic surgery, plastic surgery, physical medicine and rehabilitation, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(F) To examine complicated infectious diseases requiring hospitalization or prolonged intravenous antibiotics, including blood borne pathogens, a designated doctor must be board certified in internal medicine or occupational medicine by the ABMS or board certified in internal medicine, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(G) To examine chemical exposure, excluding chemical exposure limited to skin exposure, a designated doctor must be board certified in internal medicine, emergency medicine, or occupational medicine by the ABMS or board certified in internal medicine, emergency medicine, preventive medicine/occupational-environmental medicine, or preventive medicine/occupational by the AOABOS.

(H) To examine heart or cardiovascular conditions, a designated doctor must be board certified in internal medicine, emergency medicine, occupational medicine, thoracic and cardiac surgery, or family medicine by the ABMS or board certified in internal medicine, emergency medicine, preventive medicine/occupational-environmental medicine, preventive medicine/occupational, thoracic and cardiovascular surgery or family practice and osteopathic manipulative treatment by the AOABOS.

(c) To be qualified to perform an initial examination on an injured employee, a designated doctor, other than a chiropractor, must be qualified under Labor Code §408.0043. A designated doctor who is a chiropractor must be qualified to perform an initial designated doctor examination under Labor Code §408.0045. If, however, the requirements of this subsection would disqualify a designated doctor otherwise qualified under subsection (b) of this section, pursuant to Labor Code §408.0041(b-1), does not apply.

(d) For any particular designated doctor examination, the division may exempt a designated doctor from the applicable qualification standard if no other designated doctor is qualified and available to perform the examination. Additionally, the division may not offer a qualified designated doctor an examination if it is reasonably probable that the designated doctor will not be qualified on the date of the examination.

(e) A designated doctor who performs an initial designated doctor examination of an injured employee and had the appropriate selection criteria to perform that examination under either subsection (a) or (b) of this section, as applicable, shall remain assigned to that claim and perform all subsequent examinations of that injured employee unless the division authorizes or requires the designated doctor to discontinue providing services on that claim.

(f) The division may authorize a designated doctor to stop providing services on a claim if the doctor:

(1) decides to stop practicing in the workers' compensation system;

(2) decides to stop practicing as a designated doctor in the workers' compensation system;

(3) relocates the doctor's residence or practice;

(4) has asked the division to indefinitely defer the doctor's availability on the designated doctor list;

(5) determines that examining the injured employee would require the designated doctor to exceed the scope of practice authorized by the doctor's license; or

(6) can otherwise demonstrate to the division that the doctor's continued service on the claim would be impracticable or could impair the quality of examinations performed on the claim.

(g) The division will prohibit a designated doctor from providing services on a claim if:

(1) the doctor has failed to become recertified as a designated doctor under §127.110 (a) or (b) of this title (relating to Designated Doctor Recertification);

(2) the doctor no longer has the appropriate qualification criteria under either subsection (a) or (b) of this section, as applicable, to perform examinations on the claim;

(3) the doctor has a disqualifying association, as specified in §127.140 of this title, relevant the claim;

(4) the doctor has repeatedly failed to respond to division appointment, clarification, or document requests, or other division inquiries regarding the claim;

(5) the doctor's continued service on the claim could endanger the health, safety, or welfare of either the injured employee or doctor; or

(6) the division has revoked or suspended the designated doctor's certification.

(h) The division will prohibit a designated doctor from performing examinations on all new or existing claims if the designated doctor has had the doctor's license revoked or suspended and the suspension has not been probated by an appropriate licensing authority.

§127.140. Disqualifying Associations.

(a) A disqualifying association is any association that may reasonably be perceived as having potential to influence the conduct or decision of a designated doctor. Disqualifying associations may include:

(1) receipt of income, compensation, or payment of any kind not related to health care provided by the doctor;

(2) shared investment or ownership interest;

(3) contracts or agreements that provide incentives, such as referral fees, payments based on volume or value, and waiver of beneficiary coinsurance and deductible amounts;

(4) contracts or agreements for space or equipment rentals, personnel services, management contracts, referral services, billing services agents, documentation management or storage services or warranties, or any other services related to the management or operation of the doctor's practice;

(5) personal or family relationships;

(6) a contract with the same workers' compensation health care network certified under Chapter 1305, Insurance Code or a contract with the same political subdivision or political subdivision health plan under Labor Code §504.053(b)(2) that is responsible for the provision of medical benefits to the injured employee; or

(7) any other financial arrangement that would require disclosure under the Labor Code or applicable division rules, the Insurance Code or applicable department rules, or any other association with the injured employee, the employer, or insurance carrier that may give the appearance of preventing the designated doctor from rendering an unbiased opinion.

(b) For examination performed after January 1, 2013, a designated doctor shall also have a disqualifying association relevant to an examination or claim if an agent of the designated doctor has an association relevant to the claim that would constitute a disqualifying association under subsection (a) of this section.

(c) A designated doctor shall not perform an examination if that doctor has a disqualifying association relevant to that claim. If a designated doctor learns of a disqualifying association relevant to a claim after accepting the examination, the designated doctor must notify the division of that disqualifying association within two working days of learning of the disqualifying association. A designated doctor who performs an examination even though the doctor has a disqualifying association relevant to that claim commits an administrative violation.

(d) Insurance carriers shall notify the division of any disqualifying associations between the designated doctor and injured employee because of the network affiliations described under subsection (a)(6) of this section within five days of receiving the division's order of designated doctor examination under §127.5(a) of this title (relating to Scheduling Designated Doctor Appointments).

(e) If the division determines that a designated doctor with a disqualifying association performed a designated doctor examination, all reports produced by that designated doctor as a result of that examination shall be stripped of their presumptive weight.

(f) A party that seeks to dispute the selection of a designated doctor for a particular examination based on a disqualifying association or to dispute the presumptive weight of a designated doctor's report based on a disqualifying association must do so through the division's dispute resolution processes in Chapter 410, Labor Code and Chapters 140 - 144 and 147 of this title (relating to Dispute Resolution processes, proceedings, and procedures).

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

Filed with the Office of the Secretary of State on February 13, 2012.

TRD-201200803
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 804-4703

SUBCHAPTER C. DESIGNATED DOCTOR DUTIES AND RESPONSIBILITIES

28 TAC §§127.200, 127.210, 127.220

The new sections are proposed under the Labor Code §§402.083, 408.0041, 408.1225, and 415.021 and under the general authority of Labor Code §§402.00128, 402.021 and 402.061. Section 402.083 provides that Information in or derived from a claim file regarding an employee is confidential and may not be disclosed by the division except as provided by Title 5, Subtitle A of the Labor Code or other law. Section 408.0041 provides the general requirements and procedures for designated doctor examinations. Section 408.1225 provides that the Commissioner by rule shall develop a process for the certification of a designated doctor and that the Division may deny renewal of a designated doctor's certification. Section 408.1225 also provides that a designated doctor shall continue providing services related to a case assigned to the designated doctor, including performing subsequent examinations or acting as a resource for division disputes, unless the division authorizes the designated doctor to discontinue providing services. Section 415.021 provides that a person commits an administrative violation if the person violates, fails to comply with, or refuses to comply with this subtitle or a rule, order, or decision of the Commissioner.

Section 402.00128 lists the general powers of the Commissioner, including the power to hold hearings. Section 402.021 provides the basic goals of the workers' compensation system of this state, including that each employee shall be treated with dignity and respect when injured on the job and that each injured employee shall have access to prompt, high-quality

medical care within the framework established by this subtitle. Section 402.061 provides that the Commissioner shall adopt rules as necessary for the implementation and enforcement of this subtitle.

The following statute is affected by this proposal: §127.200 - Labor Code §§402.083, 408.0041, and 408.1225; §127.210 - Labor Code §§408.0041, 408.1225, and 415.021; and §127.220 - Labor Code §408.0041 and §408.1225.

§127.200. Duties of a Designated Doctor.

(a) All designated doctors shall:

(1) perform designated doctor examinations in a facility currently used and properly equipped for medical examinations or other similar health care services and that ensures safety, privacy, and accessibility for injured employees and injured employee medical records and other records containing confidential claim information;

(2) ensure the confidentiality of medical records, analyses, and forms provided to or generated by the designated doctor in the doctor's capacity as a designated doctor for the duration of the retention period specified in §127.10(i) of this title (relating to General Procedures for Designated Doctor Examinations) and ensure the destruction of these medical records after both this retention period expires and the designated doctor determines the information is no longer needed;

(3) ensure that all agreements with person(s) that permit those parties to perform designated doctor administrative duties, including but not limited to billing and scheduling duties, on the designated doctor's behalf:

(A) are in writing and signed by the designated doctor and the person(s) with whom the designated doctor is contracting;

(B) define the administrative duties that the person may perform on behalf of the designated doctor;

(C) require the person or persons to comply with all confidentiality provisions of the Act and other applicable laws;

(D) comply with all medical billing and payment requirements under Chapter 133 of this title (relating to General Medical Benefits);

(E) do not constitute an improper inducement relating to the delivery of benefits to and injured employee under Labor Code §415.0036 and §180.25 of this title (relating to Improper Inducements, Influence and Threats); and

(F) made available to the division upon request;

(4) notify the division in writing and in advance if the designated doctor voluntarily decides to defer the designated doctor's availability to receive any offers of examinations for personal or other reasons and the notice must specify the duration of and reason for the deferral;

(5) notify the division in writing and in advance if the designated doctor no longer wishes to practice as a designated doctor; a designated doctor who no longer wishes to practice as a designated doctor must expressly surrender the designated doctor's certification in a signed, written statement to the division;

(6) be physically present in the same room as the injured employee for the designated doctor examination or any other health care service provided to the injured employee that is not referred to another health care provider under §127.10(c) of this title;

(7) apply the appropriate edition of the American Medical Association Guides to the Evaluation of Permanent Impairment and division-adopted return-to-work guidelines and consider division-adopted treatment guidelines or other evidence-based medicine when appropriate;

(8) provide the division with updated information within 10 working days of a change in any of the information provided to the division on the doctor's application for certification or recertification as a designated doctor;

(9) maintain a professional and courteous demeanor when performing the duties of a designated doctor, including, but not limited to, explaining the purpose of a designated doctor examination to an injured employee at the beginning of the examination and using non-inflammatory, appropriate language in all reports and documents produced by the designated doctor;

(10) bill for designated doctor examinations and receive payment for those examinations in accordance with Chapter 133 of this title and 134 of this title (relating to Benefits--Guidelines for Medical Services, Charges, and Payments);

(11) respond timely to all division appointment, clarification, document requests, or other division inquiries;

(12) notify the division if a designated doctor's continued participation on a claim to which the designated doctor has already been assigned would required the doctor to exceed the scope of practice authorized by the doctor's license;

(13) not perform required medical examinations, utilization reviews, or peer reviews on a claim to which the designated doctor has been assigned as a designated doctor;

(14) identify themselves at the beginning of every designated doctor examination and present photo identification upon the request of the injured employee;

(15) consent to and cooperate during any on-site visits by the division pursuant to §180.4 of this title (relating to On-Site Visits); notwithstanding §180.4(e)(2) of this title, the division purpose for these visits will be to ensure the designated doctor's compliance with the Act and applicable division rules, and the notice provided to the designated doctor in accordance with §180.4 of this title, either in advance of or at the time of the on-site visit, will specify the duties being investigated by the division during that visit;

(16) cooperate with all division compliance audits, quality reviews; and

(17) otherwise comply with all applicable laws and rules.

(b) For the purposes of this chapter, Chapter 180 of this title (relating to Monitoring and Enforcement), and all other applicable laws and division rules, any person with whom a designated doctor contracts or otherwise permits to perform designated doctor administrative duties on behalf of the designated doctor qualifies as the doctor's "agent" as defined under §180.1 of this title (relating to Definitions).

§127.210. Designated Doctor Administrative Violations.

(a) In addition to the grounds for issuing sanctions against a doctor under §180.26 of this title (relating to Criteria for Imposing, Recommending, and Determining Sanctions; Other Remedies), other division rules, or the Texas Workers' Compensation Act, the commissioner may revoke or suspend a designated doctor's certification as a designated doctor or otherwise sanction a designated doctor for noncompliance with requirements of this chapter or for any of the following:

(1) four refusals within a 90-day period to accept or perform a division offered appointment or ordered appointment for which the doctor is qualified and that relates to a claim to which the doctor has not been previously assigned;

(2) four consecutive refusals to perform within the required time frames a division ordered appointment for which the doctor is qualified and that relates to a claim to which the doctor has not been previously assigned;

(3) any refusal to accept or perform a division offered appointment or ordered appointment that relates to a claim which the doctor has been previously assigned;

(4) misrepresentation or omission of pertinent facts in medical evaluation and narrative reports;

(5) submitting unnecessary referrals to other health care providers for the answering of any question submitted to the designated doctor by the division;

(6) ordering or performing unnecessary testing of an injured employee as part of a designated doctor's examination;

(7) submission of inaccurate or inappropriate reports due to insufficient medical history or physical examination and analysis of medical records;

(8) submission of designated doctor reports that fail to include all elements required by §127.220 of this title (relating to Designated Doctor Reports), §127.10 of this title (relating to General Procedures for Designated Doctor Examinations), and other division rules;

(9) failure to timely respond to a request for clarification from the division regarding an examination or any other information request by the division;

(10) failure to successfully complete training and testing requirements as specified in §127.110 of this title (relating to Designated Doctor Recertification);

(11) self-referring, including referral to another health care provider with whom the designated doctor has a disqualifying association, for treatment or becoming the employee's treating doctor for the medical condition evaluated by the designated doctor;

(12) behaving in an abusive or assaultive manner toward an injured employee, the division, or other system participant;

(13) failing to maintain the confidentiality of patient medical and claim file information;

(14) performing a designated doctor examination which the designated doctor was not ordered by the division to perform; or

(15) other violations of applicable statutes or rules while serving as a designated doctor.

(b) Designated doctors are liable for all administrative violations committed by their agents on the designated doctor's behalf under this section, other division rules, or any other applicable law.

(c) The process for notification and opportunity for appeal of a sanction is governed by §180.27 of this title (relating to Sanctions Process/Appeals/Restoration) except that suspension, revocation, or other sanction relating to a designated doctor's certification will be in effect during the pendency of any appeal.

§127.220. Designated Doctor Reports.

(a) Designated doctor narrative reports must be filed in the form and manner required by the division and at a minimum:

(1) identify the question(s) the division ordered to be addressed by the designated doctor examination;

(2) provide a clearly defined answer for each question to be addressed by the designated doctor examination and only for each of those questions;

(3) sufficiently explain how the designated doctor determined the answer to each question within a reasonable degree of medical probability;

(4) demonstrate, as appropriate, application or consideration of the *American Medical Association Guides to the Evaluation of Permanent Impairment,* division-adopted return-to-work and treatment guidelines, and other evidence-based medicine, if available;

(5) include general information regarding the identity of the designated doctor, injured employee, employer, treating doctor, insurance carrier, as well as the identity of the certified workers' compensation health care network under Chapter 1305, Insurance Code, if applicable, or whether the injured employee is receiving medical benefits through a political subdivision health care plan under Labor Code §504.053(b)(2) and the identity of that plan, if applicable;

(6) state the date of the examination, the time the examination began, and the address where the examination took place;

(7) summarize any additional testing conducted or referrals made as part of the evaluation, including the identity of any health care providers to which the designated doctor referred the injured employee under §127.10(c) of this title (relating to General Procedures for Designated Doctor Examinations), the types of tests conducted or referrals made and the dates the testing or referral examinations occurred, and explain why the testing or referral was necessary to resolve a question at issue in the examination;

(8) include a narrative description of the medical history, physical examination, and medical decision making performed by the designated doctor, including the time the designated doctor began taking the medical history of the injured employee, physically examining the employee, and engaging in medical decision making and the time the designated doctor completed these tasks;

(9) list the specific medical records or other documents the designated doctor reviewed as part of the evaluation, including the dates of those documents and which, if any, medical records were provided by the injured employee;

(10) be signed by the designated doctor who performed the examination;

(11) include a statement that there is no known disqualifying association as described in §127.140 of this title (relating to Disqualifying Associations) between the designated doctor and the injured employee, the injured employee's treating doctor, the insurance carrier, the insurance carrier's certified workers' compensation health care network, or a network established under Chapter 504, Labor Code;

(12) certify the date that the report was sent to all recipients required by and in the manner required by §127.10 of this title; and

(13) indicate on the report that the designated doctor reviewed and approved the final version of the report.

(b) Designated doctors who perform examinations under §127.10(d) or (e) of this title shall also complete and file the division forms required by those subsections with their narrative reports. Designated doctors shall complete and file these forms in the manner required by applicable division rules.

(c) Designated doctors who perform examinations under §127.10(f) of this title must, in addition to filing a narrative report that complies with subsection (a) of this section, also file a Designated Doctor Examination Data Report in the form and manner required by the Division. A Designated Doctor Examination Data Report must:

(1) include general information regarding the identity of the designated doctor, injured employee, insurance carrier, as well as

the identity of the certified workers' compensation health care network under Chapter 1305, Insurance Code, if applicable, or whether the injured employee is receiving medical benefits through a political subdivision health care plan under Labor Code §504.053(b)(2) and the identity of that plan, if applicable;

(2) list all injuries included on the examination request as:

(A) determined to be compensable by the division;

(B) accepted as compensable by the insurance carrier; or

(C) claimed to be compensable by the injured employee and not disputed by the insurance carrier; and

(D) for informational purposes only, the diagnosis code for each injury;

(3) identify the question(s) the division ordered to be addressed by the designated doctor examination;

(4) provide a clearly defined answer for each question to be addressed by the designated doctor examination and only for each of those questions. For extent of injury examinations, the designated doctor should also provide, for informational purposes only, a diagnosis code for each disputed injury;

(5) state the date of the examination, the time the examination began, and the address where the examination took place;

(6) list any additional testing conducted or referrals made as part of the evaluation, including the identity of any health care providers to which the designated doctor referred the injured employee under §127.10(c) of this title, the types of tests conducted or referrals made and the dates the testing or referral examinations occurred;

(7) be signed by the designated doctor who performed the examination.

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 February 13, 2012.

TRD-201200804
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 804-4703

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CHAPTER 130. IMPAIRMENT AND SUPPLEMENTAL INCOME BENEFITS SUBCHAPTER A. IMPAIRMENT INCOME BENEFITS

28 TAC §130.6

(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 Insurance, Division of Workers' Compensation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) proposes the repeal of §130.6 of this title (relating to Designated Doctor Examinations for Maximum Medical Improvement and/or Impairment Ratings). This repeal is necessary to ensure clarity and efficiency in designated doctor regulation and is proposed simultaneously with the proposal of amended §127.10 of this title (relating to General Procedures for Designated Doctor Examinations), which is published elsewhere in this issue of the *Texas Register.* Proposed §127.10 of this title recodifies subsections (a), (b)(5), and (f) of §130.6. The remaining subsections of proposed repealed §130.6 are repealed without recodification, because the provisions are either no longer applicable or redundant with other Division rules.

An informal draft of this proposed repeal, together with proposed amended §§127.1, 127.5, 127.10, 127.20, 127.25, and 180.23 of this title, the proposed repeal of §180.21 of this title, and informally proposed new §§127.100, 127.110, 127.120, 127.130, 127.140, 127.200, 127.210, and 127.220 of this title, was published on the Division's website from October 14, 2011 to November 4, 2011, and the Division received 78 written informal comments on the draft.

Patricia Gilbert, Executive Deputy Commissioner of Operations, has determined that for each year of the first five years the repeal is in effect, there will be no fiscal impact to state or local governments as a result of enforcing or administering the repeal and there will be no measurable effect on local employment or the local economy as a result of the proposed repeal.

Ms. Gilbert has also determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repeal will be to bring increased clarity and efficiency in designated doctor regulation. There will be no economic cost to any individuals, or insurers or other entities regulated by the Division, regardless of size, as a result of the proposed repeal.

In accordance with the Government Code §2006.002(c), the Division has determined that this proposed repeal will not have an adverse economic effect on small or micro businesses because the proposal of amended §127.10 of this title recodifies part of the provisions of this proposed repeal, and the remaining provisions are now either redundant or unnecessary. Therefore, in accordance with the Government Code §2006.002(c), the Division is not required to prepare a regulatory flexibility analysis.

The Division has determined that no private real property interests are affected by this proposal and this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. CST on March 26, 2012. Comments may be submitted via the internet through the Division's website at www.tdi.texas.gov/wc/rules/proposedrules/index.html, by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Office of Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. Comments received after the close of comment will not be considered.

A public hearing on this proposal will be held on March 26, 2012 at 9:30 a.m. in the Tippy Foster Conference Room of the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Austin, Texas 78744-1645. The Divi-

sion provides reasonable accommodations for persons attending meetings, hearings, or educational events, as required by the Americans with Disabilities Act. If you require accommodations in order to attend the hearing please contact Idalia Salazar at (512) 804-4403 at least two business days prior to the confirmed hearing date.

The hearing will also be audio streamed; to listen to the audio stream, access the Public Outreach Events/Training Calendar website at www.tdi.texas.gov/wc/events/index.html. Audio streaming will begin approximately five minutes before the scheduled time of the hearing.

The public hearing date, time, and location should be confirmed by those interested in attending or listening via audio stream; the hearing may be confirmed by visiting the Division's Public Outreach Events/Training Calendar website at www.tdi.texas.gov/wc/events/index.html. Written and oral comments presented at the hearing will be considered.

The repeal is proposed under the broad general authority granted to the Commissioner of Workers' Compensation by Labor Code §402.00111 and §402.061. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority under the Labor Code. Section 402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Labor Code.

The following statute is affected by this proposal: §130.6 - None.

§130.6. Designated Doctor Examinations for Maximum Medical Improvement and/or Impairment Ratings.

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 February 13, 2012.

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Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
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For further information, please call: (512) 804-4703

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CHAPTER 160. REPORTS OF INJURY AND OCCUPATIONAL DIESEASE--GENERAL PROVISIONS

28 TAC §§160.1 - 160.3

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) proposes amendments to §160.2 and §160.3 and new §160.1 regarding reports of injury and occupational disease by employers. Sections 160.2 and 160.3 are Division rules that implement certain statutory provisions in Labor Code Chapter 411, Subchapter C, specifically Labor Code §411.032, that require an employer to file with the Division a report for certain on-the-job injuries and occupational diseases. The Division proposes these amendments to §160.2 and §160.3, and new §160.1 in order to update and clarify the language and requirements associated with these reporting requirements placed upon employers.

Labor Code §411.032(a) requires an employer to file with the Division a report of each: (1) on-the-job injury that results in the employee's absence from work for more than one day; and (2) occupational disease of which the employer has knowledge. In accordance with Labor Code §411.002, employers subject to these reporting requirements are: (1) employers who obtain workers' compensation insurance coverage; and (2) employers who are not required to and do not obtain workers' compensation insurance coverage and who employ five or more employees not exempt from workers' compensation insurance coverage. Additionally, Labor Code §411.001 defines "employer" for purposes of Labor Code Chapter 411, including Labor Code §411.032, as "a person who makes a contract of hire."

Information reported to the Division by employers in accordance with Labor Code §411.032 is included in the job safety information system and associated data base mandated by Labor Code §411.031 and §411.033. These statutes require the Division to maintain a job safety information system and require this information system to include a comprehensive data base that incorporates all pertinent information relating to each injury reported under Labor Code §411.032. This information must include the age, sex, wage level, occupation, and insurance company payroll classification code of the injured employee; the nature, source, and severity of the injury; the reported cause of the injury; the part of the body affected; any equipment involved in the injury; the number of prior workers' compensation claims by the employee; the prior loss history of the employer; the standard industrial classification code of the employer; the classification code of the employer; and any other information considered useful for statistical analysis.

Labor Code §411.032(b) specifies that the Commissioner of Workers' Compensation (Commissioner) shall adopt rules and prescribe the form and manner of employer reports of injury and occupational disease filed under Labor Code §411.032. Sections 160.2 and 160.3 are current Division rules that prescribe the form and manner of these employer reports of injury and occupational disease. Section 160.2 governs reports of injury and occupational disease by certain non-subscribing employers and §160.3 governs reports by subscribing employers. As stated, the proposed amendments to these rules and new §160.1 are intended to clarify and update the reporting requirements placed upon employers by Labor Code §411.032 and §160.2 and §160.3 of this title. The clarifications include defining the term "employer" as that term is used in Chapter 160 of this title, specifying the manner in which the reports may be provided to the Division, and delineating the data elements that must be included in each report. Also proposed are rules that establish a process subscribing employers are to follow when reporting injuries incurred by employees who have waived workers' compensation insurance coverage. Other amendments are proposed to correct non-substantive typographical, grammatical, and punctuation errors in the current rule text; and re-letter and renumber rule text. The Division also proposes to retitle this chapter from "Workers' Health and Safety--General Provisions" to "Reports of Injury and Occupational Disease--General Provisions" in order to conform to current statutory language and more accurately reflect the content of this chapter.

In the development of this proposal, the Division published an informal draft of these proposed amendments and the new rule on the Division's website on November 8, 2011. The informal

comment period closed December 5, 2011 and there were five informal comments received. The Division made changes to the proposal as a result of the informal comments.

The Division proposes these amendments and new rules in conjunction with its proposal to amend §110.1 and §110.101 and proposal of new §§110.7, 110.103, and 110.105 of this title. These other proposed amendments and new rules relate to other reporting requirements placed upon employers and are published elsewhere in this issue of the *Texas Register.*

Proposed New §160.1.

Proposed new §160.1 defines employer as defined in Labor Code §411.001(2) for clarity. This definition was previously contained within §160.2(a). This definition is necessary in order to clarify the meaning of the term "employer" as it is used in this chapter. Additionally, proposed new §160.1 adds a provision addressing the applicability of the chapter to those employers subject to Labor Code Chapter 411, Subchapter C which is the statutory basis for the rules in Chapter 160.

Proposed Amendments to §160.2.

Section 160.2 governs reports of injury and occupational disease by non-subscribing employers who employ five or more employees not exempt from workers' compensation insurance coverage. The proposed amendments to §160.2(a) clarify the definition of non-subscriber and replaces the statutory reference to Labor Code §411.001(2) with a specific definition defining a non-subscriber as an employer who does not have workers' compensation insurance coverage. Proposed amendments to §160.2(a) - (b) also harmonize rule language with Labor Code §411.032. Proposed amendments to §160.2(b) further clarify when a non-subscribing employer shall file a report with the Division. Specifically, the proposed amendments provide that a report must be filed with the Division not later than the seventh day of the month following the month in which, as applicable, the death occurred; the employee was absent from work for more than one day as a result of an on-the-job injury; or the employer acquired knowledge of the occupational disease. Proposed amendments to §160.2(c) clarify and codify current Division procedures as to the ability to submit this data in writing or electronically. This subsection also clarifies and delineates, by rule, the specific data elements required in the report.

Proposed Amendments to §160.3.

Section 160.3 governs reports of injury and occupational disease by subscribing employers. These proposed amendments are necessary in order to make certain changes in terminology and to clarify the requirements associated with reports of injury and occupational disease regarding injured employees who have waived workers' compensation coverage under Labor Code §406.034. The proposed amendments to subsection (a) clarify the definition of a subscriber as an employer who does have workers' compensation insurance coverage and adds the statutory reference to Labor Code §411.032, concerning injury reporting requirements. Additional amendments to subsection (a) are non-substantive and continue to provide direction to subscribing employers on what satisfies a report of injury in respect to a covered employee under the Labor Code.

The proposed amendments to subsection (b) clarify the reporting requirements placed on subscribing employers for reporting of injuries and occupational diseases incurred by employees who have waived workers' compensation coverage under Labor Code §406.034. Specifically, a subscribing employer falling under this subsection must file with the Division a report of each death, occupational disease of which the employer has knowledge, and on-the-job injury that results in more than one day's absence from work for the injured employee. Proposed subsection (c) further explains that this reporting requirement mirrors the injury reporting requirement triggers, submission methods, and data elements required in §160.2, and adds only a statement to be included with any report that the injured employee has waived workers' compensation coverage under Labor Code §406.034.

Patricia Gilbert, Executive Deputy Commissioner of Operations, has determined that for each year of the first five years the proposed rules will be in effect there will be no fiscal implications to state or local government, except for minimal fiscal implications to the Division as described below, as a result of enforcing or administering the sections. There also will be no measurable effect on local employment or the local economy as a result of the proposed rules.

Ms. Gilbert has also determined that the proposed rules will have minimal impact on the cost of the Division's intake of report of injury information because the proposed rules primarily codify existing procedures, form requirements, and current requirements found in the Labor Code and current Division rules in Chapter 160. Costs to the Division associated with subscribing employers reporting of injuries for employees who have waived workers' compensation insurance coverage, which are delineated in new proposed §160.3(b) and (c), are not expected to significantly increase the volume of injury reports to the Division and the additional reporting volume can be absorbed by current Division resources.

Division costs associated with streamlining efforts to intake information that identifies injuries associated with employees that have waived workers' compensation insurance coverage include nominal programming, training, and form changes, which again, will be absorbed by current Division resources.

There will be no fiscal implication to local governments as a result of enforcing or administering the proposed rules.

Ms. Gilbert has determined that for each year of the first five years the proposed rules are in effect, the public benefit as a result of the proposed rules will be increased awareness of the statutory duties placed on both subscribing and non-subscribing employers in respect to reports of injury and the procedures the Division has provided for employers to report this statutorily required information.

Ms. Gilbert has determined that the costs of compliance associated with the proposed codification of processes and clarifications in text, which comprise the majority of this proposal, are a result of existing statutory duties in Labor Code §411.032 and §411.033 and in Division rules under §160.2 and §160.3(a). Costs related to compliance with established Division processes and the associated statutory provisions are typically considered costs that are anticipated with compliance and are likely a component of the "standard cost" of ongoing business operations and are planned for and included in annual budgets. If there should be a resultant cost incurred by entities based on the proposed codification and clarification portions of this proposal, it is a cost incurred by entities not currently in compliance with reporting requirements under current statutes and Division rules. These resultant costs would be incurred at the time an entity made efforts to come under compliance and thus are not a result of the codification and clarification portions of this proposal.

Cost, in aggregate, per subscribing employer reporting injuries for employees who have waived workers' compensation insurance coverage, which are delineated in proposed new §160.3(b) and (c), is dependent on the number of employees who have waived workers' compensation insurance coverage under the Act and that do incur an injury. Labor Code Chapter 411, Subchapter C, requires subscribing employers to report injuries incurred by employees who have waived workers' compensation insurance coverage, however, current Division rules do not provide a mechanism for subscribing employers to report data concerning whether the injured employee has waived workers' compensation insurance coverage. Although the Division does not have sufficient data that would allow it estimate the number of employees who have waived coverage, it is the Division's understanding, at this time, that most subscribing employers have few, if any, employees who have waived workers' compensation insurance coverage. Importantly, these costs are a direct result of compliance with statutory provisions currently placed on subscribing employers under the Labor Code. Proposed new §160.3(b) and (c) provide a process in order for subscribing employers to accurately report this information concerning injuries incurred by employees who have waived workers' compensation insurance coverage.

Many entities will likely experience no increase in costs due to proposed new §160.3(b) and (c) because the cost of updating processes and procedures in order to be in compliance with statutory provisions, are normal, expected, and budgeted for as part of the standard cost of ongoing business operations. Entities that do not budget training needs and updates, or budget insufficient amounts for such needs as part of their standard cost of ongoing business operations may experience some increased costs associated with complying with the current statutory duties provided for in proposed new §160.3(b) and (c); and, accordingly, the Division has provided estimates on the potential costs in this scenario.

The Division estimates the cost of material involved in updating training material for staff per subscribing employer at a range of $.50 to $25 based on an average of five pages of updates to training material, with a cost of $.10 to $5 per page; or five pages multiplied by $.10 and $5 respectively. The low of $.10 per page is based on updates and distribution made via established electronic means and the high of $5 is based on: (1) extensive updates, paper copy distribution, in-person training sessions; (2) the prorated cost of implementing electronic distribution and training where none had previously existed based on the presumed small allocation of resources utilized for this specific initiative; or (3) a varying combination of establishing electronic training means, in-person training sessions, etc.

The estimates on training material updates include: (1) updates to reference training materials for staff regarding the definitions and requirements under the Labor Code; (2) processes to identify employees that have waived coverage; and (3) staff training to ensure staff do not inadvertently submit incorrect information to the Division.

The Division also estimates that the cost of reporting of injury for an employee who has waived workers' compensation insurance coverage to be estimated between $1.81 to $96.15 per injury incident. This range is based on the reporting of one injured employee that has waived workers' compensation insurance coverage and the resources required of an entity to report the information to the Division. It is estimated that once procedures are established, which were previously estimated, that it will take one individual 15 minutes to a maximum of one hour to report the injury for the employee that has waived coverage to the Division. The salary range for the individual reporting the injury has been estimated based on an hourly employee earning the current minimum wage of $7.25 to an exempt employee earning $200,000 annually with 15 minutes (.25 of one hour) multiplied by $7.25 (hourly minimum wage) and one hour multiplied by $96.15 (hourly wage based on $200,000 annual salary).

The Division provides cost estimates based on ranges because business operations and processes may vary among employers operating in the state of Texas. Again, many entities will likely experience no increase in costs due to the proposal because the cost of updating processes and procedures in order to be in compliance with statutory provisions, are normal, expected, and budgeted for as part of the standard cost of ongoing business operations. Entities that do not budget training needs and updates, or budget insufficient amounts for such needs as part of their standard cost of ongoing business operations may experience some increased costs associated with complying with the current statutory duties provided for in this proposal.

As required by the Government Code §2006.002(c), the Division has determined that proposed §160.1 and the proposed amendments to §160.2 and §160.3(a) will not have an adverse economic effect on the small and micro-businesses that may be required to comply with the proposed amendments. These proposed amendments primarily clarify text and codify reporting procedures and forms currently in place pursuant to existing rules in Chapter 160 for reporting injuries to the Division. These particular amendments will not require subscribing and non-subscribing employers that qualify as a small and micro-business to make any significant changes to their existing processes for reporting injuries to the Division in accordance with Chapter 160 and the statutes these rules implement. Therefore, these proposed amendments will not have an adverse economic effect on small and micro-businesses.

Proposed §160.3(b) and (c) establishes a new process subscribers would use to report to the Division injuries incurred by their employees who have waived workers' compensation insurance coverage. Subscribing employers are required to report this information to the Division pursuant to Labor Code Chapter 411, Subchapter C, and this proposed new process for reporting this information is modeled after the process used by non-subscribers for reporting injuries under §160.2. The cost of compliance with the proposal will not vary between large businesses and small or micro-businesses as this proposal applies to employers regardless of their size, and the costs are set out in the Public Benefit/Cost Note. Although the Division does not have the data that would allow it to estimate the average number of employees who have waived workers' compensation insurance coverage, as stated, it is the Division's understanding that employers have few, if any, employees that waive workers' compensation insurance coverage. Therefore, this proposed new process will not have an adverse economic impact on small and micro-businesses. Because this proposal will not have an adverse economic effect on small or micro-businesses, Government Code §2006.002(c) does not require a regulatory flexibility analysis.

The Division has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does

not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. CST on March 26, 2012. Comments may be submitted via the internet through the Division's website at www.tdi.texas.gov/wc/rules/proposedrules/index.html, by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Office of Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. Comments received after the close of comment will not be considered.

Any request for a public hearing must be submitted separately to the Texas Department of Insurance, Division of Workers' Compensation, Office of Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Austin, Texas 78744 by 5:00 p.m. CST by the close of the comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

The new rule and amendments are proposed under Labor Code §§411.032, 411.033, 406.034, 401.024, 409.005, 411.001, 504.002(a)(5), 504.002(a)(7) and under the general authority of §402.061.

Labor Code §411.032 provides when an employer shall file reports of injury and charges the Commissioner to adopt rules to prescribe the form and manner of reports filed under this section. Labor Code §411.033 lists required data elements relating to each injury reported under Labor Code §411.032 which must be included in the job safety information maintained by the Division. Labor Code §406.034 outlines the right of an employee to retain the common-law right of action to recover damages for personal injuries or death. Labor Code §401.024 provides the Commissioner the authority to permit or require the use of electronic transmission to transmit information. Labor Code §409.005 delineates a procedure for a subscribing employer's filing of a report of injury and the format to be used. Labor Code §411.001 defines employer as a person who makes a contract of hire. Labor Code §504.002(a)(5) provides that Labor Code §406.034 is not included in Labor Code Chapter 504. Labor Code §504.002(7) provides that Labor Code Chapter 411 applies to and is included in Labor Code Chapter 504. Labor Code §402.061 provides that the Commissioner shall adopt rules as necessary for the implementation and enforcement of this subtitle.

The following statute is affected by this proposal: §160.1 - Labor Code §§411.001, 411.032, and 504.002(a)(7); §160.2 - Labor Code §§401.024, 411.001, 411.032, and 411.033; and §160.3 - Labor Code §§401.024, 406.034, 409.005, 411.001, 411.032, 411.033, 504.002(a)(5) and 504.002(a)(7).

§160.1. Applicability.

This chapter applies to an employer as defined by Labor Code §411.001(2) and that is subject to Labor Code Chapter 411, Subchapter C.

§160.2. Non-Subscribing Employer's Report of Injury.

(a) An employer that does not have workers' compensation insurance coverage (non-subscriber) [~~, as defined by the Texas Labor Code §411.001(2), who is a non-subscriber~~] and employs five or more employees not exempt from workers' compensation insurance coverage[~~,~~] shall file with the division [~~Commission~~] a [~~written~~] report of [~~for~~] each:

(1) death;[~~,~~]

(2) on-the-job injury that results in more than one day's absence from work for the injured employee; [~~each occupational disease,~~] and

(3) occupational disease of which the employer has knowledge [~~each injury that results in more than one day's absence from work for the injured employee~~].

(b) An employer shall file a report required by subsection (a) of this section with the division not later than the seventh day of the month following the month in which: [~~The report of injury shall be filed in the form, format, and manner prescribed by the Commission.~~]

(1) the death occurred;

(2) the employee was absent from work for more than one day as a result of the on-the-job injury; or

(3) the employer acquired knowledge of the occupational disease.

(c) A report shall be filed in writing or electronically and shall be in the form and manner prescribed by the division. A report must include: [~~A report of all injuries that have occurred during a calendar month shall be filed with the Commission not later than the seventh day of the following month. For purposes of this section, a report is filed when received by the Commission.~~]

(1) the employer's business name;

(2) the employer's North American Industry Classification System (NAICS) codes;

(3) the employer's business mailing address;

(4) the employer's physical address (if different from mailing address);

(5) the employer's telephone number;

(6) the employer's federal employer identification number (FEIN);

(7) the name, title, telephone number, signature, and date of signature of the person completing the report for the employer;

(8) the reporting period;

(9) the injured employee's name;

(10) the employee's social security number;

(11) the employee's date of birth;

(12) the employee's date of hire;

(13) the employee's sex;

(14) the employee's occupation;

(15) the employee's hourly wage;

(16) the employee's NAICS code;

(17) the employee's race/ethnic identification;

(18) the address where injury or occupational disease occurred;

(19) the type of location of where injury or occupational disease occurred;

(20) the date of injury or occupational disease;

(21) the date reported by employee;

(22) the return-to-work date or expected date;

(23) the reported cause of injury;

(24) the nature of injury or occupational disease;

(25) any equipment involved in the injury;

(26) body part(s) affected;

(27) the first day of absence from work;

(28) the number of days absent from work;

(29) whether the injury is an occupational disease;

(30) whether the injury resulted in death; and

(31) a description of incident.

(d) Employers are responsible for timely and accurate filing of reports under this section. A report required by this section is considered timely filed with the division only when it contains all of the data elements specified under subsection (c) of this section, contains accurate information, and is received by the division.

§160.3. Subscribing Employer's Report of Injury.

(a) An employer that has workers' compensation insurance coverage (subscriber) shall file a report of injury with the division pursuant to Labor Code §411.032. A subscribing employer's report of injury filed in accordance with [~~Texas~~] Labor Code §409.005 and applicable division rules satisfies [~~shall satisfy~~] that employer's requirement to file a report of injury under [~~Texas~~] Labor Code §411.032, unless the division [~~commission~~] requests that the employer file a report with the division [~~commission~~] for a specific injury.

(b) For an employee who has waived workers' compensation insurance coverage in accordance with Labor Code §406.034, an employer covered by workers' compensation insurance, whether by commercial insurance or through self-insurance as provided by the Texas Workers' Compensation Act, shall file with the division a report of each:

(1) death;

(2) on-the-job injury that results in more than one day's absence from work for the injured employee; and

(3) occupational disease of which the employer has knowledge.

(c) The report of injury required by subsection (b) of this section shall be filed in the form, manner, and timeframes prescribed by the division in §160.2(b) and (c) of this title (relating to Non-Subscribing Employer's Report of Injury) and shall include a statement that the injured employee has waived workers' compensation coverage in accordance with Labor Code §406.034.

(d) Employers are responsible for timely and accurate filing of reports under this section. A report required by this section is considered timely filed with the division only when it contains all of the data elements specified under subsection (c) of this section, contains accurate information, and is received by the division.

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 February 13, 2012.

TRD-201200801

Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 804-4703

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CHAPTER 180. MONITORING AND ENFORCEMENT

SUBCHAPTER B. MEDICAL BENEFIT REGULATION

28 TAC §180.21

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Insurance, Division of Workers' Compensation or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) proposes the repeal of §180.21, regarding the Division Designated Doctor List. This repeal is necessary to ensure clarity and efficiency in designated doctor regulation and is proposed simultaneously with the proposal of new of §§127.100, 127.110, 127.120, 127.130, 127.140, 127.200, 127.210, and 127.220 of this title (relating to Designated Doctor Procedures and Requirements), which are published elsewhere in this edition of the *Texas Register.* These proposed new sections recodify the majority of the provisions of §180.21 of this title. The remaining provisions of proposed repealed §180.21 are repealed without recodification because the provisions are either no longer applicable or redundant with other Division rules.

An informal draft of this proposed repeal, together with informally proposed amended §§127.1, 127.5, 127.10, 127.20, 127.25, 130.6, and 180.23 of this title, and informally proposed new §§127.100, 127.110, 127.120, 127.130, 127.140, 127.200, 127.210, and 127.220 of this title, was published on the Division's website from October 14, 2011 to November 4, 2011, and the Division received 78 written informal comments on the draft.

Patricia Gilbert, Executive Deputy Commissioner of Operations, has determined that for each year of the first five years the repeal is in effect, there will be no fiscal impact to state or local governments as a result of enforcing or administering the repeal and there will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Gilbert has also determined that, for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repeal will be to bring increased clarity and efficiency in designated doctor regulation. There will be no economic cost to any individuals, or insurers or other entities regulated by the Division, regardless of size, as a result of the proposed repeal.

In accordance with the Government Code §2006.002(c), the Division has determined that this proposed repeal will not have an adverse economic effect on small or micro businesses because the proposal of new §§127.100, 127.110, 127.120, 127.130, 127.140, 127.200, 127.210, and 127.220 of this title recodify the majority of the provisions of this proposed repeal. Therefore, in accordance with the Government Code §2006.002(c), the Division is not required to prepare a regulatory flexibility analysis.

The Division has determined that no private real property interests are affected by this proposal and this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. CST on March 26, 2012. Comments may be submitted via the internet through the Division's website at www.tdi.texas.gov/wc/rules/proposedrules/index.html, by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Office of Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. Comments received after the close of comment will not be considered.

A public hearing on this proposal will be held on March 26, 2012 at 9:30 a.m. in the Tippy Foster Conference Room of the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Austin, Texas 78744-1645. The Division provides reasonable accommodations for persons attending meetings, hearings, or educational events, as required by the Americans with Disabilities Act. If you require accommodations in order to attend the hearing please contact Idalia Salazar at (512) 804-4403 at least two business days prior to the confirmed hearing date.

The hearing will also be audio streamed; to listen to the audio stream, access the Public Outreach Events/Training Calendar website at www.tdi.texas.gov/wc/events/index.html. Audio streaming will begin approximately five minutes before the scheduled time of the hearing.

The public hearing date, time, and location should be confirmed by those interested in attending or listening via audio stream; the hearing may be confirmed by visiting the Division's Public Outreach Events/Training Calendar website at www.tdi.texas.gov/wc/events/index.html. Written and oral comments presented at the hearing will be considered.

This repeal is proposed under the broad general authority granted to the Commissioner of Workers' Compensation by Labor Code §402.00111 and §402.061. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority under the Labor Code. Section 402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Labor Code.

The following statute is affected by this proposal: §180.21 - None.

§180.21. Division Designated Doctor List.

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 February 13, 2012.

TRD-201200807

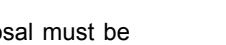
Dirk Johnson

General Counsel

Texas Department of Insurance, Division of Workers' Compensation

Earliest possible date of adoption: March 25, 2012

For further information, please call: (512) 804-4703



28 TAC §180.23

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) proposes amendments to §180.23 regarding Commission Required Training for Doctors. These proposed amendments primarily delete provisions of §180.23 that have become outdated because of the expiration of Labor Code §408.023(a) - (g) and (i) on September 1, 2007 and the Division's subsequent repeal of §180.20 of this title (relating to the Commission Approved Doctor List) on January 9, 2011. These proposed amendments, however, retain certain provisions relating to impairment rating training and testing for doctors who do not seek to become certified as Division designated doctors in order to the fulfill the requirements of Labor Code §408.023(n), which requires the Division to adopt such requirements by rule. Lastly, the proposed amendments to §180.23 clarify how the training and testing under this section interplays with the testing and training requirements for designated doctors under proposed new §127.100 and §127.110 under new Subchapters B and C, Chapter 127 of this title (relating to Designated Doctor Certification and Designated Doctor Recertification, respectively), which are published elsewhere in this issue of the *Texas Register.* A brief description of the proposed amendments to §180.23 is provided below.

An informal draft of this proposal, together with proposed amended §§127.1, 127.5, 127.10, 127.20, 127.25, and 130.6 of this title, the proposed repeal of §180.21 of this title, and informally proposed new §§127.100, 127.110, 127.120, 127.130, 127.140, 127.200, 127.210, and 127.220 of this title, was published on the Division's website from October 14, 2011 to November 4, 2011, and the Division received 78 written informal comments on the draft. Subsequent changes were made to the draft based on the informal comments and are reflected in this proposal. There have also been nonsubstantive changes made to these sections to conform to current nomenclature, reformatting, consistency, clarity, and for editorial reasons.

Proposed amended §180.23(a) - (h).

The deletions of current subsections (a) - (h) are proposed, because these subsections pertain, primarily, to required certification levels for the performance of various health care functions that are no longer applicable after the expiration of Labor Code §408.023(a) - (g) and (i) and the repeal of §180.21 of this title.

Proposed amended §180.23(i).

Current §180.23(i) is proposed to be recodified as new §180.23(a) - (d). Proposed new §180.23(a), addresses the scope of this proposed amended section, specifically that this section now only governs authorization relating to certification of maximum medical improvement (MMI), determination of permanent impairment, and assignment of impairment ratings in the event that a doctor finds permanent impairment exists.

Proposed new §180.23(b) provides that full authorization to assign an impairment rating and certify MMI in an instance where the injured employee is found to have permanent impairment requires a doctor to obtain Division certification by successfully

completing the Division-prescribed impairment rating training and passing the test or meeting the training and testing requirements for designated doctor certification or recertification under §127.100 and §127.110 of this title (relating to Designated Doctor Certification and Designated Doctor Recertification, respectively). Furthermore, this proposed subsection provides that for a doctor to remain certified the doctor must successfully complete follow-up training and testing at least every two years. Previously, doctors were only required to retrain and retest every four years, but this amendment is necessary to harmonize with the biannual recertification requirement for designated doctor in proposed new §127.110 of this title, so that all doctors assigning impairment rating in the workers' compensation system are equally current in training and testing.

Proposed new §180.23(c) provides that a doctor who has not completed the required training under proposed subsection (b) of this section but who has had similar training in the American Medical Association *Guides* from a Division-approved vendor within the prior two years may submit the syllabus and training materials from that course to the Division for review. If the Division determines that the training is substantially the same as the Division-required training and the doctor passes the Division-required test, the doctor is fully authorized under this subsection. The ability to substitute training only applies to the initial training requirement, not the follow-up training. This proposed subsection maintains the Division's current policy regarding alternative first time training for doctors seeking authorization under this section.

Proposed new §180.23(d) provides that notwithstanding any other provision of this section, a doctor who has not successfully completed training and testing required by this subsection for authorization to assign impairment ratings and certify MMI when there is permanent impairment may receive permission by exception to do so from the Division on a specific case-by-case basis. This proposed subsection maintains the Division's current policy regarding exceptions to the authorization requirements necessary to certify MMI and assign impairment ratings.

Patricia Gilbert, Executive Deputy Commissioner of Operations, has determined that for each year of the first five years the amendments to this section will be in effect, there will be no fiscal impact to state or local governments as a result of enforcing or administering these amendments and there will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Gilbert has determined that, for each year of the first five years the amendments to this section are in effect, the public benefit anticipated as a result of the amendments will be to bring increased clarity regarding the training and testing requirements for doctors who do not wish to be designated doctors but wish to obtain full authorization to certify MMI and assign impairment ratings. Furthermore, requiring these doctors to retest every two years in order to maintain their authorization will better ensure that these doctors remain familiar with the Division's current expectations regarding these issues, and it will harmonize these requirements with the analogous requirements for designated doctors. There will be an economic cost to any individuals who are not designated doctors who wish to maintain their authorization, which the Division estimates, based on current training and testing costs, to be approximately an additional $500 every four years. The Division anticipates no other costs for doctors, insurers, or other entities regulated by the Division, regardless of size, as a result of this proposal.

In accordance with the Government Code §2006.002(c), the Division has determined that this proposed section will have an adverse economic effect on small or micro businesses because the vast majority of the approximately 15 - 20 fully authorized doctors who are not designated doctors have practices that constitute small or micro-businesses. Thus, the Division can have no feasible alternative to its currently proposed regulatory requirements for these small or micro-businesses, because the primary focus of these proposed regulations is, by statutory mandate, individuals that in the vast majority of cases will constitute small or micro-business.

Inasmuch as any of the Division current or prospective designated doctors could constitute a large business, the cost of compliance with the proposal will not vary between large businesses and small or micro-businesses, and the Division's cost analysis and resulting estimated costs in the Public Benefit/Cost Note portion of this proposal is equally applicable to small or micro-businesses and large businesses.

The Division has determined that no private real property interests are affected by this proposal and this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action, and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. CST on March 26, 2012. Comments may be submitted via the internet through the Division's website at www.tdi.texas.gov/wc/rules/proposedrules/index.html, by email at rulecomments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Texas Department of Insurance, Division of Workers' Compensation, Office of Workers' Compensation Counsel, MS-4D, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645. Comments received after the close of comment will not be considered.

A public hearing on this proposal will be held on March 26, 2012 at 9:30 a.m. in the Tippy Foster Conference Room of the Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Austin, Texas 78744-1645. The Division provides reasonable accommodations for persons attending meetings, hearings, or educational events, as required by the Americans with Disabilities Act. If you require accommodations in order to attend the hearing please contact Idalia Salazar at (512) 804-4403 at least two business days prior to the confirmed hearing date.

The hearing will also be audio streamed; to listen to the audio stream, access the Public Outreach Events/Training Calendar website at www.tdi.texas.gov/wc/events/index.html. Audio streaming will begin approximately five minutes before the scheduled time of the hearing.

The public hearing date, time, and location should be confirmed by those interested in attending or listening via audio stream; the hearing may be confirmed by visiting the Division's Public Outreach Events/Training Calendar website at www.tdi.texas.gov/wc/events/index.html. Written and oral comments presented at the hearing will be considered.

The amendments are proposed under Labor Code §408.023 and the broad general authority granted to the Commissioner of Workers' Compensation by Labor Code §402.00111 and §402.061. Labor Code §408.023(n) provides, in relevant part, that the Commissioner shall by rule establish reasonable requirements for doctors regarding training and impairment rating

test. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority under the Labor Code. Section 402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Labor Code.

The following statute is affected by this proposal: §180.23 - Labor Code §408.023.

§180.23. Commission Required Training for Doctors[/~~Certification Levels~~].

~~[(a) This section identifies the training requirements for doctors to be approved to provide various services within the Texas workers' compensation system.]~~

~~[(b) The commission, in order to ensure that injured employees (employees) have access to health care and insurance carriers (carriers) have access to evaluations of an employee's health care and income benefit eligibility, may grant a doctor exceptions to certain training and registration requirements and may allow a doctor to perform functions not normally permitted by the doctor's Level of Certificate of Registration. Such exceptions may be granted on a per request, per case basis. When an exception is granted on a per request, per case basis, the commission shall provide a copy of the approval to the carrier.]~~

~~[(c) Doctors on the approved doctor list (ADL) shall have a Level 1 or Level 2 Certificate of Registration.]~~

~~[(1) A Level 1 Certificate of Registration allows a doctor to:]~~

~~[(A) infrequently provide health care to employees (providing care, other than emergency or immediate post-injury medical care, to 18 Texas workers' compensation claimants or fewer per calendar year);]~~

~~[(B) perform utilization review or peer review functions;]~~

~~[(C) participate in a regional network established under Texas Labor Code §408.0221; and/or]~~

~~[(D) provide medical services to an unlimited number of Texas workers' compensation claimants if the doctor's medical practice is Anesthesiology - Surgical Only (excludes pain management), Radiology, or Pathology and does not, by nature, include ongoing medical management of injured employees, and the doctor requests a Non-Medical Management designation. However, this designation does not allow the doctor to perform any of the functions listed in subsection (c)(1)(B) of this section.]~~

~~[(2) A Level 2 Certificate of Registration allows a doctor to serve in any role authorized in the Texas workers' compensation system with the exception of serving as a designated doctor unless the doctor is also on the designated doctor list which is governed by §180.21 of this title (relating to the Commission Designated Doctor List).]~~

~~[(d) A doctor seeking admission to the ADL shall receive training from the commission and/or a commission-approved trainer.]~~

~~[(e) A person or organization seeking to become a commission-approved trainer shall apply for approval in the form and manner prescribed by the commission.]~~

~~[(f) For each doctor trained, the commission-approved trainer shall file or provide the doctor's training information in the form and manner prescribed by the commission.]~~

~~[(g) Notwithstanding any other subsection of this section:]~~

~~[(1) a doctor not licensed in this state shall not perform utilization reviews and/or peer reviews for an insurance carrier or its agent unless the doctor performs the reviews under the direction of a doctor who:]~~

~~[(A) is licensed in this state,]~~

~~[(B) is on the ADL with a Level 2 Certificate of Registration, and]~~

~~[(C) has agreed to direct the doctor's reviews; and]~~

~~[(2) the commission may restrict or reduce a doctor's privileges or authorizations as provided in the Statute or Rules.]~~

~~[(h) ADL approval at a minimum requires a doctor to successfully complete commission-prescribed training prior to admission and renewal at a minimum requires a doctor to successfully complete follow-up training as required.]~~

~~[(1) Required training shall focus on the requirements of the Texas workers' compensation system with an emphasis on return to work, efficient utilization of care, entitlement to benefits, maximum medical improvement (MMI), and the determination of the existence of permanent impairment.]~~

~~[(2) Training may be completed through either self-study/distance learning (including online) or by attending training in person, as available.]~~

~~[(3) Application for a Level 1 Certificate of Registration requires completing the Limited Participation Doctor Training Module or other training as prescribed by the Commission in the application form. Application for a Level 2 Certificate of Registration requires completing the Doctor Training Module.]~~

~~[(4) Renewal of a Level 1 Certificate of Registration requires follow-up training every two years and renewal of a Level 2 Certificate of Registration requires follow-up training every four years unless the Certificate provides otherwise, the date is revised by agreed settlement pursuant to §180.26 of this title (relating to Doctor and Insurance Carrier Sanctions) or Texas Government Code §2001.056 (relating to Informal Disposition of Contested Case), Commission order or decision, or the doctor has been removed from the ADL. Follow-up training will serve as a refresher course but emphasize relevant changes in the Statute and Rules.]~~

(a) [~~(i)~~] This section [~~subsection~~] governs authorization relating to certification of maximum medical improvement (MMI), determination of permanent impairment, and assignment of impairment ratings in the event that a doctor finds permanent impairment exists. [~~when the examination of the employee occurs on or after September 1, 2003.~~]

~~[(1) Any doctor on the ADL, or who has been granted a temporary exception to be on the ADL pursuant to §180.20(e) or on a case-by-case basis, is authorized to determine whether an employee has permanent impairment resulting from a compensable injury. If the doctor finds that the employee does not have permanent impairment, the doctor is also authorized to certify the employee as reaching MMI.]~~

(b) [~~(2)~~] Full authorization to assign an impairment rating and certify MMI in an instance where the injured employee is found to have permanent impairment requires a doctor to obtain division [~~receive commission~~] certification by successfully completing the division-prescribed impairment rating training [~~commission-prescribed Impairment Rating Training Module~~] and passing the test or meeting the training and testing requirements for designated doctor certification or recertification under §127.100 and §127.110 of this title (relating to Designated Doctor Certification and Designated Doctor Recertification, respectively). To remain certified, a doctor is required

to successfully complete follow-up training and testing at least every two [four] years.

(c) [(3)] A doctor who has not completed the required [commission-prescribed] training under subsection (b) [(i)(2)] of this section but who has had similar training in the American Medical Association [*AMA*] *Guides* from a division-approved [commission-approved] vendor within the prior two years may submit the syllabus and training materials from that course to the division [commission] for review. If the division [commission] determines that the training is substantially the same as the division-required [commission-prescribed] training and the doctor passes the division-required [commission-prescribed] test, the doctor is fully authorized under this section [subsection]. The ability to substitute training only applies to the initial training requirement, not the follow-up training.

(d) [(4)] Notwithstanding any other provision of this section [subsection], a doctor who has not successfully completed training and testing required by this section [subsection] for authorization to assign impairment ratings and certify MMI when there is permanent impairment may receive permission by exception to do so from the division [commission] on a specific case-by-case basis [case basis].

[(5) Full authorization under this section is one of the minimum requirements to be on the Designated Doctor List (DDL). Section 180.21 of this title governs DDL membership requirements and procedures.]

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

Filed with the Office of the Secretary of State on February 13, 2012.

TRD-201200805
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 804-4703

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 285. ON-SITE SEWAGE FACILITIES

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §285.11 and §285.21; and proposes new §285.38.

Background and Summary of the Factual Basis for the Proposed Rules

In 2011, the 82nd Legislature passed House Bill (HB) 2694, relating to the continuation and functions of the TCEQ. The changes in law became effective September 1, 2011. HB 2694, Article 8, abolished the Texas On-Site Wastewater Treatment Research Council (Council) and transferred the Council's research responsibilities to the commission. The 82nd Legislature also passed HB 240, which requires that all on-site sewage facilities (OSSFs), including risers and covers, installed after September 1, 2012, be designed to prevent access to the OSSF by anyone other than the owner of the OSSF, licensed OSSF installers, or licensed OSSF maintenance providers.

This rulemaking would remove references to the Council and provide that the fee previously assessed for the Council will be used for commission OSSF research grants. It would require that OSSFs, including risers and covers, installed after September 1, 2012, be designed to prevent access to the OSSF by anyone other than the owner of the OSSF, licensed OSSF installers, or licensed OSSF maintenance providers. The purpose of the requirement is to prevent the accidental or unintentional removal of an OSSF lid that may contribute to harmful or fatal accidents involving individuals accessing and falling into OSSFs.

Section by Section Discussion

§285.11, General Requirements

The proposal would amend §285.11(b) by replacing the reference to the Council with commission. The Council was abolished by Article 8 of HB 2694. The commission is now responsible for the research function previously performed by the Council. The proposed change in the rule language is legislatively mandated.

§285.21, Fee

The proposal would amend §285.21(b) by replacing the reference to the Council with commission. The Council was abolished by Article 8 of HB 2694. The commission is now responsible for the research function previously performed by the Council. The proposed change in the rule language is legislatively mandated.

§285.38, Prevention of Unauthorized Access to OSSFs

Proposed new §285.38 would incorporate the language in HB 240 that requires all OSSFs, including risers and covers, installed after September 1, 2012, to be designed to prevent accidental or unintentional access to the OSSF by anyone other than the owner of the OSSF, licensed OSSF installers, or licensed OSSF maintenance providers. The proposed rule is based on the NSF International (formerly known as the National Sanitation Foundation) standards for residential wastewater treatment systems. At the request of stakeholders, several items were added to the standards such as: including a mechanism for the executive director to approve innovative technologies that meet the standards, addressing the Texas climate by requiring materials to be ultraviolet light resistant, and including construction standards for risers and for connecting risers to tanks. The proposed rule requires routine maintenance reports to include the security status of the access port. The proposed rule clarifies that all installations of risers or caps on an OSSF system must be performed by a licensed installer. Although septic tank pumpers were not specifically recognized in HB 240 as needing access to OSSFs, the executive director recognizes that septic tank pumpers need access to OSSFs. This proposed rule does not prohibit access to OSSFs by septic tank pumpers. The proposed rule requires any person that accesses an OSSF to secure the OSSF when access is complete.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Strategic Planning and Assessment Section Analyst, has determined that for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

The proposed rules remove references to the Council because HB 2694 abolished the Council and transferred the Council's re-

search responsibilities to the commission. The proposed rules also implement HB 240, which requires that all OSSFs, including risers and covers, installed after September 1, 2012, be designed to prevent access to the OSSF by anyone other than the owner of the OSSF, licensed OSSF installers, or licensed OSSF maintenance providers.

As of September 1, 2011, the commission assumed all administrative responsibilities previously held by the Council, including all rights and obligations under existing grant agreements and contracts. The proposed rules would provide that OSSF permit fee revenue provided to the Council for research activities will now be collected for use by the commission, as required by statute. OSSF locally authorized agents are currently required to collect a $10 fee for each OSSF permit. This fee was deposited to the General Revenue Account, to be utilized for the administration of the Council and its responsibilities under statute. Per HB 2694, local authorized agents would continue to collect this fee; however, the fee revenue would now be deposited to the Water Resource Management Account 153 for use by the commission.

Based on the 2011 Comptroller Biennial Revenue Estimate, $325,000 in 2012 and $335,000 in 2013 would now be deposited into the Water Resource Management Account instead of the General Revenue Account. This fee revenue must be appropriated to the TCEQ by the legislature before the funds can be used for administration of the former council's duties and responsibilities, including grant awards. The legislature did not appropriate funds in 2012 and 2013 for new grants for on-site sewage research.

The proposed rules implement HB 240, which requires that all OSSF systems, including risers and covers, installed after September 1, 2012, be designed to prevent access to the OSSF by anyone other than the system's owner and licensed OSSF installers or maintenance providers. The purpose of the requirement is to prevent accidental or unintentional access to a septic tank which could result in harmful or fatal accidents.

The proposed rules may increase the agency's workload with regard to the review of proposed systems and may also increase some enforcement activities relating to OSSF systems. However, any additional costs would be absorbed using existing resources. Likewise, local governments such as counties, municipalities, or river authorities who are authorized agents for the OSSF program may see an increase in workload with regard to the review of proposed systems and enforcement activities relating to OSSF systems, but any additional costs 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 rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and enhanced public safety with regard to the operation of OSSF systems.

Fiscal implications are anticipated for businesses and individuals if they design, own, or install a new OSSF system after September 1, 2012. However, these fiscal implications are expected to be minimal.

It is expected that OSSF system owners will have an additional one-time cost of between $25 and $100 (for the tank risers and/or covers including the padlock or weighted lid) for new OSSF systems designed and installed after September 1, 2012.

There are approximately 405 OSSF manufacturers and 3,081 OSSF licensed individuals that will be impacted by the proposed rules. Manufacturers will be required to provide OSSFs that meet the minimum requirements. However, according to agency staff, most manufacturers are already producing systems that meet the minimum proposed requirements so fiscal implications are not anticipated for them. Maintenance providers will be required to report the status of the secured access on routine maintenance reports. This additional reporting requirement is not expected to result in significant costs, if any. Maintenance providers and installers may also be required to purchase specialized tools to remove access ports to OSSFs, but again these costs are not anticipated 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. Most OSSF manufacturers and OSSF licensed individuals are anticipated to be small or micro-businesses. In addition, new reporting requirements for routine maintenance or any new special equipment necessary to access ports for maintenance providers or installers is not expected to result in significant costs, if any. Any small or micro-business that designs, owns, or installs a new OSSF system after September 1, 2012 will have an additional one-time cost of between $25 and $100 (for the tank risers and/or covers including the padlock or weighted lid) for the new OSSF system.

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 rules are required by statute and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are 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 the rules do not meet the definition of a "major environmental rule." Under Texas Government Code, §2001.0225, "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 rules do 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 would remove references to the Council, and would require that all OSSFs, including risers and covers, installed after September 1, 2012, be designed to prevent access to the OSSF by anyone other than the owner of the OSSF, licensed OSSF installers, or licensed OSSF maintenance providers; therefore, this rulemaking is not a major environmental rule and does not meet any of the four applicability requirements. The proposed rules should not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs because they reflect only a statement of policy and do not result in any new rights and regulations.

The commission invites public comment regarding this draft regulatory impact analysis determination.

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 rules is to remove references to the Council and require that all OSSFs, including risers and covers, installed after September 1, 2012, be designed to prevent access to the OSSF by anyone other than the owner of the OSSF, licensed installers or licensed maintenance providers.

Promulgation and enforcement of the proposed rules will not affect private real property, which is the subject of the rules, 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 rules only apply 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 rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), concerning rules subject to the Texas Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process. The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is editorial and procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

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

A public hearing on this proposal will be held in Austin on March 21, 2012, at 2:00 p.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building B, Room 201A. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member 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, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-040-285-CE. The comment period closes March 26, 2012. Copies of the proposed rule can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Candy Garrett, Field Operations Support Division, (512) 239-1457.

SUBCHAPTER B. LOCAL ADMINISTRATION OF THE OSSF PROGRAM

30 TAC §285.11

Statutory Authority

The amendment is proposed under the authority granted to the commission by the legislature in Texas Health and Safety Code (THSC), §366.001, which provides the commission with the authority to regulate On-site Sewage Facilities (OSSF) and collect fees and penalties for OSSFs; THSC, §366.011, which provides the commission or authorized agents general authority over OSSFs; THSC, §366.012, which provides the commission with authority to adopt rules governing OSSFs; THSC, §367.008, which authorizes the commission to award competitive grants for OSSF research; THSC, §367.009, which requires certain fees be used for competitive grants for OSSF research; and THSC, §367.010, which provides that fees from OSSF permit applications shall be deposited to the credit of the water resources management account.

The amendment is also proposed under the general authority granted in Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under TWC and other laws of the state; and TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties.

The proposed amendment implements House Bill 2694 (Article 8), 82nd Legislature, 2011; and THSC, §§285.11, 367.001, 367.007, 367.008, 367.009, and 367.010.

§285.11. General Requirements.

(a) General Administrative Requirements for Authorized Agents. On-site sewage facility (OSSF) [~~OSSF~~] permitting, construction, and inspection requirements are in §285.3 of this title (relating to General Requirements).

(b) Fees. The OSSF permit and inspection fees will be set by the authorized agent. Additionally, a fee of $10 shall be assessed for each OSSF permit for the commission [~~On-Site Wastewater Treatment Research Council~~] as required in the Texas Health and Safety Code, Chapter 367.

(c) Complaints. The authorized agent shall investigate all complaints within 30 days after receipt. After completing the investigation, the authorized agent shall take appropriate and timely action according to §285.71 of this title (relating to Authorized Agent Enforcement of OSSFs).

(d) Appeals. Appeals of an authorized agent's decision will be made through the appeal procedures stated in the authorized agent's order, ordinance, or resolution.

(e) Authorized Agents Reporting Requirements.

(1) The authorized agent shall notify the executive director, in writing, of any change of the designated representative within 30 days after the date of the change.

(2) Each authorized agent shall provide to the executive director an OSSF monthly activity report on the form provided by the executive director, within ten days after the end of the month.

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 February 10, 2012.

TRD-201200735
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 239-2141

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SUBCHAPTER C. COMMISSION ADMINISTRATION OF THE OSSF PROGRAM IN AREAS WHERE NO AUTHORIZED AGENT EXISTS

30 TAC §285.21

Statutory Authority

The amendment is proposed under the authority granted to the commission by the legislature in Texas Health and Safety Code (THSC), §366.001, which provides the commission with the authority to regulate On-site Sewage Facilities (OSSF) and collect fees and penalties for OSSFs; THSC, §366.011, which provides the commission or authorized agents general authority over OSSFs; THSC, §366.012, which provides the commission with authority to adopt rules governing OSSFs; THSC, §367.008, which authorizes the commission to award competitive grants for OSSF research; THSC, §367.009, which requires certain fees be used for completive grants for OSSF research; and THSC, §367.010, which provides that fees from OSSF permit applications shall be deposited to the credit of the water resources management account.

The amendment is also proposed under the general authority granted in Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under TWC and other laws of the state; and TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties.

The proposed amendment implements House Bill 2694 (Article 8), 82nd Legislature, 2011; and THSC, §§285.21, 367.001, 367.007, 367.008, 367.009, and 367.010.

§285.21. Fees.

(a) The application fee for an on-site sewage facility (OSSF) [~~OSSF~~] permit is:

(1) $200 for an OSSF serving a single family dwelling; or

(2) $400 for all other types of OSSFs.

(b) A fee of $10 shall also be collected for each OSSF permit for the commission [~~On-Site Wastewater Treatment Research Council~~] as required by the Texas Health and Safety Code, Chapter 367.

(c) The fees are payable when the owner, or owner's agent, applies to the executive director for an OSSF permit. The fee shall be submitted to the appropriate regional office and shall be paid by a money order or check. Payments shall be made payable to the Texas Commission on Environmental Quality.

(d) The re-inspection fee shall be equal to one-half of the permit fee that was in effect at the time the original application was submitted to the regional office.

(e) Refunds of the application fee shall not be granted.

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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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2141

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SUBCHAPTER D. PLANNING, CONSTRUCTION, AND INSTALLATION STANDARDS FOR OSSFS

30 TAC §285.38

Statutory Authority

The new section is proposed under the authority granted to the commission by the legislature in Texas Health and Safety Code (THSC), §366.001, which provides the commission with the authority to regulate On-site Sewage Facilities (OSSF) and collect fees and penalties for OSSFs; THSC, §366.011, which provides the commission or authorized agents general authority over OSSFs; and THSC, §366.012, which provides the commission with authority to adopt rules governing OSSFs.

The new section is also proposed under the general authority granted in Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission over other areas of responsibility as assigned to the commission under TWC and other laws of the state; and TWC, §5.103 and §5.105, which authorize the commission to adopt rules and policies necessary to carry out its responsibilities and duties.

The proposed new section implements House Bill 240, 82nd Legislature, 2011; and THSC, §§366.001, 366.011, and 366.012.

§285.38. Prevention of Unauthorized Access to On-Site Sewage Facilities (OSSFs).

(a) Applicability.

(1) The construction criteria under this subsection applies to:

(A) pretreatment (trash) tanks referenced in §285.32(b)(1)(G) of this title (relating to Criteria for Sewage Treatment Systems);

(B) proprietary treatment units referenced in §285.32(c) of this title;

(C) non-standard treatment units referenced in §285.32(d) of this title;

(D) pump tanks referenced in §285.34(b) of this title (relating to Other Requirements); and

(E) holding tanks referenced in §285.34(e) of this title.

(2) The construction criteria found in this subsection is in addition to the construction criteria in §285.32 of this title.

(b) All tanks must have inspection or cleanout ports located on the tank top over all inlet and outlet devices. Each inspection or cleanout port must be offset to allow for pumping of the tank. The ports may be configured in any manner as long as the smallest dimension of the opening is at least 12 inches, and is large enough to provide for maintenance and equipment removal. Inspection and cleanout ports shall have risers over the port openings which extend to the ground surface. When a riser is installed, a secondary plug, cap, or other suitable restraint system shall be provided below the riser cap to prevent tank entry if the cap is unknowingly damaged or removed.

(c) Risers.

(1) The risers shall have inside diameters which are equal to or larger than the inspection or cleanout ports.

(2) Risers must be permanently fastened to the tank lid or cast into the tank. The connection between the riser and the tank lid must be watertight.

(3) Risers must be fitted with removable watertight caps and protected against unauthorized intrusions. Acceptable protective measures include:

(A) a padlock;

(B) a cover that can be removed only with specialized tools;

(C) a cover having a minimum net weight of 29.5 kilograms (65 pounds); or

(D) any other means approved by the executive director.

(4) Risers and riser caps exposed to sunlight must have ultraviolet light protection.

(5) Risers must be able to withstand the pressures created by the surrounding soil.

(d) Installation of a riser to any component of an OSSF is considered construction under this chapter and must be performed by a licensed installer.

(e) Installation of risers for OSSF components installed on or prior to September 1, 2012, are considered an emergency repair as described in §285.35 of this title (relating to Emergency Repairs).

(f) Any person who accesses any secured lid(s) or cover(s) on an OSSF shall secure the lid(s) or cover(s) when access is complete.

(g) All inspection reports sent to Authorized Agents, Regional Offices, and homeowners must document that the access to the OSSF inspection and cleanout ports was secured after the maintenance or inspection activities were completed.

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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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 239-2141

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CHAPTER 291. UTILITY REGULATIONS

The Texas Commission on Environmental Quality (TCEQ or commission) proposes to repeal §291.7 and amend §291.22.

Background and Summary of the Factual Basis for the Proposed Rules

Section 291.7 sets forth the filing fees required for a rate change application; an application for a certificate of public convenience and necessity (CCN); and an application for sale, assignment, or lease of a CCN, or notice of intent to sell, assign, lease, or rent a water or sewer system. This rule was promulgated based on Texas Water Code (TWC), Chapter 13, Subchapter L. House Bill (HB) 2694 was passed during the 82nd Legislature, 2011. HB 2694, §6.04 repealed TWC, Chapter 13, Subchapter L, thus eliminating the commission's ability to collect application fees for rate change requests; applications for CCNs; applications for sale, transfer or merger (STM) requests; and notices of intent to sell, assign, lease, or rent a water or sewer system. Therefore, the commission proposes to repeal §291.7 and not require any filing fees for a rate change application; an application for a CCN; an application for sale, assignment, or lease of a CCN; or a notice of intent to sell, assign, lease, or rent a water or sewer system.

Section 291.22 allows a governing body of a municipality or a political subdivision that provides retail water or sewer service to customers outside their respective boundaries to mail or hand deliver individual written notice to each affected ratepayer eligible to appeal a rate change within 30 days after the date of the final decision. HB 2694, §9.01 amended TWC, §13.043(i) by increasing this time frame from 30 to 60 days and by allowing the written notice to be e-mailed if the municipality or political subdivision has access to a ratepayer's e-mail address. The commission therefore proposes an amendment to §291.22 to increase the time frame for delivery of notice of a final rate decision by a municipality or political subdivision, and allow the notice to be e-mailed if the municipality or political subdivision has access to

a ratepayer's e-mail address in order to achieve consistency with HB 2694, §6.04.

Section 291.22 also requires a utility to mail or hand deliver the statement of intent to change rates to the appropriate officer of each affected municipality. HB 2694, §9.02 amended TWC, §13.187(b), by allowing a utility to e-mail the statement of intent to change rates. Therefore, the commission proposes to amend §291.22 by allowing the statement of intent to change rates to be e-mailed in order to achieve consistency with HB 2694, §9.02. The commission also proposes an amendment to §291.22 to allow e-mail as an acceptable delivery method for the noticing of utility rate change applications in order to maintain internal consistency in commission rules regarding rate change notification.

In a corresponding rulemaking published in this issue of the *Texas Register,* the commission also proposes revisions to 30 TAC Chapter 293, Water Districts, and 30 TAC Chapter 297, Water Rights, Substantive.

Section by Section Discussion

§291.7, Filing Fees

The commission proposes to repeal §291.7 and not require any filing fees for a rate change application; an application for a CCN; an application for sale, assignment, or lease of a CCN; or a notice of intent to sell, assign, lease, or rent a water or sewer system. The commission proposes to repeal this section because HB 2694, 82nd Legislature, 2011, repealed TWC, Chapter 13, Subchapter L, which was the statutory basis for the rule. The repeal of the rule will ensure consistency with the statutory change.

§291.22, Notice of Intent To Change Rates

The commission proposes to amend §291.22(a) by allowing a utility to provide notice of a proposed rate change to all affected utility customers by e-mail, in addition to delivery by mail or hand delivery. This amendment ensures internal consistency in commission rules regarding notice as to rate changes. The commission proposes to amend §291.22(b) by allowing the governing body of a municipality or a political subdivision that provides retail water or sewer service to customers outside the boundaries of the municipality or political subdivision to e-mail individual written notice of a final decision on a rate change to each affected ratepayer eligible to appeal it, if the municipality or political subdivision has access to a ratepayer's e-mail address. The commission also proposes to amend this subsection by changing the number of days from 30 to 60 that the municipality or political subdivision has to provide such notice. These amendments ensure consistency with HB 2694, §9.01. The commission proposes to amend §291.22(c) by allowing a utility to deliver notice of a proposed rate change by e-mail, in addition to mailing notices separately or with customer billings. This amendment ensures internal consistency in commission rules regarding notice as to rate changes. The commission proposes to amend §291.22(d) by allowing a utility to deliver a statement of intent to change rates by e-mail to the appropriate officer of each affected municipality, in addition to the options of mailing or delivering a copy of the statement of intent. The amendment ensures consistency with HB 2694, §9.02. The commission proposes to amend §291.22(e) by clarifying that the proof of notice in the form of an affidavit allows delivery by e-mail in addition to mail or personal delivery to customers and affected municipalities. This amendment ensures internal consistency in commission rules regarding notice as to rate changes. The commission proposes these amendments to implement TWC, §13.043(i) and §13.187(b), as amended by HB 2694, 82nd Legislature, 2011.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, determined that, for the first five-year period the proposed rulemaking is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rulemaking. The agency will experience a decrease, although not significant, in fee revenue. Units of local government could experience some cost savings as a result of reduced fees and e-mailing of notices.

The proposed rulemaking would revise Chapter 291 to implement certain provisions of HB 2694. The proposed rulemaking would repeal application fees currently collected from investor owned utilities for rate change requests; fees for applications for CCNs; fees for applications for STM requests; and fees for notice of intent to sell, assign, lease, or rent a water or sewer system. The proposed rulemaking also increases the time frame that municipalities or political subdivisions providing retail water or sewer service to customers outside their boundaries have when providing notice of a final rate change decision from 30 to 60 days. However, these municipalities or political subdivisions would be allowed to e-mail rate change notices to affected customers if e-mail addresses are available. In addition, an investor owned retail water or sewer utility would be allowed to e-mail a statement of intent to change rates and notice of utility rate change applications (instead of mailing or delivering such notices) to the appropriate office of municipalities served by the utility.

Agency Revenue

The proposed rulemaking is expected to decrease agency revenue in Account 153 - Water Resource Management Account by $30,000 per year. The repeal of application fees currently collected from investor owned utilities for rate change requests, fees for applications for CCNs, fees for applications for STM requests, and fees for notice of intent to sell, assign, lease, or rent a water or sewer system are not expected to have a significant fiscal impact on the agency.

Impact on Units of Local Government

Municipalities or political subdivisions providing retail water or sewer service to customers outside their boundaries will be required to give those customers notice of a final decision to change rates within 60 days, rather than 30 days. The proposed rules will allow these municipalities or political subdivisions to e-mail rate change notices to affected customers if e-mail addresses are available. Staff does not expect the additional number of days to result in significant increases in the number of appeals for these units of local government. If units of local government are able to obtain e-mail addresses for affected customers and provide notice by e-mail for rate changes, there may be decreased postage and delivery costs. Any cost savings for postage and delivery services is not expected to be significant.

Units of local government that plan to file a CCN or STM application should experience additional, although not significant, cost savings under the proposed rulemaking since they will no longer be required to pay filing fees for a CCN or STM application. Current application fees are $100 per CCN application and $50 to $500 (depending on the number of connections being acquired) per STM application and per notice of intent to sell, assign, lease, or rent a water or sewer system.

Public Benefits and Costs

Nina Chamness 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 rules will be compliance with state law.

The proposed rulemaking is not expected to have a significant fiscal impact on individuals since savings under the proposed rulemaking is not expected to significantly reduce the cost of providing water or sewer service. However, the proposed rulemaking allows for delivery of notice of rate changes to be e-mailed which some affected individuals may prefer as a delivery option.

The proposed rulemaking repeals fees paid by investor owned utilities for rate change requests; fees for applications for CCNs; fees for applications for STM requests; and fees for notices of intent to sell, assign, lease, or rent a water or sewer system. Current application fees are $100 per CCN application and $50 to $500 (depending on the number of connections being acquired) per STM application and per notice of intent to sell, assign, lease, or rent a water or sewer system. Current application fees for rate change requests are $50 to $500 depending on the number of connections. The elimination of these fees is not expected to significantly reduce the operating costs of retail water or sewer providers.

The proposed rulemaking will also allow investor owned utilities to provide notice of rate changes by e-mail to affected municipalities instead of mailing or hand delivering the notices. However, any cost savings are not expected to be significant.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses providing retail water or sewer service under the proposed rulemaking. Small businesses that provide retail water or sewer services should experience the same cost reductions as those experienced by a large business. Some small businesses that currently receive mailed or hand delivered notice or rate changes may receive notice via e-mail.

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 rulemaking does not adversely affect a local economy in a material way for the first five years that the proposed rulemaking 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 that the rulemaking is not subject to §2001.0225. "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.

First, the proposed rulemaking does not meet the statutory definition of a "major environmental rule" because its specific intent is not to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the proposed rulemaking is to implement legislation enacted in 2011 by the 82nd Legislature, specifically HB 2694, §§6.04, 9.01, and 9.02. HB 2694, §6.04 repealed TWC, Chapter 13, Subchapter L, which covered fees for rate changes and CCNs. The commission rule based upon TWC, Chapter 13, Subchapter L is therefore proposed to be repealed. HB 2694, §9.01 provides an additional 30 days for a municipality or political subdivision to notify ratepayers of a rate increase, and allows such notice to be delivered by e-mail if the municipality or political subdivision has access to a ratepayer's e-mail address. The proposed rulemaking implements these changes. HB 2694, §9.02 allows a utility to notify ratepayers of its intent to change rates by e-mail. The proposed rule implements this change and also allows a utility to provide e-mail notice to ratepayers of a rate change application.

Second, the proposed rulemaking does not meet the statutory definition of a "major environmental rule" because the proposed rulemaking would not 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. It is not anticipated that the cost of complying with the proposed rulemaking will be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the proposed rulemaking will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

The commission invites public comment regarding this draft regulatory impact analysis determination. Written comments 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 evaluated this proposed rulemaking and performed an assessment of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007.

The commission proposed this rulemaking for the specific purpose of implementing legislation enacted by the 82nd Legislature in 2011. The proposed rulemaking repeals §291.7 and amends §291.22. The commission's analysis revealed that repealing §291.7 would achieve consistency with the statutory changes made by HB 2694. The repeal impacts the commission financially, but does not impact private real property financially. The commission's analysis also revealed that amending §291.22 would achieve consistency with TWC, §13.043(i) as amended in 2011 by HB 2694. The rulemaking would require that a municipality or political subdivision provide notice to ratepayers eligible to appeal a rate-making decision by those entities within 60 days, rather than 30 days. The proposed rulemaking would allow the entity to provide electronic notice to ratepayers if the entity has access to a ratepayer's e-mail address. The notice requirement applies to governmental entities rather than to private citizens.

A "taking" under Texas Government Code, Chapter 2007 means a governmental action that affects private real property in a manner that requires compensation to the owner under the United States or Texas Constitution, or a governmental action that affects real private property in a manner that restricts or limits the owner's right to the property and reduces the market value of affected real property by at least 25%. Because no taking

of private real property would occur by amending the definition as proposed, the commission has determined that promulgation and enforcement of this proposed rulemaking would be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rules because the proposed rulemaking neither relates to, nor has any impact on, the use or enjoyment of private real property, and there would be no reduction in real property value as a result of the rulemaking. Therefore, the proposed rulemaking would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking 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/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rulemaking is not subject to the Texas Coastal Management Program.

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 March 20, 2012, at 2:00 p.m. in Building E, Room 201 S, 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 2011-039-293-OW. The comment period closes March 26, 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 Justin Taack, Water Supply Division, at (512) 239-1122.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §291.7

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

Statutory Authority

The repeal is proposed under Texas Water Code, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; and §13.041(b), which establishes the commission's authority to adopt and enforce rules relating to Water Rates and Services.

The proposed repeal implements House Bill 2694, §6.04, 82nd Legislature, 2011.

§291.7. Filing Fees.

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

Filed with the Office of the Secretary of State on February 10, 2012.

TRD-201200728
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 239-2141

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SUBCHAPTER B. RATES, RATE-MAKING, AND RATES/TARIFF CHANGES

30 TAC §291.22

Statutory Authority

The amendment is proposed under Texas Water Code, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; §5.105, which establishes the commission's authority to set policy by rule; §13.041(b), which establishes the commission's authority to adopt and enforce rules relating to Water Rates and Services.

The proposed amendment implements House Bill 2694, §9.01 and §9.02, 82nd Legislature, 2011.

§291.22. Notice of Intent <u>to</u> [~~To~~] Change Rates.

(a) Administrative requirements. In order to change rates, which are subject to the commission's original jurisdiction, the applicant utility shall file with the commission an original completed application for rate change with the number of copies specified in the application form and shall give notice of the proposed rate change by mail, <u>e-mail,</u> or hand delivery to all affected utility customers at least 60 days prior to the proposed effective date. Notice must be provided on the notice form included in the commission's rate application package and must contain the following information:

(1) the utility name and address, current rates, the proposed rates, the effective date of the proposed rate change, the increase or decrease requested over test year revenues as adjusted for test year customer growth and annualization of test year rate increases, stated as a dollar amount, and the classes of utility customers affected. The effective date of the new rates must be the first day of a billing period, which should correspond to the day of the month when meters are typically read, and the new rates may not apply to service received before the effective date of the new rates;

(2) information on how to protest the rate change, the required number of protests to ensure a hearing, the address of the commission, and the time frame for protests;

(3) a billing comparison showing the existing rate and the new computed water rate using 10,000 gallons of water and 30,000 gallons of water;

(4) a billing comparison showing the existing sewer rate and the new sewer rate for the use of 10,000 gallons, unless the utility proposes a flat rate for sewer services; and

(5) any other information that is required by the executive director in the rate change application form.

(b) Notice requirements. The governing body of a municipality or a political subdivision that provides retail water or sewer service to customers outside the boundaries of the municipality or political subdivision shall mail, e-mail, or hand deliver individual written notice to each affected ratepayer eligible to appeal who resides outside the boundaries within 60 [~~30~~] days after the date of the final decision on a rate change. The governing body of a municipally owned utility or political subdivision may provide the notice electronically if the municipality or political subdivision has access to a ratepayer's e-mail address. The commissioners court of an affected county that provides water or sewer service shall mail or hand deliver individual written notice to each affected ratepayer eligible to appeal within 30 days after the date of the final decision on a rate change. The notice must include, at a minimum, the effective date of the new rates, the new rates, and the location where additional information on rates can be obtained.

(c) Notice delivery requirements. Notices may be mailed separately, e-mailed, or may accompany customer billings. Notice of a proposed rate change by a utility must be mailed, e-mailed, or hand delivered to the customers at least 60 days prior to the effective date of the rate increase.

(d) Notice and statement of intent. The applicant utility shall mail, e-mail, or deliver a copy of the statement of intent to change rates to the appropriate officer of each affected municipality at least 60 days prior to the effective date of the proposed change. If the utility is requesting a rate change from the commission for customers residing outside the municipality, it shall also provide a copy of the rate application filed with the commission to the municipality. The commission may also require that notice be mailed, e-mailed, or delivered to other affected persons or agencies.

(e) Proof of notice. Proof of notice in the form of an affidavit stating that proper notice was mailed, e-mailed, or delivered to customers and affected municipalities and stating the dates of such delivery [~~mailing~~], shall be filed with the commission by the applicant utility as part of the rate change application. Notice to customers is sufficient if properly stamped and addressed to the customer and deposited in the United States mail at least 60 days before the effective date.

(f) Standby fees. A utility may request in a rate change application that standby fees be approved for property or lots for which the utility has previously entered into an agreement to serve or construction of water or sewer utility facilities has already begun or been completed if the developer owning the property at the time the rate change application is filed is given individual written notice by certified mail of the request and an opportunity to protest.

(g) Emergency rate increase in certain circumstances. After receiving a request, the commission or executive director may authorize an emergency rate increase under Texas Water Code, §5.508 and §13.4133 and Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) for a utility:

(1) for which a person has been appointed under Texas Water Code, §13.4132; or

(2) for which a receiver has been appointed under Texas Water Code, §13.412; and

(3) if the increase is necessary to ensure the provision of continuous and adequate services to the utility's customers.

(h) Line extension and construction charges. A utility shall request in a rate change application that its extension policy be approved or amended. The application must include the proposed tariff and other information requested by the executive director. The request may be made with a request to change one or more of the utility's other rates.

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 February 10, 2012.

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CHAPTER 293. WATER DISTRICTS
SUBCHAPTER H. REPORTS
30 TAC §293.94

The Texas Commission on Environmental Quality (TCEQ or commission) proposes to amend §293.94.

Background and Summary of the Factual Basis for the Proposed Rule

Section 293.94 allows a district to file an annual financial report with the executive director in lieu of an audit if: 1) the district had no bonds or other long-term (more than one year) liabilities outstanding during the fiscal period; 2) the district did not have gross receipts from operations, loans, taxes, or contributions in excess of $100,000 during the fiscal period; and 3) the district's cash and temporary investments were not in excess of $100,000 at any time during the fiscal period.

During the 82nd Legislature, 2011, House Bill (HB) 2694, HB 3002, and Senate Bill (SB) 1361 were passed that affected the audit report exemption thresholds in Texas Water Code (TWC), §49.198(a). These bills increased the dollar amount of the exemption which allows districts to file an annual financial report in lieu of an annual audit. None of the bills referenced each other. HB 2694, §4.23, did not amend one of the two dollar amounts in the exemption thresholds. Pursuant to Texas Government Code, §311.025(b), the three bills were harmonized based upon the fact that two of the three bills raised both dollar amount thresholds and that the third bill raised one dollar amount threshold to the same level as the other two bills. This harmonization leads to a just and reasonable result, compliant with Texas Government Code, §311.021(3). Therefore, the commission proposes to amend §293.94(e) to increase the audit report exemp-

tion thresholds from $100,000 to $250,000 to ensure consistency with HB 2694, §4.23; HB 3002; and SB 1361.

Section 293.94 indicates that there are two manuals, "Water District Accounting Manual" and "Annual Audit Report Requirements," governing the accounting and auditing of water districts. The commission maintains the "Water District Financial Management Guide" as the only manual currently in use for the accounting and auditing of water districts. Therefore, the commission proposes to amend §293.94(b) to reflect that the "Water District Financial Management Guide" is the only manual currently in use for the accounting and auditing of water districts. The commission proposes this amendment to ensure that the regulated community complies with the appropriate manual.

The commission also proposes to amend §293.94(j) to correct a misspelling.

In a corresponding rulemaking published in this issue of the *Texas Register,* the commission also proposes revisions to 30 TAC Chapter 291, Utility Regulations, and 30 TAC Chapter 297, Water Rights, Substantive.

Section Discussion

§293.94, Annual Financial Reporting Requirements

The commission proposes to amend §293.94(b) to reflect that the "Water District Financial Management Guide" is the only manual currently in use for the accounting and auditing of water districts. The amendment is proposed to ensure that the regulated community complies with the appropriate manual.

The commission proposes to amend §293.94(e)(1)(B) to reflect that if a district is to be considered exempt from filing an annual audit report required under TWC, §49.198, a district must not have had gross receipts from operations, loans, taxes, or contributions in excess of $250,000 during the fiscal period. The commission also proposes to amend §293.94(e)(1)(C) to reflect that if a district is to be considered exempt from filing an annual audit report required under TWC, §49.198, a district's cash and temporary investments must not have been in excess of $250,000 at any time during the fiscal period. The commission proposes to amend §293.94(e)(1)(B) and (C) to implement TWC, §49.198, as amended by §4.23 of HB 2694; HB 3002; and SB 1361, to remain consistent with the amended statute.

The commission proposes to amend §293.94(j)(2) to correct the spelling of the word "willfully."

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rule. Small water districts could see a decrease in audit costs as a result of the proposed rule. Other state agencies or units of local government are not expected to be impacted by the proposed rule.

The proposed rule implements HB 3002 and would exempt certain water districts from the requirement to file an annual audit report with the agency. The proposed rule would increase the current thresholds (in excess of $100,000) for certain gross receipts and cash and temporary investments to thresholds in excess of $250,000 when applying the criteria to determine when a water district is required to file an audit report. Instead of filing an audit report, water districts would be allowed to file annual financial reports if they do not exceed the proposed thresholds and do not have bonds or other long term liabilities. The proposed rule also makes minor administrative changes to correct rule terminology and eliminate inaccuracies.

The proposed rule is not expected to have a significant fiscal impact on the agency. The proposed rule would affect water districts but no other forms of local government would be impacted. Water districts that would not be required to file an audit report would save the cost of an annual audit. Audit costs for small water districts are estimated to range from $6,000 to $10,000 per year. The exact amount of savings are expected to vary and would depend on a variety of factors, including the quality of each district's financial controls and records as well as the market rates for audit services in that area of the state.

Public Benefits and Costs

Nina Chamness 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 would be compliance with state law and lower administrative costs in exempted water districts.

The proposed rule would allow certain water districts to file an annual financial report instead of an annual audit report. Water districts that would not be required to file an audit under the proposed rule might save as much as $6,000 to $10,000 per year. The amount of cost savings would depend on a variety of factors including the quality of the district's financial controls and records as well as the market rates for audit services in that area of the state. Individuals and business customers of an exempted water district are expected to benefit from lower operating costs, but each water district is responsible for determining how to distribute any cost savings to their customers.

Certified Public Accountants (CPAs) that provide audit services to affected water districts could see a decrease in revenue as a result of the proposed rule. The fiscal impact of any decrease will depend on a variety of factors including the economic environment and client base of each CPA or CPA firm.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses that are clients of affected water districts. CPA practices that are considered to be a small business could experience a decrease in revenue as a result of the proposed rule. Whether the fiscal impact of a revenue decrease is significant will depend on a variety of factors, including the economic environment and client base of each CPA or CPA firm.

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 rule is required to comply with state law. Also, the proposed rule does not adversely affect a small or micro-business that is a customer of an affected water district in a material way for the first five years that the proposed rule 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 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 that the rulemaking is not subject to §2001.0225. "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.

First, the proposed rulemaking does not meet the statutory definition of a "major environmental rule" because its specific intent is not to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the proposed rulemaking is to implement legislation enacted in 2011 by the 82nd Legislature, specifically HB 2694, §4.23; HB 3002; and SB 1361. These bills increased the dollar amount of the exemption which allows districts to file an annual financial report in lieu of an annual audit. The proposed rule implements this intent.

Second, the proposed rulemaking does not meet the statutory definition of a "major environmental rule" because the proposed rule would not 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. It is not anticipated that the cost of complying with the proposed rule would be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the proposed amendment would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

The commission invites public comment regarding this draft regulatory impact analysis determination. Written comments 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 evaluated this proposed rulemaking and performed an assessment of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007.

The commission proposes this rule for the specific purpose of implementing legislation enacted by the 82nd Legislature in 2011. The proposed rule amends §293.94.

The commission's analysis reveals that amending §293.94 would achieve consistency with TWC, §49.198(a), which was amended in 2011 by HB 2694. The rule is a reporting requirement that applies to districts, which are political subdivisions, rather than to private citizens. No private real property will be subject to the rule.

A "taking" under Texas Government Code, Chapter 2007 means a governmental action that affects private real property in a manner that requires compensation to the owner under the United States or Texas Constitution, or a governmental action that affects real private property in a manner that restricts or limits the owner's right to the property and reduces the market value of affected real property by at least 25%.

Because no taking of private real property will occur by amending the definitions as proposed, the commission has determined that promulgation and enforcement of this proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rule because the proposed rule neither relates to, nor has any impact on, the use or enjoyment of private real property, and there would be no reduction in real property value as a result of this rule. Therefore, the proposed rule would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4) relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is administrative in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

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 March 20, 2012, at 2:00 p.m. in Building E, Room 201 S, 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 2011-039-293-OW. The comment period closes March 26, 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 Justin Taack, Water Supply Division, at (512) 239-1122.

Statutory Authority

The amendment is proposed under Texas Water Code, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; and §5.105, which establishes the commission's authority to set policy by rule.

The proposed amendment implements House Bill 2694, §4.23; House Bill 3002; and Senate Bill 1361, 82nd Legislature, 2011.

§293.94. Annual Financial Reporting Requirements.

(a) Statutory provisions for fiscal accountability. All districts as defined in Texas Water Code, §49.001(a) are required to comply with the provisions of Texas Water Code, §§49.191-49.198 requiring every district to either have performed an annual audit or to submit an annual financial dormancy affidavit or an annual financial report.

(b) Accounting and auditing manual [~~manuals~~]. All districts shall comply with the accounting and auditing manual [~~manuals~~] adopted by the executive director. The manual [~~manuals~~] shall consist of one publication [~~two publications~~], "Water District Financial Management Guide." [~~"Water District Accounting Manual" and "Annual Audit Report Requirements."~~] The manual [~~manuals~~] may be revised as necessary by the executive director.

(c) Duty to audit. The governing board of each district created under the general law or by special act of the legislature shall have the district's fiscal accounts and records audited annually at the expense of the district. The person who performs the audit shall be a certified public accountant or public accountant holding a permit from the Texas State Board of Public Accountancy. Districts with limited or no financial activity may qualify to prepare an unaudited financial report, pursuant to subsection (e) of this section, or a financial dormancy affidavit, pursuant to subsection (f) of this section.

(d) Form of audit. The audit shall be performed according to generally accepted auditing standards adopted by the American Institute of Certified Public Accountants. Financial statements shall be prepared in accordance with generally accepted accounting principles as adopted by the American Institute of Certified Public Accountants.

(e) Audit report exemption.

(1) A district may elect to submit annual financial reports to the executive director in lieu of the district's compliance with Texas Water Code, §49.191 provided:

(A) the district had no bonds or other long-term (more than one year) liabilities outstanding during the fiscal period;

(B) the district did not have gross receipts from operations, loans, taxes, or contributions in excess of $250,000 [~~$100,000~~] during the fiscal period; and

(C) the district's cash and temporary investments were not in excess of $250,000 [~~$100,000~~] at any time during the fiscal period.

(2) The annual financial report must be accompanied by an affidavit, attesting to the accuracy and authenticity of the financial report, signed by a duly authorized representative of the district, which conforms with the format prescribed by the executive director. Financial report and filing affidavit forms may be obtained from the executive director.

(3) Districts governed by this section are subject to periodic audits by the executive director.

(f) Financially dormant districts.

(1) A district may elect to prepare a financial dormancy affidavit rather than an unaudited financial report, as prescribed by subsection (e) of this section, provided:

(A) the district had $500 or less of receipts from operations, tax assessments, loans, contributions, or any other sources during the calendar year;

(B) the district had $500 or less of disbursements of funds during the calendar year;

(C) the district had no bonds or other long-term (more than one year) liabilities outstanding during the calendar year; and

(D) the district did not have cash or investments in excess of $5,000 at any time during the calendar year.

(2) The required financial dormancy and filing affidavit shall be prepared in a format prescribed by the executive director and shall be submitted by a duly authorized representative of the district. Financial dormancy affidavit forms may be obtained from the executive director.

(3) Districts governed by this section are subject to periodic audits by the executive director.

(g) Annual filing affidavit. Each district shall submit annually with the executive director a filing affidavit which affirms that copies of the district's audit report, financial report, or financial dormancy affidavit have been filed within the district's business office. Each district that files a financial report or a financial dormancy affidavit will find that the annual filing affidavit has been incorporated within those documents, so a separate filing affidavit form is not necessary. However, each district that submits an audit report must execute and submit, together with the audit, an annual filing affidavit when the audit is submitted with the executive director. Annual filing affidavits must conform to the format prescribed by the executive director. Filing affidavit forms may be obtained from the executive director.

(h) Submitting of audits, financial reports, and affidavits.

(1) Submittal dates.

(A) Audits. Audit reports and the annual filing affidavits that must accompany those reports shall be submitted as prescribed by paragraph (2) of this subsection within 135 days after the close of the district's fiscal year. The district's governing board shall approve the audit before a copy of the report is submitted to the executive director; however, the governing board's refusal to approve the audit shall not extend the submittal deadline for the audit report. If the governing board refuses to approve the audit, the board shall submit to the executive director by the prescribed submittal date the report and a statement providing the reasons for the board's refusal to approve the report.

(B) Financial reports. Financial reports and the annual filing affidavits in a format prescribed by the executive director, must be submitted to the executive director as prescribed by paragraph (2) of this subsection within 45 days after the close of the district's fiscal year.

(C) Financial dormancy affidavits. Financial dormancy affidavits shall be submitted as prescribed by paragraph (2) of this subsection by January 31 of each year. The calendar year affidavit affirms that the district met the financial dormancy requirements stated in subsection (f) of this section during part or all of the calendar year immediately preceding the January 31 filing date.

(2) Submittal locations. Copies of the audit, financial report, or financial dormancy affidavit described in subsections (c), (e) and (f) of this section shall be submitted annually to the executive director, and within the district's office.

(i) Review by executive director.

(1) The executive director may review the audit report of each district, and if the executive director has any objections or determines any violations of generally accepted auditing standards or accounting principles, statutes or commission rules, or if the executive director has any recommendations, he shall notify the governing board of the district.

(2) Before the audit report may be accepted by the executive director as being in compliance with the provisions of this section, the governing board and the auditor shall remedy objections and correct violations of which they have been notified by the executive director.

(3) Districts governed by this section are subject to periodic audits by the executive director. The executive director shall have access to all vouchers, receipts, district fiscal and financial records, and other district records which the executive director considers necessary for the review, analysis, and approval of an audit report, financial report, or financial dormancy affidavit.

(j) Penalties for Noncompliance.

(1) The executive director shall file with the attorney general the names of any districts that do not comply with the provisions of this subchapter.

(2) A district that fails to comply with the filing provisions of Texas Water Code, Chapter 49, may be subject to a civil penalty of up to $100 per day for each day the district willfully [~~wilfully~~] continues to violate these provisions after receipt of written notice of violation from the executive director by certified mail, return receipt requested. The state may sue to recover the penalty.

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 February 10, 2012.

TRD-201200730
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 239-2141

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CHAPTER 297. WATER RIGHTS, SUBSTANTIVE

SUBCHAPTER A. DEFINITIONS AND APPLICABILITY

30 TAC §297.1

The Texas Commission on Environmental Quality (TCEQ or commission) proposes to amend §297.1.

Background and Summary of the Factual Basis for the Proposed Rule

During the 82nd Legislature, 2011, House Bill (HB) 2694 was passed. Section 5.01 of HB 2694 amends the definition of "Agriculture" under Texas Water Code (TWC), §11.002(12) by adding that "Agriculture" includes aquaculture as defined in Texas Agriculture Code, §134.001. Texas Agriculture Code, §134.001 states, "'Aquaculture' or "fish farming" means the business of producing and selling cultured species raised in private facilities. Aquaculture or fish farming is an agricultural activity."

The commission proposes to amend §297.1 to implement HB 2694, §5.01, by adding the activity of aquaculture under the definition of "Agriculture or agricultural" in §297.1(1). The proposed amendment to §297.1(1) defines aquaculture as it is defined in the Texas Agriculture Code. The commission also proposes an amendment to §297.1 to remove commercial fish and shellfish production, i.e. aquaculture, from the term "Industrial use" in §297.1(24) in recognition of the fact that the term "Agriculture" now includes the activity of aquaculture.

In a corresponding rulemaking published in this issue of the *Texas Register*, the commission also proposes revisions to 30 TAC Chapter 291, Utility Regulations, and 30 TAC Chapter 293, Water Districts.

Section Discussion

§297.1, Definitions

The commission proposes to amend §297.1(1) by adding subparagraph (G) concerning aquaculture to the list of activities that define the term "Agriculture or agricultural" and also defining aquaculture as it is defined in the Texas Agriculture Code. Because subparagraph (G) is proposed to be added, the commission also proposes to delete the word "and" from current subparagraph (E) and amend current subparagraph (F) in order to maintain the proper sequence of the subparagraphs and conform with grammatical and rulemaking form requirements. The commission also proposes to amend §297.1(24) by removing "commercial fish and shellfish production and" from the definition of "Industrial use" in recognition of the fact that the term "Agriculture" now includes the activity of aquaculture. The commission proposes this amendment to implement TWC, §11.002(12), as amended by HB 2694, 2011.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state and local government as a result of administration or enforcement of the proposed rule.

The proposed rule would implement sections of HB 2694 to modify the term of "Agriculture" in Chapter 297 to include aquaculture and define aquaculture as it is defined in the Texas Agriculture Code. The definition of "Industrial use" would no longer include aquaculture under the proposed rule.

The proposed rule is not expected to have a significant fiscal impact on the agency or other units of state or local government. The agency has issued 45 water rights permits for aquaculture and does not expect to see a significant increase or decrease in the number of applications for aquaculture water rights permits as a result of the implementation of the proposed rule. Of the 45 water rights permits issued, there are currently three state agencies and one city that have water right permits for aquaculture. The application fee for an aquaculture operation will not change under the proposed rule.

Public Benefits and Costs

Nina Chamness 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 would be compliance with state law.

The proposed rule is administrative in nature and is not expected to have a fiscal impact on individuals or businesses. The proposed rule does not change application fees for aquaculture operations. The proposed rule defines aquaculture as it is defined in the Texas Agriculture Code and moves the definition from the term "Industrial Use" to "Agriculture" in Chapter 297. The number of applications for aquaculture permits is not expected to

change significantly. Currently, ten businesses and 31 individuals have water right permits for aquaculture. The agency does not track data concerning business size and is not able to determine whether any of the ten businesses are small businesses.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. Application fees for aquaculture operations would not change under the proposed rule.

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 rule is required to comply with state law. Also, the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule 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 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 that the rulemaking is not subject to §2001.0225. "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.

First, the proposed rulemaking does not meet the statutory definition of a "major environmental rule" because its specific intent is not to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the proposed rulemaking is to implement legislation enacted in 2011 by the 82nd Legislature, specifically HB 2694, §5.01. HB 2694, §5.01 added the term "aquaculture" as defined by the Texas Agriculture Code to the definitions in TWC, §11.002(12). The proposed rule defines the term "aquaculture" consistently with the amended statute.

Second, the proposed rulemaking does not meet the statutory definition of a "major environmental rule" because the proposed rule would not 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. It is not anticipated that the cost of complying with the proposed rule would be significant with respect to the economy as a whole or with respect to a sector of the economy; therefore, the proposed amendment will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

The commission invites public comment regarding this draft regulatory impact analysis determination. Written comments 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 evaluated this proposed rulemaking and performed an assessment of whether the proposed rule constitutes a taking under Texas Government Code, Chapter 2007.

The commission proposed the rule for the specific purpose of implementing legislation enacted by the 82nd Legislature in 2011. The proposed rule amends definitions in Chapter 297. First, the term "aquaculture" as defined in Texas Agriculture Code, §134.001 is proposed to be added to the definition of "Agriculture" in §297.1. Second, the phrase "commercial fish and shellfish production" is proposed to be deleted from the definition of "Industrial use" in §297.1.

The commission's analysis reveals that amending the definitions in Chapter 297 will achieve consistency with TWC, §11.002(12), as amended in 2011 by HB 2694 and with Texas Agriculture Code, §134.001, regarding aquaculture.

A "taking" under Texas Government Code Chapter 2007 means a governmental action that affects private real property in a manner that requires compensation to the owner under the United States or Texas Constitution, or a governmental action that affects real private property in a manner that restricts or limits the owner's right to the property and reduces the market value of affected real property by at least 25%.

Because no taking of private real property will occur by amending the definitions as proposed, the commission has determined that promulgation and enforcement of the proposed rule would be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rule because the proposed rule neither relates to, nor has any impact on, the use or enjoyment of private real property, and there would be no reduction in real property value as a result of the rule. Therefore, the proposed rule would not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4) relating to rules subject to the Coastal Management Program (CMP), and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking is administrative in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

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 March 20, 2012, at 2:00 p.m. in Building E, Room 201 S, 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 2011-039-293-OW. The comment period closes March 26, 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 Justin Taack, Water Supply Division, at (512) 239-1122.

Statutory Authority

The amendment is proposed under Texas Water Code, §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction; §5.103, which establishes the commission's general authority to adopt rules; and §5.105, which establishes the commission's authority to set policy by rule.

The proposed amendment implements House Bill 2694, §5.01, 82nd Legislature, 2011.

§297.1. Definitions.

The following words and terms, when used in this chapter and in Chapters 288 and 295 of this title (relating to Water Conservation Plans, [~~and~~] Drought Contingency Plans, Guidelines and Requirements; and Water Rights, Procedural, respectively), shall have the following meanings, unless the context clearly indicates otherwise.

(1) Agriculture or agricultural--means any of the following activities:

(A) cultivating the soil to produce crops for human food, animal feed, or planting seed or for the production of fibers;

(B) the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or non-soil media by a nursery grower;

(C) raising, feeding, or keeping animals for breeding purposes or for the production of food or fiber, leather, pelts, or other tangible products having a commercial value;

(D) raising or keeping equine animals;

(E) wildlife management; [~~and~~]

(F) planting cover crops, including cover crops cultivated for transplantation, or leaving land idle for the purpose of participating in any governmental program or normal crop or livestock rotation procedure; and [~~.~~]

(G) aquaculture as defined in Texas Agriculture Code, §134.001, which reads "'aquaculture' or 'fish farming' means the business of producing and selling cultured species raised in private facilities. Aquaculture or fish farming is an agricultural activity."

(2) Agricultural use--Any use or activity involving agriculture, including irrigation.

(3) Appropriations--The process or series of operations by which an appropriative right is acquired. A completed appropriation thus results in an appropriative right; the water to which a completed appropriation in good standing relates is appropriated water.

(4) Appropriative right--The right to impound, divert, store, take, or use a specific quantity of state water acquired by law.

(5) Aquifer Storage and Retrieval Project--A project with two phases that anticipates the use of a Class V aquifer storage well, as defined in §331.2 of this title (relating to Definitions), for injection into a geologic formation, group of formations, or part of a formation that is capable of underground storage of appropriated surface water for subsequent retrieval and beneficial use. Phase I of the project requires commission authorization by a temporary or term permit to determine feasibility for ultimate storage and retrieval for beneficial use. Phase II of the project requires commission authorization by permit or permit amendment after the commission has determined that Phase I of the project has been successful.

(6) Baseflow or normal flow--The portion of streamflow uninfluenced by recent rainfall or flood runoff and is comprised of springflow, seepage, discharge from artesian wells or other groundwater sources, and the delayed drainage of large lakes and swamps. (Accountable effluent discharges from municipal, industrial, agricultural, or other uses of ground or surface waters may be included at times.)

(7) Beneficial inflows--Freshwater inflows providing for a salinity, nutrient, and sediment loading regime adequate to maintain an ecologically sound environment in the receiving bay and estuary that is necessary for the maintenance of productivity of economically important and ecologically characteristic sport or commercial fish and shellfish species and estuarine life upon which such fish and shellfish are dependent.

(8) Beneficial use--Use of the amount of water which is economically necessary for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose and shall include conserved water.

(9) Certificate of adjudication--An instrument evidencing a water right issued to each person adjudicated a water right in conformity with the provisions of Texas Water Code, §11.323, or the final judgment and decree in State of Texas v. Hidalgo County Water Control and Improvement District No. 18, 443 S.W.2d 728 (Texas Civil Appeals - Corpus Christi 1969, writ ref. n.r.e.).

(10) Certified filing--A declaration of appropriation or affidavit which was filed with the State Board of Water Engineers under the provisions of the 33rd Legislature, 1913, General Laws, Chapter 171, §14, as amended.

(11) Claim--A sworn statement filed under Texas Water Code, §11.303.

(12) Commencement of construction--An actual, visible step beyond planning or land acquisition, which forms the beginning of the on-going (continuous) construction of a project in the manner specified in the approved plans and specifications, where required, for that project. The action must be performed in good faith with the bona fide intent to proceed with the construction.

(13) Conservation--Those practices, techniques, and technologies that will reduce the consumption of water, reduce the loss or waste of water, improve the efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

(14) Conserved water--That amount of water saved by a water right holder through practices, techniques, or technologies that would otherwise be irretrievably lost to all consumptive beneficial uses arising from the storage, transportation, distribution, or application of

the water. Conserved water does not mean water made available simply through its non-use without the use of such practices, techniques, or technologies.

(15) Dam--Any artificial structure, together with any appurtenant works, which impounds or stores water. All structures which are necessary to impound a single body of water shall be considered as one dam. A structure used only for diverting water from a watercourse by gravity is a diversion dam.

(16) Diffused surface water--Water on the surface of the land in places other than watercourses. Diffused water may flow vagrantly over broad areas coming to rest in natural depressions, playa lakes, bogs, or marshes. (An essential characteristic of diffused water is that its flow is short-lived.)

(17) District--Any district or authority created by authority of the Texas Constitution, either Article III, §52, (b), (1) and (2), or Article XVI, §59.

(18) Domestic use--Use of water by an individual or a household to support domestic activity. Such use may include water for drinking, washing, or culinary purposes; for irrigation of lawns, or of a family garden and/or orchard; for watering of domestic animals; and for water recreation including aquatic and wildlife enjoyment. If the water is diverted, it must be diverted solely through the efforts of the user. Domestic use does not include water used to support activities for which consideration is given or received or for which the product of the activity is sold.

(19) Drought of record--The historic period of record for a watershed in which the lowest flows were known to have occurred based on naturalized streamflow.

(20) Firm yield--That amount of water, that the reservoir could have produced annually if it had been in place during the worst drought of record. In performing this simulation, naturalized streamflows will be modified as appropriate to account for the full exercise of upstream senior water rights is assumed as well as the passage of sufficient water to satisfy all downstream senior water rights valued at their full authorized amounts and conditions as well as the passage of flows needed to meet all applicable permit conditions relating to instream and freshwater inflow requirements.

(21) Groundwater--Water under the surface of the ground other than underflow of a stream and underground streams, whatever may be the geologic structure in which it is standing or moving.

(22) Habitat Mitigation--Actions taken to off-set anticipated adverse environmental impacts from a proposed project. Such actions and their sequence include:

(A) avoiding the impact altogether by not taking a certain action or parts of an action or pursuing a reasonably practicable alternative;

(B) minimizing impacts by limiting the degree or magnitude of the action and its implementation;

(C) rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(D) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the project; and

(E) compensating for the impact by replacing or providing substitute resources or environments.

(23) Hydropower use--The use of water for hydroelectric and hydromechanical power and for other mechanical devices of like nature.

(24) Industrial use--The use of water in processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including [~~commercial fish and shellfish production and~~] the development of power by means other than hydroelectric, but does not include agricultural use.

(25) Instream use--The beneficial use of instream flows for such purposes including, but not limited to, navigation, recreation, hydropower, fisheries, game preserves, stock raising, park purposes, aesthetics, water quality protection, aquatic and riparian wildlife habitat, freshwater inflows for bays and estuaries, and any other instream use recognized by law. An instream use is a beneficial use of water. Water necessary to protect instream uses for water quality, aquatic and riparian wildlife habitat, recreation, navigation, bays and estuaries, and other public purposes may be reserved from appropriation by the commission.

(26) Irrigation--The use of water for the irrigation of crops, trees, and pasture land, including, but not limited to, golf courses and parks which do not receive water through a municipal distribution system.

(27) Irrigation water efficiency--The percentage of that amount of irrigation water which is beneficially used by agriculture crops or other vegetation relative to the amount of water diverted from the source(s) of supply. Beneficial uses of water for irrigation purposes include but are not limited to evapotranspiration needs for vegetative maintenance and growth and salinity management and leaching requirements associated with irrigation.

(28) Livestock use--The use of water for the open-range watering of livestock, exotic livestock, game animals or fur-bearing animals. For purposes of this definition, the terms livestock and exotic livestock are to be used as defined in §142.001 of the Agriculture Code, and the terms game animals and fur-bearing animals are to be used as defined in §63.001 and 71.001, respectively, of the Parks and Wildlife Code.

(29) Mariculture--The propagation and rearing of aquatic species, including shrimp, other crustaceans, finfish, mollusks, and other similar creatures in a controlled environment using brackish or marine water.

(30) Mining use--The use of water for mining processes including hydraulic use, drilling, washing sand and gravel, and oil field repressuring.

(31) Municipal per capita water use--The sum total of water diverted into a water supply system for residential, commercial, and public and institutional uses divided by actual population served.

(32) Municipal use--The use of potable water within a community or municipality and its environs for domestic, recreational, commercial, or industrial purposes or for the watering of golf courses, parks and parkways, or the use of reclaimed water in lieu of potable water for the preceding purposes or the application of municipal sewage effluent on land, under a Texas Water Code, Chapter 26, permit where:

(A) the application site is land owned or leased by the Chapter 26 permit holder; or

(B) the application site is within an area for which the commission has adopted a no-discharge rule.

(33) Navigable stream--By law, Natural Resources Code, §21.001(3), any stream or streambed as long as it maintains from its mouth upstream an average width of 30 feet or more, at which point it becomes statutorily nonnavigable.

(34) Nursery grower--A person engaged in the practice of floriculture, viticulture, silviculture, and horticulture, including the cultivation of plants in containers or nonsoil media, who grows more than 50% of the products that the person either sells or leases, regardless of the variety sold, leased, or grown. For the purpose of this definition, grow means the actual cultivation or propagation of the product beyond the mere holding or maintaining of the item prior to sale or lease and typically includes activities associated with the production or multiplying of stock such as the development of new plants from cuttings, grafts, plugs, or seedlings.

(35) One-hundred-year flood--The flood peak discharge of a stream, based upon statistical data, which would have a 1.0% chance of occurring in any given year.

(36) Permit--The authorization by the commission to a person whose application for a permit has been granted. A permit also means any water right issued, amended, or otherwise administered by the commission unless the context clearly indicates that the water right being referenced is being limited to a certificate of adjudication, certified filing, or unadjudicated claim.

(37) Pollution--The alteration of the physical, thermal, chemical, or biological quality of, or the contamination of any water in the state that renders the water harmful or detrimental to humans, animal life, vegetation, or property, or the public health, safety or welfare, or impairs the usefulness of the public enjoyment of the waters for any lawful or reasonable purpose.

(38) Priority--As between appropriators, the first in time is the first in right, Texas Water Code, §11.027, unless determined otherwise by an appropriate court or state law.

(39) Reclaimed water--Municipal or industrial wastewater or process water that is under the direct control of the treatment plant owner/operator, or agricultural tailwater that has been collected for reuse, and which has been treated to a quality suitable for the authorized beneficial use.

(40) Recreational use--The use of water impounded in or diverted or released from a reservoir or watercourse for fishing, swimming, water skiing, boating, hunting, and other forms of water recreation, including aquatic and wildlife enjoyment, and aesthetic land enhancement of a subdivision, golf course, or similar development.

(41) Register--The *Texas Register*.

(42) Reservoir system operations--The coordinated operation of more than one reservoir or a reservoir in combination with a direct diversion facility in order to optimize available water supplies.

(43) Return water or return flow--That portion of state water diverted from a water supply and beneficially used which is not consumed as a consequence of that use and returns to a watercourse. Return flow includes sewage effluent.

(44) Reuse--The authorized use for one or more beneficial purposes of use of water that remains unconsumed after the water is used for the original purpose of use and before that water is either disposed of or discharged or otherwise allowed to flow into a watercourse, lake, or other body of state-owned water.

(45) River basin--A river or coastal basin designated by the Texas Water Development Board as a river basin under Texas Water Code, §16.051. The term does not include waters originating in bays or arms of the Gulf of Mexico.

(46) Runoff--That portion of streamflow comprised of surface drainage or rainwater from land or other surfaces during or immediately following a rainfall.

(47) Secondary use--The reuse of state water for a purpose after the original, authorized use.

(48) Sewage or sewage effluent--Water-carried human or animal wastes from residences, buildings, industrial establishments, cities, towns, or other places, together with any groundwater infiltration and surface waters with which it may be commingled.

(49) Spreader dam--A levee-type embankment placed on alluvial fans or within a flood plain of a watercourse, common to land use practices, for the purpose of overland spreading of diffused waters and overbank flows.

(50) State water--The water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the stormwater, floodwater, and rainwater of every river, natural stream, and watercourse in the state. State water also includes water which is imported from any source outside the boundaries of the state for use in the state and which is transported through the beds and banks of any navigable stream within the state or by utilizing any facilities owned or operated by the state. Additionally, state water injected into the ground for an aquifer storage and recovery project remains state water. State water does not include percolating groundwater; nor does it include diffuse surface rainfall runoff, groundwater seepage, or springwater before it reaches a watercourse.

(51) Stormwater or floodwater--Water flowing in a watercourse as the result of recent rainfall.

(52) Streamflow--The water flowing within a watercourse.

(53) Surplus water--Water taken from any source in excess of the initial or continued beneficial use of the appropriator for the purpose or purposes authorized by law. Water that is recirculated within a reservoir for cooling purposes shall not be considered to be surplus water.

(54) Unappropriated water--The amount of state water remaining in a watercourse or other source of supply after taking into account complete satisfaction of all existing water rights valued at their full authorized amounts and conditions.

(55) Underflow of a stream--Water in sand, soil, and gravel below the bed of the watercourse, together with the water in the lateral extensions of the water-bearing material on each side of the surface channel, such that the surface flows are in contact with the subsurface flows, the latter flows being confined within a space reasonably defined and having a direction corresponding to that of the surface flow.

(56) Waste--The diversion of water if the water is not used for a beneficial purpose; the use of that amount of water in excess of that which is economically reasonable for an authorized purpose when reasonable intelligence and reasonable diligence are used in applying the water to that purpose. Waste may include, but not be limited to, the unreasonable loss of water through faulty design or negligent operation of a water delivery, distribution or application system, or the diversion or use of water in any manner that causes or threatens to cause pollution of water. Waste does not include the beneficial use of water where the water may become polluted because of the nature of its use, such as domestic or residential use, but is subsequently treated in accordance with all applicable rules and standards prior to its discharge into or

adjacent to water in the state so that it may be subsequently beneficially used.

(57) Water conservation plan--A strategy or combination of strategies for reducing the volume of water withdrawn from a water supply source, for preventing or reducing the loss or waste of water, for maintaining or improving the efficiency in the use of water, for increasing the recycling and reuse of water, and for preventing the pollution of water. A water conservation plan may be a separate planning document or may be contained within another water management document(s).

(58) Water in the state--Groundwater, percolating or otherwise, lakes, bays, ponds, impounding reservoirs, springs, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Gulf of Mexico inside the territorial limits of the state, and all other bodies of surface water, natural or artificial, inland or coastal, fresh or salt, navigable or nonnavigable, and including the beds and banks of all watercourses and bodies of surface water, that are wholly or partially inside or bordering the state or inside the jurisdiction of the state.

(59) Watercourse--A definite channel of a stream in which water flows within a defined bed and banks, originating from a definite source or sources. (The water may flow continuously or intermittently, and if the latter with some degree of regularity, depending on the characteristics of the sources.)

(60) Water right--A right or any amendment thereto acquired under the laws of this state to impound, divert, store, convey, take, or use state water.

(61) Watershed--A term used to designate the area drained by a stream and its tributaries, or the drainage area upstream from a specified point on a stream.

(62) Water supply--Any body of water, whether static or moving, either on or under the surface of the ground, available for beneficial use on a reasonably dependable basis.

(63) Wetland--An area (including a swamp, marsh, bog, prairie pothole, playa, or similar area) having a predominance of hydric soils that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support and that under normal circumstances supports the growth and regeneration of hydrophytic vegetation. The term "hydric soil" means soil that, in its undrained condition is saturated, flooded, or ponded long enough during a growing season to develop an anaerobic condition that supports the growth and regeneration of hydrophytic vegetation. The term "hydrophytic vegetation" means a plant growing in water or a substrate that is at least periodically deficient in oxygen during a growing season as a result of excessive water content. The term "wetland" does not include:

(A) irrigated acreage used as farmland;

(B) man-made wetlands of less than one acre; or

(C) man-made wetlands not constructed with wetland creation as a stated objective, including, but not limited to, impoundments made for the purpose of soil and water conservation which have been approved or requested by soil and water conservation districts. This definition does not apply to man-made wetlands described under this subparagraph constructed or created on or after August 28, 1989. If this definition conflicts with the federal definition in any manner, the federal definition prevails.

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 February 10, 2012.

TRD-201200731
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 239-2141

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CHAPTER 330. MUNICIPAL SOLID WASTE
SUBCHAPTER A. GENERAL INFORMATION

30 TAC §330.7

The Texas Commission on Environmental Quality (commission) proposes an amendment to §330.7.

Background and Summary of the Factual Basis for the Proposed Rule

Senate Bill (SB) 1258, 82nd Legislature, 2011, added Texas Health and Safety Code (THSC), §361.126. This statute allows the commission to issue a permit by rule (PBR) to authorize certain counties or municipalities to dispose of demolition waste from nuisance or abandoned buildings.

The commission is proposing this rulemaking to provide a new PBR to authorize a county or municipality with a population of 10,000 people or less to dispose of demolition waste from properties with nuisance or abandoned buildings that have been acquired by the county or municipality by means of bankruptcy, tax delinquency, or condemnation on land that is owned or controlled by the county or municipality and that would qualify for an arid exemption under commission rules.

Section Discussion

The commission proposes to add §330.7(i). Proposed subsection (i) would create a PBR for a county or municipality with a population of 10,000 people or less. The PBR would authorize disposal of materials that meet the limitations of §330.5(a)(2), from properties with nuisance and abandoned buildings that have been acquired by the county or municipality by means of bankruptcy, tax delinquency, or condemnation. The previous owners of the properties must be financially incapable of paying the costs of disposal of the demolition waste at a permitted solid waste disposal facility, including transportation of the waste to the facility.

Disposal must occur on property that is owned or controlled by the county or municipality and would qualify for an arid exemption. To satisfy the executive director that disposal would occur on land that would qualify for an arid exemption, the county or municipality must demonstrate that the property meets the requirements of §330.63(d)(5)(D), which requires that the location receive less than or equal to 25 inches of average annual precipitation based on data from the nearest official precipitation recording station for the most recent 30-year period. The executive director could allow alternative methods of demonstrating the rainfall requirement.

The demonstration that a property would qualify for an arid exemption would not include all provisions of §330.63(d)(5); therefore, facilities authorized under the proposed PBR would not be arid-exempt landfills. For example, facilities authorized under

this PBR would not be limited to a disposal rate of 20 tons per day, as are arid-exempt landfills.

Asbestos-containing materials may be found in abandoned structures addressed by this rule. The abatement of these materials is regulated by the Texas Department of State Health Services, not the commission. Therefore, the proposed subsection would require that structures to be demolished under this authorization be surveyed and abated, if required, for asbestos-containing materials in accordance with 25 TAC Chapter 295, Subchapter C.

Acceptable wastes for disposal under this PBR would include all materials meeting the limitations of §330.5(a)(2) and not excluded under §330.15(e), from property on which an abandoned or nuisance building is located. This will allow disposal of brush, litter and other debris from the properties containing the abandoned or nuisance building, to the extent that they are authorized.

The authorizing statute directs the commission to adopt rules to control the collection, handling, storage, processing and disposal of demolition wastes to protect public and private property, rights-of-way, groundwater, and any other right that requires protection. The provisions discussed below are intended to address this charge.

The purpose of the proposed PBR is to address a short-term issue currently facing small West Texas communities. This is expected to consist of specific projects of short duration. As such, the commission proposes to limit the term on the PBR to a period of five years.

The proposed PBR would authorize disposal of regulated asbestos-containing materials (RACM) and non-regulated asbestos-containing materials (non-RACM) that result from the demolition of abandoned and nuisance structures. The proposed rule includes handling requirements for each of these materials, including a requirement to immediately place six inches of soil cover over RACM and to place six inches of soil over non-RACM at the end of the operating day.

The proposed PBR would require access control by fences and other artificial or natural barriers, including a locking gate, and a buffer zone of at least 50 feet between the permit boundary and waste management activities. Waste management activities will not be allowed within a utility or pipeline easement and no closer than 25 feet from the centerline of these easements. Facilities operating under this authorization would be required to post a sign that provides 24-hour emergency contact information and states that the facility is not open to the public.

The proposed PBR would require that the 25-year/24-hour storm event be controlled by berms to prevent storm water from entering trenches that have received waste. The permittee would be required to consider water that has contacted waste to be contaminated water and dispose of it at a facility authorized to accept this waste.

Under the proposed PBR, disposal may only occur below grade. The facility would be required to place at least two feet of compacted soil as final cover. The rule would provide schedules for placement of final cover and for notifications to the executive director and the applicable regional office. Deed recordation would be required in accordance with §330.19. The rule would require that final contours, after installation of final cover, be at pre-existing grades or up to three feet above pre-existing grades. The PBR would allow any trench that has received waste to be inactive for up to 180 days. Before the 180-day limit is reached, the rule would require that intermediate cover or final cover be placed. The commission solicits comment on potential positive or negative impacts that could occur as a result of the requirement for placement of intermediate or final cover after six months of inactivity.

The volume of waste disposed could not exceed 2.5 million cubic meters. This volume is not expected to limit the capacity of units authorized under the proposed PBR, but ensures that authorized activities would qualify under an air emissions PBR in accordance with 30 TAC §106.534(3).

The facility would be required to cover waste at least weekly with six inches of soil, or with tarps. The executive director evaluated alternative daily cover (ADC) options and concluded, based on cost and complexity, that tarps are the only practical ADC for the proposed PBR. Authorization of ADC for a waste unit is typically provided through a temporary authorization and subsequent modification. As modification of a PBR is impractical, the proposed PBR would authorize the use of tarps as ADC. The PBR would limit tarp use to seven days, at which time waste, soil cover, intermediate cover, or final cover would be required. The commission solicits comment on potential positive or negative impacts that could occur as a result of a seven-day limitation on tarp use.

Proposed subsection (i) would require annual reporting in accordance with §330.675(a), but exempts facilities authorized under the proposed PBR from fee requirements of Chapter 330, Subchapter P.

Proposed subsection (i) would establish notification, deed recordation, and reporting requirements for closure of the facility.

Proposed subsection (i) would authorize processing of waste destined for a unit authorized under the proposed PBR. Authorized processing would be limited to volume-reduction activities, such as chipping or grinding, but not burning. Processing could only occur within the permit boundary, but not within a buffer zone or right-of-way. The processing of tires, RACM and non-RACM would be prohibited under this authorization.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rule. The agency will utilize currently available resources to implement the proposed rule. Affected counties and municipalities may experience cost savings for the disposal of nuisance and abandoned buildings.

The proposed rule implements the provisions of SB 1258 and would provide a new PBR to authorize a county or municipality with a population of 10,000 people or less to dispose of demolition waste from properties with nuisance or abandoned buildings that have been acquired by the county or municipality by means of bankruptcy, tax delinquency, or condemnation on land that is owned or controlled by the county or municipality and that would qualify for an arid exemption under commission rules. The proposed PBR would allow qualifying municipalities and counties to dispose of demolition waste from nuisance or abandoned buildings without paying the tipping fees associated with disposal in a municipal solid waste (MSW) facility. There would be no fee charged for the proposed PBR. Qualifying local governments are

also expected to pay lower transportation costs since MSW facilities in the areas of the state that qualify for arid exemption can be long distances from an affected municipality or county.

Impact on Agency Revenue

The commission currently receives revenue from tipping fees when waste is disposed of in an MSW facility. The commission does not expect the proposed rule to significantly increase or decrease the amount of revenue it receives in Account 549 - Waste Management Account. Current tipping fees and transportation costs for disposal of nuisance or abandoned buildings can be unaffordable for municipalities and counties in the area of the state affected by the proposed rule, and tipping fees collected from these local governments for disposal of demolition waste from these buildings has been minimal. Since the proposed rule does not require a tipping fee for disposal or an application fee for the new PBR, the impact to agency revenue is expected to be neutral.

Impact to Qualifying Municipalities and Counties

Counties and municipalities in areas of the state that receive 25 inches or less of annual precipitation are not expected to experience a significant fiscal impact as a result of the proposed rule. The commission estimates that there could be as many as 630 municipalities and counties that might benefit under the proposed rule. The proposed rule does not mandate the disposal of certain nuisance or abandoned buildings, but it does offer a more affordable disposal option than any currently available. Most affected municipalities and counties do not have existing landfills and cannot afford to dispose of this type of waste under current rules. Disposal costs in Texas under the current rules average $30.19 per ton for tipping fees. Waste in some instances could be transported for as much as 150 miles, and transportation costs could be as much as $2.50 per mile. Many abandoned and nuisance buildings have not been demolished and disposed of as a result of these costs.

Qualifying counties and municipalities can request a new PBR and construct a facility that meets the requirements of the proposed rule instead of paying tipping fees and transportation costs that would currently be incurred to dispose of the waste in an MSW facility. There is no fee for the new PBR, and facilities authorized by it would not be limited to a disposal rate of 20 tons per day. Land utilized for a disposal facility must be owned or controlled by the county or municipality. Construction of a facility is not expected to significantly increase costs if qualifying counties or municipalities use currently available personnel and equipment. Using existing staff and equipment, construction costs for a facility meeting the requirements of the proposed rule could be as much as $1.97 per cubic yard and $1.80 per cubic yard for labor assuming trenches are 14 to 20 feet deep and the use of a one-cubic-yard excavator. If a six-foot-high fence is installed, costs could be as much as $34.44 per linear foot plus $1,200 for a 12-foot-wide gate. If construction costs are subcontracted, a municipality or county could pay 10% more than these estimated costs. Total construction costs would depend on a variety factors including the size of the facility, but they are expected to be lower than the tipping fees and transportation costs paid under the current rules.

Public Benefits and Costs

Nina Chamness 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 a less expensive alternative for disposal of nuisance and abandoned buildings in qualifying municipalities and counties that cannot afford current disposal options for this type of waste. The proposed rule could help reduce the number of buildings that have become unsafe or that possibly foster illegal activities in these communities.

The proposed rule is not expected to have a significant, direct fiscal impact on individuals or businesses in affected municipalities or communities. However, individuals and businesses in qualifying municipalities and counties should benefit from the reduction of abandoned or nuisance buildings if their municipality or county chooses to apply for the new PBR and take advantage of the new disposal options it affords. Benefits could include the elimination of structurally unsound properties, properties fostering illegal activities, and the possible return of properties to local tax roles. The fiscal impact of the proposed rule would depend on the circumstances of each municipality or county that chooses to apply for the new PBR.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. The proposed rule is expected to impact a small business in the same way that they impact individuals or large 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 proposed rule complies with state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rule 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 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 that the rule is not subject to §2001.0225, because the rule does not meet the criteria for 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 specific intent of the proposed rule is to provide a new PBR to authorize a county or municipality with a population of 10,000 people or less to dispose of demolition waste from properties with nuisance or abandoned buildings. It is not anticipated that the rule will 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 commission concludes that the proposed rule does not meet the definition of major environmental rule.

Furthermore, even if the proposed rule did meet the definition of a major environmental rule, the rule is not subject to Texas Government Code, §2001.0225, because it does not meet any of the

four applicable requirements specified in §2001.0225(a). Texas Government Code, §2001.0225(a) applies to a rule adopted by an agency, 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.

In this case, the proposed rule does not meet any of these requirements. First, there are no federal standards specifically for these types of facilities. Second, the rule does not exceed an express requirement of state law in THSC, §§361.0641, 361.0665, and 361.079. Third, there is no delegation agreement that would be exceeded by the rule. Fourth, the commission proposes this rule under the specific authority of THSC, §361.126. This rulemaking is also proposed under the authority of THSC, §§361.011, 361.017, and 361.024, which provide the commission the authority to adopt rules necessary to carry out its powers and duties under the Texas Solid Waste Disposal Act. Therefore, the commission does not propose the rule solely under the commission's general powers.

Takings Impact Assessment

The commission evaluated the rule and performed an assessment of whether the rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The specific intent of the proposed rule is to provide a new PBR to authorize a county or municipality with a population of 10,000 people or less to dispose of demolition waste from properties with nuisance or abandoned buildings. The proposed rule will substantially advance this stated purpose by establishing requirements relating to facility locations, sources of waste, waste acceptance, access control, buffers and easements, cover, maximum volume, signage, and closure.

Promulgation and enforcement of the rule would be neither a statutory nor a constitutional taking of private real property because the rule does not affect private real property.

In particular, there are no burdens imposed on private real property. In addition, the proposed rulemaking does not burden, restrict, or limit an owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulation. Therefore, this proposed rulemaking 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 March 22, 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 Ms. 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 2011-048-330-WS. The comment period closes March 26, 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 Steve Odil, MSW Permits Section at (512) 239-4568.

Statutory Authority

The amended section is proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties; and under Texas Health and Safety Code (THSC), §361.011, which establishes the commission's jurisdiction over all aspects of the management of municipal solid waste with all powers necessary or convenient to carry out the responsibilities of that jurisdiction; THSC, §361.024, which provides the commission with rulemaking authority; and THSC, §361.061, which authorizes the commission to require and issue permits governing the construction, operation, and maintenance of solid waste facilities used to store, process, or dispose of solid waste.

The amendment is also proposed under THSC, §361.126, which authorizes the commission to create a permit by rule to authorize a county or municipality with a population of 10,000 or less to dispose of demolition waste from abandoned or nuisance buildings acquired by the county or municipality by bankruptcy, tax delinquency, or condemnation.

The proposed amendment implements THSC, §361.002, Policy and Findings; THSC, §361.011, Commission's Jurisdiction, Municipal Solid Waste; THSC, §361.024, Rules and Standards and THSC, §361.061, Permits. The proposed amendment also implements TWC, §5.103, Rules.

§330.7. Permit Required.

(a) Except as provided in §§330.9, 330.11, 330.13, or 330.25 of this title (relating to Registration Required; Notification Required; Waste Management Activities Exempt from Permitting, Registration, or Notification; and Relationship with County Licensing System), no person may cause, suffer, allow, or permit any activity of storage, processing, removal, or disposal of any solid waste unless such activity is authorized by a permit or other authorization from the commission. In the event this requirement is violated, the executive director may seek

recourse against not only the person that stored, processed, or disposed of the waste but also against the generator, transporter, owner or operator, or other person who caused, suffered, allowed, or permitted its waste to be stored, processed, or disposed. No person may commence physical construction of a new municipal solid waste (MSW) management facility, a vertical expansion, or a lateral expansion without first having submitted a permit application in accordance with §§330.57, 330.59, 330.61, 330.63, and 330.65 of this title (relating to Permit and Registration Applications for Municipal Solid Waste Facilities; Contents of Part I of the Application; Contents of the Part II of the Application; Contents of Part III of the Application; and contents of Part IV of the Application, respectively [~~Permit and Registration Application Procedures~~]) and received a permit from the commission, except as provided otherwise in this section.

(b) A separate permit is required for the storage, transportation, or handling of used oil mixtures collected from oil/water separators. Any person that intends to conduct such activity shall comply with the regulatory requirements of Chapter 324 of this title (relating to Used Oil Standards).

(c) Permits by rule may be granted for persons that compact or transport waste in enclosed containers or enclosed transportation units to a Type IV facility.

(1) A permit by rule is granted for a generator operating a stationary compactor that is only used to compact waste to be disposed of at a Type IV landfill, if all of the following conditions are met.

(A) The generator submits the following information and any requested additional information on forms provided by the executive director:

(i) generator contact person, company name, mailing address, street address, city, state, ZIP code, and telephone number;

(ii) contract renewal date, if applicable;

(iii) rated compaction capability in pounds per cubic yard;

(iv) container size;

(v) description of waste stream to enter compactor;

(vi) receiving MSW Type IV disposal facility name, permit number, mailing address, street address, city, state, ZIP code, telephone number, and contact person; and

(vii) a certification from the generator that states the following: I, (name) _____, (title) _____ of (company name) _____, located at (street address) _____ in (city) _____, certify that the contents of the compactor located at the location stated herein are free of and shall be maintained free of putrescible, hazardous, infectious, and any other waste not allowed in an MSW Type IV landfill.

(B) The generator submits a $75 fee along with the claim for the permit by rule.

(C) The generator complies with the operational requirements of §330.215 of this title (relating to Requirements for Stationary Compactors).

(D) A stationary compactor permit by rule expires after one year. The generator must submit an annual renewal fee in the amount of $75. Failure to timely pay the annual fee eliminates the option of disposal of these wastes at a Type IV landfill until the generator claims a new or renewed permit by rule.

(2) A permit by rule is granted for transporters using enclosed containers or enclosed vehicles to collect and transport brush, construction or demolition wastes, and rubbish along special collection routes to MSW Type IV landfill facilities if all of the following conditions are met.

(A) The owner or operator seeking a special collection route permit by rule submits to the executive director the following information and any requested additional information on forms provided by the executive director:

(i) name of owner and operator, mailing address, street address, city, state, ZIP code, name and title of a contact person, and telephone number;

(ii) receiving MSW Type IV disposal facility name, permit number, mailing address, street address, city, state, ZIP code, telephone number, and contact person;

(iii) information on each transportation unit, including, at a minimum, license number, vehicle identification number, year model, make, capacity in cubic yards, and rated compaction capability in pounds per cubic yard;

(iv) route information, which shall include as a minimum the collection frequency, the day of the week the route is to be collected, and the day and time span within which the route is to arrive at the MSW Type IV landfill;

(v) a description of the wastes to be transported;

(vi) an alternative contingency disposal plan to include alternate trucks to be used or alternative disposal facilities; and

(vii) a signed and notarized certification from the owner or operator that states the following: I, (name) _____, (title) _____, of _____ operating in _____ County, certify that the contents of the vehicles described above will be free of putrescible, household, hazardous, infectious, or any other waste not allowed in an MSW Type IV landfill.

(B) The transporter submits a $100 per vehicle fee along with the claim for a permit by rule.

(C) The transporter documents each load delivered with a trip ticket form provided by the executive director, and provides the trip ticket to the landfill operator prior to discharging the load.

(D) A special collection route permit by rule expires after one year. The owner or operator must submit an annual renewal fee in the amount of $100 per vehicle. Failure to timely pay the annual fee eliminates the option of disposal of these wastes at a Type IV landfill until the owner or operator claims a new or renewed permit by rule.

(E) This paragraph does not apply if the waste load is from a single collection point that is a stationary compactor authorized in accordance with paragraph (1) of this subsection.

(3) Revision requirements for stationary compactor permits or special collection route permits by rule identified in paragraphs (1) and (2) of this subsection are as follows.

(A) An update must be submitted if any information within the original permit by rule submittal changes.

(B) A submittal to update an existing permit by rule must include all of the same documentation required for an original permit by rule submittal.

(d) A major permit amendment, as defined by §305.62 of this title (relating to Amendments), is required to reopen a Type I, Type IAE, Type IV, or Type IVAE MSW facility permitted by the commis-

sion or any of its predecessor or successor agencies that has either stopped accepting waste, or only accepted waste in accordance with an emergency authorization, for a period of five years or longer. The MSW facilities covered by this subsection may not be reopened to accept waste again unless the permittee demonstrates compliance with all applicable requirements of the Resource Conservation and Recovery Act, Subtitle D and the implementing Texas state regulations. If an MSW facility was subject to a contract of sale on January 1, 2001, the scope of any public hearing held on the permit amendment required by this subsection is limited to land use compatibility, as provided by §330.57(a) of this title [~~(relating to Permit and Registration Applications for Municipal Solid Waste Facilities)~~]. This subsection does not apply to any MSW facility that has received a permit but never received waste, or that received an approved Subtitle D permit modification before September 1, 2001.

(e) A permit by rule is granted for an animal crematory that meets the following criteria. For facilities that do not meet all the requirements of this subsection, the owner or operator shall submit a permit application under §§330.57, 330.59, 330.61, 330.63, and 330.65 of this title and obtain a permit. To qualify for a permit by rule under this subsection, the following requirements must be met.

(1) General prohibitions. An animal crematory facility shall comply with §330.15(a) of this title (relating to General Prohibitions).

(2) Incineration limits. Incineration of carcasses shall be limited to the conditions specified in §106.494 of this title (relating to Pathological Waste Incinerators (Previously SE 90)). The facility shall not accept animal carcasses that weigh more than the capacity of the largest incinerator at the facility and shall not dismember any carcasses during processing.

(3) Ash control. Ash disposal must be at an authorized facility unless the ash is returned to the animal owner or sent to a pet cemetery. Ash shall be stored in an enclosed container that will prevent release of the ash to the environment. There shall be no more than 2,000 pounds of ash stored at an animal crematory at any given time.

(4) Air pollution control. Air emissions from the facility shall not cause or contribute to a condition of air pollution as defined in Texas Clean Air Act, §382.003. All animal crematories, prior to construction or modification, must have an air permit issued under Chapter 116 of this title (relating to Control of Air Pollution by Permits for New Construction or Modification), or qualify for a permit by rule under §106.494 of this title.

(5) Fire protection. The facility shall prepare, maintain, and follow a fire protection plan. This fire protection plan shall describe fire protection resources (a local fire department, fire hydrants, fire extinguishers, water tanks, water well, etc.), and employee training and safety procedures. The fire protection plan shall comply with local fire codes.

(6) Storage limits. Carcasses must be incinerated within two hours of receipt, unless stored at or below a temperature of 29 degrees Fahrenheit. Storage of carcasses shall be in a manner that minimizes the release of odors. Storage of carcasses shall be limited to the lesser of 3,200 pounds or the amount that can be incinerated at the maximum loading rate for the incinerators at the facility in a two-day period.

(7) Unauthorized waste. Only carcasses or animal parts, with any associated packaging, shall be processed. Carcasses shall not be accepted in packaging that includes any chlorinated plastics. Carcasses or animal parts that are either hazardous waste or medical waste are prohibited.

(8) Cleaning. Storage and processing units must be properly cleaned on a routine basis to prevent odors and the breeding of flies.

(9) Nuisance prevention. The facility shall be designed and operated in a manner so as to prevent nuisance conditions, including, but not limited to, dust from ashes, disease vectors, odors, and liquids from spills, from being released from the property boundary of the authorized facility.

(10) Diseased animals. The facility shall be equipped with appropriate protective equipment and clothing for personnel handling diseased animals that may be received at the facility. Facility owners or operators must inform customers and local veterinarians of the need to identify diseased animals for the protection of personnel handling the animals.

(11) Buffer zone. An animal crematory, including unloading and storage areas, constructed after March 2, 2003, must be at least 50 feet from the property boundary of the facility.

(12) Operating hours. A crematory shall operate within the time frames allowed by §111.129 of this title (relating to Operating Requirements).

(13) Documentation. The operator of an animal crematory shall document the carcasses' weight, date and time when carcasses are received, and when carcasses are loaded into the incinerator. A separate entry in the records for loading into the incinerator is not required if a carcass is loaded within two hours of receipt. This information will be maintained in records on site.

(14) Breakdown. The facility is subject to §330.241 of this title (relating to Overloading and Breakdown).

(15) Records management. The owner or operator must retain records as follows:

(A) maintain a copy of all requirements of this subsection that apply to the facility;

(B) maintain records for the previous consecutive 12-month period containing sufficient information to demonstrate compliance with all requirements of this subsection;

(C) keep all required records at the facility; and

(D) make the records available upon request to personnel from the commission or from local governments with jurisdiction over the facility.

(16) Fees. An animal crematory facility authorized under this section is exempt from the fee requirements of Subchapter P of this chapter (relating to Fees and Reporting).

(17) Other requirements. No other requirements under this chapter are applicable to a facility that meets all of the requirements of this subsection.

(f) A permit by rule is granted for a dual chamber incinerator if the owner or operator complies with §106.491 of this title (relating to Dual-Chamber Incinerators).

(g) A permit by rule is granted for an air curtain incinerator if the owner or operator complies with §106.496 of this title (relating to Air Curtain Incinerators). An air curtain incinerator may not be located within 300 feet of an active or closed MSW landfill unit boundary.

(h) A standard air permit is granted for facilities that comply with Subchapter U of this chapter (relating to Standard Air Permits for Municipal Solid Waste Landfill Facilities and Transfer Stations).

(i) A permit by rule is granted for a period of up to five years to a county or municipality with a population of 10,000 people or less to dispose of demolition waste from properties with nuisance or abandoned buildings.

(1) Requirements. The following conditions must be met.

(A) Form submittal. The county or municipality submits a form provided by the commission to the executive director for review and approval before construction begins.

(B) Notice to regional office. The county or municipality notifies the applicable commission regional office of the intent to dispose of waste under this authorization at least 48 hours prior to accepting the first load of waste.

(C) Facility location. The location where disposal will occur:

(i) is owned or controlled by the county or municipality; and

(ii) receives less than or equal to 25 inches average annual precipitation as determined from precipitation data for the nearest official precipitation recording station for at least the most recent 30-year reporting period or by another method approved by the executive director.

(D) Sources of waste. The properties on which nuisance and abandoned buildings are located have been acquired by the county or municipality by means of bankruptcy, tax delinquency, or condemnation, and the previous owners are not financially capable of paying the costs of the disposal of demolition waste at a permitted solid waste disposal facility, including transportation of the waste to the facility.

(E) Waste acceptance.

(i) Prior to demolition, structures are surveyed and abated, if required, for asbestos-containing materials in accordance with 25 TAC Chapter 295, Subchapter C (relating to Texas Asbestos Health Protection).

(ii) The facility may accept non-regulated asbestos-containing materials (non-RACM) for disposal. The wastes are placed on the active working face and covered at the end of the operating day with at least six inches of soil. Under no circumstances may any of the material containing non-RACM be placed on a surface that is subject to vehicular traffic or disposed of by any other means by which the material could be crumbled into a friable state.

(iii) The facility may accept regulated asbestos-containing materials (RACM) if the following conditions are met.

(I) The county or municipality notifies the executive director on a form provided by the commission in accordance with subparagraph (A) of this paragraph.

(II) All waste trenches are identified as receiving RACM, and deed records required under subparagraph (P)(i) of this paragraph include an indication that the waste trench(es) received RACM.

(III) RACM is transported and received at the facility in tightly closed and unruptured containers or bags or wrapped with at least six-mil polyethylene.

(IV) Bags or containers holding RACM are carefully unloaded and placed in the final disposal location. RACM is then covered immediately with at least six inches of soil. Care is taken during unloading and placement of RACM and during application of the cover so that the bags or containers are not ruptured.

(iv) Waste is limited to the abandoned or nuisance buildings and materials from the property on which the buildings are located. All waste disposed under this authorization must meet the limitations of §330.5(a)(2) of this title (relating to Classification of Municipal Solid Waste Facilities) and may not include waste prohibited under §330.15(e) of this title.

(F) Access control. Access to the disposal facility is controlled by means of fences, other artificial barriers, natural barriers, or a combination of these methods, and includes a locking gate.

(G) Buffers and easements. The county or municipality maintains a minimum distance of 50 feet as a buffer between the permit boundary and waste storage, processing and disposal areas. No disposal occurs within a utility or pipeline easement or within 25 feet of the center of a utility or pipeline easement.

(H) Below-grade placement. Waste is placed only below grade. The top of final cover is placed at pre-existing grade or up to three feet above pre-existing grade to ensure that natural drainage patterns are not altered and ponding of water over waste is prevented.

(I) Weekly cover. Waste is covered at least weekly with six inches of earthen material not previously mixed with waste, or by tarps. Use of tarps as cover is limited to a seven-day period after which the county or municipality must replace the tarp with either waste or a six-inch layer of earthen material not previously mixed with waste. Tarps may not be used in place of soil cover requirements relating to non-RACM and RACM in subparagraph (E)(ii) and (iii) of this paragraph. Any trench that has received waste but will be inactive for more than 180 days receives intermediate cover in accordance with subparagraph (J) of this paragraph, or final cover in accordance with subparagraph (P) of this paragraph.

(J) Intermediate cover. Waste is covered, including any soil weekly cover, with twelve inches of well compacted earthen material not previously mixed with waste.

(K) Maximum volume. The design waste disposal volume is less than 2.5 million cubic meters in accordance with §106.534(3) of this title (relating to Municipal Solid Waste Landfills and Transfer Stations).

(L) Facility signs. At all entrances through which waste is received, the facility conspicuously displays a sign with letters at least three inches in height providing a statement that the facility is "NOT FOR PUBLIC USE," an emergency 24-hour contact number that reaches an individual with the authority to obligate the facility at all times that the facility is not in operation, and the local emergency fire department number.

(M) Storm water and contaminated water. The county or municipality constructs berms to divert the 25-year/24-hour storm event from entering excavations containing waste. Water that has contacted waste is managed as contaminated water and disposed at an authorized treatment facility.

(N) Reporting. The county or municipality, while not required to provide quarterly reporting, provides annual reporting in accordance with the annual reporting provisions of §330.675(a) of this title (relating to Reports).

(O) Reauthorization. Before reaching the permit by rule term limit of five years, the county or municipality may request reauthorization under the permit by rule by submitting a form that is current at the time of reauthorization, provided by the commission in accordance with subparagraph (A) of this paragraph, to the executive director at least 14 days before the end of the permit term.

(P) Final cover. The following conditions are met.

(i) Within 60 days after a trench reaches its capacity or waste deposition activities are complete in a trench, the county or municipality installs final cover over waste in the trench. Final cover shall be composed of no less than two feet of soil. The first 18 inches or more of cover shall be of compacted clayey soil, classification sand clay (SC) or low plasticity clay (CL) as defined in the "Unified Soils Classification System" developed by the United States Army Corps of Engineers, and placed and compacted in layers of no more than six inches to minimize the potential for water infiltration. A high plasticity clayey (CH) soil may be used; however, this soil may experience excessive cracking and shall therefore be covered by a minimum of 12 inches of topsoil to retain moisture. Other types of soil may be used with prior written approval from the executive director. The final six inches of cover shall be of suitable topsoil that is capable of sustaining native plant growth and shall be seeded or sodded as soon as practicable following the application of the final cover in order to minimize erosion.

(ii) The trench final cover procedures listed in clause (i) of this subparagraph are completed before facility closure, as described in subparagraph (Q) of this paragraph. If these procedures cannot be performed before the permit by rule term limit is reached, the county or municipality submits a current application form for reauthorization of the permit by rule to the executive director at least 14 days before the end of the permit term.

(Q) Facility closure. The county or municipality notifies the executive director and the applicable regional office at least 60 days before the anticipated closure date of the facility. Within ten days after closure, submit to the executive director by registered mail a certified copy of an "affidavit to the public" in accordance with the requirements of §330.19 of this title (relating to Deed Recordation). In addition, record a certified notation of the deed to the facility property, or on some other instrument that is normally examined during title search, that will in perpetuity notify any potential purchaser of the property that the land has been used as a landfill facility and use of the land is restricted. Submit a certified deed to the executive director.

(2) Other provisions. The following provisions also apply to this authorization.

(A) Processing. This permit by rule also authorizes the processing of waste destined for the disposal unit. Authorized processing is limited to volume reduction, such as chipping or grinding, but not burning. Processing must occur within the permit boundary and may not occur within a buffer zone or right-of-way. Tires, RACM and non-RACM may not be processed. If required, the county or municipality must obtain authorization for air emissions resulting from this processing.

(B) Fees. Waste that is disposed under this authorization is not subject to the fee requirements of Subchapter P of this chapter.

(C) Other requirements. No other requirements under this chapter are applicable to a facility that meets all the requirements of this subsection.

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

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Texas Commission on Environmental Quality

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For further information, please call: (512) 239-2141

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CHAPTER 331. UNDERGROUND INJECTION CONTROL

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§331.2, 331.14, 331.17, 331.18, 331.42 - 331.47, 331.61, 331.121, 331.142, 331.161, 331.162, 331.165, 331.168, 331.170, 331.171, and 331.206. The commission also proposes new §§331.241 - 331.251; and the repeal of §331.120.

Background and Summary of the Factual Basis for the Proposed Rules

The purpose of this rulemaking is to amend existing rules, add new rules, and develop guidance pertaining to the use of a Class I well for disposal of nonhazardous drinking water treatment residuals (DWTR) into a salt cavern in horizontally bedded or non-domal salt. This includes disposal of nonhazardous DWTR that contain naturally occurring radioactive material (NORM). For commercial disposal of DWTR containing NORM, a Class I well permit would be accompanied by a radioactive materials license. These proposed rules will provide an alternative for disposal of nonhazardous DWTR containing NORM within Texas. Currently, the only facilities licensed to dispose of these wastes are landfills located out-of-state.

The proposed rules include repeal of an obsolete rule requiring a comprehensive compliance summary for injection well permit applications submitted or pending on or after May 26, 2001 and before September 1, 2002. In addition, some editorial corrections are being proposed to provide for disposal of DWTR into a bedded salt formation.

The United States Environmental Protection Agency (EPA) has adopted federal standards for radionuclides in drinking water. These standards are applicable to approximately 50 community public water systems in Texas which may be in violation of the standards. These public water systems have or will have an agreement or order with the TCEQ or the EPA. The enforcement action requires a public water system to determine fiscally feasible methods to return to compliance. The public water systems using treatment to remove the excess radionuclides will need to manage and dispose of their treatment residuals containing NORM in a manner that is protective of human health and safety and the environment. "NORM waste" means solid, liquid, or gaseous material or combination of materials, excluding source material, special nuclear material, and by-product material, that, in its natural physical state spontaneously emits radiation; is discarded or unwanted; and is not exempt by Texas Department of State Health Services rule adopted under Texas Health and Safety Code, §401.106.

One option for disposal of nonhazardous DWTR containing NORM could be the use of an injection well authorized to dispose of such waste into a bedded salt formation. In past years, the regulated community has discussed with TCEQ the possibility of submitting a petition for rulemaking to remove the prohibition in §331.14 on construction and operation of Class I salt cavern solid waste disposal wells and associated caverns in

formations other than salt stocks of salt domes, which effectively prohibits waste disposal in a Class I well by injection into a bedded salt formation. However, a rulemaking petition for this purpose has not been submitted. During the 82nd Legislature, 2011, legislation was filed, but not passed, to address the management and disposal of certain nonhazardous DWTR containing NORM through underground injection into a bedded salt formation. The objective of the new and amended rules is to remove the prohibition on the construction and operation of a Class I salt cavern disposal well in geologic structures or formations other than salt stocks of salt domes, and to provide authorization and technical standards for use of a Class I well for disposal of nonhazardous DWTR (including NORM) into a bedded salt formation. Under these proposed rules, an existing salt cavern well permitted as a Class II well by the Railroad Commission of Texas (RRC) may be converted and permitted for use as a Class I bedded salt cavern disposal well if the requirements of these proposed rules are met. Salt cavern disposal wells are injection wells that dispose of waste within voids or caverns created within geologic formations composed of salt (such as the mineral halite). The injection wells and caverns are specifically designed, constructed, operated, and closed to contain the waste and prevent the lateral and vertical migration of the waste outside of the cavern. In Texas, geologic salt formations include salt domes and bedded salt. Salt domes are located primarily in East Texas and are dome-shaped formations created from the buoyant properties of salt, which causes the deformation of the salt stock and surrounding strata as the salt moves slowly upwards over geologic time. Bedded salt formations in West Texas are relatively horizontal layers of thick salt that may be interspersed with other non-salt sedimentary materials, such as anhydrite, shale, dolomite, or limestone. The TCEQ has had existing rules that authorize injection wells and caverns in salt domes but has not had rules addressing injection wells and caverns in bedded salt. Because of different geological and geophysical properties of salt domes and bedded salt formations, the commission is proposing new and different technical requirements specific to injection wells and salt caverns in bedded salt.

Because of the pressing need of public water systems to manage DWTR, the commission is exploring options for expedited processing of applications for use of a Class I well for disposal of nonhazardous DWTR containing NORM. One option to provide expedited application processing may be authorizing disposal of these wastes under the Underground Injection Control (UIC) general permit (WDWG010000) which authorizes the use of a Class I well to inject nonhazardous DWTR. The UIC general permit would need to be amended to incorporate standards for waste disposal into a bedded salt formation. In addition, an application for an individual Class I injection well permit for the disposal of brine from a desalination operation or disposal of DWTRs is not subject to the opportunity for a contested case hearing on the application under Texas Water Code, §27.021.

The commercial receipt, storage, processing, or disposal of nonhazardous industrial solid waste requires a TCEQ permit in accordance with the requirements of 30 TAC Chapter 335 and Texas Health and Safety Code, Chapter 361. This rulemaking project is not intending to revise any of the existing requirements for a commercial industrial waste facility.

Stakeholders also requested TCEQ staff to identify potential efficiencies in the radioactive materials licensing process for Class I wells to dispose of nonhazardous DWTR containing NORM. Concurrent with this rulemaking, TCEQ is initiating guidance related to the current radioactive materials licensing requirements in 30 TAC Chapter 336, Subchapter K.

Section by Section Discussion

Subchapter A. General Provisions

The commission proposes to amend §331.2 by adding three definitions. These definitions are necessary to characterize new terminology pertaining to bedded salt cavern disposal wells that does not currently appear in Chapter 331. "Bedded salt," "bedded salt cavern disposal well," and "blanket material or blanket pad," are proposed to be added as paragraphs (14), (15), and (16), respectively. The commission is renumbering the definitions in §331.2 as a result of the added definitions.

An editorial change is being proposed in paragraph (88) which defines "public water system" in the context of Chapter 331. Paragraph (88) references the definition of "public water system" in 30 TAC §290.38(47); however, (47) is no longer the paragraph number associated with "public water system." This unnecessary level of detail in citing the §290.38 definition is proposed to be omitted, leaving "§290.38 of this title" as the citation in proposed §331.2(88).

The commission also proposes to revise definitions in §331.2 to clarify the applicability of certain definitions to caverns in domal salt versus bedded salt formations. In proposed paragraphs (36) and (96) - (98), each occurrence of "salt cavern" is being amended by inserting "dome" between "salt" and "cavern," forming the phrase "salt dome cavern," to clarify that these definitions pertain to caverns in domal salt and not bedded salt. With the insertion of "dome" as previously mentioned, existing paragraphs (91) - (93) now define "salt *dome* cavern confining zone," "salt *dome* cavern injection interval" and "salt *dome* cavern injection zone," respectively. To maintain the alphabetical order of the definitions, existing paragraphs (91) - (93) are being renumbered as proposed paragraphs (96) - (98), respectively. Existing paragraph (90), which defines salt cavern, is being broadened to apply to bedded salt as well as domal salt by replacing the word "stock" with "formation." Existing paragraph (94) (proposed as new paragraph (94)), which gives the same definition for two alternative variations of terminology, "salt cavern solid waste disposal well" or "salt cavern disposal well," is being clarified by deleting the first variation, "Salt cavern solid waste disposal well." This leaves the less-confusing term "salt cavern disposal well." The deleted term is a source of confusion between the context of solid waste as defined in §335.1 and the state of matter (solid, liquid, gas). In paragraph (94)(B), "hazardous" is being replaced with "nonhazardous" because hazardous waste disposal in salt caverns is prohibited in §331.14(b). In paragraph (110)(B), a typographical correction is being made to replace the lower-case letter "l" in "l0,000" with the number "1" for "10,000." The definition of "Well stimulation" in paragraph (116) is being clarified by replacing the confusing phrase "interval to be injected" with the defined term "injection interval." Also, the word "wastewater," is being replaced with "fluid" because well stimulation makes it possible for fluids, not limited to wastewater, to move more readily into the formation. Lastly, the terms "blasting" and "hydraulic fracturing" are being deleted from the list of processes typically used in well stimulation.

The proposed rule would amend the title of §331.14 to remove the phrase "Prohibition of Class I Salt Cavern Solid Waste Disposal Wells and Associated Caverns in Geologic Structures or Formations Other Than Salt Stocks of Salt Domes" because the proposed rule would make that part of the title obsolete by pro-

viding standards for disposal of DWTR into formations other than salt stocks of salt domes. Additionally, existing subsection (a), which prohibits Class I salt cavern solid waste disposal wells and associated caverns in geologic structures or formations other than salt stocks of salt domes, is being deleted because the proposed rule also makes existing subsection (a) obsolete. Existing Subsection (b) is amended by adding "bedded salt cavern" to the list of structures into which hazardous waste disposal is prohibited, and relettered as subsection (a). Proposed subsection (b) is added to prohibit waste streams, other than nonhazardous DWTRs, from injection into a Class I salt cavern disposal well located in horizontally bedded or non-domal salt and its associated salt cavern.

The commission proposes to amend §331.17(d)(3) and §331.18(b)(6). Both of these subsections cite the applicable technical requirements of Chapter 317 as standards for pre-injection units used for storage or processing of waste to be injected, or in conjunction with an injection operation. However, Chapter 317 was repealed, and its provisions were incorporated into 30 TAC Chapter 217, in rules effective August 28, 2008 (33 TexReg 6843). Chapter 217 brought the standards and criteria for wastewater treatment systems up to date with current engineering practices and technology, and it is necessary to cite these current standards as technical requirements for pre-injection units in §331.17(d)(3) and §331.18(b)(6).

Subchapter C. General Standards and Methods

The commission proposes to amend occurrences of "salt cavern" in §§331.42(a)(3) and (3)(B); 331.45(1), (3), (3)(E), and (G); and 331.46(a) and (p) by inserting "dome" between "salt" and "cavern," forming the phrase "salt dome cavern," to clarify that these phrases pertain to caverns in domal salt and not bedded salt. Section 331.42(b), which contains a mathematical equation, is revised by making a typographical correction in the equation to remove an extraneous lower-case "h." In §331.43(b)(2), the extraneous phrase "outside the salt stock" is being deleted to expand the applicability of this subsection to bedded salt caverns as well as salt dome caverns. In §331.44(b)(7), the incomplete rule reference, §331.62(5) is corrected to §331.62(a)(5). In §331.46, proposed subsection (q) is added to provide that bedded salt caverns must be closed according to §331.250, and existing subsection (q) is relettered as subsection (r). Consequently, §331.46(a) is being revised to specify the subsections in §331.46 that are applicable to various types of Class I wells. For Class I wells except for salt cavern disposal wells and those Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous DWTRs, proposed §331.46(a) lists subsections (b) - (i), (k) - (n), and (r) as applicable to those wells instead of subsections (b) - (n) and (q) as listed previously. Subsection (j), which was previously listed as applicable to these wells, is being omitted because subsection (j) applies to Class III wells. The list of subsections applicable to salt cavern disposal wells is being described in separate sentences for domal and bedded salt. As defined in §331.2, the term "salt cavern disposal well" currently used in §331.46(a) includes both domal and bedded salt cavern disposal wells; however, the applicable closure standards are different for domal and bedded salt. The list of subsections applicable to salt dome cavern disposal wells includes subsections (c), (e) - (i), (k) - (l), (n) - (p), and (r) instead of subsections (c) and (e) - (q). The added list of subsections applicable to bedded salt cavern disposal wells includes subsections (e) - (h), (k) - (l), (n) - (o), and (q) - (r). For both domal and bedded salt cavern disposal wells, the revised lists omit subsection (j) which applies to Class III wells and subsection (m) which applies to hazardous waste disposal wells. Disposal of hazardous waste in salt cavern disposal wells is prohibited. Subsection (c) does not apply to bedded salt cavern disposal wells because demonstration of mechanical integrity prior to closure of these wells is provided in proposed §331.246(f)(1)(D). Existing subsection (p) applies only to salt *dome* cavern disposal wells, and proposed subsection (q) applies only to *bedded* salt cavern disposal wells. Subsection (r), formerly identified as subsection (q), also applies to both domal and bedded salt cavern disposal wells. Further, in §331.46(a), the list of subsections applicable to Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous DWTRs is being revised to cite subsection (n), which is applicable to all Class I wells, and proposed subsection (r). In §331.46(c), "all" is removed between "For" and "Class" because the requirement for mechanical integrity testing prior to well closure as stated in subsection (c) does not apply to Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous DWTRs.

The commission proposes to amend §331.47(b). This subsection cites the applicable technical requirements of Chapter 317 as standards for all surface impoundments for nonhazardous, noncommercial Class 1 industrial waste associated with Class I nonhazardous, noncommercial injection wells, or Class V injection wells permitted for the disposal of nonhazardous waste. However, Chapter 317 was repealed, and its provisions were incorporated into Chapter 217, in rules effective August 28, 2008 (33 TexReg 6843). Chapter 217 brought the standards and criteria for wastewater treatment systems up to date with current engineering practices and technology, and it is necessary to cite these current standards as technical requirements for surface impoundments in §331.47(b).

Subchapter D. Standards for Class I Wells Other Than Salt Cavern Solid Waste Disposal Wells

The proposed amendment would modify the title of Subchapter D by deleting the words "solid waste" because those words are extraneous and a source of confusion between the context of solid waste as defined in §335.1 and the state of matter (solid, liquid, gas). Also, deleting the words "solid waste" leaves the term "salt cavern disposal wells" which provides consistent terminology defined in §331.2. Section 331.61 is being amended by inserting "disposal" between "cavern" and "wells," forming the phrase "salt cavern disposal wells." This revision provides consistent terminology defined in §331.2 to specify the applicability of Subchapter D.

Subchapter G. Consideration Prior to Permit Issuance

Section 331.120 pertains to compliance history and denial of permit. The commission proposes to repeal §331.120 because it applies to applications for UIC permits submitted or pending on or after May 26, 2001, and before September 1, 2002, and the commission has no applications submitted or pending within this time frame.

Section 331.121 pertains to Class I wells. The commission proposes to amend subsections (a)(2)(B), (G)(v) - (vi), (d), (d)(1)(A)(ii) and (E) by inserting "dome" between "salt" and "cavern," forming the phrase "salt dome cavern" to clarify that these rules pertain to caverns in domal salt and not bedded salt. In subsections (a)(2), (3), (5), and (c), inappropriate capitalization of "Wells" is being corrected to lower-case "wells." The commission proposes to amend subsection (a)(2)(R) which cites the applicable technical requirements of Chapter 317 as standards for pre-injection units associated with Class I nonhazardous,

noncommercial injection wells. However, Chapter 317 was repealed, and its provisions were incorporated into Chapter 217, in rules effective August 28, 2008 (33 TexReg 6843). Chapter 217 brought the standards and criteria for wastewater treatment systems up to date with current engineering practices and technology, and it is necessary to cite these current standards as technical requirements for pre-injection units associated with Class I nonhazardous, noncommercial injection wells in subsection (a)(2)(R).

In subsection (b)(1) the missing word "applicant" is being inserted between "the" and "in" consistent with terminology used in the cited statute and rule, Texas Water Code, §27.051(e) and §281.21(d), respectively. The commission proposes to delete subsection (g) because it relates to the disposal of hazardous waste in a solution-mined salt dome cavern which is prohibited in §331.14.

Subchapter I. Financial Responsibility

Although no changes are being proposed to the financial assurance requirements as stated in §331.142(a), for wells permitted by both the RRC and TCEQ, the executive director may consider options for meeting these requirements that are consistent with the terms of the Memorandum of Understanding between the RRC and the TCEQ (30 TAC §7.117). The commission proposes to revise §331.142(b), which pertains to the requirement for liability coverage for Class I hazardous waste injection wells, by deleting the obsolete phrase "or Class I salt cavern disposal well and associated salt cavern." The liability coverage required in subsection (b) is not applicable to Class I salt cavern disposal wells because disposal of hazardous waste in a solution-mined salt dome cavern is prohibited in §331.14.

Subchapter J. Standards for Class I Salt Cavern Solid Waste Disposal Wells

The commission proposes to revise the title of Subchapter J by inserting "dome" between "salt" and "cavern," forming the phrase "salt dome cavern." Using the phrase "salt dome cavern" clarifies the applicability of Subchapter J to caverns in domal salt and not bedded salt. Also, the words "solid waste" are being deleted from Subchapter J, §331.161 and §331.162. Deleting "solid waste" clarifies terminology because the words "solid waste" are extraneous and a source of confusion between the context of solid waste as defined in §335.1 and the state of matter (solid, liquid, gas). Section 331.161 is also being revised to delete the reference to the prohibition of salt cavern solid waste disposal wells and associated caverns in geologic structures or formations other than salt stocks of salt domes stated in §331.14 because this rulemaking proposes to remove that prohibition. Section 331.162 is proposed for further revision to delete the words "hazardous constituents" and substitute the word "waste" for "hazardous constituents," forming the phrase, "no escape of waste from the salt cavern injection zone." The sentence, "Demonstration of attainment of this standard may be shown by modeling waste transport over a period of at least 15,000 years" is also being deleted. These references related to hazardous waste are obsolete because §331.14 prohibits the disposal of hazardous waste in salt cavern disposal wells. For this reason also, the words "hazardous" and "or hazardous waste constituents" are deleted in §331.165(a)(10)(B), and "hazardous" is deleted in §331.165(a)(15). A typographical correction is being made in §331.165(a)(11) to replace the incorrect word "or" with "of" in the phrase "a release of injected wastes." In §331.165(a)(14), the phrase "solid waste disposal cavern" is proposed for deletion and replacement with "salt cavern disposal well" to provide consistent terminology which is defined in §331.2. Applying this same rationale, §§331.165(c)(1), 331.168(a) and (5), 331.170(a), and 331.171(a) are being revised to delete "solid waste," resulting in the phrase "salt cavern disposal well." A grammatical correction is being made in §331.170(a)(3)(A)(iii) to replace the word "effect" with "affect."

Subchapter L. General Permit Authorizing Use of a Class I Injection Well to Inject Nonhazardous Desalination Concentrate or Nonhazardous Drinking Water Treatment Residuals

The commission proposes to revise §331.206 to cite the correct title for Chapter 335, Subchapter J. The correct title is "Hazardous Waste Generation, Facility and Disposal Fee System," instead of the incorrect title which is the title for Subchapter J in Chapter 305, not Chapter 335.

Subchapter N. Standards for Class I Bedded Salt Cavern Disposal Wells

Proposed new Subchapter N, titled "Standards for Class I Bedded Salt Cavern Disposal Wells," specifies standards for disposal of nonhazardous DWTR, including nonhazardous DWTR containing NORM, in bedded salt cavern disposal wells. Proposed Subchapter N is analogous to Subchapter J for salt dome cavern disposal wells, and Subchapter N is structured with sections titled similarly to Subchapter J.

Proposed new §331.241, states that Subchapter N applies to all Class I disposal wells located in horizontally bedded or non-domal salt and their associated salt caverns, and not to such facilities located in the salt stocks of salt domes. Section 331.241 also states that the receipt, processing, or disposal of radioactive material under Subchapter N is subject to the applicable requirements of Chapter 336.

Proposed new §331.242 provides the performance standard and siting requirements for bedded salt cavern disposal wells and their associated caverns. Subsection (a) provides that, for all stages in the life of the well and cavern(s), from construction through post-closure care, the owner or operator must attain a performance standard to prevent the movement of fluids that would result in the pollution of an underground source of drinking water (USDW). Subsection (b) requires that, to qualify for a permit or to continue operations, applicants and facility operators must demonstrate that this performance standard will be satisfied even if it is necessary to go beyond the minimum operating requirements. The siting requirements under subsection (c) state that bedded salt cavern disposal wells must comply with the minimum siting criteria for Class I disposal wells. In addition, each permit applicant for a Class I bedded salt cavern disposal well and associated cavern must identify potential risks to the waste disposal operation within the area of review.

Proposed new §331.243 pertains to construction standards for bedded salt cavern disposal wells. Subsection (a) requires these wells to be sited so that they inject into a formation which is beneath the lowermost formation containing, within one quarter mile of the well bore, a USDW. Subsection (b) requires drilling and completion of the well to be done according to plans and specifications as stated in the permit application. Subsection (c) specifies that any changes to the plans and specifications must be approved in writing by the executive director that said changes provide protection standards equivalent to or greater than the original design criteria (as stated in §331.62(a)(3)). Detailed casing and cementing requirements are provided in subsection (d). Paragraph (1) states a performance standard requiring wells to be cased and cemented to prevent the movement of

fluids into or between USDWs, and the casing and cement used in the construction of each newly drilled well must be designed for the life expectancy of the well. In determining and specifying casing and cementing requirements, 11 factors are to be considered under subparagraphs (A) - (K), including the depth of the lowermost USDW or freshwater aquifer; depth to the injection zone; injection pressure, external pressure, internal pressure, and axial loading; hole size; size and grade of all casing strings (wall thickness, diameter, nominal weight, length, joint specification, and construction material); maximum burst and collapse pressures, and tensile stresses which may be experienced at any point along the length of the casings at any time during the construction, operation, and closure of the well; corrosive effects of injected materials, formation fluids, and temperatures; lithology of injection and confining zones; types and grades of cement; quantity and chemical composition of the injected fluid; and cement and cement additives which must, at a minimum, be of sufficient quality and quantity to maintain integrity over the design life of the well. Paragraph (2) requires surface casing set to a minimum subsurface depth which extends into a confining bed below the lowest formation containing a USDW or freshwater aquifer. Paragraphs (3) and (4) require long string casing set into the salt formation using a sufficient number of centralizers, and that cement prepared with a salt-saturated cementing material must be used to cement that part of the casing opposite a salt formation. Except for circulation of drilling fluids during well construction, subsection (e) requires all injection activities for bedded salt cavern construction and waste disposal to be performed using removable injection tubing(s) suspended from the wellhead. During bedded salt cavern construction, paragraph (1) states that the annulus between the tubing and long string casing must be filled with a noncorrosive fluid sufficient to protect the long string casing seat. Paragraph (2) requires waste injection to be performed through tubing with a packer to seal the annulus between the tubing and casing near the bottom of the casing, or tubing with an approved fluid seal as an alternative. The tubing, packer, and fluid seal must be designed for the expected service. Subsection (f) lists factors that must be considered and addressed in determining and specifying requirements for a tubing and packer system or tubing with a fluid seal. As stated in paragraphs (1) - (7), these factors include depth of setting; characteristics of injection fluid and waste; injection pressure; annular pressure; rate, temperature, and volume of injected waste; size of casing; and tensile, burst, and collapse strengths of the tubing. Subsection (g)(1) pertains to geophysical logging and requires appropriate logs and other tests to be conducted during the drilling and construction phases of the well including drilling into the salt. Logs and tests must be interpreted by the service company which processed the logs or conducted the test, or by other qualified persons. Subparagraphs (A) - (C) specify that, at a minimum, the following logs and tests are to be conducted: deviation checks on all holes; a spontaneous potential and resistivity log; a natural gamma ray log; compensated density and neutron porosity logs; acoustic or sonic log; inclination (directional) survey; and a caliper log (open hole). From the ground surface or from the base of conductor casing to the lowermost casing seat, subparagraph (D) specifies a cement bond with variable density log; temperature log (cased hole); and casing inspection log. Subparagraph (E) requires a fracture detector log from the base of the surface casing to the total investigated depth including all core hole or pilot hole. Consistent with federal regulations, the availability of similar data from logs and tests in the area of the drilling site may be taken into account. Subsection (g)(2) relates to pressure tests. Subparagraph (A) requires that, after installation and cementing of casings, and before drilling out the cemented casing shoe, surface casing must be pressure tested at mill test pressure or 80% of the calculated internal pressure at minimum yield strength, and the intermediate and long string casing must be tested to 1,500 pounds per square inch (psi) for 30 minutes, unless otherwise specified by the executive director. After drilling out the cemented long string casing shoe, and before drilling more than 100 feet of core hole or pilot hole below the long string casing shoe, subparagraph (B) requires the bond between the salt, cement, and casing to be tested at a pressure of 0.8 psi per foot of depth. Subparagraph (C) requires that the pilot hole and/or core hole must be tested between the long string casing shoe and the total investigated depth, at a casing seat pressure of 0.8 psi per foot of depth. Subsection (g)(3) pertains to coring, and subparagraph (A) requires that full-hole cores must be taken from selected intervals of the injection zone and lowermost overlying confining zone; or, if full-hole coring is not feasible or adequate core recovery is not achieved, sidewall cores must be taken at sufficient intervals to yield representative data for selected parts of the injection zone and lowermost overlying confining zone. Core analysis must include a determination of permeability, porosity and bulk density. Consistent with federal regulations, the availability of similar data in the area of the drilling site may be taken into account. In the core hole for the salt, within the cavern injection interval, subparagraph (B) requires determination of in situ permeability, lithostatic gradients, and fracture pressure gradients. Subsection (g)(4) requires any portion of the pilot hole or core hole that extends beyond the intended wall of the cavern to be filled with salt-saturated cement from total investigated depth back to the designed cavern boundary before commencement of injection for cavern construction. Subsection (g)(5) requires that the mechanical integrity of a well must be demonstrated before initiation of injection activities. Subparagraphs (A) - (D) provide that mechanical integrity testing must consist of a pressure test with liquid or gas; a temperature, noise log, or oxygen activation log; a casing inspection log, if required by the executive director; and any other test required by the executive director. Material compatibility is covered in subsection (h), including the requirement that all well materials must be compatible with formations and fluids with which the materials may be expected to come into contact. A well will be deemed to have compatibility as long as the materials used in the construction of the well meet or exceed standards developed for such materials by the American Petroleum Institute (API), the American Society for Testing Materials (ASTM), or comparable standards acceptable to the executive director. Subsection (i) relates to pre-injection units. Paragraph (1) requires the injection pump to be designed to assure that the surface injection pressure limitations authorized by the well permit will not be exceeded. For the purpose of detecting well malfunctions, paragraph (2) provides instrumentation to be installed to continuously monitor changes in annulus pressure and annulus fluid volume. Paragraph (3) states that pre-injection units must be designed to prevent the release of unauthorized cavern contents to the atmosphere. Paragraph (4) requires secondary containment of the wellhead to protect the ground surface from spills and releases. Subsection (j) requires all phases of well construction and workovers to be supervised by a Texas licensed professional engineer or licensed professional geoscientist, as appropriate. Before beginning cavern construction and operation, subsection (k) requires the permittee to obtain written approval from the executive director stating that the well construction complies with the applicable provisions of the permit. Within 90 days of completion of well construction, the permittee

must submit reports to the executive director that have been prepared and sealed by a Texas licensed professional engineer or licensed professional geoscientist, as appropriate. Details of the required reports are given in paragraphs (1) - (3) to include final construction, "as-built" plans and specifications, reservoir data, and an evaluation of the considerations set out in §331.45(3); certification that construction of the well has been completed in accordance with the provisions of the disposal well permit and with the design and construction specifications of the permittee's application; and certification that actual reservoir data obtained will not result in the need for a change in the operating parameters specified in the permit.

Proposed new §331.244 pertains to bedded salt cavern construction standards. Subsection (a) states that construction of the cavern must be done in accordance with all permit application plans and specifications, and any proposed changes to the plans and specifications must be certified by the executive director that said changes provide protection standards equivalent to or greater than the original design criteria. Subsection (b) covers standards for bedded salt cavern construction. Paragraph (1) specifies that bedded salt caverns are to be created by the controlled dissolution of the sidewalls of the well bore to a specified maximum diameter, between selected elevations specified in the permit as the top and bottom of the injection interval. Paragraph (2) requires that creation of the cavern must be done according to the cavern construction plans submitted in the permit application. Subparagraphs (A) - (G) list demonstrations that must be made in the construction plans, including separation between adjacent caverns by a minimum pillar to cavern diameter ratio of 2.0 to ensure a sufficient amount of separation for cavern safety and stability; design of cavern dimensions by a qualified professional engineer and geologist, to ensure the structural integrity of the cavern; a plan for the controlled expansion of the cavern if an applicant proposes to conduct solution-mining activities concurrent with waste disposal; plans for continual monitoring of the volumes of materials injected and produced during cavern development and waste injection; plans for cavern pressure tests and sonar surveys to determine the cavern dimensions, volume, geometric shape, and characterization of anomalies; supervision of the cavern construction process by a qualified Texas professional engineer; and management and/or disposal of all brines displaced from the cavern in facilities authorized for such purpose. Except for circulation of drilling fluids during well construction, subsection (c) specifies that all injection activities for bedded salt cavern construction and waste disposal in a bedded salt cavern must be performed through removable injection tubing(s) installed inside the cemented long string casing and extending from the wellhead at ground surface to the bedded salt cavern below the long string casing seat. Subsection (d) pertains to logs and tests. Paragraph (1)(A) and (B) requires the construction plan submitted by the applicant to identify the tests to be used to verify cavern dimensions, including a description of surveys, logs, and tests to be run and analyzed; and the frequency of such surveys or logs. Before waste disposal, paragraph (2) requires testing of the integrity of the cavern in accordance with §331.43(b). Subsection (e) relates to workovers of a bedded salt cavern disposal well. Paragraph (1) requires the permittee to notify the executive director, submit plans for the proposed work, and obtain approval before commencing any workover operation or corrective maintenance which involves taking the disposal well out of service. When immediate action is required, the executive director may grant an exception of the prior written notification. Pressure control equipment must be installed and maintained during workovers which involve the removal of tubing. Paragraph (2) requires a demonstration of well mechanical integrity following any major operations which involve removal of the injection tubing, recompletions, unseating of the packer, or in instances where the integrity of the casing seat or cavern may be compromised. Subsection (f) lists reports and approvals required after completion of cavern construction. Within 30 days of completion of bedded salt cavern construction, paragraph (1) requires an initial cavern integrity report including the results of all tests regarding cavern integrity. Within 90 days of completion of cavern construction, paragraph (2)(A) - (D) require the permittee to notify the executive director that the cavern construction is in compliance with provisions of the permit and submit reports and certifications, prepared and sealed by a Texas professional engineer, including final construction, "as-built" plans and specifications, injection and confining zone data, and an evaluation of the considerations under §331.45(3); certification that the construction of the cavern has been completed in accordance with the provisions of the disposal well permit and with the design and construction specifications of the permittee's application; certification that actual confining and injection zone data obtained will not result in need for a change in the operating parameters specified in the permit; and certification that the bedded salt cavern injection zone will not be in or above a formation which within 1/4 mile of the bedded salt cavern injection zone contains a USDW.

Proposed new §331.245 pertains to bedded salt cavern disposal well operating requirements. Subsection (a) specifies general operating requirements, and paragraph (1) specifies 0.8 psi per foot of depth as the maximum allowable operating pressure and test pressure, but in no case is the pressure allowed to disrupt the bond between the salt, cement, and the casing seat, initiate or propagate fractures in the cavern or the confining zone, or cause movement of fluid or waste out of the injection zone. Paragraphs (2) and (3) state that the minimum operating pressure must be protective of bedded salt cavern integrity, and injection between the outermost casing protecting USDWs, and fresh or surface water and the wellbore is prohibited. Paragraph (4) requires the annulus between the tubing and long string casing to be filled with a noncorrosive fluid, unless an alternative to a packer has been approved under §331.243(d). To detect malfunctions, at all times that the well is in service the annulus pressure must be at least 100 psi greater than the injection tubing pressure, unless this requirement might harm the integrity of the well. Compatibility is addressed in paragraph (5) which requires the chemical and physical characteristics of all injected materials and cavern contents to protect and be compatible with the disposal well, associated facilities, and injection zone, and ensure proper operation of the facility to meet the performance standard of §331.242. Paragraph (6) specifies that, to inject waste into a bedded salt cavern, removable tubing(s) with a packer or fluid seal near the bottom of the long string casing must be used. Paragraph (7) prohibits unauthorized releases of cavern contents to the atmosphere. Paragraph (8)(A) - (D) provides that before beginning waste disposal operations, a blanket material must be placed into the salt cavern to prevent unwanted leaching of the cavern roof; consisting of crude oil, mineral oil, or other fluid possessing similar noncorrosive, nonsoluble, low-density properties; be sufficient to protect the integrity of the cement and formation bond at the long string casing seat; and be of sufficient volume to contact the entire cavern roof. Paragraph (9) requires monitoring of the cavern roof and level of the blanket material at least once every five years by running a density interface survey or using an alternative method. If an automatic alarm or shutdown is triggered, paragraph (10)(A) - (C) requires the owner or operator to immediately investigate and identify the cause of the

alarm or shutoff, and if the well or cavern appears to be lacking integrity, the owner or operator must immediately cease injection of waste unless authorized by the executive director to continue or resume injection; take all necessary steps to determine the presence or absence of a leak; and notify the executive director within 24 hours after the alarm or shutdown. If the loss of integrity is discovered, or if unauthorized communication is established between bedded salt caverns, paragraph (11)(A) - (E) requires the owner or operator to immediately cease injection of waste; take all steps required to determine whether there may have been a release of wastes into any unauthorized zone; notify the executive director within 24 hours after loss of mechanical integrity is discovered; notify the executive director when injection can be expected to resume; and restore and demonstrate well mechanical integrity and/or cavern integrity before resuming injection of waste. Whenever the owner or operator obtains evidence that there may have been a release of injected wastes or brine into an unauthorized zone, paragraph (12)(A) requires the owner or operator to immediately cease injection of waste; notify the executive director within 24 hours of obtaining such evidence; take all necessary steps to identify and characterize the extent of any release; propose a remediation plan for executive director review and approval; comply with any remediation plan specified by the executive director; implement any remediation plan approved by the executive director; and where such release is into a USDW or freshwater aquifer currently serving as a water supply, within 24 hours notify the local health department, place a notice in a newspaper of general circulation and notify by mail the adjacent landowners. Paragraph (12)(B) provides that the executive director may allow the operator to resume injection before completing cleanup action if the owner or operator demonstrates that the injection operation will not endanger USDWs or freshwater aquifers. Paragraph (13) requires all fluids displaced from the cavern after injection of any waste to be managed under applicable state and federal regulations. Subsection (b) pertains to workovers. Unless immediate action is required, paragraph (1) requires the permittee to notify and obtain approval from the executive director before commencing any workover operation or corrective maintenance which involves taking the disposal well out of service, including plans for the proposed work. Pressure control equipment must be installed and maintained during workovers which involve the removal of tubing. Paragraph (2) requires mechanical integrity of the well to be demonstrated following any major operations which involve removal of the injection tubing, recompletions, or unseating of the packer.

Proposed new §331.246 pertains to bedded salt cavern and well monitoring and testing requirements. The requirement for a waste analysis plan is provided in subsection (a), which includes sampling and analyzing all material injected into or produced from the cavern. Subsection (b) requires pressure gauges to be installed and maintained in proper operating conditions at all times on the tubing string(s) and on any annulus extending to the wellhead. Subsection (c)(1) - (5) requires continuous recording devices and instruments to be installed in weatherproof enclosures, used, and maintained in proper operating condition at all times to record tubing string pressures; the pressure and volume of any annular space that extends to the wellhead; injection and production fluid flow rates, volume, and density; the volume and composition of displaced gases; and any other data specified by the permit. Subsection (d)(1) and (2) pertains to automatic alarms and requires the owner or operator to install and use automatic alarm and automatic shutoff systems, designed to sound and shut-in the well when pressures and flow rates or other parameters approved by the executive director exceed a range and/or gradient specified in the permit; or automatic alarms designed to sound when the pressures, flow rates, or other parameters approved by the executive director exceed a rate and/or gradient specified in the permit, in cases where the owner or operator certifies that a trained operator will be on location and able to immediately respond to alarms at all times when the well is operating. Subsection (e) provides that all gauges, and pressure sensing and recording devices must be tested and calibrated semi-annually. Subsection (f) relates to mechanical integrity and requires the owner or operator to maintain mechanical integrity of the disposal well and bedded salt cavern at all times that the well and cavern are in service. Paragraph (1)(A) - (D) states that mechanical integrity of the well must be demonstrated before the well is initially placed in service; within five-year intervals during the operating life of the well to test for fluid movement along the borehole; after each workover which involves removal of the injection tubing, recompletions, or unseating of the packer; and before the well is plugged, unless the mechanical integrity test has been performed in the last five years. Paragraph (2)(A) - (C) requires demonstration of cavern mechanical integrity before the cavern is initially placed in service; within five-year intervals during the operating life of the cavern; and in instances where the integrity of the casing seat or cavern may be compromised. Paragraph (3) lists mechanical integrity test methods for each bedded salt cavern disposal well and cavern. In subparagraphs (A) - (D) these methods include a nitrogen-brine interface test on each well, a hydrostatic brine test and sonar survey, or other test approved by the executive director, for each cavern, and pressure testing on each well and cavern. Paragraph (4) provides that the owner or operator may use an alternative cavern integrity test if the alternative integrity test is substantially equivalent to the integrity tests specified in paragraph (3). Paragraph (4)(A) - (D) requires the owner or operator to submit, for the executive director's consideration, a description of the test method and the theory of operation, including the test sensitivities, a justification for the test parameters, and the pass and fail criteria for the test; a description of the well and cavern conditions under which the test can be conducted; the procedure for interpreting the test results; and an interpretation of the test upon completion of the test. Paragraph (5) requires the well and cavern integrity testing to be conducted at the maximum allowable operating pressure. Corrosion monitoring is addressed in §331.246(g). Subsection (g)(1) requires quarterly corrosion monitoring of the well materials used in the injection tubing, packer, and long string casing, and the test materials must be continuously exposed to the waste with the exception of when the well is taken out of service. Corrosion monitoring may be waived as provided in subsection (g)(2) if the disposal well owner or operator demonstrates that the waste will not be corrosive to the well materials with which the waste is expected to come into contact throughout the life of the well. Subsection (h) pertains to ambient monitoring, and paragraph (1) requires the owner or operator to comply with ambient monitoring requirements in accordance with §331.64(h). Paragraph (2) requires the owner or operator to conduct subsidence monitoring (elevation surveys) over the area of review and any other type of ambient monitoring necessary to comply with the performance standard stated in §331.242. Elevation surveys must be conducted by a licensed professional land surveyor. These requirements under subsection (h)(2) are necessary for equivalency with federal rules for Class I nonhazardous waste wells. Subsection (i) requires the owner or operator to submit information demonstrating that the waste stream and its anticipated reaction products will not

alter the permeability, thickness, or other relevant characteristics of the bedded salt cavern confining zone or bedded salt cavern injection zone such that they would no longer meet the requirements specified in §331.121. Subsection (j) requires the owner or operator to conduct any other monitoring and testing requirements, including determination of the composition and volume of leachate. Subsection (k) states that all testing and monitoring of the bedded salt disposal cavern and well must be planned and supervised, and test results reviewed by qualified individuals acting under the responsible charge of a Texas licensed professional engineer or licensed professional geoscientist, as appropriate. Subsection (l) requires the owner or operator to submit a written schedule of all logging and testing to the executive director at least seven days before conducting the testing, and provide the executive director the opportunity to witness the testing.

Proposed new §331.247 provides reporting requirements for bedded salt cavern disposal wells. Subsection (a) relates to pre-operation reports, and paragraph (1) requires the permittee to notify the executive director in writing of the anticipated well construction and cavern construction start-up dates at least 24 hours before beginning drilling and cavern construction operations. Before beginning injection operations, compliance with all pre-operation terms of the permit must occur. Paragraph (2) requires the permittee to submit notice of completion of construction to the executive director as specified in §331.65(e)(1). Within 90 days after the completion of the well, paragraph (3) requires the permittee to submit a Well Completion Report to the executive director addressing the considerations and standards in §331.45(3) and §331.243. The Well Completion Report must include the commission's Well Data Form; a surveyor's plat showing the exact location and giving the latitude and longitude of the well; and a certification that a notation on the deed to the facility property or on some other instrument which is normally examined during title search stating the property legal description, the surveyed location of the well, and the well permit number, has been filed in the real property records in the county in which the facility is located. Within 90 days after the completion of the cavern, paragraph (4) requires the permittee to submit a Cavern Completion Report to the executive director addressing the considerations and standards in §331.45(3) and §331.244. The Cavern Completion Report must include a surveyor's plat showing the exact location and giving the latitude and longitude of the cavern and a certification that a notation on the deed to the facility property or on some other instrument which is normally examined during title search has been made stating the surveyed location of the cavern, the well permit number, the depth of the cavern floor and ceiling, the cavern diameter, the dates of operation, and its permitted waste streams. Paragraph (5) requires the permittee to provide written notice to the executive director that a copy of the permit has been properly filed with the health and pollution control authorities of the county, city, and town where the well is located. Subsection (b) relates to operating reports. For noncommercial facilities, paragraph (1)(A) requires the permittee to submit to the executive director a quarterly report of injection operation on forms supplied by the executive director within 20 days after the last day of the months of March, June, September, and December. These forms will comply with the reporting requirements of 40 Code of Federal Regulations §146.69(a). Paragraph (1)(B) requires the owner or operator to submit inventory balance data measuring the volume of waste and brine injected into or withdrawn from each bedded salt cavern well, including methods for measuring and verifying volume. Under paragraph (1)(C), the executive director may require more frequent reporting. For all facilities, paragraph (2) requires the permittee to submit annually with the December report of injection operation an updated graphic or other acceptable report and description of the effects of the well and cavern on the area of review, including a report on monitoring required by §331.246(j). The report must also include locations of newly constructed or newly discovered wells within the area of review if such wells were not included in the technical report accompanying the permit application or in later reports; a tabulation of data as required by §331.121(a)(2)(B) for all such wells within the area of review that penetrate the injection zone or confining zone; and for noncommercial facilities only, a current injection fluid analysis. Within 30 days after the completion of a workover on a well, paragraph (3) requires a report to be filed with the executive director including the reason for well workover and the details of all work performed. Within 30 days after completion of periodic testing of well mechanical integrity, cavern integrity, and any other testing required by the executive director, paragraph (4) requires the permittee to submit a report, including both data and interpretation, on the test results. Subsection (b)(5) requires the permittee to notify UIC staff of the Austin office and the local district office of the commission, within 24 hours of any significant change in monitoring parameters or of any other observations which could reasonably be attributed to a leak or other failure of the well equipment or cavern integrity.

Proposed new §331.248 contains additional requirements and conditions for bedded salt cavern disposal wells. Subsection (a)(1) - (5) lists the following conditions that a permit for a Class I bedded salt cavern disposal well must include: a sign posted at the well site (in English with legible letters at least one inch high) which shows the name of the company, company well number, and commission permit number; an all-weather road installed and maintained to allow access to the disposal well and related facilities; the wellhead and associated facilities painted, if appropriate, and maintained in good working order without detectable leaks; secondary containment of the wellhead consisting of a diked, impermeable pad or sump; and any other requirements prescribed by the executive director for Class I bedded salt cavern disposal wells in order to protect USDW, and fresh or surface water from pollution. Subsection (a)(6) states that the obligation to implement the plugging and abandonment plan and the post-closure plan survives the termination of a permit or the cessation of injection activities, and the requirement to maintain an approved plan is directly enforceable regardless of whether the requirement is a condition of the permit. Subsection (b) requires pressure control equipment to be installed and maintained in proper operating condition at certain times as specified in this subsection.

Proposed new §331.249 provides record-keeping requirements for bedded salt cavern disposal wells. Subsection (a)(1) states that the permittee must keep complete and accurate records of all required monitoring, including continuous records of tubing string pressures; the pressure and volume of any annular space that extends to the wellhead; injection and production fluid flow rates, volume and density; the volume and composition of displaced gases; and any other data specified by the permit. Subsection (a)(2) - (4) requires the permittee to keep complete and accurate records of all periodic well tests, including analyses of injected and produced materials; cavern integrity; well mechanical integrity; casing inspection surveys; all shut-in periods and times that emergency measures were used for handling injection fluid or waste; and any additional information on conditions

that might reasonably affect the operation of the disposal well. Subsection (b) states that all records must be made available promptly on location for review upon request from a representative of the commission. Subsection (c) requires the permittee to retain on location, for a period of three years following abandonment, records of all information resulting from monitoring activities, including the chemical and physical characteristics of injected waste, or other records required by the permit. The executive director may require a permittee to submit copies of the records at any time before conclusion of the retention period.

Proposed new §331.250 pertains to bedded salt cavern closure. Subsection (a) lists the minimum requirements for a plan for a cavern closure plan that the owner or operator must prepare, maintain, and comply with. Paragraph (1) requires the owner or operator to submit the plan as a part of the permit application, and such a plan must be a condition of any permit issued. Paragraph (2) requires the owner or operator to submit all proposed revisions to the plan and obtain any necessary permit amendments over the life of the well and cavern. Paragraph (3) lists the required information to be contained in the plan. Subparagraph (A) lists activities the operator must perform upon cessation of waste disposal, and before cavern sealing. Clause (i) requires the operator to conduct a gamma-density log to determine the cavern top, salt top, and to check for fluid behind the casing. To determine cavern configuration and measure cavern capacity, clause (ii) requires the permittee to conduct a sonar caliper survey (or other similar proven technology) on the storage cavern if no sonar has been run within the past five years. Subparagraph (B) provides that all brine displaced from the well or flushed from waste lines during the plugging operation must be managed and disposed of under applicable state and federal regulations. Subsection (b) requires the well to be closed in accordance with §331.46 of this title.

Proposed new §331.251 relates to post-closure care for bedded salt cavern disposal wells and requires the owner or operator of a Class I bedded salt cavern disposal well to prepare, maintain, and comply with a plan for post-closure care that meets the requirements of §331.68(b).

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state government as a result of administration or enforcement of the proposed rules. Units of local government that own or operate public water systems using treatment to remove the excess radionuclides will need to manage and dispose of their treatment residuals containing NORM in a manner that is protective of human health and safety and the environment.

The purpose of this rulemaking is to amend existing rules, add new rules, repeal a rule, and develop guidance pertaining to the use of a Class I well for disposal of nonhazardous DWTR into a salt cavern in horizontally bedded or non-domal salt. The proposed rules would provide alternative disposal options for these wastes. Specifically, the proposed rules will allow disposal of nonhazardous DWTR into commercial and non-commercial Class I bedded salt cavern disposal wells within the state and provide the technical standards for doing so. For commercial disposal of DWTR containing NORM, Class I permitting under the proposed rules would be accompanied by a radioactive materials license. Authorization for disposal in a Class I well would be under an individual Class I UIC permit or authorized under General Permit Number WDWG010000. The proposed rulemaking will also repeal §331.120 which is no longer applicable since the agency does not have any UIC applications submitted or pending on or after May 26, 2001 and before September 1, 2002.

Some DWTR contain NORM, and currently the only facilities that can dispose of DWTR containing NORM generated in Texas are in the states of Idaho, Utah, and Washington. Units of local government that own or operate public water systems producing NORM as part of DWTR may have a less expensive alternative under the proposed rules to dispose of this waste rather than transporting it out of state. Out of state disposal cost for NORM is estimated to be ten times more expensive than disposal costs would be in an in-state facility with a Class I well within a bedded salt formation. Out-of-state transportation costs are estimated to be three to four times higher than transportation costs would be to transport waste to an authorized in-state Class I well bedded salt facility. Out-of-state disposal fees for DWTR containing radium NORM range from $25 to $30 per cubic foot for low levels of radium to $75 to $150 per cubic foot of waste for higher levels of radium. Out-of-state disposal fees for uranium NORM range from $200 to $250 per cubic foot. For a public water system in south Texas (Jim Wells County), transportation costs could be as much as $3.00 per mile for a distance of 1,620 miles from south Texas to Utah to 2,210 miles from south Texas to Washington.

Owners of Class I Bedded Salt Cavern Disposal Wells

Currently one entity in the state in Andrews County is known to be interested in offering disposal for DWTR in a Class I bedded salt formation. No fees for in-state disposal services have been set at this time, and fees are expected to vary with market conditions. However, in-state costs are expected to be less, perhaps ten times lower, than the rates for out-of-state disposal. Construction of a Class I bedded salt cavern disposal well and required monitoring systems may be as much as $1 million or more. Annual monitoring and testing costs could range from $40,000 to $100,000, and the cost to obtain a radioactive materials license would be $50,000 for the application fee and $25,000 for an annual license fee if the DWTR contain NORM.

Public Water Systems Using Class I Wells Owned by Third Parties

There may be as many as 50 public water systems struggling with the radionuclide maximum contaminant levels (MCLs) established by the EPA. Of these systems, the agency does not know how many local government public water systems would choose to treat water for radionuclides versus other methods of complying with the MCLs. In drought conditions, however, public water systems may need to treat water more often as other compliance options become less available and they are forced to use non-compliant water sources. Under the proposed rules, disposal of DWTR becomes more economically feasible since in-state disposal would be allowed. If a public water system chooses to dispose of DWTR in a well owned by another entity, it could pay lower disposal fees, and it is expected to save on transportation costs. The amount of disposal fees is not known at this time, and they are expected to vary with market conditions. However, in-state disposal fees could be ten times less than those charged by out-of-state facilities. Savings for in-state transportation costs will vary depending on the location of the public water system, but transportation of DWTR from south Texas to Andrews County could be approximately 510 miles. The shorter distance to a facility within the state could produce savings from over $3,000 to over $5,000.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be a less expensive, safe disposal method for nonhazardous DWTR, especially if it contains NORM.

The proposed rules may save individuals and businesses money if public drinking water systems are able to pass along the savings of a less expensive disposal method for nonhazardous DWTR to their customers. In-state disposal of this waste at a Texas facility is expected to cost public drinking water systems ten times less in disposal fees and three to four times less in transportation costs if this option is chosen as a method of complying with radionuclide MCLs. The amount of savings that could be available to pass on to customers will depend on the operating circumstances of each public drinking water system.

The agency knows of one business in Andrews County that is interested in providing a disposal facility of a Class I well in a bedded salt formation. The cost of constructing a Class I bedded salt disposal well and required monitoring systems is estimated to be $1 million or more; required annual monitoring and testing costs could range from $40,000 to $100,000; and the cost to obtain a radioactive materials license if the DWTRs contain NORM is estimated to cost $50,000 for the application fee and $25,000 for an annual license fee. No fees for in-state disposal services have been set at this time, and fees are expected to vary with market conditions.

Businesses that own a public water system will have a less expensive option of disposing of DWTR, especially if they contain NORM, under the proposed rules. Business-owned public water systems could expect to experience the same types of cost savings for disposal and transportation as those experienced by public water systems owned or operated by a local government.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules. Small businesses that own a public water system may have a less expensive option of disposing of DWTR, especially if they contain NORM, under the proposed rules, and they could expect to experience the same types of cost savings for disposal and transportation as those experienced by public water systems owned or operated by a local government.

If a small business decides it would be economically advantageous to offer disposal services to public water systems for disposal of nonhazardous DWTR in a Class I well within a bedded salt formation, it could expect to incur the same costs as that incurred by a large business to obtain a permit, construct the proper underground injection well, and comply with the required monitoring and testing requirements.

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 rules do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are 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 has reviewed the proposed rules to determine whether a regulatory analysis is required by Texas Government Code, §2001.0225, and has determined that the proposed rules are not subject to §2001.0225 because they do not meet the definition of a "major environmental rule" as defined in that statute. "Major environmental rule" is defined under Texas Government Code, §2001.0225(g)(3) as "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, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state."

The specific intent of the proposed rules is to allow use of a Class I disposal well for disposal of nonhazardous DWTR, including DWTR containing NORM, into horizontally bedded or non-domal salt and its associated salt cavern. The rules substantially advance their purpose by amending existing and adding new commission rules: 1) removing the prohibition on use of a Class I well for waste disposal into a bedded salt formation; 2) providing authorization and technical standards for use of a Class I well for disposal of nonhazardous DWTR, including NORM, into a bedded salt formation; and 3) providing siting requirements and construction and performance standards for cavern construction and operation. This intent is not inconsistent with the first prong of the definition of a "major environmental rule."

However, the proposed rules do not meet the second prong of the definition of a "major environmental rule" by adversely affecting, in a material way, the economy, a sector of the economy, productivity, competition, or jobs because the proposed rules do not require more from an applicant than is required by current rules. Additionally, the proposed rules do not meet the second prong of the definition of a "major environmental rule" because the proposed rules are not anticipated to adversely affect in a material way the environment or the public health and safety of the state or a sector of the state because the proposed rules specify construction and performance standards and waste management requirements designed to prevent the movement of fluids that could result in the pollution of a USDW or pollution of waters of the state for all stages of the life of the well and cavern(s), from construction through post closure care.

In addition to not meeting the definition of a "major environmental rule," under Texas Government Code, §2001.0025(a) the proposed rules do not exceed the four applicability requirements of Texas Government Code §2001.0025(a)(1) - (4) in that the proposal does not: 1) exceed a standard set by federal law; 2) exceed an express requirement of state law; 3) exceed a requirement of a delegation agreement; or 4) propose to adopt a rule solely under the general powers of the agency.

The proposed rules do not exceed a standard set by federal law because the commission's UIC program is authorized by the EPA and federal law does not prohibit use of a Class I well for waste disposal into a bedded salt formation. Therefore, the proposed rules are compatible with federal law. Additionally, the proposed rules do not exceed an express requirement of state law because Texas Water Code, Chapter 27, the Injection Well Act, establishes requirements for the commission's UIC program and the Injection Well Act does not prohibit use of a Class I well for waste disposal into a bedded salt formation. Therefore, the proposed

rules are compatible with state law. Additionally, the proposed rules do not exceed a requirement of a delegation agreement because the commission's UIC program is authorized by the EPA and the commission's authorized UIC program does not prohibit use of a Class I well for waste disposal into a bedded salt formation. Therefore, the proposed rules are compatible with the commission's federally authorized UIC program. Finally, the proposed rules are not proposed solely under the general powers of the agency, because they are proposed under the Texas Injection Well Act, Texas Water Code, §27.019(a), which requires the commission to adopt rules reasonably required for the performance of its powers, duties, and functions under the act.

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 has prepared a takings impact assessment for these proposed rules in accordance with Texas Government Code, §2007.043. The commission's preliminary assessment is that implementation of these proposed rules would not constitute a taking of real property.

The purpose of the proposed rules is to amend existing and add new commission rules to allow use of a Class I disposal well for disposal of nonhazardous DWTRs, including DWTR containing NORM, into horizontally bedded or non-domal salt and its associated salt cavern. The proposed rules substantially advance their purpose by amending existing and adding new commission rules that: 1) remove the prohibition on use of a Class I well for waste disposal into a bedded salt formation; 2) provide authorization and technical standards for use of a Class I well for disposal of nonhazardous DWTR, including NORM, into a bedded salt formation; and 3) provide siting requirements and construction and performance standards for cavern construction and operation.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. The proposed rules do not affect a landowner's rights in private real property because this rulemaking action does not constitutionally burden, nor restrict or limit, the owner's right to property and reduce its value by 25% or more beyond which would otherwise exist in the absence of these regulations. The proposed rules establishing authorization and standards for use of a Class I disposal well for disposal of nonhazardous DWTR into horizontally bedded or non-domal salt and its associated salt cavern do not affect real property. The proposed rules apply only to those who apply for authorization of Class I injection wells for disposal of nonhazardous waste into horizontally bedded or non-domal salt and its associated salt cavern. Because the proposed rules remove existing restrictions and establish new requirements for the use of Class I disposal wells into bedded salt formations, the rules do not restrict or limit an owner's rights in real property or reduce its value by 25% or more beyond which would otherwise exist in the absence of the proposed rules. Therefore, the proposed rules would not affect real property in a manner that is different than real property would have been affected without the proposed rules.

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

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 March 20, 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.

Submittal of Comments

Written comments may be submitted to Michael Parrish, 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 2011-023-331-WS. The comment period closes March 27, 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 Kathryn Flegal, Radioactive Materials Division, (512) 239-6890 or *kathryn.flegal@tceq.texas.gov.*

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §§331.2, 331.14, 331.17, 331.18

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, which provides the commission the power to perform any acts necessary and convenient to the exercise of its jurisdiction and powers as provided by this code and other laws; §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells.

The proposed amendments implement TWC, §27.019.

§331.2. Definitions.

General definitions can be found in Chapter 3 of this title (relating to Definitions). The following words and terms, when used in this chapter, have the following meanings.

(1) Abandoned well--A well which has been permanently discontinued from use or a well for which, after appropriate review and evaluation by the commission, there is no reasonable expectation of a return to service.

(2) Activity--The construction or operation of any of the following:

(A) an injection well for disposal of waste;

(B) an injection or production well for the recovery of minerals;

(C) a monitor well at a Class III injection well site;

(D) pre-injection units for processing or storage of waste; or

(E) any other class of injection well regulated by the commission.

(3) Affected person--Any person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the proposed injection operation for which a permit is sought.

(4) Annulus--The space in the wellbore between the injection tubing and the long string casing and/or liner.

(5) Annulus pressure differential--The difference between the annulus pressure and the injection pressure in an injection well.

(6) Aquifer--A geological formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

(7) Aquifer restoration--The process used to achieve or exceed water quality levels established by the commission for a permit/production area.

(8) Aquifer storage well--A Class V injection well used for the injection of water into a geologic formation, group of formations, or part of a formation that is capable of underground storage of water for later retrieval and beneficial use.

(9) Area of review--The area surrounding an injection well described according to the criteria set forth in §331.42 of this title (relating to Area of Review) or in the case of an area permit, the project area plus a circumscribing area the width of which is either 1/4 mile or a number calculated according to the criteria set forth in §331.42 of this title.

(10) Area permit--A permit that authorizes the construction and operation of two or more similar injection, production, or monitoring wells used in operations associated with Class III well activities within a specified area.

(11) Artificial liner--The impermeable lining of a pit, lagoon, pond, reservoir, or other impoundment, that is made of a synthetic material such as butyl rubber, chlorosulfonated polyethylene, elasticized polyolefin, polyvinyl chloride (PVC), other manmade materials, or similar materials.

(12) Baseline quality--The parameters and their concentrations that describe the local groundwater quality of an aquifer prior to the beginning of injection operations.

(13) Baseline well--A well from which groundwater is analyzed to define baseline quality in the permit area (regional baseline well) or in the production area (production area baseline well).

(14) Bedded salt--A geologic formation, group of formations, or part of a formation consisting of non-domal salt that is layered and may be interspersed with non-salt sedimentary materials such as anhydrite, shale, dolomite, and limestone. The salt layers themselves often contain significant impurities.

(15) Bedded salt cavern disposal well--A well or group of wells and connecting storage cavities which have been created by solution mining, dissolving or excavation of salt bearing deposits or other geological formations and subsequently developed for the purpose of disposal of nonhazardous drinking water treatment residuals.

(16) Blanket material or blanket pad--A fluid placed within a salt cavern that is lighter than the water in the cavern and will not dissolve the salt or any mineral impurities that may be contained within the salt. The function of the blanket is to prevent unwanted leaching of the salt cavern roof, prevent leaching of salt from around the cemented casing, and to protect the cemented casing from internal corrosion. Blanket material typically consists of crude oil, mineral oil, or some fluid possessing similar noncorrosive, nonsoluble, low density properties. The blanket material is placed between the salt cavern's outermost hanging string and innermost cemented casing.

(17) [~~(14)~~] Buffer area--The area between any mine area boundary and the permit area boundary.

(18) [~~(15)~~] Caprock--A geologic formation typically overlying the crest and sides of a salt stock. The caprock consists of a complex assemblage of minerals including calcite ($CaCO_3$), anhydrite ($CaSO_4$), and accessory minerals. Caprocks often contain lost circulation zones characterized by rock layers of high porosity and permeability.

(19) [~~(16)~~] Captured facility--A manufacturing or production facility that generates an industrial solid waste or hazardous waste that is routinely stored, processed, or disposed of on a shared basis in an integrated waste management unit owned, operated by, and located within a contiguous manufacturing complex.

(20) [~~(17)~~] Casing--Material lining used to seal off strata at and below the earth's surface.

(21) [~~(18)~~] Cement--A substance generally introduced as a slurry into a wellbore which sets up and hardens between the casing and borehole and/or between casing strings to prevent movement of fluids within or adjacent to a borehole, or a similar substance used in plugging a well.

(22) [~~(19)~~] Cementing--The operation whereby cement is introduced into a wellbore and/or forced behind the casing.

(23) [~~(20)~~] Cesspool--A drywell that receives untreated sanitary waste containing human excreta, and which sometimes has an open bottom and/or perforated sides.

(24) [~~(21)~~] Commercial facility--A Class I permitted facility, where one or more commercial wells are operated.

(25) [~~(22)~~] Commercial underground injection control (UIC) Class I well facility--Any waste management facility that accepts, for a charge, hazardous or nonhazardous industrial solid waste for disposal in a UIC Class I injection well, except a captured facility or a facility that accepts waste only from other facilities owned or effectively controlled by the same person.

(26) [~~(23)~~] Commercial well--An underground injection control Class I injection well which disposes of hazardous or nonhazardous industrial solid wastes, for a charge, except for a captured facility or a facility that accepts waste only from facilities owned or effectively controlled by the same person.

(27) [~~(24)~~] Conductor casing or conductor pipe--A short string of large-diameter casing used to keep the top of the wellbore open during drilling operations.

(28) [~~(25)~~] Cone of influence--The potentiometric surface area around the injection well within which increased injection zone

pressures caused by injection of wastes would be sufficient to drive fluids into an underground source of drinking water or freshwater aquifer.

(29) [~~(26)~~] Confining zone--A part of a formation, a formation, or group of formations between the injection zone and the lowermost underground source of drinking water or freshwater aquifer that acts as a barrier to the movement of fluids out of the injection zone.

(30) [~~(27)~~] Contaminant--Any physical, biological, chemical, or radiological substance or matter in water.

(31) [~~(28)~~] Control parameter--Any physical parameter or chemical constituent of groundwater monitored on a routine basis used to detect or confirm the presence of mining solutions in a designated monitor well. Monitoring includes measurement with field instrumentation or sample collection and laboratory analysis.

(32) [~~(29)~~] Desalination brine--The waste stream produced by a desalination operation containing concentrated salt water, other naturally occurring impurities, and additives used in the operation and maintenance of a desalination operation.

(33) [~~(30)~~] Desalination concentrate--Same as desalination brine.

(34) [~~(31)~~] Desalination operation--A process which produces water of usable quality by desalination.

(35) [~~(32)~~] Disposal well--A well that is used for the disposal of waste into a subsurface stratum.

(36) [~~(33)~~] Disturbed salt zone--Zone of salt enveloping a salt dome cavern, typified by increased values of permeability or other induced anomalous conditions relative to undisturbed salt which lies more distant from the salt dome cavern, and is the result of mining activities during salt dome cavern development and which may vary in extent through all phases of a cavern including the post-closure phase.

(37) [~~(34)~~] Drilling mud--A heavy suspension used in drilling an injection well, introduced down the drill pipe and through the drill bit.

(38) [~~(35)~~] Drinking water treatment residuals--Materials generated, concentrated or produced as a result of treating water for human consumption.

(39) [~~(36)~~] Drywell--A well, other than an improved sinkhole or subsurface fluid distribution system, completed above the water table so that its bottom and sides are typically dry except when receiving fluids.

(40) [~~(37)~~] Enhanced oil recovery project (EOR)--The use of any process for the displacement of oil from the reservoir other than primary recovery and includes the use of an immiscible, miscible, chemical, thermal, or biological process. This term does not include pressure maintenance or water disposal projects.

(41) [~~(38)~~] Excursion--The movement of mining solutions, as determined by analysis for control parameters, into a designated monitor well.

(42) [~~(39)~~] Existing injection well--A Class I well which was authorized by an approved state or United States Environmental Protection Agency-administered program before August 25, 1988, or a well which has become a Class I well as a result of a change in the definition of the injected waste which would render the waste hazardous under §335.1 of this title (relating to Definitions).

(43) [~~(40)~~] Fluid--Material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state.

(44) [~~(41)~~] Formation--A body of rock characterized by a degree of lithologic homogeneity which is prevailingly, but not necessarily, tabular and is mappable on the earth's surface or traceable in the subsurface.

(45) [~~(42)~~] Formation fluid--Fluid present in a formation under natural conditions.

(46) [~~(43)~~] Fresh water--Water having bacteriological, physical, and chemical properties which make it suitable and feasible for beneficial use for any lawful purpose.

(A) For the purposes of this chapter [~~subchapter~~], it will be presumed that water is suitable and feasible for beneficial use for any lawful purpose only if:

(i) it is used as drinking water for human consumption; or

(ii) the groundwater contains fewer than 10,000 milligrams per liter (mg/L) total dissolved solids; and

(iii) it is not an exempted aquifer.

(B) This presumption may be rebutted upon a showing by the executive director or an affected person that water containing greater than or equal to 10,000 mg/L total dissolved solids can be put to a beneficial use.

(47) [~~(44)~~] General permit--A permit issued under the provisions of this chapter authorizing the disposal of nonhazardous desalination concentrate and nonhazardous drinking water treatment residuals as provided by Texas Water Code, §27.023.

(48) [~~(45)~~] Groundwater--Water below the land surface in a zone of saturation.

(49) [~~(46)~~] Groundwater protection area--A geographic area (delineated by the state under Safe Drinking Water Act, 42 United States Code, §300j-13) near and/or surrounding community and non-transient, non-community water systems that use groundwater as a source of drinking water.

(50) [~~(47)~~] Hazardous waste--Hazardous waste as defined in §335.1 of this title (relating to Definitions).

(51) [~~(48)~~] Improved sinkhole--A naturally occurring karst depression or other natural crevice found in carbonate rocks, volcanic terrain, and other geologic settings which has been modified by man for the purpose of directing and emplacing fluids into the subsurface.

(52) [~~(49)~~] Individual permit--A permit, as defined in the Texas Water Code (TWC), §27.011 and §27.021, issued by the commission or the executive director to a specific person or persons in accordance with the procedures prescribed in the TWC, Chapter 27 (other than TWC, §27.023).

(53) [~~(50)~~] Injection interval--That part of the injection zone in which the well is authorized to be screened, perforated, or in which the waste is otherwise authorized to be directly emplaced.

(54) [~~(51)~~] Injection operations--The subsurface emplacement of fluids occurring in connection with an injection well or wells, other than that occurring solely for construction or initial testing.

(55) [~~(52)~~] Injection well--A well into which fluids are being injected. Components of an injection well annulus monitoring system are considered to be a part of the injection well.

(56) [~~(53)~~] Injection zone--A formation, a group of formations, or part of a formation that receives fluid through a well.

(57) [~~(54)~~] In service--The operational status when an authorized injection well is capable of injecting fluids, including times when the well is shut-in and on standby status.

(58) [~~(55)~~] Intermediate casing--A string of casing with diameter intermediate between that of the surface casing and that of the smaller long-string or production casing, and which is set and cemented in a well after installation of the surface casing and prior to installation of the long-string or production casing.

(59) [~~(56)~~] Large capacity cesspool--A cesspool that is designed for a flow of greater than 5,000 gallons per day.

(60) [~~(57)~~] Large capacity septic system--A septic system that is designed for a flow of greater than 5,000 gallons per day.

(61) [~~(58)~~] Licensed professional geoscientist--A geoscientist who maintains a current license through the Texas Board of Professional Geoscientists in accordance with its requirements for professional practice.

(62) [~~(59)~~] Liner--An additional casing string typically set and cemented inside the long string casing and occasionally used to extend from base of the long string casing to or through the injection zone.

(63) [~~(60)~~] Long string casing or production casing--A string of casing that is set inside the surface casing and that usually extends to or through the injection zone.

(64) [~~(61)~~] Lost circulation zone--A term applicable to rotary drilling of wells to indicate a subsurface zone which is penetrated by a wellbore, and which is characterized by rock of high porosity and permeability, into which drilling fluids flow from the wellbore to the degree that the circulation of drilling fluids from the bit back to ground surface is disrupted or "lost."

(65) [~~(62)~~] Mine area--The area defined by a line through the ring of designated monitor wells installed to monitor the production zone.

(66) [~~(63)~~] Mine plan--A plan for operations at a mine, consisting of:

(A) a map of the permit area identifying the location and extent of existing and proposed production areas; and

(B) an estimated schedule indicating the sequence and timetable for mining and any required aquifer restoration.

(67) [~~(64)~~] Monitor well--Any well used for the sampling or measurement with field instrumentation of any chemical or physical property of subsurface strata or their contained fluids. The term "monitor well" shall have the same meaning as the term "monitoring well" as defined in Texas Water Code [~~TWC~~], §27.002.

(A) Designated monitor wells are those listed in the production area authorization for which routine water quality sampling or measurement with field instrumentation is required.

(B) Secondary monitor wells are those wells in addition to designated monitor wells, used to delineate the horizontal and vertical extent of mining solutions.

(C) Pond monitor wells are wells used in the subsurface surveillance system near ponds or other pre-injection units.

(68) [~~(65)~~] Motor vehicle waste disposal well--A well used for the disposal of fluids from vehicular repair or maintenance activities including, but not limited to, repair and maintenance facilities for cars, trucks, motorcycles, boats, railroad locomotives, and airplanes.

(69) [~~(66)~~] New injection well--Any well, or group of wells, not an existing injection well.

(70) [~~(67)~~] New waste stream--A waste stream not permitted.

(71) [~~(68)~~] Non-commercial facility--A Class I permitted facility which operates only non-commercial wells.

(72) [~~(69)~~] Non-commercial underground injection control (UIC) Class I well facility--A UIC Class I permitted facility where only non-commercial wells are operated.

(73) [~~(70)~~] Non-commercial well--An underground injection control Class I injection well which disposes of wastes that are generated on-site, at a captured facility or from other facilities owned or effectively controlled by the same person.

(74) [~~(71)~~] Notice of change (NOC)--A written submittal to the executive director from a permittee authorized under a general permit providing changes to information previously provided to the agency, or any changes with respect to the nature or operations of the facility, or the characteristics of the waste to be injected.

(75) [~~(72)~~] Notice of intent (NOI)--A written submittal to the executive director requesting coverage under the terms of a general permit.

(76) [~~(73)~~] Off-site--Property which cannot be characterized as on-site.

(77) [~~(74)~~] On-site--The same or geographically contiguous property which may be divided by public or private rights-of-way, provided the entrance and exit between the properties is at a cross-roads intersection, and access is by crossing, as opposed to going along, the right-of-way. Noncontiguous properties owned by the same person but connected by a right-of-way which the owner controls and to which the public does not have access, is also considered on-site property.

(78) [~~(75)~~] Out of service--The operational status when a well is not authorized to inject fluids, or the well itself is incapable of injecting fluids for mechanical reasons, maintenance operations, or well workovers or when injection is prohibited due to the well's inability to comply with the in-service operating standards of this chapter.

(79) [~~(76)~~] Permit area--The area owned or under lease by the permittee which may include buffer areas, mine areas, and production areas.

(80) [~~(77)~~] Plugging--The act or process of stopping the flow of water, oil, or gas into or out of a formation through a borehole or well penetrating that formation.

(81) [~~(78)~~] Point of injection--For a Class V well, the last accessible sampling point prior to fluids being released into the subsurface environment.

(82) [~~(79)~~] Pollution--The contamination of water or the alteration of the physical, chemical, or biological quality of water:

(A) that makes it harmful, detrimental, or injurious:

(i) to humans, animal life, vegetation, or property; or

(ii) to public health, safety, or welfare; or

(B) that impairs the usefulness or the public enjoyment of the water for any lawful and reasonable purpose.

(83) [~~(80)~~] Pre-injection units--The on-site above-ground appurtenances, structures, equipment, and other fixtures including the injection pumps, filters, tanks, surface impoundments, and piping for

wastewater transmission between any such facilities and the well that are or will be used for storage or processing of waste to be injected, or in conjunction with an injection operation.

(84) [~~(81)~~] Production area--The area defined by a line generally through the outer perimeter of injection and recovery wells used for mining.

(85) [~~(82)~~] Production area authorization--An authorization, issued under the terms of a Class III injection well area permit, approving the initiation of mining activities in a specified production area within a permit area, and setting specific conditions for production and restoration in each production area within an area permit.

(86) [~~(83)~~] Production well--A well used to recover uranium through in situ solution recovery, including an injection well used to recover uranium. The term does not include a well used to inject waste.

(87) [~~(84)~~] Production zone--The stratigraphic interval extending vertically from the shallowest to the deepest stratum into which mining solutions are authorized to be introduced.

(88) [~~(85)~~] Public water system--A system for the provision to the public of water for human consumption through pipes or other constructed conveyances as defined in §290.38[~~(47)~~] of this title (relating to Definitions).

(89) [~~(86)~~] Radioactive waste--Any waste which contains radioactive material in concentrations which exceed those listed in 10 Code of Federal Regulations Part 20, Appendix B, Table II, Column 2, and as amended.

(90) [~~(87)~~] Registered Well--A well registered in accordance with the requirements of §331.221 of this title (relating to Registration of Wells).

(91) [~~(88)~~] Restoration demonstration--A test or tests conducted by a permittee to simulate production and restoration conditions and verify or modify the fluid handling values submitted in the permit application.

(92) [~~(89)~~] Restored aquifer--An aquifer whose local groundwater quality, within a production area, has, by natural or artificial processes, returned to the restoration table values established in accordance with the requirements of §331.107 of this title (relating to Restoration).

(93) [~~(90)~~] Salt cavern--A hollowed-out void space that has been purposefully constructed within a salt formation [~~stock~~], typically by means of solution mining by circulation of water from a well or wells connected to the surface.

(94) Salt cavern disposal well--For the purposes of this chapter, regulations of the commission, and not to underground injection control (UIC) Class II or UIC Class III wells in salt caverns regulated by the Texas Railroad Commission, a salt cavern disposal well is a type of UIC Class I injection well used:

(A) to solution mine a waste storage or disposal cavern in naturally occurring salt; and/or

(B) to inject nonhazardous, industrial, or municipal waste into a salt cavern for the purpose of storage or disposal of the waste.

(95) Salt dome--A geologic structure that includes the caprock, salt stock, and deformed strata surrounding the salt stock.

(96) [~~(91)~~] Salt dome cavern confining zone--A zone between the salt dome cavern injection zone and all underground sources of drinking water and freshwater aquifers, that acts as a barrier to movement of waste out of a salt dome cavern injection zone, and consists of the entirety of the salt stock excluding any portion of the salt stock designated as an underground injection control (UIC) Class I salt dome cavern injection zone or any portion of the salt stock occupied by a UIC Class II or Class III salt dome cavern or its disturbed salt zone.

(97) [~~(92)~~] Salt dome cavern injection interval--That part of a salt dome cavern injection zone consisting of the void space of the salt dome cavern into which waste is stored or disposed of, or which is capable of receiving waste for storage or disposal.

(98) [~~(93)~~] Salt dome cavern injection zone--The void space of a salt dome cavern that receives waste through a well, plus that portion of the salt stock enveloping the salt dome cavern, and extending from the boundaries of the cavern void outward a sufficient thickness to contain the disturbed salt zone, and an additional thickness of undisturbed salt sufficient to ensure that adequate separation exists between the outer limits of the injection zone and any other activities in the domal area.

~~[(94) Salt cavern solid waste disposal well or salt cavern disposal well--For the purposes of this chapter, regulations of the commission, and not to underground injection control (UIC) Class II or UIC Class III wells in salt caverns regulated by the Texas Railroad Commission, a salt cavern disposal well is a type of UIC Class I injection well used:]~~

~~[(A) to solution mine a waste storage or disposal cavern in naturally occurring salt; and/or]~~

~~[(B) to inject hazardous, industrial, or municipal waste into a salt cavern for the purpose of storage or disposal of the waste.]~~

~~[(95) Salt dome--A geologic structure that includes the caprock, salt stock, and deformed strata surrounding the salt stock.]~~

(99) [~~(96)~~] Salt stock--A geologic formation consisting of a relatively homogeneous mixture of evaporite minerals dominated by halite (NaCl) that has migrated from originally tabular beds into a vertical orientation.

(100) [~~(97)~~] Sanitary waste--Liquid or solid waste originating solely from humans and human activities, such as wastes collected from toilets, showers, wash basins, sinks used for cleaning domestic areas, sinks used for food preparation, clothes washing operations, and sinks or washing machines where food and beverage serving dishes, glasses, and utensils are cleaned.

(101) [~~(98)~~] Septic system--A well that is used to emplace sanitary waste below the surface, and is typically composed of a septic tank and subsurface fluid distribution system or disposal system.

(102) [~~(99)~~] Stratum--A sedimentary bed or layer, regardless of thickness, that consists of generally the same kind of rock or material.

(103) [~~(100)~~] Subsurface fluid distribution system--An assemblage of perforated pipes, drain tiles, or other similar mechanisms intended to distribute fluids below the surface of the ground. This definition includes subsurface area drip dispersal systems as defined in §222.5 of this title (relating to Definitions).

(104) [~~(101)~~] Surface casing--The first string of casing (after the conductor casing, if any) that is set in a well.

(105) [~~(102)~~] Temporary injection point--A method of Class V injection that uses push point technology (injection probes pushed into the ground) for the one-time injection of fluids into or above an underground source of drinking water.

(106) [~~(103)~~] Total dissolved solids--The total dissolved (filterable) solids as determined by use of the method specified in 40 Code of Federal Regulations Part 136, as amended.

(107) [~~(104)~~] Transmissive fault or fracture--A fault or fracture that has sufficient permeability and vertical extent to allow fluids to move between formations.

(108) [~~(105)~~] Underground injection--The subsurface emplacement of fluids through a well.

(109) [~~(106)~~] Underground injection control--The program under the federal Safe Drinking Water Act, Part C, including the approved Texas state program.

(110) [~~(107)~~] Underground source of drinking water--An "aquifer" or its portions:

(A) which supplies drinking water for human consumption; or

(B) in which the groundwater contains fewer than 10,000 [~~10,000~~] milligrams per liter total dissolved solids; and

(C) which is not an exempted aquifer.

(111) [~~(108)~~] Upper limit--A parameter value established by the commission in a permit/production area authorization which when exceeded indicates mining solutions may be present in designated monitor wells.

(112) [~~(109)~~] Verifying analysis--A second sampling and analysis or measurement with instrumentation of control parameters for the purpose of confirming a routine sample analysis or measurement which indicated an increase in any control parameter to a level exceeding the upper limit. Mining solutions are assumed to be present in a designated monitor well if a verifying analysis confirms that any control parameter in a designated monitor well is present in concentration equal to or greater than the upper limit value.

(113) [~~(110)~~] Well--A bored, drilled, or driven shaft whose depth is greater than the largest surface dimension, a dug hole whose depth is greater than the largest surface dimension, an improved sinkhole, or a subsurface fluid distribution system but does not include any surface pit, surface excavation, or natural depression.

(114) [~~(111)~~] Well injection--The subsurface emplacement of fluids through a well.

(115) [~~(112)~~] Well monitoring--The measurement by on-site instruments or laboratory methods of any chemical, physical, radiological, or biological property of the subsurface strata or their contained fluids penetrated by the wellbore.

(116) [~~(113)~~] Well stimulation--Several processes used to clean the well bore, enlarge channels, and increase pore space in the injection interval, [~~interval to be injected~~] thus making it possible for fluid [~~wastewater~~] to move more readily into the formation including, but not limited to, surging, jetting, and [~~blasting,~~] acidizing [~~, and hydraulic fracturing~~].

(117) [~~(114)~~] Workover--An operation in which a downhole component of a well is repaired, the engineering design of the well is changed, or the mechanical integrity of the well is compromised. Workovers include operations such as sidetracking, the addition of perforations within the permitted injection interval, and the addition of liners or patches. For the purposes of this chapter, workovers do not include well stimulation operations.

§331.14. [~~Prohibition of Class I Salt Cavern Solid Waste Disposal Wells and Associated Caverns in Geologic Structures or Formations Other Than Salt Stocks of Salt Domes and~~] Prohibition of Disposal of Certain Wastes [~~Hazardous Waste~~] into Certain Geological Formations.

[~~(a) Construction and operation of Class I salt cavern solid waste disposal wells and associated caverns in geologic structures or formations other than salt stocks of salt domes is prohibited until such time at which this section is amended to provide for authorization of such facilities and activities, and specific rules for such facilities and activities are promulgated.~~]

(a) [~~(b)~~] Notwithstanding any provision to the contrary in this chapter, Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste), or any other chapter of this title, the storage, processing, or disposal of hazardous waste in a solution-mined salt dome cavern, bedded salt cavern, or a sulphur mine is prohibited.

(b) Waste streams other than nonhazardous drinking water treatment residuals are prohibited from injection into a Class I salt cavern disposal well located in horizontally bedded or non-domal salt and its associated salt cavern.

§331.17. Pre-injection Units Registration.

(a) Pre-injection units not otherwise authorized under this chapter, except for those pre-injection units used in conjunction with a Class I well authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals, must be registered in accordance with the requirements of this section. Pre-injection units used in conjunction with a Class I well authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals are not subject to authorization by registration but are subject to authorization by an individual permit or under the general permit issued under Subchapter L of this chapter (relating to General Permit Authorizing Use of a Class I Injection Well to Inject Nonhazardous Desalination Concentrate or Nonhazardous Drinking Water Treatment Residuals).

(b) No registration shall be approved, and registrations may be denied or revoked, if the executive director determines that:

(1) a pre-injection unit causes or allows the release of fluid that would result in the pollution of underground sources of drinking water, fresh water, or surface water; or

(2) a pre-injection unit poses an immediate threat to public health or safety.

(c) Registration procedures for pre-injection units not otherwise authorized under this chapter must include the following.

(1) The owner or operator shall submit an application for registration to the executive director, in accordance with the applicable requirements of this subchapter;

(A) for any proposed pre-injection unit, obtain approval of the registration before operating the pre-injection unit; or

(B) for any existing unauthorized pre-injection unit, submit the application on or before the date the injection well permit renewal application is submitted.

(2) The owner or operator shall cease operation of any pre-injection unit if:

(A) the registration application for an existing pre-injection unit has not been submitted before approval of the injection well permit renewal;

(B) renewal of the registration is denied by the executive director;

(C) the term of the registration expires, however, if registration renewal procedures have been initiated before the permit expiration date, the existing registration will remain in full force and effect and will not expire until commission action on the application for renewal of the registration is final;

(D) the registration is denied or revoked by the executive director; or

(E) the executive director determines that the unit poses an immediate threat to public health or safety.

(d) Design criteria are as follows:

(1) pre-injection units shall be designed in such a manner as to protect underground sources of drinking water, fresh water, and surface water from pollution;

(2) pre-injection units shall be designed in such a manner as to enable the authorized injection well to meet all permit conditions and applicable rules and law;

(3) pre-injection units shall meet the design standards contained in Chapter 217 [~~317~~] of this title (relating to Design Criteria for Domestic Wastewater [~~Sewerage~~] Systems) which apply to the type of unit being proposed; and

(4) all ponds shall be lined according to the requirements of §331.47 of this title (relating to Pond Lining).

§331.18. Registration Application, Processing, Notice, Comment, Motion to Overturn.

(a) Applicability. This section sets forth the requirements for applications and the manner in which action will be taken on applications filed for a registration for pre-injection units.

(b) Contents of application. Registration applications for pre-injection units must include:

(1) complete application form(s), signed and notarized, and required number of copies provided;

(2) the verified legal status of the applicant(s) as applicable;

(3) the signature of the applicant(s), in accordance with the requirements of §305.44 of this title (relating to Signatories to Applications);

(4) a notarized affidavit from the applicant(s) verifying land ownership or landowner agreement to the proposed activity. Pre-injection unit registration information on file with the commission shall be confirmed or updated, in writing, no later than 30 days after:

(A) the mailing address and/or telephone number of the owner or operator is changed; or

(B) requested by the commission or executive director;

(5) maps showing:

(A) the name and address of persons who own the property on which the existing or proposed pre-injection unit is or will be located, if different from the applicant; and

(B) the name and address of landowners adjacent to the property on which the pre-injection unit is located or is proposed to be located;[~~.~~]

(6) plans and specifications of the pre-injection units which have the seal of a professional engineer licensed in the State of Texas. The engineer shall certify that the submission meets the applicable technical requirements of Chapter 217 [~~317~~] of this title (relating to Design Criteria for Domestic Wastewater [~~Sewerage~~] Systems);

(7) the attachment of technical reports and supporting data required by the application; and

(8) any other information the executive director or the commission may reasonably require.

(c) Administrative completeness. Upon receipt of an application for a registration, the executive director or his designee shall assign the application a number for identification purposes. Applications for registrations shall be reviewed by the staff for administrative completeness within the period specified by §281.3(a) of this title (relating to Initial Review).

(d) Technical completeness. When the application is declared to be technically complete, the executive director or his designee shall prepare a statement of the receipt of the application and declaration of technical completeness which is suitable for mailing and shall forward that statement to the chief clerk. The chief clerk shall notify every person entitled to notification as stated in subsection (e) of this section. The notice of receipt of an application for registration and declaration of technical completeness shall contain the following information:

(1) the location of the pre-injection unit;

(2) the identifying number given the application by the executive director;

(3) the type of registration sought under the application;

(4) the name, address, and telephone number of the applicant and the name and address of the agency and the telephone number of an agency contact from whom interested persons may obtain further information about the application to register the unit;

(5) the date on which the application was submitted;

(6) a brief summary of the information included in the application;

(7) a statement that the registration application has been provided to the county judge and that it is available for review by interested parties;

(8) a brief description of public comment procedures; and

(9) the deadline to file public comment. The deadline shall be not less than 30 days after the date notice is mailed.

(e) Notice requirements.

(1) The public notice requirements of this subsection apply to new applications for a registration, and to applications for major amendment or renewal of a registration for pre-injection units.

(2) The chief clerk of the commission shall mail Notice of Receipt of Application and Technical Completeness, along with a copy of the registration application, to the county judge in the county where the pre-injection unit is located or proposed to be located.

(3) The chief clerk of the commission shall mail Notice of Receipt of Application and Technical Completeness to the adjacent landowners named on the application map or supplemental map, or the sheet attached to the application map or supplemental map.

(f) Application processing procedures. Any person who is required to obtain approval of a registration, or who requests an amendment, modification, or renewal of a registration for pre-injection units is subject to the application processing procedures and requirements found in Chapter 281 of this title (relating to Application Processing).

(g) Major amendment. A major amendment is an amendment that changes a substantive term, provision, requirement, or a limiting

parameter of a registration. Notice requirements of subsection (e) of this section are applicable to major amendments.

(h) Minor amendment. A minor amendment is an amendment to improve or maintain the quality or method of management of waste, and includes any other change to a registration issued under this chapter that will not cause or relax a standard or criterion which may result in a potential deterioration of quality of waters in the state. Notice requirements of subsection (e) of this section are not applicable to minor amendments.

(i) Public comment on registrations. A person may provide the commission with written comments on any new, major amendment, or renewal applications to register pre-injection units. The executive director shall review any written comments received within the public comment period. The written information received shall be utilized by the executive director in determining what action to take on the application for registration, in accordance with §331.17 of this title (relating to Pre-injection Units Registration [~~Registration of Pre-Injection Units~~]). After the deadline for submitting public comment, the executive director may take final action on the application.

(j) Delegation, effective date of registration, term. The commission delegates to the executive director the authority to approve pre-injection unit registrations. The effective date for the registration of a site at which pre-injection units are located is the date that the executive director by letter, approves the application. The term for registration shall not exceed ten years and shall be synchronized with the term of the injection well permit.

(k) Motion to overturn. The applicant or a person affected may file with the chief clerk a motion to overturn the executive director's final approval of an application, under §50.139(b) - (f) of this title (relating to Motion to Overturn Executive Director's Decision).

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

Filed with the Office of the Secretary of State on February 10, 2012.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2548

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SUBCHAPTER C. GENERAL STANDARDS AND METHODS

30 TAC §331.42 - 331.47

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, which provides the commission the power to perform any acts necessary and convenient to the exercise of its jurisdiction and powers as provided by this code and other laws; §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells.

The proposed amendments implement TWC, §27.019.

§331.42. Area of Review.

(a) The area of review is the area surrounding an injection well or a group of injection wells, for which the permit application must detail the information required in Subchapter G of this chapter (relating to Consideration Prior to Permit Issuance).

(1) The area of review for Class I wells, except those wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals, is an area determined by a radius of 2 1/2 miles from the proposed or existing wellbore, or the area within the cone of influence, whichever is greater.

(2) The area of review for those Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals, is an area determined by a radius of 1/4 mile from the proposed or existing wellbore, or the area within the cone of influence, whichever is greater. Notwithstanding subsection (c) of this section, if the area of review is determined by a mathematical model pursuant to subsection (b) of this section, the permissible radius is the result of such calculation even if it is less than 1/4 mile.

(3) The area of review for salt dome cavern disposal wells and associated caverns, is the sum of the two following areas:

(A) an area determined by a radius of 2 1/2 miles from the proposed or existing wellbore; and

(B) the greatest horizontal plane cross-sectional area of the salt dome between land surface and a depth of 1,000 feet below the projected floor of the proposed or existing salt dome cavern.

(4) The area of review for Class III wells, is the project area plus a circumscribing area, a minimum of 1/4 mile, the width of which is the lateral distance from the perimeter of the project area, in which the pressures in the injection zone may cause the migration of the injection and/or formation fluid into a Underground Sources of Drinking Water.

(5) The area of review for Class V wells is an area determined by a radius of at least 1/4 mile from the proposed or existing wellbore.

(b) The computation of the cone of influence may be based upon the parameters listed in the figure in this subsection and should be calculated for an injection time period equal to the expected life of the injection well or pattern. The following modified Theis equation illustrates one form which the mathematical model may take:
Figure: 30 TAC §331.42(b)
[~~Figure: 30 TAC §331.42(b)~~]

(c) After an appropriate review, the commission may modify the area of review. In no event shall the boundary of an area of review be less than 2 1/2 miles for Class I wells, except those wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals, or 1/4 mile for Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals, or 1/4 mile from any other injection well covered by the appropriate authorization. The following factors are to be included in the review:

(1) Chemistry of injection and formation fluids;

(2) Hydrogeology;

(3) Population and its dependence on ground water use; and

(4) Historical practices in the area.

(d) The executive director may require an owner or operator of an existing injection well to submit any reasonably available information regarding the area of review, if the information would aid a review for the prevention or correction of freshwater pollution.

§331.43. Mechanical Integrity Standards.

(a) An injection well has mechanical integrity if:

(1) there is no significant leak in the casing, tubing, or packer; and

(2) if there is no significant fluid movement through vertical channels adjacent to the injection wellbore.

(b) A salt cavern has integrity if it:

(1) has no anomalies or irregularities that would prevent optimum cavern filling or that would prevent the cavern from holding pressure; and

(2) has no pressure communication or fluid flow between other caverns or formations [~~outside the salt stock~~]. The tests to show salt cavern integrity shall consist of cavern pressure and sonar tests, or other tests approved by the executive director, to determine the geometric shape of the unfilled cavern.

(c) Methods and standards approved by the United States Environmental Protection Agency [~~EPA~~] through federal Underground Injection Control Program delegation to the commission, shall be applied in conducting and evaluating the tests required by this section.

(d) When the owner or operator reports the results of mechanical integrity tests to the executive director, he shall include a description of the test(s) and the method(s) used. In making his/her evaluation, the executive director shall review monitoring and other test data submitted since the previous evaluation.

(e) The executive director may require additional or alternative tests if the results presented by the owner or operator under subsection (d) of this section are not satisfactory to the executive director to demonstrate that there is no movement of fluid into or between underground source of drinking waters [~~USDWs~~] resulting from the injection activity.

§331.44. Corrective Action Standards.

(a) Corrective action standards for all wells. In determining the adequacy of corrective action proposed or required to prevent or correct pollution of underground sources of drinking waters (USDWs), and fresh or surface water, the following factors shall be considered:

(1) toxicity and volume of the injected fluid;

(2) toxicity of native fluids and by-products of injection;

(3) population potentially affected;

(4) geology and hydrology;

(5) history of the injection operation;

(6) completion and plugging records;

(7) abandonment procedures in effect at the time a well was abandoned;

(8) hydraulic connections with USDWs, and fresh or surface water;

(9) reliability of the procedures used to identify abandoned wells;

(10) any other factors which might affect the movement of fluids into or between USDWs; and

(11) for Class III wells only, when setting corrective action requirements the executive director shall consider the overall effect of the project on the hydraulic gradient in potentially affected USDWs, and the corresponding changes in potentiometric surfaces(s) and flow directions(s) rather than the discrete effect of each well. If a decision is made that corrective action is not necessary based on the determinations in this paragraph, the monitoring program required in §331.84 of this title (relating to Monitoring Requirements) shall be designed to verify the validity of those determinations.

(b) Additional corrective action standards for Class I wells.

(1) For such wells within the area of review which are in the opinion of the executive director inadequately constructed, completed, plugged, or abandoned, or for which plugging or completion information is unavailable, the applicant shall also submit a plan consisting of such steps or modifications as are necessary to prevent movement of fluids into or between USDWs or freshwater aquifers. Where such a plan is adequate, the commission shall incorporate it into the permit as a condition. Where the executive director's review of an application indicates that the permittee's plan is inadequate the executive director shall:

(A) require the applicant to revise the plan;

(B) prescribe a plan for corrective action as a condition of the permit; or

(C) deny the application.

(2) The criteria of subsection (a) of this section will be used to determine adequacy.

(3) Any permit issued for a Class I well which was authorized prior to August 25, 1988, by an approved state program or an EPA-administered program or a well which has become a Class I well as a result of a change in the definition of the injected waste which would render the waste hazardous under §331.2 of this title (relating to Definitions) and which require corrective action other than pressure limitations shall include a compliance schedule requiring any corrective action accepted or prescribed under this section. Any such compliance schedule shall provide for compliance no later than two years following issuance of the permit and shall require observance of appropriate pressure limitations under paragraph (4) [~~(b)(4)~~] of this subsection until all other corrective action measures have been implemented.

(4) As part of the corrective action plan, the commission may impose an injection pressure limitation that does not cause the pressure in the injection zone to be sufficient to drive fluids into or between USDWs or freshwater aquifers in those wells described in subsection (a) of this section, which condition shall expire upon adequate completion of all corrective action measures.

(5) Action prescribed by a corrective action plan for new wells or new areas must be completed to the satisfaction of the executive director before operation of the well begins.

(6) In the event that, after an authorization for injection has been granted, additional information is submitted or discovered that a well within the applicable area of review might pose a hazard to a USDW or freshwater aquifer, the commission may prescribe a corrective action plan and compliance schedule as a condition for continued injection activities.

(7) If at any time the operator cannot assure the continuous attainment of the performance standard in §331.62(a)(5) [~~§331.62(5)~~] of this title (relating to Construction Standards), the executive director may require a corrective action plan and compliance schedule. The operator must demonstrate compliance with the performance standard, as a condition for receiving approval of continued operation of the well.

The executive director also may require permit changes to provide for additional testing and/or monitoring of the well to insure the continuous attainment of the performance standard. The commission may order closure of the well if the operator fails to demonstrate, to the executive director's satisfaction, that the performance standard is satisfied.

§331.45. Executive Director Approval of Construction and Completion.

The executive director may approve or disapprove the construction and completion for an injection well or project. In making a determination whether to grant approval, the following shall be reviewed for compliance with the standards of this chapter:

(1) for Class I wells, except for those Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals, and salt dome cavern disposal wells and associated salt dome caverns:

(A) actual as-built drilling and completion data on the well;

(B) all logging and testing data on the well;

(C) a demonstration of mechanical integrity;

(D) anticipated maximum pressure and flow rate at which the permittee will operate;

(E) results of the injection zone and confining zone testing program as required in §331.62(a)(7) [~~§331.62(7)~~] of this title (relating to Construction Standards) and §331.65(a) of this title (relating to Reporting Requirements);

(F) the actual injection procedure;

(G) the compatibility of injected wastes with fluids in the injection zone and minerals in both the injection zone and the confining zone and materials used to construct the well;

(H) the calculated area of review and cone of influence based on data obtained during logging and testing of the well and the formation, and where necessary, revisions to the information submitted under §331.121 of this title (relating to Class I Wells);

(I) the status of corrective action required for defective wells in the area of review;

(J) compliance with the casing and cementing performance standard in §331.62(a)(5) [~~§331.62(5)~~] of this title, and where necessary, changes to the permit to provide for additional testing and/or monitoring of the well to insure the continuous attainment of the performance standard; and

(K) compliance with the cementing requirements in §331.62(a)(6) [~~§331.62(6)~~] of this title.

(2) for Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals:

(A) all available logging and testing program data on the well;

(B) a demonstration of mechanical integrity;

(C) the anticipated maximum pressure and flow rate at which the permittee will operate;

(D) the results of the formation testing program;

(E) the actual injection procedure;

(F) the compatibility of injected waste with fluids in the injection zone and minerals in both the injection zone and the confining zone; and

(G) the status of corrective action on defective wells in the area of review.

(3) for salt dome cavern disposal wells and associated salt dome caverns:

(A) actual as-built drilling and completion data on the well;

(B) all logging, coring, and testing program data on the well and salt pilot hole;

(C) a demonstration of mechanical integrity of the well;

(D) the anticipated maximum wellhead and casing seat pressures and flow rates at which the well will operate during cavern development and cavern waste filling;

(E) results of the salt dome cavern injection zone and salt dome cavern confining zone testing program as required in §331.163(e)(3) of this title (relating to Well Construction Standards);

(F) the injection and production procedures for cavern development and cavern waste filling;

(G) the compatibility of injected materials with the contents of the salt dome cavern injection zone and the salt dome cavern confining zone, and with the materials of well construction;

(H) land subsidence monitoring data and groundwater quality monitoring data, including determinations of baseline conditions for such monitoring throughout the area of review;

(I) the status of corrective action required for defective wells in the area of review;

(J) actual as-built specifications of the well's surface support and monitoring equipment; and

(K) conformity of the constructed well system with the plans and specifications of the permit application;

(4) for Class III wells:

(A) logging and testing data on the well;

(B) a satisfactory demonstration of mechanical integrity for all new wells, excluding monitor and baseline wells;

(C) anticipated operating data;

(D) the results of the formation testing program;

(E) the injection procedures; and

(F) the status of corrective action required for defective wells in the area of review.

§331.46. Closure Standards.

(a) Applicability. Subsections (b) - (i), (k) - (n), and (r) [~~(q)~~] of this section apply to Class I wells except for salt cavern disposal wells and those Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. For salt dome cavern disposal wells, only subsections (c), (e) - (i), (k) - (l), (n) - (p), and (r) [~~(c) and (e) - (q)~~] of this section apply. For bedded salt cavern disposal wells, only subsections (e) - (h), (k) - (l), (n) - (o), and (q) - (r) of this section apply. For Class I wells authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals, only subsections (e) - (h), (n), and (r) [~~(q)~~] of this section apply.

(b) For Class I wells, prior to closing the well, the owner or operator shall observe and record the pressure decay for a time specified by the executive director. The executive director shall analyze the pressure decay and the transient pressure observations conducted pursuant to §331.64 of this title (relating to Monitoring and Testing Requirements) and determine whether the injection activity has conformed with predicted values.

(c) For [~~all~~] Class I wells, prior to well closure, appropriate mechanical integrity testing shall be conducted to ensure the integrity of that portion of the long string casing and cement that will be left in the ground after closure. Testing methods may include:

(1) pressure tests with liquid or gas;

(2) radioactive tracer surveys for wells other than salt cavern disposal wells;

(3) noise logs, temperature logs, pipe evaluation logs, cement bond logs, or oxygen activation logs; and

(4) any other test required by the executive director.

(d) For Class I wells, prior to well closure the well shall be flushed with a nonhazardous buffer fluid.

(e) In closure of all Class I wells, Class III wells, and permitted Class V wells, a well shall be plugged in a manner which will not allow the movement of fluids through the well, out of the injection zone either into or between underground sources of drinking waters (USDWs) or to the land surface. Well plugs shall consist of cement or other materials that provide protection equivalent to or greater than that provided by cement.

(f) The permittee shall notify the executive director before commencing closure according to an approved plan. For Class I wells this notice shall be given at least 60 days before commencement. At the discretion of the executive director, a shorter notice period may be allowed. The executive director shall review any revised, updated, or additional closure plans.

(g) Placement of the plugs in the wellbore shall be accomplished by an approved method that may include one of the following:

(1) the balance plug method;

(2) the dump bailer method;

(3) the two-plug method; or

(4) an alternate method, approved by the executive director, that will reliably provide a comparable level of protection.

(h) Prior to closure, the well shall be in a state of static equilibrium with the mud or nonhazardous fluid weight equalized top to bottom, either by circulating the mud or fluid in the well at least once or by a comparable method prescribed by the executive director.

(i) Each plug used shall be appropriately tagged and tested for seal and stability before closure is completed.

(j) The closure plan shall, in the case of a Class III production zone which underlies or is in an exempted aquifer, also demonstrate that no movement of contaminants that will cause pollution from the production zone into a USDW or freshwater aquifer will occur. The commission shall prescribe aquifer cleanup and monitoring where deemed necessary and feasible to ensure that no migration of contaminants that will cause pollution from the production zone into a USDW or freshwater aquifer will occur.

(k) The following shall be considered in determining the adequacy of a plugging and abandonment plan for Class I and III wells:

(1) the type and number of plugs to be used;

(2) the placement of each plug including the elevation of the top and bottom;

(3) the type, grade, and quantity of plugging material to be used;

(4) the method of placement of the plugs;

(5) the procedure used to plug and abandon the well;

(6) any newly constructed or discovered wells, or information, including existing well data, within the area of review;

(7) geologic or economic conditions;

(8) the amount, size, and location by depth of casings and any other materials left in the well;

(9) the method and location where casing is to be parted if applicable;

(10) the estimated cost of the plugging procedure; and

(11) such other factors that may affect the adequacy of the plan.

(l) For Class I wells only, a monument or other permanent marker shall be placed at or attached to the plugged well before abandonment. The monument shall state the permit number, date of abandonment, and company name.

(m) Each owner of a Class I hazardous waste injection well, and the owner of the surface or subsurface property on or in which a Class I hazardous waste injection well is located, must record, within 60 days after approval by the executive director of the closure operations, a notation on the deed to the facility property or on some other instrument which is normally examined during a title search that will, in perpetuity, provide any potential purchaser of the property the following information:

(1) the fact that land has been used to manage hazardous waste;

(2) the name of the state agency or local authority with which the plat was filed, as well as the Austin address of the Underground Injection Control staff of the commission, to which it was submitted; and

(3) the type and volume of waste injected, the injection interval or intervals, and for salt cavern wells, the maximum cavern radius into which it was injected, and the period over which injection occurred.

(n) Within 30 days after completion of closure, the permittee shall file with the executive director a closure report on forms provided by the commission. The report shall be certified as accurate by the owner or operator and by the person who performed the closure operation (if other than the owner or operator). This report shall consist of a statement that the well was closed in accordance with the closure plan previously submitted and approved by the executive director. Where the actual closure differed from the plan previously submitted, a written statement shall be submitted specifying the differences between the previous plan and the actual closure.

(o) For salt cavern disposal wells, prior to sealing the cavern and plugging the well, the owner or operator shall complete any preclosure monitoring of the cavern and its contents required by rule or permit.

(p) For salt <u>dome</u> cavern disposal wells, the cavern shall be closed according to §331.170 of this title (relating to Cavern Closure).

(q) For bedded salt cavern disposal wells, the cavern shall be closed according to §331.250 of this title (relating to Bedded Salt Cavern Closure).

(r) [~~(q)~~] The obligation to implement the closure plan survives the termination of a permit or the cessation of injection activities. The requirement to maintain and implement an approved plan is directly enforceable regardless of whether the closure plan requirement is a condition of the permit.

§331.47. Pond Lining.

(a) Except as provided in subsection (b) of this section, all holding ponds, emergency overflow ponds, emergency storage ponds, or other surface impoundments associated with, or part of the pre-injection units associated with underground injection wells shall be lined with clay or an artificial liner as approved by the executive director or as required by permit, and shall in addition, conform to any applicable requirements of Chapter 335 of this title (relating to Industrial Solid Waste and Municipal Hazardous Waste).

(b) All surface impoundments for nonhazardous, noncommercial Class 1 industrial waste associated with Class I nonhazardous, noncommercial injection wells, or Class V injection wells permitted for the disposal of nonhazardous waste, shall meet the design standards contained in Chapter 217 [~~317~~] of this title (relating to Design Criteria for Domestic Wastewater [~~Sewerage~~] Systems) which apply to surface impoundments.

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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Robert Martinez
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SUBCHAPTER D. STANDARDS FOR CLASS I WELLS OTHER THAN SALT CAVERN DISPOSAL WELLS

30 TAC §331.61

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, which provides the commission the power to perform any acts necessary and convenient to the exercise of its jurisdiction and powers as provided by this code and other laws; §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells.

The proposed amendment implements TWC, §27.019.

§331.61. Applicability.

The sections of this subchapter apply to all Class I injection wells, other than salt cavern disposal wells, unless otherwise noted.

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. CONSIDERATION PRIOR TO PERMIT ISSUANCE

30 TAC §331.120

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

Statutory Authority

The repeal is proposed under Texas Water Code (TWC), §5.102, which provides the commission the power to perform any acts necessary and convenient to the exercise of its jurisdiction and powers as provided by this code and other laws; §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells.

The proposed repeal implements TWC, §27.019.

§331.120. Compliance History; Denial of Permit.

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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30 TAC §331.121

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, which provides the commission the power to perform any acts necessary and convenient to the exercise of its jurisdic-

tion and powers as provided by this code and other laws; §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells.

The proposed amendment implements TWC, §27.019.

§331.121. Class I Wells.

(a) The commission shall consider the following before issuing a Class I Injection Well Permit:

(1) all information in the completed application for permit;

(2) all information in the Technical Report submitted with the application for permit in accordance with §305.45(a)(8) of this title (relating to Contents of Application for Permit). Subparagraphs (A) - (R) of this paragraph apply to all Class I wells except those Class I wells [~~Wells~~] authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. Information to be considered includes, but is not limited to:

(A) a map showing the location of the injection well for which a permit is sought and the applicable area of review. Within the area of review, the map must show the number, or name, and location of all producing wells, injection wells, abandoned wells, dry holes, surface bodies of water, springs, mines (surface and subsurface), quarries, water wells, and other pertinent surface features, including residences and roads. The map should also show faults, if known or suspected. Only information of public record is required to be included on this map;

(B) a tabulation of all wells within the area of review which penetrate the injection zone or confining zone, and for salt dome cavern disposal wells, the salt dome cavern injection zone, salt dome cavern confining zone and caprock. Such data shall include a description of each well's type, construction, date drilled, location, depth, record of plugging and/or completion, and any additional information the executive director may require;

(C) the protocol followed to identify, locate, and ascertain the condition of abandoned wells within the area of review which penetrate the injection or the confining zones;

(D) maps and cross-sections indicating the general vertical and lateral limits of underground sources of drinking water (USDWs) and freshwater aquifers, their positions relative to the injection formation and the direction of water movement, where known, in each USDW or freshwater aquifer which may be affected by the proposed injection;

(E) maps, cross-sections, and description of the geologic structure of the local area;

(F) maps, cross-sections, and description of the regional geologic setting;

(G) proposed operating data:

(i) average and maximum daily injection rate and volume of the fluid or waste to be injected over the anticipated life of the injection well;

(ii) average and maximum injection pressure;

(iii) source of the waste streams;

(iv) an analysis of the chemical and physical characteristics of the waste streams;

(v) for salt dome cavern waste disposal, the bulk waste density, permeability, porosity, and compaction rate, as well as the individual physical characteristics of the wastes and transporting media;

(vi) for salt dome cavern waste disposal, the results of tests performed on the waste to demonstrate that the waste will remain solid under cavern conditions; and

(vii) any additional analyses which the executive director may reasonably require;

(H) proposed formation testing program to obtain an analysis of the chemical, physical, and radiological characteristics of formation fluids, and other information on the injection zone and confining zone;

(I) proposed stimulation program, if needed;

(J) proposed operation and injection procedures;

(K) engineering drawings of the surface and subsurface construction details of the injection well and pre-injection units, except that pre-injection units registered under the provisions of §331.17 of this title (relating to Pre-injection [~~Pre-Injection~~] Units Registration) shall be considered under that section;

(L) contingency plans, based on a reasonable worst case scenario, to cope with all shut-ins; loss of cavern integrity, or well failures so as to prevent migration of fluid into any USDW;

(M) plans (including maps) for meeting the monitoring requirements of this chapter, such plans shall include all parameters, test methods, sample methods, and quality assurance procedures necessary and used to meet these requirements;

(N) for wells within the area of review which penetrate the injection zone or confining zone but are not adequately constructed, completed, or plugged, the corrective action proposed to be taken;

(O) construction procedures including a cementing and casing program, contingency cementing plan for managing lost circulation zones and other adverse subsurface conditions, well materials specifications and their life expectancy, logging procedures, deviation checks, and a drilling, testing, and coring program;

(P) delineation of all faults within the area of review, together with a demonstration, unless previously demonstrated to the commission or to the United States Environmental Protection Agency, that the fault is not sufficiently transmissive or vertically extensive to allow migration of hazardous constituents out of the injection zone;

(Q) the authorization status under this chapter of the pre-injection units for the injection well; and

(R) information demonstrating compliance with the applicable design criteria of Chapter 217 [~~317~~] of this title (relating to Design Criteria for Domestic Wastewater [~~Sewerage~~] Systems), for pre-injection units associated with Class I nonhazardous, noncommercial injection wells.

(3) This paragraph applies to those Class I wells [~~Wells~~] authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. Information to be considered includes, but is not limited to:

(A) a map showing the injection well(s) for which a permit is sought and the applicable area of review. Within the area of review, the map must show the number, or name, and location of all producing wells, dry holes, surface bodies of water, springs, mines (surface and subsurface), quarries, water wells and other pertinent surface features including residences and roads. The map should also show faults,

if known or suspected. Only information of public record is required to be included on this map;

(B) a tabulation of data on all wells within the area of review that penetrate into the proposed injection zone. Such data shall include a description of each well's type, construction, date drilled, location, depth, record of plugging and/or completion, and any additional information the executive director may require;

(C) a topographic map (or other map if a topographic map is unavailable) extending one mile beyond the property boundaries of the source depicting the facility and each of its intake and discharge structures; each of its hazardous waste treatment, storage, or disposal facilities; each well where fluids from the facility are injected underground; and those wells, springs, and other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant within a quarter mile of the facility property boundary;

(D) maps and cross sections indicating the general vertical and lateral limits of all underground sources of drinking water within the area of review, their position relative to the injection formation and the direction of water movement, where known, in each underground source of drinking water which may be affected by the proposed injection;

(E) maps and cross sections detailing the geologic structure of the local area;

(F) generalized maps and cross sections illustrating the regional geologic setting;

(G) proposed operating data:

(i) average and maximum daily rate and volume of the fluid to be injected;

(ii) average and maximum injection pressure; and

(iii) source and an analysis of the chemical, physical, radiological and biological characteristics of injection fluids;

(H) proposed formation testing program to obtain an analysis of the chemical, physical and radiological characteristics of and other information on the receiving formation;

(I) proposed stimulation program;

(J) proposed injection procedure;

(K) schematic or other appropriate drawings of the surface and subsurface construction details of the well;

(L) contingency plans to cope with all shut-ins or well failures so as to prevent migration of fluids into any underground source of drinking water;

(M) plans (including maps) for meeting the monitoring requirements in §331.64 of this title (relating to Monitoring and Testing Requirements);

(N) for wells within the area of review which penetrate the injection zone but are not properly completed or plugged, the corrective action proposed to be taken under §331.45(2)(G) of this title (relating to Executive Director Approval of Construction and Completion); and

(O) construction procedures including a cementing and casing program, logging procedures, deviation checks, and a drilling, testing, and coring program; and

(4) whether the applicant will assure, in accordance with Chapter 37, Subchapter Q of this title (relating to Financial Assurance for Underground Injection Control Wells), the resources necessary to close, plug, abandon, and if applicable, provide post-closure care for the well and/or waste disposal cavern as required;

(5) the closure plan, corrective action plan, and post-closure plan submitted in the technical report accompanying the permit application; except that a post-closure plan is not required for those Class I wells [~~Wells~~] authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals; and

(6) any additional information required by the executive director for the evaluation of the proposed injection well.

(b) In determining whether the use or installation of an injection well is in the public interest under Texas Water Code, §27.051(a)(1), the commission shall also consider:

(1) the compliance history of the applicant in accordance with Texas Water Code, §27.051(e) and §281.21(d) of this title (relating to Draft Permit, Technical Summary, Fact Sheet, and Compliance History);

(2) whether there is a practical, economic and feasible alternative to an injection well reasonably available to manage the types and classes of hazardous waste;

(3) if the injection well will be used for the disposal of hazardous waste, whether the applicant will maintain liability coverage for bodily injury and property damage to third parties that is caused by sudden and nonsudden accidents in accordance with Chapter 37 of this title (relating to Financial Assurance); and

(4) that any permit issued for a Class I injection well for disposal of hazardous wastes generated on site requires a certification by the owner or operator that:

(A) the generator of the waste has a program to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to economically practicable; and

(B) injection of the waste is that practicable method of disposal currently available to the generator which minimizes the present and future threat to human health and the environment.

(c) The commission shall consider the following minimum criteria for siting before issuing a Class I injection well permit for all Class I wells except those Class I wells [~~Wells~~] authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals. For Class I wells [~~Wells~~] authorized to inject only nonhazardous desalination concentrate or nonhazardous drinking water treatment residuals, only paragraph (1) of this subsection applies.

(1) All Class I injection wells shall be sited such that they inject into a formation that is beneath the lowermost formation containing, within 1/4 mile of the wellbore, a USDW or freshwater aquifer.

(2) The siting of Class I injection wells shall be limited to areas that are geologically suitable. The executive director shall determine geologic suitability based upon:

(A) an analysis of the structural and stratigraphic geology, the hydrogeology, and the seismicity of the region;

(B) an analysis of the local geology and hydrogeology of the well site, including, at a minimum, detailed information regarding stratigraphy, structure, and rock properties, aquifer hydrodynamics, and mineral resources; and

(C) a determination that the geology of the area can be described confidently and that limits of waste fate and transport can be accurately predicted through the use of analytical and numerical models.

(3) Class I injection wells shall be sited such that:

(A) the injection zone has sufficient permeability, porosity, thickness, and areal extent to prevent migration of fluids into USDWs or freshwater aquifers;

(B) the confining zone:

(i) is laterally continuous and free of transecting, transmissive faults or fractures over an area sufficient to prevent the movement of fluids into a USDW or freshwater aquifer; and

(ii) contains at least one formation of sufficient thickness and with lithologic and stress characteristics capable of preventing initiation and/or propagation of fractures.

(4) The owner or operator shall demonstrate to the satisfaction of the executive director that:

(A) the confining zone is separated from the base of the lowermost USDW or freshwater aquifer by at least one sequence of permeable and less permeable strata that will provide an added layer of protection for the USDW or freshwater aquifer in the event of fluid movement in an unlocated borehole or transmissive fault; or

(B) within the area of review, the piezometric surface of the fluid in the injection zone is less than the piezometric surface of the lowermost USDW or freshwater aquifer, considering density effects, injection pressures, and any significant pumping in the overlying USDW or freshwater aquifer; or

(C) there is no USDW or freshwater aquifer present;

(D) the commission may approve a site which does not meet the requirements in subparagraphs (A), (B), or (C) of this paragraph if the owner or operator can demonstrate to the commission that because of the geology, nature of the waste, or other considerations, that abandoned boreholes or other conduits would not cause endangerment of USDWs, and fresh or surface water.

(d) The commission shall also consider the following additional information, which must be submitted in the technical report of the application as part of demonstrating that the facility will meet the performance standard in §331.162 of this title (relating to Performance Standard), before issuing a salt dome cavern Class I injection well permit:

(1) a thorough characterization of the salt dome to establish the geologic suitability of the location, including:

(A) data and interpretation from all appropriate geophysical methods (such as well logs, seismic surveys, and gravity surveys), subject to the approval of the executive director, necessary to:

(i) map the overall geometry of the salt dome, including all edges and any suspected overhangs of the salt stock;

(ii) demonstrate the existence of a minimum distance of 500 feet between the boundaries of the proposed salt dome cavern injection zone and the boundaries of the salt stock;

(iii) define the composition and map the top and thickness of the sedimentary rock units between the caprock and surface, including the flanks of the salt stock;

(iv) define the composition and map the top and thickness of the caprock overlying the salt stock;

(v) map the top of the salt stock;

(vi) calculate the movement and the salt loss rate of the salt stock;

(vii) define any other caverns and other uses of the salt dome, and address any conditions that may result in potential adverse impact on the salt dome; and

(viii) satisfy any other requirement of the executive director necessary to demonstrate the geologic suitability of the location;

(B) a surface-recorded three-dimensional seismic survey, subject to the following minimum requirements:

(i) the lateral extent of the survey will be determined by the executive director; and

(ii) the survey must provide information as part of demonstrating that the location is geologically suitable for the purpose of meeting the performance standard in §331.162 of this title;

(C) identification of any unusual features, such as depressions or lineations observable at the land surface or within or detectable within the subsurface, which may be indicative of underlying anomalies in the caprock or salt stock, which might affect construction, operation, or closure of the cavern;

(D) the petrology of the caprock, salt stock, and deformed strata; and

(E) for strata surrounding the salt stock, information on their nature, structure, hydrodynamic properties, and relationships to USDWs, including a demonstration that the proposed salt dome cavern injection zone will not be in or above a formation which within 1/4 mile of the salt dome cavern injection zone contains a USDW;

(2) establishment of a pre-development baseline for subsidence and groundwater monitoring, over the area of review;

(3) characterization of the predicted impact of the proposed operations on the salt stock, specifically the extent of the disturbed zone;

(4) demonstration of adequate separation between the outer limits of the injection zone and any other activities in the domal area. The thickness of the disturbed zone, as well as any additional safety factors will be taken into consideration; and

(5) the commission will consider the presence of salt cavern storage activities, sulfur mining, salt mining, brine production, oil and gas activity, and any other activity which may adversely affect or be affected by waste disposal in a salt cavern.

(e) Information requirements for Class I hazardous waste injection well permits.

(1) The following information is required for each active Class I hazardous waste injection well at a facility seeking an underground injection control permit:

(A) dates well was operated; and

(B) specification of all wastes that have been injected in the well, if available.

(2) The owner or operator of any facility containing one or more active hazardous waste injection wells must submit all available information pertaining to any release of hazardous waste or constituents from any active hazardous waste injection well at the facility.

(3) The owner or operator of any facility containing one or more active Class I hazardous waste injection wells must conduct such preliminary site investigations as are necessary to determine whether a release is occurring, has occurred, or is likely to have occurred.

(f) Interim Status under the Resource Conservation Recovery Act (RCRA) [~~RCRA~~] for Class I hazardous waste injection wells. The minimum state standards which define acceptable injection of hazardous waste during the period of interim status are set out in this chapter. The issuance of an underground injection well permit does not automatically terminate RCRA interim status. A Class I well's interim status does, however, automatically terminate upon issuance of a RCRA permit for that well, or upon the well's receiving a RCRA permit-by-rule under §335.47 of this title (relating to Special Requirements for Persons Eligible for a Federal Permit by Rule). Thus, until a Class I well injecting hazardous waste receives a RCRA permit or RCRA permit-by-rule, the well's interim status requirements are the applicable requirements imposed under this chapter, including any requirements imposed in the underground injection control [~~UIC~~] permit.

[~~(g) Before issuing a permit for a hazardous waste injection well in a solution-mined salt dome cavern, the commission by order must find that there is an urgent public necessity for the hazardous waste injection well. The commission, in determining whether an urgent public necessity exists for the permitting of the hazardous waste injection well in a solution-mined salt dome cavern, must find that:~~]

[~~(1) the injection well will be designed, constructed, and operated in a manner that provides at least the same degree of safety as required of other currently operating hazardous waste disposal technologies;~~]

[~~(2) consistent with the need and desire to manage the state hazardous wastes generated in the state, there is a substantial or obvious public need for additional hazardous waste disposal capacity and the hazardous waste injection well will contribute additional capacity toward servicing that need;~~]

[~~(3) that the injection well will be constructed and operated in a manner so as to safeguard public health and welfare and protect physical property and the environment;~~]

[~~(4) the has demonstrated that groundwater and surface waters, including public water supplies, will be protected from the release of hazardous waste from the salt dome waste containment cavern; and~~]

[~~(5) any other criteria required by the commission to satisfy that the test of urgency has been met.~~]

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. FINANCIAL RESPONSIBILITY

30 TAC §331.142

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, which provides the commission the power to perform any acts necessary and convenient to the exercise of its jurisdiction and powers as provided by this code and other laws; §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells.

The proposed amendment implements TWC, §27.019.

§331.142. Financial Assurance.

(a) The permittee shall secure and maintain financial assurance for plugging and abandonment in the amount of the plugging and abandonment cost estimate for Class I, Class I salt cavern disposal wells and associated salt caverns, and Class III wells in a manner that meets the requirements of Chapter 37, Subchapter Q of this title (relating to Financial Assurance for Underground Injection Control Wells). Financial assurance for plugging and abandonment shall be provided in the amount of the plugging and abandonment cost estimate as provided in §331.143 of this title (relating to Cost Estimate for Plugging and Abandonment and Aquifer Restoration). Financial assurance for post closure of Class I hazardous wells shall be provided in the amount of the post closure cost estimate.

(b) The permittee of a hazardous waste Class I waste injection well [~~or Class I salt cavern disposal well and associated salt cavern~~] shall establish and maintain sufficient liability coverage for bodily injury and property damage to third parties caused by sudden or nonsudden accidental occurrences arising from operations of the facility that meets the requirements of Chapter 37 of this title (relating to Financial Assurance) and §305.154(a)(11) of this title (relating to Standards).

(c) The requirement to maintain financial responsibility is enforceable regardless of whether the requirement is a condition of the permit.

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 J. STANDARDS FOR CLASS I SALT DOME CAVERN DISPOSAL WELLS

30 TAC §§331.161, 331.162, 331.165, 331.168, 331.170, 331.171

Statutory Authority

The amendments are proposed under Texas Water Code (TWC), §5.102, which provides the commission the power to perform any acts necessary and convenient to the exercise of its jurisdiction and powers as provided by this code and other laws; §5.103,

which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells.

The proposed amendments implement TWC, §27.019.

§331.161. Applicability.

The sections of this subchapter apply to all Class I salt cavern [~~solid waste~~] disposal wells and their associated salt caverns located in the salt stocks of salt domes, and not to such facilities in horizontally bedded or non-domal salt. [~~As provided by §331.14 of this title (relating to Prohibition of Class I Salt Cavern Solid Waste Disposal Wells and Associated Caverns in Geologic Structures or Formations Other Than Salt Stocks of Salt Domes and Prohibition of Disposal of Hazardous Waste into Certain Geological Formations), salt cavern solid waste disposal wells and associated caverns in geologic structures or formations other than salt stocks of salt domes are prohibited until such time at which §331.14 of this title and this subchapter are amended to allow the subject facilities, and any necessary specific rules for such facilities are added by amendment to this subchapter or promulgated as a new subchapter.~~]

§331.162. Performance Standard.

The operator and permittee shall assure for construction, operation, maintenance, monitoring, closure, and post-closure of a Class I salt cavern [~~solid waste~~] disposal well and associated cavern, the continuous attainment of a performance standard of no escape of waste [~~hazardous constituents~~] from the salt cavern injection zone. [~~Demonstration of attainment of this standard may be shown by modeling waste transport over a period of at least 15,000 years.~~] The provisions of this chapter, as well as any permit or order issued by the commission, shall be construed as minimum operating requirements. To qualify for a permit or to otherwise operate a Class I salt cavern [~~solid waste~~] disposal well and associated cavern, permit applicants and facility operators must demonstrate that this performance standard will be satisfied even if it is necessary to go beyond the minimum operating requirements described in this chapter.

§331.165. Waste Disposal Operating Requirements.

(a) General operating requirements.

(1) Injection pressure at the wellhead shall not exceed a maximum, which shall be calculated, so as to assure that the pressure in the cavern during injection does not disrupt the bond between the salt, cement, and the casing seat, initiate new fractures or propagate existing fractures in the cavern or the confining zone, or cause movement of fluid or waste out of the injection zone.

(2) Injection between the outermost casing protecting underground sources of drinking water (USDWs), and fresh or surface water and the wellbore is prohibited.

(3) The annulus between the outer tubing and long string casing shall be filled with an inert gas approved by the commission. The annulus pressure, at all times that the well is in service, shall be at least 100 pounds per square inch [~~psi~~] greater than the injection tubing pressure, to detect well malfunctions, unless the executive director determines that such a requirement might harm the integrity of the well.

(4) Chemical and physical characteristics of all injected materials and cavern contents, including but not limited to, bulk density and compressive strength of solidified waste, shall protect and be compatible with the injection well, associated facilities, and injection zone, and shall ensure proper operation of the facility to meet the performance standard of §331.162 of this title (relating to Performance Standard). In addition, after cavern construction is certified and a cavern is authorized to receive wastes under §331.164(f) of this title (relating to Cavern Construction Standards), all injected materials and cavern contents shall not cause further dissolution of the cavern walls.

(5) The waste stream shall be stabilized, prior to injection, to minimize the generation of fluids in the cavern.

(6) All injection of waste into a salt cavern shall be performed through the inner of two removable tubings with a packer to seal the annulus between the outer tubing and long string casing, near the bottom of the long string casing.

(7) Unauthorized releases of cavern contents to the atmosphere are prohibited.

(8) The cavern will be operated so as to control the extent of the disturbed zone.

(9) If an automatic alarm or shutdown is triggered, the owner or operator shall immediately investigate and identify as expeditiously as possible the cause of the alarm or shutoff. If, upon such investigation, the well or cavern appears to be lacking integrity, or if monitoring required under §331.166(c) of this title (relating to Monitoring and Testing Requirements) otherwise indicates that the well or cavern lacks integrity, the owner or operator shall:

(A) immediately cease injection of waste unless authorized by the executive director to continue or resume injection;

(B) take all necessary steps to determine the presence or absence of a leak; and

(C) notify the executive director within 24 hours after the alarm or shutdown.

(10) If the loss of integrity is discovered pursuant to paragraph (3) of this subsection or during periodic integrity testing, the owner or operator shall:

(A) immediately cease injection of waste;

(B) take all steps required to determine whether there may have been a release of [~~hazardous~~] wastes [~~or hazardous waste constituents~~] into any unauthorized zone;

(C) notify the executive director within 24 hours after loss of mechanical integrity is discovered;

(D) notify the executive director when injection can be expected to resume; and

(E) restore and demonstrate well mechanical integrity and/or cavern integrity to the satisfaction of the executive director prior to resuming injection of waste.

(11) Whenever the owner or operator obtains evidence that there may have been a release of [~~or~~] injected wastes into an unauthorized zone:

(A) the owner or operator shall immediately cease injection of waste, and:

(i) notify the executive director within 24 hours of obtaining such evidence;

(ii) take all necessary steps to identify and characterize the extent of any release;

(iii) propose a remediation plan for executive director review and approval;

(iv) comply with any remediation plan specified by the executive director;

(v) implement any remediation plan approved by the executive director; and

(vi) where such release is into a USDW or freshwater aquifer currently serving as a water supply, within 24 hours notify the local health department, place a notice in a newspaper of general circulation and notify by mail the adjacent landowners;[:]

(B) the executive director may allow the operator to resume injection prior to completing cleanup action if the owner or operator demonstrates that the injection operation will not endanger USDWs or freshwater aquifers.

(12) Cavern contents shall not interfere with the set-up of any stabilized waste injected after the waste and solidifying agents have been mixed, but is injected while is still pumpable and has not set.

(13) Waste emplacement must be performed in such a manner as to minimize gas or fluid entrapment, so that compaction of wastes does not disrupt the integrity of the cavern.

(14) A salt cavern disposal well [~~solid waste disposal cavern~~] shall be operated in a manner which will not generate high temperatures that will result in nonattainment of the performance standard of §331.162 of this title [~~(relating to Performance Standard)~~].

(15) All fluids purged from the cavern after emplacement of any waste shall be managed at a [~~hazardous~~] waste management facility pursuant to applicable state and federal regulations.

(b) Workovers.

(1) The permittee shall notify the executive director before commencing any workover operation or corrective maintenance which involves taking the injection well out of service. The notification shall be in writing and shall include plans for the proposed work. The executive director may grant an exception of the prior written notification when immediate action is required. Approval by the executive director shall be obtained before the permittee may begin any workover operation or corrective maintenance that involves taking the well out of service. Pressure control equipment shall be installed and maintained during workovers which involve the removal of tubing.

(2) Mechanical integrity of the well shall be demonstrated following any major operations which involve removal of the injection tubing, recompletions, or unseating of the packer.

(c) Temporary cessation of operations.

(1) An owner or operator of a Class I salt cavern [~~solid waste~~] disposal well who ceases injection operations temporarily, may keep the well open provided he:

(A) has received written authorization from the executive director; and

(B) has described actions or procedures, satisfactory to the executive director, that the owner or operator will take to ensure that the well will not endanger USDWs, and fresh or surface water during the period of temporary disuse. These actions and procedures shall include compliance with the technical requirements applicable to active injection wells, including mechanical integrity, and monitoring, unless waived by the executive director.

(2) The owner or operator of a well that has ceased operations for more than two years shall notify the executive director, in writing, 30 days prior to resuming operation of the well.

§331.168. Additional Requirements and Conditions.

(a) A permit for a Class I salt cavern [~~solid waste~~] disposal well shall include expressly or by reference the following conditions.

(1) A sign shall be posted at the well site which shall show the name of the company, company well number, commission permit number, the depth of the cavern floor and ceiling, and the cavern diameter. The sign and identification shall be in the English language, clearly legible, and shall be in numbers and letters at least one inch high.

(2) An all-weather road shall be installed and maintained to allow access to the injection well and related facilities.

(3) The wellhead and associated facilities shall be painted, if appropriate, and maintained in good working order without detectable leaks.

(4) Secondary containment of the wellhead shall consist of a diked, impermeable pad or sump.

(5) The commission may prescribe additional requirements for Class I salt cavern [~~solid waste~~] disposal wells in order to protect underground sources of drinking water, and fresh or surface water from pollution.

(6) The obligation to implement the plugging and abandonment plan and the post-closure plan survives the termination of a permit or the cessation of injection activities. The requirement to maintain an approved plan is directly enforceable regardless of whether the requirement is a condition of the permit.

(b) Pressure control equipment including blowout preventers or a wellhead with closeable valves shall be required to be installed and maintained in proper operating condition at all times at the casing head, extending from the time of advancing the surface casing hole after conductor casing is set, to the time of well closure, to safeguard against any pressure imbalance which might cause a backflow, blowout, or fracturing of the salt to occur.

§331.170. Cavern Closure.

(a) The owner or operator of a Class I salt cavern [~~solid waste~~] disposal well shall prepare, maintain, and comply with a plan for cavern closure that meets the minimum following requirements, and that is acceptable to the executive director.

(1) The owner or operator shall submit the plan as a part of the permit application and, upon approval, or approval with modifications, by the executive director, such plan shall be a condition of any permit issued.

(2) The owner or operator shall submit all proposed revisions to the plan and obtain any necessary permit amendments, as appropriate, over the life of the well and cavern.

(3) The plan shall include, at a minimum, the following information:

(A) upon cessation of waste disposal, and prior to cavern sealing, the operator shall:

(i) monitor the cavern pressure and cavern fluid volume and fluid chemical composition, to provide information regarding the cavern's natural closure characteristics and any ensuant pressure buildup;

(ii) provide predictions from data gathered in clause (i) of this subparagraph of cavern behavior after sealing is completed;

(iii) demonstrate, to the executive director, utilizing actual pre-closure monitoring data, that the sealing of the cavern will not result in any pressure buildup within the cavern that could adversely affect [~~effect~~] the integrity of the cavern, well, or seal;

(iv) fill all partially filled caverns with crushed salt or another approved suitable material which is compatible with the waste and the salt stock;

(v) complete any monitoring of the cavern and its contents required by rule or permit;

(vi) use redundant seals or plugs, comprised of different compositions and sealing properties, to provide for immediate as well as long-term salt cavern injection zone containment;

(vii) obtain written authorization from the executive director for cavern sealing;

(B) upon completion of cavern sealing, the owner or operator shall:

(i) monitor the seal for leaks;

(ii) demonstrate to the executive director that the seal is not leaking prior to requesting authorization for closing the wellbore;

(iii) obtain written authorization from the executive director to begin well closure.

(b) The well shall be closed in accordance with §331.46 of this title (relating to Closure Standards).

§331.171. Post-Closure Care.

(a) The owner or operator of a Class I salt cavern [~~solid waste~~] disposal well shall prepare, maintain, and comply with a plan for post-closure care that meets the requirements of subsection (b) of this section, and that is acceptable to the executive director.

(1) The owner or operator shall submit the plan as a part of the permit application and, upon approval by the executive director, such plan shall be a condition of any permit issued.

(2) The owner or operator shall submit any proposed significant revision to the plan and obtain any necessary permit amendment, as appropriate over the life of the well, but no later than the date of the closure report required under §331.46 of this title (relating to Closure Standards).

(3) The plan shall provide financial assurance as required in this chapter. The owner or operator shall demonstrate and maintain financial assurance in the amount of the post closure cost estimate to cover post closure in a manner that meets the requirements of this chapter and Chapter 37, Subchapter Q of this title (relating to Financial Assurance for Underground Injection Control Wells). The amount of the funds available shall be no less than the amount identified in paragraph (4)(F) of this subsection.

(4) The plan shall include the following information:

(A) the pressure in the injection zone before injection began;

(B) the anticipated pressure in the injection zone at the time of closure;

(C) the predicted time based on actual preclosure monitoring data until pressure in the injection interval reaches equilibrium with the surrounding salt stock;

(D) predicted position of the waste front at closure (cavern sealing and well plugging);

(E) the status of any corrective action required under §331.44 of this title (relating to Corrective Action Standards);

(F) the estimated cost of proposed closure and post-closure care to be based on a reasonable worst case scenario.

(5) At the request of the owner or operator, or on his own initiative, the executive director may modify the post-closure plan after submission of the closure report following the procedures in §331.46 of this title [(~~relating to Closure Standards~~)].

(b) The owner or operator shall:

(1) continue and complete any corrective action required under §331.44 of this title [(~~relating to Corrective Action Standards~~)];

(2) continue to conduct any groundwater monitoring and subsidence monitoring required under the permit until pressure in the injection interval reaches equilibrium with the salt stock. The executive director may extend the period of post-closure monitoring if he determines that the well or cavern may endanger an underground source of drinking water or freshwater aquifer;

(3) submit a survey plat to the local zoning authority designated by the executive director. The plat shall indicate the location of the well relative to permanently surveyed benchmarks, the depth of the cavern ceiling and floor, and the maximum cavern radius. A copy of the plat shall be submitted to the underground injection control [(~~UIC~~)] staff of the commission;

(4) provide appropriate notification and information to such state and local authorities as have authority over drilling activities to enable such state and local authorities to impose appropriate conditions on subsequent drilling activities that may penetrate the well's confining or injection zone;

(5) retain for a period of three years following well closure records reflecting the nature, composition, and volume of all injected materials. The executive director shall require the owner or operator to deliver the records to the executive director at the conclusion of the retention period, and all records shall thereafter be retained at a location designated by the executive director for that purpose.

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 L. GENERAL PERMIT AUTHORIZING USE OF A CLASS I INJECTION WELL TO INJECT NONHAZARDOUS DESALINATION CONCENTRATE OR NONHAZARDOUS DRINKING WATER TREATMENT RESIDUALS

30 TAC §331.206

Statutory Authority

The amendment is proposed under Texas Water Code (TWC), §5.102, which provides the commission the power to perform any acts necessary and convenient to the exercise of its jurisdic-

tion and powers as provided by this code and other laws; §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells.

The proposed amendment implements TWC, §27.019.

§331.206. Annual Fee Assessments.

A person authorized by a general permit shall pay annual facility and waste management fees according to Chapter 335, Subchapter J of this title (relating to Hazardous Waste Generation, Facility and Disposal Fee System [~~Permits for Land Treatment Demonstrations Using Field Tests or Laboratory Analyses~~]) unless specified in the general permit.

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

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SUBCHAPTER N. STANDARDS FOR CLASS I BEDDED SALT CAVERN DISPOSAL WELLS

30 TAC §§331.241 - 331.251

Statutory Authority

The new sections are proposed under Texas Water Code (TWC), §5.102, which provides the commission the power to perform any acts necessary and convenient to the exercise of its jurisdiction and powers as provided by this code and other laws; §5.103, which provides the commission with the authority to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; §5.105, which authorizes the commission to establish and approve all general policy of the commission by rule; and §27.019, which requires the commission to adopt rules reasonably required for the regulation of injection wells.

The new sections implement TWC, §27.019.

§331.241. Applicability.

(a) The sections of this subchapter apply to all Class I disposal wells located in horizontally bedded or non-domal salt and their associated salt caverns, and not to such facilities located in the salt stocks of salt domes.

(b) The receipt, processing or disposal of radioactive material under this subchapter is subject to the applicable requirements of Chapter 336 of this title (relating to Radioactive Substance Rules).

§331.242. Bedded Salt Cavern Disposal Well Performance Standard and Siting Requirements.

(a) Performance standard. The operator and permittee shall assure for construction, operation, maintenance, monitoring, closure, and post-closure of a Class I disposal well located in horizontally bedded or non-domal salt and associated cavern, the continuous attainment of a performance standard to prevent the movement of fluids that would result in the pollution of an underground source of drinking water.

(b) The provisions of this chapter, as well as any permit or order issued by the commission, shall be construed as minimum operating requirements. To qualify for a permit or to otherwise operate a Class I disposal well located in horizontally bedded or non-domal salt and associated cavern, permit applicants and facility operators must demonstrate that this performance standard will be satisfied even if it is necessary to go beyond the minimum operating requirements described in this chapter.

(c) Siting. In addition to the minimum siting criteria for Class I disposal wells, each permit applicant for a Class I bedded salt cavern disposal well and associated cavern shall identify potential risks to the waste disposal operation within the area of review.

§331.243. Bedded Salt Cavern Disposal Well Construction Standards.

(a) Wells shall be sited in such a fashion that they inject into a formation which is beneath the lowermost formation containing, within one quarter mile of the well bore, an underground source of drinking water (USDW).

(b) Plans and specifications. Except as specifically required in the terms of the disposal well permit, the drilling and completion of the well shall be done in accordance with all permit application plans and specifications.

(c) Any proposed changes to the plans and specifications must be in accordance with §331.62(a)(3) of this title (relating to Construction Standards).

(d) Casing and cementing.

(1) Wells shall be cased and cemented to prevent the movement of fluids into or between USDW. The casing and cement used in the construction of each newly drilled well shall be designed for the life expectancy of the well. In determining and specifying casing and cementing requirements, the following factors shall be considered:

(A) depth of lowermost USDW or freshwater aquifer;

(B) depth to the injection zone;

(C) injection pressure, external pressure, internal pressure, and axial loading;

(D) hole size;

(E) size and grade of all casing strings (wall thickness, diameter, nominal weight, length, joint specification, and construction material);

(F) the maximum burst and collapse pressures, and tensile stresses which may be experienced at any point along the length of the casings at any time during the construction, operation, and closure of the well;

(G) corrosive effects of injected materials, formation fluids, and temperatures;

(H) lithology of injection and confining zones;

(I) types and grades of cement;

(J) quantity and chemical composition of the injected fluid; and

(K) cement and cement additives which must, at a minimum, be of sufficient quality and quantity to maintain integrity over the design life of the well.

(2) Surface casing shall be set to a minimum subsurface depth which extends into a confining bed below the lowest formation containing a USDW or freshwater aquifer.

(3) A second or long string casing, using a sufficient number of centralizers, shall be set into the salt formation.

(4) The cement for that part of the casing opposite a salt formation shall be prepared with salt-saturated cementing material.

(e) Injection tubings. Except for circulation of drilling fluids during well construction, all injection activities for bedded salt cavern construction and waste disposal in a bedded salt cavern shall be performed using removable injection tubing(s) suspended from the wellhead.

(1) All injection activities during bedded salt cavern construction shall be performed with the annulus between the tubing and long string casing filled with a noncorrosive fluid sufficient to protect the long string casing seat.

(2) All injection of waste into a bedded salt cavern shall be performed through tubing with a packer to seal the annulus between the tubing and casing near the bottom of the casing, or tubing with an approved fluid seal as an alternative. The tubing, packer, and fluid seal shall be designed for the expected service.

(f) Well annulus system factors for consideration. In determining and specifying requirements for a tubing and packer system or tubing with a fluid seal, the following factors shall be considered and addressed:

(1) depth of setting;

(2) characteristics of injection fluid and waste;

(3) injection pressure;

(4) annular pressure;

(5) rate, temperature, and volume of injected waste;

(6) size of casing; and

(7) tensile, burst, and collapse strengths of the tubing.

(g) Logs and tests.

(1) Geophysical logging. Appropriate logs and other tests shall be conducted during the drilling and construction phases of the well including drilling into the salt. All logs and tests shall be interpreted by the service company which processed the logs or conducted the test, or by other qualified persons. At a minimum the following logs and tests shall be conducted:

(A) deviation checks on all holes, conducted at sufficiently frequent intervals to assure that avenues for fluid migration in the form of diverging holes are not created during drilling;

(B) a spontaneous potential and resistivity log;

(C) from the ground surface or from the base of conductor casing to the total investigated depth including all core hole or pilot hole:

(i) natural gamma ray log;

(ii) compensated density and neutron porosity logs;

(iii) acoustic or sonic log;

(iv) inclination (directional) survey; and

(v) caliper log (open hole);

(D) from the ground surface or from the base of conductor casing to the lowermost casing seat:

(i) cement bond with variable density log;

(ii) temperature log (cased hole); and

(iii) casing inspection log; and

(E) fracture detector log from the base of the surface casing to the total investigated depth including all core hole or pilot hole.

(2) Pressure tests.

(A) After installation and cementing of casings, and before drilling out the cemented casing shoe, surface casing shall be pressure tested at mill test pressure or 80% of the calculated internal pressure at minimum yield strength, and the intermediate and long string casing shall be tested to 1,500 pounds per square inch (psi) for 30 minutes, unless otherwise specified by the executive director.

(B) After drilling out the cemented long string casing shoe, and before drilling more than 100 feet of core hole or pilot hole below the long string casing shoe, the bond between the salt, cement, and casing shall be tested at a pressure of 0.8 psi per foot of depth.

(C) The pilot hole and/or core hole shall be tested between the long string casing shoe and the total investigated depth, at a casing seat pressure of 0.8 psi per foot of depth.

(3) Coring.

(A) Core samples. Full-hole cores shall be taken from selected intervals of the injection zone and lowermost overlying confining zone; or, if full-hole coring is not feasible or adequate core recovery is not achieved, sidewall cores shall be taken at sufficient intervals to yield representative data for selected parts of the injection zone and lowermost overlying confining zone. Core analysis shall include a determination of permeability, porosity, and bulk density.

(B) In situ permeability, lithostatic gradients, and fracture pressure gradients shall be determined in the core hole for the salt, within the cavern injection interval.

(4) Before commencement of injection for cavern construction, any portion of the pilot hole or core hole that extends beyond the intended wall of the cavern shall be filled with salt-saturated cement from total investigated depth back to the designed cavern boundary.

(5) Well integrity testing. The mechanical integrity of a well must be demonstrated before initiation of injection activities. A mechanical integrity test shall consist of:

(A) a pressure test with liquid or gas;

(B) a temperature, noise log, or oxygen activation log;

(C) a casing inspection log, if required by the executive director; and

(D) any other test required by the executive director.

(h) Compatibility. All well materials must be compatible with formations and fluids with which the materials may be expected to come into contact. A well shall be deemed to have compatibility as long as the materials used in the construction of the well meet or exceed standards developed for such materials by the American Petroleum Institute, the American Society for Testing Materials, or comparable standards acceptable to the executive director.

(i) Pre-injection units.

(1) The injection pump system shall be designed to assure that the surface injection pressure limitations authorized by the well permit shall not be exceeded.

(2) Instrumentation shall be installed to continuously monitor changes in annulus pressure and annulus fluid volume for the purpose of detecting well malfunctions.

(3) Pre-injection units, while allowing for pressure release, shall be designed to prevent the release of unauthorized cavern contents to the atmosphere.

(4) To protect the ground surface from spills and releases, the wellhead will have secondary containment in the form of a diked, impermeable pad or sump.

(j) Construction supervision. All phases of well construction and all phases of any well workover shall be supervised by a licensed professional engineer or licensed professional geoscientist, as appropriate, with current registration under the Texas Engineering Practice Act or Texas Geoscience Practice Act, who is knowledgeable and experienced in practical drilling engineering and who is familiar with the special conditions and requirements of waste disposal well construction.

(k) Approval of completion of the well construction stage. Before beginning cavern construction and operation, the permittee shall obtain written approval from the executive director which states that the well construction is in compliance with the applicable provisions of the permit. To obtain approval, the permittee shall submit to the executive director within 90 days of completion of well construction, including all logging, coring, and testing of the pilot hole, the following reports and certifications prepared and sealed by a licensed professional engineer or licensed professional geoscientist with current registration under the Texas Engineering Practice Act or Texas Geoscience Practice Act:

(1) final construction, "as-built" plans and specifications, reservoir data, and an evaluation of the considerations set out in §331.45(3) of this title (relating to Executive Director Approval of Construction and Completion);

(2) certification that construction of the well has been completed in accordance with the provisions of the disposal well permit and with the design and construction specifications of the permittee's application; and

(3) certification that actual reservoir data obtained will not result in the need for a change in the operating parameters specified in the permit.

§331.244. Bedded Salt Cavern Construction Standards.

(a) Plans and specifications. Except as specifically required in the terms of the disposal well permit, construction of the cavern shall be done in accordance with all permit application plans and specifications. Any proposed changes to the plans and specifications must be certified in writing by the executive director that said changes provide protection standards equivalent to or greater than the original design criteria.

(b) Standards for bedded salt cavern construction.

(1) The creation of waste disposal caverns within bedded salt shall be accomplished by the controlled dissolution of the sidewalls of the well bore to a specified maximum diameter, between selected elevations specified in the permit as the top and bottom of the injection interval.

(2) The enlargement of a portion of the original well bore to serve as the cavern shall be done according to the cavern construction plans which shall be submitted as a part of the permit application. The cavern construction plans shall demonstrate at a minimum, the following:

(A) adjacent caverns shall be separated by a minimum pillar to cavern diameter ratio of 2.0 to ensure a sufficient amount of separation for cavern safety and stability;

(B) that cavern dimensions have been designed by a qualified professional engineer and geologist, to ensure the structural integrity of the cavern;

(C) if an applicant proposes to conduct solution-mining activities concurrent with waste disposal, a plan for the controlled expansion of the cavern;

(D) plans for continual monitoring of the volumes of materials injected and produced during cavern development and waste injection;

(E) plans for cavern pressure tests and sonar surveys to determine the cavern dimensions, volume, geometric shape, and characterization of anomalies;

(F) the cavern construction process shall be conducted under the supervision of a qualified professional engineer, with current registration under the Texas Engineering Practice Act, in accordance with accepted practices in the cavern construction industry; and

(G) all brines displaced from the cavern shall be managed and/or disposed of in facilities authorized for such purpose.

(c) Injection tubing. Except for circulation of drilling fluids during well construction, all injection activities for bedded salt cavern construction and waste disposal in a bedded salt cavern shall be performed through removable injection tubing(s) installed inside the cemented long string casing and extending from the wellhead at ground surface to the bedded salt cavern below the long string casing seat.

(d) Logs and Tests.

(1) The permit applicant shall submit, as part of its construction plan, information identifying the tests which it will use to verify cavern dimensions. This information shall include at a minimum, the following:

(A) a description of surveys, logs, and tests to be run and analyzed, including any quantitative performance standards appropriate for any such procedure; and

(B) the frequency of such surveys or logs.

(2) Before waste disposal, the integrity of the cavern shall be tested in accordance with §331.43(b) of this title (relating to Mechanical Integrity Standards).

(e) Workovers.

(1) The permittee shall notify the executive director before commencing any workover operation or corrective maintenance which involves taking the disposal well out of service. The notification shall be in writing and shall include plans for the proposed work. The executive director may grant an exception of the prior written notification when immediate action is required. Approval by the executive director shall be obtained before the permittee may begin any workover operation or corrective maintenance that involves taking the well out of service. Pressure control equipment shall be installed and maintained during workovers which involve the removal of tubing.

(2) Well mechanical integrity shall be demonstrated following any major operations which involve removal of the injection tubing, recompletions, or unseating of the packer. Cavern integrity

demonstration may be required by the executive director in instances where the integrity of the casing seat or cavern may be compromised.

(f) Reports and approval.

(1) Initial cavern integrity report. The operator shall submit a report with the results of all tests regarding cavern integrity, within 30 days of completion of the bedded salt cavern construction stage.

(2) Notification of completion of the cavern construction stage. Within 90 days of completion of cavern construction, the permittee shall provide notification to the executive director which states that the cavern construction is in compliance with the applicable provisions of the permit. The permittee shall submit to the executive director the following reports and certifications prepared and sealed by a professional engineer with current registration under the Texas Engineering Practice Act:

(A) final construction, "as-built" plans and specifications, injection and confining zone data, and an evaluation of the considerations under §331.45(3) of this title (relating to Executive Director Approval of Construction and Completion);

(B) certification that the construction of the cavern has been completed in accordance with the provisions of the disposal well permit and with the design and construction specifications of the permittee's application;

(C) certification that actual confining and injection zone data obtained will not result in need for a change in the operating parameters specified in the permit; and

(D) certification that the bedded salt cavern injection zone will not be in or above a formation which within 1/4 mile of the bedded salt cavern injection zone contains an underground source of drinking water.

§331.245. Bedded Salt Cavern Disposal Well Operating Requirements.

(a) General operating requirements.

(1) A maximum allowable operating pressure and test pressure shall not exceed 0.8 pounds per square inch per foot of depth measured at the higher elevation of either the long string casing seat or the highest interior elevation of the cavern roof, but in no case shall it disrupt the bond between the salt, cement, and the casing seat, initiate new fractures or propagate existing fractures in the cavern or the confining zone, or cause movement of fluid or waste out of the injection zone.

(2) A minimum operating pressure that is protective of bedded salt cavern integrity shall be maintained.

(3) Injection between the outermost casing protecting underground sources of drinking water (USDWs), and fresh or surface water and the wellbore is prohibited.

(4) Unless an alternative to a packer has been approved under §331.243(d) of this title (relating to Bedded Salt Cavern Disposal Well Construction Standards), the annulus between the tubing and long string casing shall be filled with a noncorrosive fluid approved by the commission. The annulus pressure, at all times that the well is in service, shall be at least 100 pounds per square inch greater than the injection tubing pressure, to detect well malfunctions, unless the executive director determines that such a requirement might harm the integrity of the well.

(5) Chemical and physical characteristics of all injected materials and cavern contents shall protect and be compatible with the disposal well, associated facilities, and injection zone, and shall ensure proper operation of the facility to meet the performance standard of §331.242 of this title (relating to Bedded Salt Cavern Disposal Well Performance Standard and Siting Requirements).

(6) All injection of waste into a bedded salt cavern shall be performed through removable tubing(s) with a packer or fluid seal to seal the annulus between the outer tubing and long string casing, near the bottom of the long string casing.

(7) Unauthorized releases of cavern contents to the atmosphere are prohibited.

(8) Before beginning waste disposal operations, a blanket material shall:

(A) be placed into the salt cavern to prevent unwanted leaching of the cavern roof;

(B) consist of crude oil, mineral oil, or other fluid possessing similar noncorrosive, nonsoluble, low-density properties;

(C) be sufficient to protect the integrity of the cement and formation bond at the long string casing seat; and

(D) be of sufficient volume to contact the entire cavern roof.

(9) The cavern roof and level of the blanket material shall be monitored at least once every five years by running a density interface survey or using an alternative method.

(10) If an automatic alarm or shutdown is triggered, the owner or operator shall immediately investigate and identify as expeditiously as possible the cause of the alarm or shutoff. If, upon such investigation, the well or cavern appears to be lacking integrity, or if monitoring required under §331.246(c) of this title (relating to Bedded Salt Cavern and Well Monitoring and Testing Requirements) otherwise indicates that the well or cavern lacks integrity, the owner or operator shall:

(A) immediately cease injection of waste unless authorized by the executive director to continue or resume injection;

(B) take all necessary steps to determine the presence or absence of a leak; and

(C) notify the executive director within 24 hours after the alarm or shutdown.

(11) If the loss of integrity is discovered under paragraph (4) of this subsection or during periodic integrity testing, or if unauthorized communication is established between bedded salt caverns, the owner or operator shall:

(A) immediately cease injection of waste;

(B) take all steps required to determine whether there may have been a release of wastes into any unauthorized zone;

(C) notify the executive director within 24 hours after loss of mechanical integrity is discovered;

(D) notify the executive director when injection can be expected to resume; and

(E) restore and demonstrate well mechanical integrity and/or cavern integrity before resuming injection of waste.

(12) Whenever the owner or operator obtains evidence that there may have been a release of injected wastes or brine into an unauthorized zone:

(A) the owner or operator shall immediately cease injection of waste, and:

(i) notify the executive director within 24 hours of obtaining such evidence;

(ii) take all necessary steps to identify and characterize the extent of any release;

(iii) propose a remediation plan for executive director review and approval;

(iv) comply with any remediation plan specified by the executive director;

(v) implement any remediation plan approved by the executive director; and

(vi) where such release is into a USDW or freshwater aquifer currently serving as a water supply, within 24 hours notify the local health department, place a notice in a newspaper of general circulation and notify by mail the adjacent landowners.

(B) The executive director may allow the operator to resume injection before completing cleanup action if the owner or operator demonstrates that the injection operation will not endanger USDWs or freshwater aquifers.

(13) All fluids displaced from the cavern after injection of any waste shall be managed under applicable state and federal regulations.

(b) Workovers.

(1) The permittee shall notify the executive director before commencing any workover operation or corrective maintenance which involves taking the disposal well out of service. The notification shall be in writing and shall include plans for the proposed work. The executive director may grant an exception of the prior written notification when immediate action is required. Approval by the executive director shall be obtained before the permittee may begin any workover operation or corrective maintenance that involves taking the well out of service. Pressure control equipment shall be installed and maintained during workovers which involve the removal of tubing.

(2) Mechanical integrity of the well shall be demonstrated following any major operations which involve removal of the injection tubing, recompletions, or unseating of the packer.

§331.246. Bedded Salt Cavern and Well Monitoring and Testing Requirements.

(a) Waste analysis plan. All material injected into or produced from the cavern shall be sampled and analyzed in accordance with the approved written waste analysis plan as specified by 40 Code of Federal Regulations §146.68(a).

(b) Pressure gauges. Pressure gauges shall be installed and maintained in proper operating conditions at all times on the tubing string(s) and on any annulus extending to the wellhead.

(c) Continuous recording devices. Continuous recording devices and instruments shall be installed in weatherproof enclosures, used, and maintained in proper operating condition at all times to record:

(1) tubing string pressures;

(2) the pressure and volume of any annular space that extends to the wellhead;

(3) injection and production fluid flow rates, volume, and density;

(4) the volume and composition of displaced gases; and

(5) any other data specified by the permit.

(d) Automatic Alarms. The owner or operator shall also install and use:

(1) automatic alarm and automatic shutoff systems, designed to sound and shut-in the well when pressures and flow rates or other parameters approved by the executive director exceed a range and/or gradient specified in the permit; or

(2) automatic alarms designed to sound when the pressures, flow rates, or other parameters approved by the executive director exceed a rate and/or gradient specified in the permit, in cases where the owner or operator certifies that a trained operator will be on location and able to immediately respond to alarms at all times when the well is operating.

(e) Testing and calibration of monitoring instruments. All gauges, and pressure sensing and recording devices shall be tested and calibrated semi-annually.

(f) Mechanical integrity. The owner or operator shall maintain mechanical integrity of the disposal well and bedded salt cavern at all times that the well and cavern are in service.

(1) Mechanical integrity of the well must be demonstrated:

(A) before the well is initially placed in service;

(B) within five-year intervals during the operating life of the well to test for fluid movement along the borehole;

(C) after each workover which involves removal of the injection tubing, recompletions, or unseating of the packer; and

(D) before the well is plugged, unless the mechanical integrity test has been performed in the last five years.

(2) Mechanical integrity of the cavern must be demonstrated:

(A) before the cavern is initially placed in service;

(B) within five-year intervals during the operating life of the cavern; and

(C) in instances where the integrity of the casing seat or cavern may be compromised.

(3) Mechanical integrity test methods.

(A) Each bedded salt cavern disposal well shall be tested for mechanical integrity using a nitrogen-brine interface method.

(B) Each bedded salt cavern shall be tested for mechanical integrity using a hydrostatic brine test.

(C) A sonar survey, or other test approved by the executive director, shall be conducted for each bedded salt cavern.

(D) A pressure test shall be performed on each bedded salt cavern disposal well and cavern.

(4) The owner or operator may use an alternative cavern integrity test if the alternative integrity test is substantially equivalent to the integrity tests specified in paragraph (3) of this subsection. The owner or operator shall submit the following information for the executive director's consideration:

(A) A description of the test method and the theory of operation, including the test sensitivities, a justification for the test parameters, and the pass and fail criteria for the test;

(B) a description of the well and cavern conditions under which the test can be conducted;

(C) the procedure for interpreting the test results; and

(D) an interpretation of the test upon completion of the test.

(5) The well and cavern integrity testing shall be conducted at the maximum allowable operating pressure.

(g) Corrosion monitoring.

(1) Corrosion monitoring of well materials shall be conducted quarterly. Test materials shall be the same as those used in the injection tubing, packer, and long string casing, and will be continuously exposed to the waste with the exception of when the well is taken out of service.

(2) Corrosion monitoring may be waived if the disposal well owner or operator demonstrates that the waste will not be corrosive to the well materials with which the waste is expected to come into contact throughout the life of the well. The demonstration shall include a description of the methodology used to make that determination.

(h) Ambient monitoring.

(1) The owner or operator shall comply with ambient monitoring requirements in accordance with §331.64(h) of this title (relating to Monitoring and Testing Requirements).

(2) The owner or operator shall conduct subsidence monitoring (elevation surveys) over the area of review and any other type of ambient monitoring necessary to comply with §331.242 of this title (relating to Bedded Salt Cavern Disposal Well Performance Standard and Siting Requirements). Elevation surveys shall be conducted by a licensed professional land surveyor.

(i) Hydrogeologic compatibility determination. The owner or operator shall submit information demonstrating that the waste stream and its anticipated reaction products will not alter the permeability, thickness, or other relevant characteristics of the bedded salt cavern confining zone or bedded salt cavern injection zone such that they would no longer meet the requirements specified in §331.121 of this title (relating to Class I Wells).

(j) Other monitoring and testing. The owner or operator shall conduct any other monitoring and testing requirements, including determination of composition and volume of leachate.

(k) All testing and monitoring of the bedded salt disposal cavern and well shall be planned and supervised, and test results shall be reviewed by qualified individuals acting under the responsible charge of a licensed professional engineer or licensed professional geoscientist, as appropriate, with current registration under the Texas Engineering Practice Act or Texas Geoscience Practice Act.

(l) Notification of scheduled logging and testing. The executive director or his designated representative shall have the opportunity to witness all logging and testing. The owner or operator shall submit a written schedule of such activities to the executive director at least seven days before conducting tests.

§331.247. Bedded Salt Cavern Disposal Well Reporting Requirements.

(a) Pre-operation reports.

(1) Start-up date and time. At least 24 hours before beginning drilling and cavern construction operations, the permittee shall notify the executive director in writing of the anticipated well construction and cavern construction start-up dates. Compliance with all pre-operation terms of the permit must occur before beginning injection operations.

(2) Notice of Completion. The permittee shall submit notice of completion of construction to the executive director as specified in §331.65(e)(1) of this title (relating to Reporting Requirements).

(3) Well completion report. Within 90 days after the completion of the well, the permittee shall submit a Well Completion Report to the executive director addressing the considerations and standards in §331.45(3) of this title (relating to Executive Director Approval of Construction and Completion) and §331.243 of this title (relating to Bedded Salt Cavern Disposal Well Construction Standards), and including a completed copy of the commission's Well Data Form, and a surveyor's plat showing the exact location and giving the latitude and longitude of the well. The report will also include a certification that a notation on the deed to the facility property or on some other instrument which is normally examined during title search has been made stating the surveyed location of the well, and the well permit number.

(4) Cavern completion report. Within 90 days after the completion of the cavern, the permittee shall submit a Cavern Completion Report to the executive director addressing the considerations and standards in §331.45(3) of this title and §331.244 of this title (relating to Bedded Salt Cavern Construction Standards), and including a surveyor's plat showing the exact location and giving the latitude and longitude of the cavern. The report will also include a certification that a notation on the deed to the facility property or on some other instrument which is normally examined during title search has been made stating the surveyed location of the cavern, the well permit number, the depth of the cavern floor and ceiling, the cavern diameter, the dates of operation, and its permitted waste streams.

(5) Local authorities. The permittee shall provide written notice to the executive director in a manner specified by the executive director that a copy of the permit has been properly filed with the health and pollution control authorities of the county, city, and town where the well is located.

(b) Operating reports.

(1) Injection operation quarterly report.

(A) For noncommercial facilities only, within 20 days after the last day of the months of March, June, September, and December, the permittee shall submit to the executive director a quarterly report of injection operation on forms supplied by the executive director. These forms will comply with the reporting requirements of 40 Code of Federal Regulations §146.69(a).

(B) The owner or operator shall submit inventory balance data measuring the volume of waste and brine injected into or withdrawn from each bedded salt cavern well, including methods for measuring and verifying volume.

(C) The executive director may require more frequent reporting.

(2) Injection zone annual report. For all facilities, the permittee shall submit annually with the December report of injection operation an updated graphic or other acceptable report and description of the effects of the well and cavern on the area of review, including a report on monitoring required by §331.246(j) of this title (relating to Bedded Salt Cavern and Well Monitoring and Testing Requirements). To the extent such information is reasonably available the report shall also include:

(A) locations of newly constructed or newly discovered wells within the area of review if such wells were not included in the technical report accompanying the permit application or in later reports;

(B) a tabulation of data as required by §331.121(a)(2)(B) of this title (relating to Class I Wells) for all such wells within the area of review that penetrate the injection zone or confining zone; and

(C) for noncommercial facilities only, a current injection fluid analysis.

(3) Workover reports. Within 30 days after the completion of the workover, a report shall be filed with the executive director including the reason for well workover and the details of all work performed.

(4) Well mechanical integrity, cavern integrity, and other reports. The permittee shall submit within 30 days after test completion a report including both data and interpretation on the results of:

(A) periodic tests of well and cavern integrity; and

(B) any other test of the injection well or cavern if required by the executive director.

(5) Emergency report of leak or other failure. The permittee shall notify the underground injection control staff of the Austin office and the local district office of the commission, within 24 hours of any significant change in monitoring parameters or of any other observations which could reasonably be attributed to a leak or other failure of the well equipment or cavern integrity.

§331.248. Additional Requirements and Conditions for Bedded Salt Cavern Disposal Wells.

(a) A permit for a Class I bedded salt cavern disposal well shall include expressly or by reference the following conditions.

(1) A sign shall be posted at the well site which shall show the name of the company, company well number, and commission permit number. The sign and identification shall be in the English language, clearly legible, and shall be in numbers and letters at least one inch high.

(2) An all-weather road shall be installed and maintained to allow access to the disposal well and related facilities.

(3) The wellhead and associated facilities shall be painted, if appropriate, and maintained in good working order without detectable leaks.

(4) Secondary containment of the wellhead shall consist of a diked, impermeable pad or sump.

(5) The executive director may prescribe additional requirements for Class I bedded salt cavern disposal wells in order to protect underground sources of drinking water, and fresh or surface water from pollution.

(6) The obligation to implement the plugging and abandonment plan and the post-closure plan survives the termination of a permit or the cessation of injection activities. The requirement to maintain an approved plan is directly enforceable regardless of whether the requirement is a condition of the permit.

(b) Pressure control equipment including blowout preventers or a wellhead with closeable valves shall be required to be installed and maintained in proper operating condition at all times at the casing head, extending from the time of advancing the surface casing hole after conductor casing is set, to the time of well closure, to safeguard against any pressure imbalance which might cause a backflow, blowout, or fracturing of the salt to occur.

§331.249. Record-Keeping Requirements for Bedded Salt Cavern Disposal Wells.

(a) The permittee shall keep complete and accurate records of, but not limited to:

(1) all required monitoring, including continuous records of:

(A) tubing string pressures;

(B) the pressure and volume of any annular space that extends to the wellhead;

(C) injection and production fluid flow rates, volume and density;

(D) the volume and composition of displaced gases; and

(E) any other data specified by the permit.

(2) all periodic well tests, including but not limited to:

(A) analyses of injected and produced materials;

(B) cavern integrity;

(C) well mechanical integrity; and

(D) casing inspection surveys;

(3) all shut-in periods and times that emergency measures were used for handling injection fluid or waste; and

(4) any additional information on conditions that might reasonably affect the operation of the disposal well.

(b) All records shall be made available promptly on location for review upon request from a representative of the commission.

(c) The permittee shall retain on location, for a period of three years following abandonment, records of all information resulting from any monitoring activities, including the chemical and physical characteristics of injected waste, or other records required by the permit. The executive director may require a permittee to submit copies of the records at any time before conclusion of the retention period.

§331.250. Bedded Salt Cavern Closure.

(a) The owner or operator of a Class I bedded salt cavern disposal well shall prepare, maintain, and comply with a plan for cavern closure that meets the following minimum requirements:

(1) The owner or operator shall submit the plan as a part of the permit application and, upon approval, or approval with modifications by the executive director, such plan shall be a condition of any permit issued.

(2) The owner or operator shall submit all proposed revisions to the plan and obtain any necessary permit amendments, as appropriate, over the life of the well and cavern.

(3) The plan shall include, at a minimum, the following information:

(A) Upon cessation of waste disposal, and before cavern sealing, the operator shall:

(i) Conduct a gamma-density log to determine the cavern top, salt top and to check for fluid behind the casing.

(ii) Conduct a sonar caliper survey on the storage cavern if no sonar has been run within the past five years. The owner or operator may use another similar proven technology designed to determine cavern configuration and measure cavern capacity as a substitute for a sonar survey.

(B) All brine displaced from the well or flushed from waste lines during the plugging operation shall be managed and disposed of under applicable state and federal regulations.

(b) The well shall be closed in accordance with §331.46 of this title (relating to Closure Standards).

§331.251. Post-Closure Care for Bedded Salt Cavern Disposal Wells.

The owner or operator of a Class I bedded salt cavern disposal well shall prepare, maintain, and comply with a plan for post-closure care that meets the requirements of §331.68(b) of this title (relating to Post-Closure Care).

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 February 10, 2012.

TRD-201200725
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: March 25, 2012
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 151. GENERAL PROVISIONS

37 TAC §151.3

The Texas Board of Criminal Justice (TBCJ) proposes amendments to §151.3, concerning Texas Board of Criminal Justice Operating Procedures. The proposed amendments are necessary to clarify existing procedures.

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 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 the public notice of the operating procedures of the TBCJ.

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 rule.

The amendments are proposed under Texas Government Code §492.013.

Cross Reference to Statutes: Texas Government Code §492.013.

§151.3. Texas Board of Criminal Justice Operating Procedures.

(a) General. This section establishes operating procedures for the Texas Board of Criminal Justice (TBCJ [~~or Board~~]) to conduct business.

(b) Organization.

(1) The TBCJ is a nine [~~(9)~~-]member body appointed by the governor [~~Governor~~] to oversee the Texas Department of Criminal Justice (TDCJ [~~or Agency~~]). The TBCJ chairman [~~Chairman~~] is designated by and serves at the request [~~pleasure~~] of the governor [~~Governor~~] pursuant to Texas Government Code §492.005 [~~Section 492.005, Texas Government Code~~].

(2) The TBCJ shall elect a vice-chairman [~~Vice-Chairman~~] and a secretary [~~Secretary~~] each odd-numbered year. The vice-chairman [~~Board Vice-Chairman~~] shall preside over meetings in the chairman's [~~Board Chairman's~~] absence, and either the chairman or the secretary [~~Secretary~~] shall execute [~~provide~~] any necessary [~~execution of~~] documents.

(3) The chairman, [~~Chairman,~~] on behalf of the TBCJ, is empowered to appoint members of the TBCJ [~~Board~~] to be members or chairs of standing or limited-purpose committees, or to serve as liaisons to the TBCJ on particular subject areas or divisions within TDCJ's jurisdiction, or both. The purpose for a committee, if appointed, is to have certain members become particularly familiar with various issues[~~,~~] and to facilitate discussion and recommend potential strategies as appropriate [~~bring forward consensus recommendations, or a candid report on any disagreements, to the full Board~~].

(4) The TBCJ chairman [~~A member who chairs a committee appointed by the Board Chairman~~] may appoint non-members to sit on a [~~the~~] committee in an advisory capacity; however, advisory members are non-voting members [~~(subsection (c)(6) of this rule)~~] and cannot be reimbursed for expenses incurred in this capacity.

(c) Meetings.

(1) The TBCJ shall attempt to hold a regular meeting at least every other [~~odd-numbered~~] month of the year, but shall meet at least once each quarter of the calendar year pursuant to Texas Government Code §492.006 [~~Section 492.006, Texas Government Code~~]. Special called meetings can be held at the discretion of the TBCJ chairman [~~Board Chairman~~].

(2) TBCJ meetings shall be held in Austin[~~, Texas,~~] or [~~under exceptional circumstances in~~] Huntsville, Texas[~~, pursuant to the General Appropriations Act~~]. If the TBCJ uses video conference technology to convene a meeting, at least one conference site must be located in Huntsville or Austin. To convene a video conference meeting, a quorum of the TBCJ must be present at one of the video conference sites [~~at least three (3) members shall convene at the Austin video conference site, or under exceptional circumstances, the Huntsville video conference site~~]. The other members may convene using the technology from remote sites.

(3) The agenda and date for the TBCJ meetings shall be set by the TBCJ chairman in consultation with the TDCJ executive director [~~Board Chairman~~].

(4) The agenda for committee meetings shall be set by the TBCJ chairman [~~Committee Chairman~~] in consultation with the committee's chairman and the TDCJ executive director [~~lead staff~~]. If the TBCJ committee uses video conference technology to convene a meeting, at least a quorum of the committee[~~, such as, three (3) members of a four (4)-member committee,~~] shall convene in one [~~(1)~~] location. The[~~, and the~~] other member(s) [~~members~~] may convene using the technology from remote sites.

(5) A majority of the TBCJ, or of a committee of the TBCJ, constitutes a quorum for the convening of and transaction of business at any meeting. A quorum of a committee with two [~~(2)~~] members consists of both members [~~is two (2)~~].

(6) A quorum of a committee does not include its [~~cannot depend on the presence of an~~] advisory member.

(7) Meetings of the TBCJ and its committees shall be conducted according to standard parliamentary procedures.

(8) Meetings of the TBCJ and its committees are governed by the *Texas Open Meetings Act,* (Texas Government Code[~~,~~] Chapter 551).

(9) The TDCJ executive director [~~Executive Director~~] shall ensure members are provided the materials necessary to conduct the business of the TBCJ [~~Board~~] and its committees well in advance of the meetings.

(10) The TDCJ executive director [~~Executive Director~~] shall ensure the minutes of each meeting are prepared, retained and filed with the Legislative Reference Library, and made available to the public. The minutes shall state the subject matter of each deliberation and shall indicate each vote, order, decision, or other action taken by the TBCJ.

(11) Requests by the public to make presentations or comments to the TBCJ are governed by 37 Texas Administrative Code §151.4 [~~Section 151.4 of this title~~], pursuant to Texas Government Code §492.007 and §551.042 [~~Sections 492.007 and 551.042, Texas Government Code~~].

(12) The TBCJ shall approve meeting minutes for any committees deleted, renamed, or for which their limited-purpose has concluded.

(13) Prior to [~~The agenda of~~] each regularly scheduled meeting, the TBCJ shall offer the [~~include an~~] opportunity for:

(A) The presiding officer [~~Presiding Officer~~] of the Board of Pardons and Paroles [~~(BPP)~~] or a designee of the presiding officer to present [~~at a minimum~~] any items relating to the operation of the parole system and other matters of mutual interest determined by the presiding officer [~~Presiding Officer~~] to require the TBCJ's [~~Board's~~] consideration;

(B) The chairman [~~Chairman~~] of the Judicial Advisory Council (JAC) to the TBCJ [~~Board~~] and the Community Justice Assistance Division [~~(CJAD)~~] to present [~~at a minimum~~] any items relating to the operation of the community justice system and other matters of mutual interest determined by the JAC chairman [~~Chairman~~] to require the TBCJ's [~~Board's~~] consideration;

(C) The TDCJ executive director [~~Executive Director~~] to present any items relating to the TDCJ [~~Agency~~] as determined by the executive director [~~Executive Director~~] or the TBCJ chairman [~~Board Chairman~~];

(D) The TBCJ chairman to present any items relating to the TBCJ or the TDCJ as determined by the TBCJ chairman in consultation with the TDCJ executive director;

(E) [~~(D)~~] The chairman [~~Chairman~~] or designee of the Correctional Managed Health Care Committee (CMHCC) to present on the CMHCC's [~~committee's~~] policy decisions, the financial status of the correctional health care system, and corrective actions taken by or required of the TDCJ [~~department~~] or the health care providers; and

(F) [~~(E)~~] The chairman [~~Chairman~~] of the Advisory Committee on Offenders with Medical or Mental Impairments (ACOOMMI) or a designee of the ACOOMMI chairman [~~Chairman~~] to present any [~~on~~] items related to offenders with medical or mental impairments.

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 February 13, 2012.

TRD-201200785
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 463-9693

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37 TAC §151.4

The Texas Board of Criminal Justice (TBCJ) proposes amendments to §151.4, concerning Public Presentations and Comments to the Texas Board of Criminal Justice. The proposed amendments are necessary to clarify existing procedures.

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 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 notice to the public on the procedures for addressing the TBCJ.

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 rule.

The amendments are proposed under Texas Government Code §492.007, §492.013 and Chapter 551.

Cross Reference to Statutes: Texas Government Code §492.007, §492.013 and Chapter 551.

§151.4. Public Presentations and Comments to the Texas Board of Criminal Justice.

(a) Policy. The Texas Board of Criminal Justice (TBCJ or board [~~Board~~]) is committed to providing access and opportunity for public presentations and comments as provided for in this section [~~rule~~]. Persons not employed by or under contract with [~~outside~~] the Texas Department of Criminal Justice (TDCJ [~~or Agency~~]), who wish to have items placed on the board's [~~Board's~~] posted agenda, shall follow the procedures set forth in subsection (h) of this section [~~rule~~]. Public presentations and comments shall be:

(1) subject to the requirements and restrictions of subsections (b), (c), (d), (e), (f), and (g) of this section [~~rule~~];

(2) pertinent to issues under the jurisdiction of the board [~~Board~~], as determined by the board chairman [~~Board Chairman~~] and the TDCJ general counsel [~~General Counsel~~]; and

(3) pertinent to policies, procedures, standards, and rules of the TDCJ. Disputes that are appropriately the subject of the employee grievance system, the employee disciplinary system, the offender grievance system, the offender disciplinary system, or comments regarding pending litigation shall be addressed through those processes.

(b) Definitions.

(1) Public presentations are [--] presentations made by the public to the TBCJ [Board] regarding topics posted on a board [Board] meeting agenda that has been filed with and published by the *Texas Register* and as provided for in subsection (c) of this section [rule].

(2) Public comments are [--] comments made by the public on non-posted [Board] agenda topics and as provided for in subsection (d) of this section [rule].

(c) Public presentations. Persons who desire to make public presentations to the TBCJ [Board] on posted agenda topics shall provide, on the date of the meeting, a completed registration card to onsite board [Board] office staff at least 10 [ten (10)] minutes prior to the meeting's posted start time. Registration cards shall be made available at the entry to the room where the board's [Board's] scheduled meeting is held.

(1) Pre-registration is available for public presentations through first class mail at P.O. Box 13084, Austin, Texas 78711, [(P.O. Box 13084, Austin Texas 78711)] or e-mail at [email (]tbcj@tdcj.state.tx.us[)]. Pre-registration shall be received by the board [Board] office staff no later than four [(4)] calendar days prior to the posted meeting date of the presentation. In addition to the information required in subsection (c)(2) of this section, pre-registration submissions shall include appropriate contact information, such as a [(]daytime phone number or e-mail address, [and/or email address)] for the individual who is registering to speak.

(2) Registration cards and pre-registration submissions shall disclose:

(A) the name of the person who will make the presentation;

(B) a statement as to whether the person is being remunerated for the presentation and if so, by whom; and if applicable, the name of the person or entity on whose behalf the presentation will be made;

(C) a statement as to whether the presenter has registered as a lobbyist in relation to the agenda topic being addressed;

(D) a reference to the agenda topic on which the person wants [wishes] to present;

(E) an indication as to whether the presenter will speak for or against the proposed agenda topic; and

(F) a statement verifying that all information that will be presented is factual, true, and correct to the best of the speaker's knowledge.

(3) The TBCJ chairman [Chairman] shall have discretion in setting reasonable limits on the time allocated for public presentations on posted agenda topics. If several persons have registered to address the board [Board] on the same agenda topic, it shall be within the discretion of the board chairman [Board Chairman] to request that those persons [to] select a representative amongst themselves to express such remarks or [to] limit their presentations to an expression of support for views previously articulated.

(4) The TBCJ chairman [Chairman] shall provide an opportunity for public presentations to occur prior to the board [Board] taking action on the topic denoted on the presenter's registration card. If a person who is registered to speak on a posted agenda item is not present when called upon, that person's opportunity to speak prior to action being taken on that [such] topic shall be forfeited.

(5) A presenter may submit documentation pertaining to the public presentation to the board [Board] office staff. Documents shall be submitted no later than three [(3)] calendar days prior to the posted meeting date where the presentation is to occur. Such documentation shall then be distributed to the board [Board]. Any documentation submitted after the above-referenced date will not be distributed to the board [Board] until after the presentation. A minimum of 12 copies of any such documentation shall be submitted to the board [Board] office staff or distribution may [will] not occur.

(d) Public comments.

(1) [The Board defines its areas of jurisdiction in Board Policy BP-01.01, which is available through the Board office at the address listed in subsection (c) of this rule, or on the Internet at http://tdcj.state.tx.us/policy/policy-home.htm.] Twice a year, at the second and fourth regular called meetings of the board [Board], an opportunity shall be provided for public comment on issues that are not part of the TBCJ's [Board's] posted agenda but are within the board's [Board's] jurisdiction. Special called meetings are not counted toward [towards] the requirement of this subsection.

(2) Persons who desire to make public comments to the TBCJ [Board] at these meetings shall provide, on the date of the meeting, a completed registration card to onsite board [Board] office staff at least 10 [ten (10)] minutes prior to the meeting's posted start time. Registration cards shall be made available at the entry to the room where the board's [Board's] scheduled meeting is held.

(3) Pre-registration is available for public comments through first class mail at P.O. Box 13084, Austin, Texas 78711, [(P.O. Box 13084, Austin Texas 78711)] or e-mail at [email(]tbcj@tdcj.state.tx.us[)]. Pre-registration shall be received by board [Board] office staff no earlier than the first day of the month preceding the board [Board] meeting for which the registration is intended and no later than four [(4)] calendar days prior to the posted meeting date where the comments are to occur. In addition to the information required in subsection (d)(4) of this section, pre-registration submissions shall include appropriate contact information, such as a [(]daytime phone number or e-mail address, [and/or email address,)] for the individual who is registering to speak.

(4) Registration cards and pre-registration submissions shall disclose:

(A) the name of the person who will make the comments;

(B) a statement as to whether the person is being remunerated for the comments and if so, by whom; and, if applicable, the name of the person or entity on whose behalf the comments will be made;

(C) a statement as to whether the presenter has registered as a lobbyist in relation to the topic being addressed;

(D) the topic on which the person shall speak and whether the person will speak for or against the topic; and

(E) a statement verifying that all information that will be presented is factual, true, and correct to the best of the speaker's knowledge.

(5) The TBCJ chairman [~~Chairman~~] shall have discretion in setting reasonable limits on the time allocated for public comments. If several persons have registered to address the board [~~Board~~] on the same topic, it shall be within the discretion of the board chairman [~~Board Chairman~~] to request that those persons select a representative amongst themselves to express such comments, or limit their comments to an expression of support for views previously articulated.

(6) Public comments shall be heard just prior to the conclusion of the board [~~Board~~] meeting, with deviation from this practice within the discretion of the board chairman [~~Board Chairman~~]. If a person who is registered to speak on a non-posted topic is not present when called upon, that person shall be called once more following all other registered speakers. If that person is not present at that time, their opportunity to speak at that meeting shall be forfeited.

(7) A presenter [~~Presenters~~] may submit documentation pertaining to the public comments to the board [~~Board~~] office staff. Documentation shall be submitted no later than three [~~(3)~~] calendar days prior to the posted meeting date where the comments are to occur. Such documentation shall then be distributed to the board [~~Board~~]. Any documentation submitted after the above-referenced date will not be distributed to the board [~~Board~~] until after the comments. A minimum of 12 copies of any such documentation shall be submitted to the board [~~Board~~] office staff or distribution may [~~will~~] not occur.

(e) Disability accommodations. Persons with disabilities who have special communication or accommodation needs and who plan to attend a meeting may contact the board [~~Board~~] office at 512- [~~(512)~~] 475-3250. Requests for accommodation shall be made at least two [~~(2)~~] days prior to a posted meeting. The TBCJ shall make every reasonable effort to accommodate these needs.

(f) Conduct and decorum. The TBCJ [~~Board~~] shall receive public presentations and comments as authorized by this section [~~rule~~], subject to the following additional guidelines:

(1) Due to requirements of the *Open Meetings Act,* questions shall only occur on public presentations as defined in subsection (b) of this section as they [~~herein (not as to public comments as defined herein) that~~] are associated with posted agenda topics. Questions [~~and they~~] shall be reserved for board [~~Board~~] members and staff recognized by the board chairman. [~~Board Chairman;~~]

(2) Presentations and comments shall remain pertinent to the issues denoted on the registration cards.[~~;~~]

(3) A presenter who is determined by the board chairman [~~Board Chairman~~] to be disrupting a meeting shall immediately cease the disruptive activity or leave the meeting room if ordered to do so by the board chairman. [~~Board Chairman; and~~]

(4) A presenter may not assign a portion of his or her allotted presentation time to another speaker.

(5) Signs and placards shall not be carried or displayed in the meeting room.

(g) A presenter may not carry or possess a prohibited weapon, [~~(~~]as defined in §46.05, Texas Penal Code[~~)~~], an illegal knife, a club , or a handgun, to include a licensed concealed handgun, during any meeting of the board [~~Board~~].

(h) Requests for issues to be placed on an agenda. Persons not employed by or under contract with the TDCJ [~~Agency~~] who wish to propose an agenda item for discussion at [~~on~~] a TBCJ [~~Board~~] meeting shall address the request in writing to the chairman [~~Chairman,~~] Texas Board of Criminal Justice, P.O. Box 13084, Austin, Texas 78711. Such requests shall be titled, "Proposed Agenda Topic" and shall be submitted no later than the first day of the month preceding the board [~~Board~~] meeting for which the request is intended. Such requests are subject to the requirements of the registration card in subsection (c) of this section [~~rule~~]. The decision as to whether to calendar a matter for discussion before the TBCJ [~~Board~~], a board [~~Board~~] committee, a board liaison, [~~Board liaison~~] or with a designated staff member shall be within the discretion of the board chairman [~~Board Chairman~~]. Public presentations on topics placed on a board [~~Board~~] agenda, at the request of an individual, shall be in accordance with subsection (c) of this section [~~rule~~].

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 February 13, 2012.

TRD-201200786
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 463-9693

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CHAPTER 155. REPORTS AND INFORMATION GATHERING
SUBCHAPTER C. PROCEDURES FOR RESOLVING CONTRACT CLAIMS AND DISPUTES

37 TAC §155.31

The Texas Board of Criminal Justice (TBCJ) proposes amendments to §155.31, concerning Establishing Procedures for Resolving Contract Claims and Disputes with the Texas Department of Criminal Justice (TDCJ). The proposed amendments are non-substantive.

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 notice to contractors on the process for resolving contract claims.

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 rule.

The amendments are proposed under Texas Government Code §495.008(e) and Chapter 2260.

Cross Reference to Statutes: Texas Government Code Chapters 552, 2001, and 2009; Texas Government Code §2166.001;

Texas Transportation Code §201.112; Texas Civil Practice and Remedies Code Chapters 107 and 154.

§155.31. Establishing Procedures for Resolving Contract Claims and Disputes.

(a) Purpose. This section [~~rule~~] is intended to serve as a guideline for the negotiation and mediation of a breach of contract claim asserted by a contractor against the Texas Department of Criminal Justice (TDCJ [~~or Agency~~]) under [~~the~~] Texas Government Code[~~,~~] Chapter 2260. This section [~~rule~~] is binding upon the TDCJ and is not intended to replace the TDCJ procedures relating to a breach of contract claim that is mandated by state or federal law, but is intended to provide procedures when none are so mandated.

(b) Policy. It is the policy of the Texas Board of Criminal Justice (TBCJ [~~or Board~~]) and the TDCJ to resolve a breach of contract claim as efficiently and as expeditiously as possible, consistent with prudent stewardship of the state [~~State~~] of Texas assets.

(c) Applicability. This section [~~rule~~] does not apply to an action of a unit of state government for which a contractor is entitled to a specific remedy pursuant to state or federal constitution or statute.

(1) This section [~~rule~~] does not apply to a contract action proposed or taken by a unit of state government for which a contractor receiving Medicaid funds under that contract is entitled by state statute or rule to a hearing conducted in accordance with Texas Government Code[~~,~~] Chapter 2001.

(2) This section [~~rule~~] does not apply to contracts:

(A) between a unit of state government and the federal government or its agencies, another state, or another nation;

(B) between two [~~(2)~~] or more units of state government;

(C) between a unit of state government and a local governmental body, or a political subdivision of another state;

(D) between a subcontractor and a contractor;

(E) subject to [~~§201.112 of the~~] Texas Transportation Code §201.112;

(F) within the exclusive jurisdiction of state or local regulatory bodies;

(G) within the exclusive jurisdiction of federal courts or regulatory bodies; or

(H) that are solely and entirely funded by federal grant monies other than for a project defined in subsection (d)(9) of this section [~~rule~~].

(d) Definitions. The following words and terms, when used in this section [~~rule~~], shall have the following meaning, unless the context clearly indicates otherwise.

(1) Claim is a [~~--A~~] demand for damages by the contractor based upon the TDCJ's alleged breach of the contract.

(2) Contract is a [~~--A~~] written contract between the TDCJ and a contractor by the terms of which the contractor agrees either:

(A) to provide goods or services, by sale or lease, to or for the TDCJ; or

(B) to perform a project as defined by Texas Government Code[~~,~~] §2166.001.

(3) Contractor is an independent [~~--Independent~~] contractor who has entered into a contract directly with the TDCJ. The term does not include:

(A) the contractor's subcontractor, officer, employee, agent, or other person who furnishes goods or services to a contractor;

(B) an employee of a unit of state government; or

(C) a student at an institution of higher education.

(4) Counterclaim is a [~~--A~~] demand by the TDCJ arising out of the contract.

(5) Day is a [~~--A~~] calendar day. If an act is required to occur on a date that falls on a Saturday, Sunday, or holiday, the first working day that follows [~~is not one of those days~~] shall be counted as the required day for purpose of that act.

(6) Event is an [~~--An~~] act or omission or a series of acts or omissions giving rise to a claim. The following list contains illustrative examples of events, subject to the specific terms of the contract.

(A) Examples of events in the context of a contract for goods or services:

(i) the failure of the TDCJ to timely pay for goods and services;

(ii) the failure of the TDCJ to pay the balance due and owing on the contract price, including orders for additional work, after deducting any amount owed the TDCJ for work not performed under the contract or in substantial compliance with the contract terms;

(iii) the suspension, cancellation, or termination of the contract;

(iv) the final rejection of the goods or services tendered by the contractor, in whole or in part;

(v) the repudiation of the entire contract prior to or at the outset of performance by the contractor; or

(vi) the withholding liquidated damages from final payment to the contractor.

(B) Examples of events in the context of a project:

(i) the failure to timely pay the unpaid balance of the contract price following final acceptance of the project;

(ii) the failure to make timely progress payments required by the contract;

(iii) the failure to pay the balance due and owing on the contract price, including orders for additional work, after deducting work not performed under the contract;

(iv) the failure to grant time extensions to which the contractor is entitled under the terms of the contract;

(v) the failure to compensate the contractor for occurrences for which the contract provides a remedy;

(vi) the suspension, cancellation, or termination of the contract;

(vii) the rejection by the TDCJ, in whole or in part, of the "work," as defined by the contract, tendered by the contractor;

(viii) the repudiation of the entire contract prior to or at the outset of performance by the contractor;

(ix) the withholding liquidated damages from final payment to the contractor; or

(x) the refusal, in whole or in part, of a written request made by the contractor in strict accordance with the contract to adjust the contract price, the contract time or the scope of work.

(7) Executive Director is the [~~(ED) -- The~~] chief administrative officer responsible for the day-to-day operations of the TDCJ.

(8) Parties means the [~~-- The~~] TDCJ and the contractor who have entered into a contract in connection with which a breach of contract claim has been filed under this section [~~rule~~].

(9) Project as [~~-- As~~] defined in Texas Government Code[~~,~~] §2166.001, is a building construction project that is financed wholly or partly by a specific appropriation, bond issue, or federal money, including the construction of:

(A) a building, structure, or appurtenant facility or utility, including the acquisition and installation of original equipment and original furnishing; and

(B) an addition to, or alteration, modification, rehabilitation, or repair of an existing building, structure, or appurtenant facility or utility.

(10) Services means the [~~-- The~~] furnishing of skilled or unskilled labor or consulting or professional work, or a combination thereof, excluding the labor of an employee of a unit of state government.

(e) Prerequisites to Suit. The procedures contained in this section [~~rule~~] are exclusive and required prerequisites to suit under [~~the~~] Texas Civil Practice & Remedies Code[~~,~~] Chapter 107 and [~~the~~] Texas Government Code[~~,~~] Chapter 2260.

(f) Notice of Breach of Contract Claim.

(1) A contractor, asserting a breach of contract claim under [~~the~~] Texas Government Code[~~,~~] Chapter 2260 shall file notice of the claim as provided by this subsection.

(2) The notice of claim shall:

(A) be in writing and signed by the contractor or the contractor's authorized representative;

(B) be delivered by hand, certified mail return receipt requested, or other verifiable delivery service, to the TDCJ Director of Contracts and Procurement, Two Financial Plaza, Suite 474 [~~300A~~], Huntsville, Texas 77340; and

(C) state in detail:

(i) the nature of the alleged breach of contract, including the date of the event the contractor asserts as the basis of the claim and each contractual provision allegedly breached;

(ii) a description of damages that resulted from the alleged breach, including the amount and method used to calculate those damages; and

(iii) the legal theory of recovery, such as [~~(i.e., ~~]breach of contract,[~~)~~] including the causal relationship between the alleged breach and the damages claimed.

(3) In addition to the mandatory contents of the notice of claim as required by paragraph (2) of this subsection, the contractor may submit supporting documentation or other tangible evidence to facilitate the TDCJ's evaluation of the contractor's claim.

(4) The notice of claim shall be delivered no later than 180 days after the date of the event that the contractor asserts as the basis of the claim.

(g) Agency Counterclaim.

(1) The TDCJ, asserting a counterclaim under [~~the~~] Texas Government Code[~~,~~] Chapter 2260, shall file notice of the counterclaim as provided by this subsection.

(2) The notice of counterclaim shall:

(A) be in writing;

(B) be delivered by hand, certified mail return receipt requested, or other verifiable delivery service to the contractor or representative of the contractor who signed the notice of breach of contract claim; and

(C) state in detail:

(i) the nature of the counterclaim;

(ii) a description of damages or offsets sought, including the amount and method used to calculate those damages or offsets; and

(iii) the legal theory supporting the counterclaim.

(3) In addition to the mandatory contents of the notice of counterclaim required by paragraph (2) of this subsection, the TDCJ may submit supporting documentation or other tangible evidence to facilitate the contractor's evaluation of the TDCJ's counterclaim.

(4) The notice of counterclaim shall be delivered to the contractor no later than 60 days after the TDCJ's receipt of the contractor's notice of claim.

(5) Nothing herein precludes the TDCJ from initiating a lawsuit for damages against the contractor in a court of competent jurisdiction.

(h) Contract Disputes.

(1) To every extent possible, a dispute with a contractor should be resolved during the course of the contract. However, after completion of a contract, or when required for orderly performance prior to completion, if a resolution of a contractor's dispute has not been reached [~~resolved~~] by the appropriate TDCJ division, the contractor should file a Notice of Breach of Contract Claim with the director [~~Director~~] of Contracts and Procurement per the requirements in subsection (f) of this section [~~rule~~].

(2) The executive director [~~ED~~] shall name the members and chairman of a Contract Dispute Committee (the committee [~~Committee~~]), which will serve at the executive director's request [~~ED's pleasure~~]. It shall be the responsibility of the committee [~~Committee~~] to gather information, study relevant facts and documentation, [~~and~~] meet with contractors and, if requested, to resolve any disputes between a TDCJ division and the contractor, as set forth by the claim.

(3) The committee [~~Committee~~] shall secure detailed reports and recommendations from the appropriate TDCJ division and may confer with TDCJ personnel, other persons, and outside entities that it deems appropriate.

(4) The committee [~~Committee~~] shall then afford the contractor an opportunity for a meeting or hearing to discuss the claim and to provide the contractor an opportunity to present additional relevant information and respond to information the committee [~~Committee~~] has received from the appropriate TDCJ division.

(5) The committee chairman [~~Committee chairperson~~] shall give written notice of the committee's [~~Committee's~~] proposed disposition of the claim to the contractor and the appropriate TDCJ division. If that disposition is acceptable, the contractor shall advise the committee chairman [~~Committee chairperson~~] in writing within 20 days of the date such notice is received, and the committee chairman [~~chairperson~~] shall forward the agreed disposition to the executive director [~~ED~~] for a final and binding order on the claim. If the contractor

or TDCJ division is dissatisfied with the proposal of the committee [~~Committee~~], either party may appeal to the executive director [~~ED~~].

(i) Appeal to the Executive Director.

(1) An aggrieved contractor or TDCJ division may file a written appeal of the committee's [~~Committee's~~] decision to the executive director [~~ED~~] within 20 days of the receipt of the committee's [~~Committee's~~] decision. The contractor's appeal shall be submitted in writing and signed by the contractor or the contractor's authorized representative and delivered by hand, certified mail return receipt requested, or other verifiable delivery service to the TDCJ Executive Director, P.O. Box 99, Huntsville, Texas 77342. The TDCJ division's appeal shall be in writing and signed by the appropriate division director [~~Division Director~~]. The executive director [~~ED~~] or designee may uphold, reverse, or modify the decision of the committee [~~Committee~~].

(2) The executive director [~~ED~~] or designee shall give written notice of the disposition of the claim to the contractor and the appropriate TDCJ division. If that disposition is acceptable to the contractor, the contractor shall advise the executive director, [~~ED,~~] in writing, within 20 days of the date such notice is received. The TDCJ division shall have no right to object to the disposition of the claim or dispute made by the executive director [~~ED~~] or designee.

(j) Appeal to the TBCJ with Respect to Certain Contracts. A contractor who operates or manages a secure correctional facility of the TDCJ may appeal to the TBCJ for final determination, within 20 days of the executive director's [~~ED's~~] decision, any imposed sanction under the contract. The appeal shall be submitted in writing and signed by the contractor or the contractor's authorized representative and delivered by hand, certified mail return receipt requested, or other verifiable delivery service to the TBCJ [~~office~~], P.O. Box 13084, Austin, Texas 78711.

(k) Request for Voluntary Disclosure of Additional Information.

(1) Upon the filing of a claim or counterclaim, each party may request to review and copy information in the possession, custody, or control of the other party that pertains to the contract claimed to have been breached, including, without limitation:

(A) accounting records;

(B) correspondence between the TDCJ and outside consultants it used when preparing its bid solicitation or any part thereof or in administering the contract, and correspondence between the contractor and its subcontractors, material men, [~~materialmen~~] and vendors;

(C) schedules;

(D) the parties' internal memoranda; and

(E) documents created by the contractor in preparing its offer to the TDCJ and documents created by the TDCJ in analyzing the offers it received in response to a solicitation.

(2) This subsection applies to all information in the parties' possession regardless of the manner in which it is recorded, including, without limitation, paper and electronic media.

(3) The contractor and the TDCJ may seek additional information directly from third-parties, including, without limitation, the TDCJ's third-party consultants and the contractor's subcontractors.

(4) Nothing in this subsection requires any party to disclose any information or any matter that is privileged under Texas law.

(5) Requests submitted pursuant to this subsection for material claimed to be confidential by the contractor shall be handled pursuant to the requirements of the *Public Information Act.*

(l) Duty to Negotiate. The parties shall negotiate in accordance with the timetable set forth in subsection (m) of this section [~~rule~~] to resolve all claims and counterclaims. No party is obligated to settle with the other party as a result of the negotiation.

(m) Negotiation Timetable.

(1) Following receipt of a contractor's notice of claim, the committee [~~Committee~~] shall review the contractor's claim(s) and the TDCJ's counterclaim(s), if any, and shall initiate negotiations with the contractor to resolve the claim(s) and counterclaim(s).

(2) The parties shall begin negotiations within a reasonable period of time, not to exceed 120 days following the date the TDCJ receives the contractor's notice of claim.

(3) The parties may conduct negotiations according to an agreed schedule provided negotiations begin no later than the deadline set forth in paragraph (2) of this subsection.

(4) Subject to paragraph (5) of this subsection, the parties shall complete the negotiations required by this subsection as a prerequisite to a contractor's request for contested case hearing no later than 270 days after the TDCJ receives the contractor's notice of claim.

(5) The parties may agree in writing to extend the time for negotiations on or before the 270th day after the TDCJ receives the contractor's notice of claim. The agreement shall be signed by representatives of the parties with authority to bind each respective party and shall provide for the extension of the statutory negotiation period until a certain date. The parties may enter into a series of written extension agreements that comply with the requirements of this section [~~rule~~].

(6) The contractor may request, in writing, a contested case hearing before the State Office of Administrative Hearings (SOAH) pursuant to subsection (q) of this section [~~rule~~] after the 270th day after the TDCJ receives the contractor's notice of claim or the expiration of any extension agreed to under paragraph (5) of this subsection.

(7) The parties may agree to mediate the dispute at any time before the 120th day after the TDCJ receives the contractor's notice of claim or before the expiration of any extension agreed to by the parties pursuant to paragraph (5) of this subsection. The mediation shall be governed by subsections (r), (s), (t), (u), (v), and (w) of this section [~~rule~~].

(8) Nothing in this subsection is intended to prevent the parties from agreeing to commence negotiations earlier than the deadlines established in paragraph (2) of this subsection, or from continuing or resuming negotiations after the contractor requests a contested case hearing before the SOAH.

(n) Conduct of Negotiation.

(1) A negotiation under this subchapter may be conducted by any method, technique, or procedure authorized under the contract or agreed upon by the parties, including, without limitation, negotiation in person, by telephone, by correspondence, by video conference, or by any other method which permits the parties to identify respective positions, discuss respective differences, confer with respective advisers, exchange offers of settlement, and settle.

(2) The parties may conduct negotiations with the assistance of one [~~(1)~~] or more neutral third-parties. If the parties choose to mediate the dispute, the mediation shall be conducted in accordance with subsections (r), (s), (t), (u), (v), and (w) of this section [~~rule~~]. Parties may choose an assisted negotiation process other than mediation, including, without limitation, processes such as those described in subsections (x), (y), and (z) of this section [~~rule~~].

(3) To facilitate the meaningful evaluation and negotiation of the claim(s) and any counterclaim(s), the parties may exchange relevant documents that support the respective claims, defenses, counterclaims, or positions.

(4) Material submitted pursuant to this subsection and claimed to be confidential by the contractor shall be handled pursuant to the requirements of the *Public Information Act.*

(o) Settlement Agreement.

(1) A settlement agreement may resolve an entire claim or any designated and severable portion of a claim.

(2) To be enforceable, a settlement agreement shall be in writing and signed by representatives of the contractor and the TDCJ who have authority to bind each respective party.

(3) A partial settlement does not waive a party's rights under [~~the~~] Texas Government Code[,] Chapter 2260 as to the parts of the claims or counterclaims that are not resolved.

(p) Costs of Negotiation. Unless the parties agree otherwise in writing, each party shall be responsible for its own costs incurred in connection with a negotiation, including, without limitation, attorney fees, consultant fees, and expert fees.

(q) Request for Contested Case Hearing.

(1) If a breach of contract claim is not resolved in its entirety through negotiation, mediation, or other assisted negotiation process in accordance with this section [~~rule~~] on or before the 270th day after the TDCJ receives the notice of claim, or after the expiration of any extension agreed to by the parties pursuant to subsection (m)(5) of this section [~~rule~~], the contractor may file a request with the TDCJ for a contested case hearing before the SOAH.

(2) A request for a contested case hearing shall state the legal and factual basis for the claim and shall be delivered to the executive director [~~ED~~] or other officer designated in the contract to receive notice within a reasonable time after the 270th day or the expiration of any written extension agreed to pursuant to subsection (m)(5) of this section [~~rule~~].

(3) The TDCJ shall forward the contractor's request for contested case hearing to the SOAH within a reasonable period of time, not to exceed 30 days, after receipt of the request.

(4) The parties may agree to submit the case to the SOAH before the 270th day after the notice of claim is received by the TDCJ if they have achieved a partial resolution of the claim or if an impasse has been reached in the negotiations and proceeding to a contested case hearing would serve the interests of justice.

(r) Mediation Timetable.

(1) The contractor and the TDCJ may agree to mediate the dispute at any time before the 120th day after the TDCJ receives a notice of a breach of contract claim, or before the expiration of any extension agreed to by the parties in writing.

(2) A contractor and the TDCJ may mediate the dispute even after the case has been referred to the SOAH for a contested case. The SOAH may also refer a contested case for mediation pursuant to its own rules and guidelines, whether or not the parties have previously attempted mediation.

(s) Conduct of Mediation.

(1) The mediation is subject to the provisions of the *Governmental Dispute Resolution Act,* Texas Government Code[,] Chapter 2009. For purposes of this subchapter, "mediation" is assigned the meaning set forth in [~~the~~] Texas Civil Practice and Remedies Code[,] §154.023.

(2) Parties may agree to use mediation as an option to resolve a breach of contract claim at the time the parties enter into the contract and include a contractual provision to do so. The parties may mediate a breach of contract claim even absent a contractual provision to do so if both parties agree.

(3) In selecting a mediator, the parties should use the qualifications set forth in subsection (t) of this section [~~rule~~]. The mediator shall be acceptable to both parties.

(t) Qualification and Immunity of the Mediator.

(1) The mediator shall possess the qualifications required under [~~the~~] Texas Civil Practice and Remedies Code[,] §154.052, be subject to the standards and duties prescribed by [~~the~~] Texas Civil Practice and Remedies Code[,] §154.053 and have the qualified immunity prescribed by [~~the~~] Texas Civil Practice and Remedies Code[,] §154.055, if applicable.

(2) The parties should decide whether, and to what extent, knowledge of the subject matter and experience in mediation would be advisable for the mediator.

(3) The parties should obtain from the prospective mediator the ethical standards that shall govern the mediation.

(u) Confidentiality of Mediation and Final Mediated Settlement Agreement.

(1) A mediation conducted under this section [~~rule~~] is confidential in accordance with [~~the~~] Texas Government Code[,] §2009.054.

(2) The confidentiality of a final settlement agreement to which the TDCJ is a signatory that is reached as a result of the mediation is governed by [~~the~~] Texas Government Code[,] Chapter 552.

(v) Costs of Mediation. Unless the contractor and the TDCJ agree otherwise in writing, each party shall be responsible for its own costs incurred in connection with the mediation, including costs of document reproduction for documents requested by such party, attorney fees, consultant fees or expert fees. The costs of the mediation process itself shall be divided equally between the parties.

(w) Mediated Settlement Agreement. Any settlement agreement reached during the mediation shall be signed by the representatives of the contractor and the TDCJ and describe any procedures required to be followed by the parties in connection with final approval of the agreement.

(x) Final Settlement Agreement.

(1) A final settlement agreement reached through mediation that resolves an entire claim or any designated and severable portion of a claim, shall be in writing and signed by representatives of the contractor and the TDCJ who have authority to bind each respective party.

(2) If the settlement agreement does not resolve all issues raised by the claim and counterclaim, the agreement shall identify the issues that are not resolved.

(3) A partial settlement does not waive a party's rights under [~~the~~] Texas Government Code[,] Chapter 2260 as to the parts of the claim that are not resolved.

(y) Assisted Negotiation Processes. Parties to a contract dispute under [~~the~~] Texas Government Code[,] Chapter 2260 may agree, either contractually or when a dispute arises, to use assisted negotiation

processes (alternative dispute resolution) in addition to negotiation and mediation to resolve the dispute.

(z) Factors Supporting the Use of Assisted Negotiation Processes. The following factors may help the parties decide whether one [~~(1)~~] or more assisted negotiation processes could help resolve the dispute:

(1) the parties recognize the benefits of an agreed resolution of the dispute;

(2) the expense of proceeding to contested case hearing at the SOAH is substantial and might outweigh any potential recovery;

(3) the parties want an expedited resolution;

(4) the ultimate outcome is uncertain;

(5) there exists factual or technical complexity or uncertainty that would benefit from the expertise of a third-party [~~thirty-party~~] expert for technical assistance or fact-finding;

(6) the parties are having substantial difficulty communicating effectively;

(7) a mediator third-party could facilitate the parties' realistic evaluation of the respective cases;

(8) there is an on-going relationship that exists between the parties;

(9) the parties want to retain control over the outcome;

(10) there is a need to develop creative alternatives to resolve the dispute;

(11) there is a need for flexibility in shaping relief;

(12) a party has an unrealistic view of the merits of its case; or

(13) the parties, [~~(~~]or aggrieved persons,[~~)~~] need to hear an evaluation of the case from someone other than their lawyers.

(aa) Use of Assisted Negotiation Processes. Any of the following methods, or a combination of these methods, or any assisted negotiation process agreed to by the parties, may be used in seeking resolution of disputes or other controversy arising under [~~the~~] Texas Government Code[~~,~~] Chapter 2260. If the parties agree to use an assisted negotiation procedure, the parties should agree in writing to a detailed description of the process prior to engaging in the process.

(1) Mediation.

(2) Early evaluation by a neutral third-party.

(A) This is a confidential conference wherein the parties and counsel present the factual and legal bases of their claims and receive a non-binding assessment by an experienced neutral third-party with subject-matter expertise or with significant experience in the substantive area of law involved in the dispute.

(B) After summary presentation, the neutral third-party identifies areas of agreement for possible stipulations, assesses the strengths and weaknesses of each party's position, and estimates, if possible, the likelihood of liability and the dollar range of damages that appear reasonable to the neutral third-party.

(C) This less complicated procedure may be appropriate only for some issues in dispute where there are clear-cut differences over the appropriate amount of damages. This process may be particularly helpful when:

(i) the parties agree that the dispute can be settled;

(ii) the dispute involves specific legal issues;

(iii) the parties disagree on the amount of damages;

(iv) the opposition has an unrealistic view of the dispute; or

(v) the neutral third-party is a recognized expert in the subject area or area of law involved.

(3) Neutral fact-finding by an expert.

(A) In this process, a neutral third-party expert studies a particular issue and reports findings on that issue. The process usually occurs after most discovery concerning the dispute has been completed and the significance of particular technical or scientific issues is apparent.

(B) The parties may agree in writing that the fact-finding shall be binding in later proceedings, [~~(~~]and entered into as a stipulation in the dispute if the matter proceeds to contested case hearing[~~)~~], or that it shall be advisory in nature, to be used only in further settlement discussions between representatives of the parties. This process may be particularly helpful when:

(i) factual issues requiring expert testimony may be dispositive of liability or damage issues;

(ii) the use of a neutral third-party is cost effective; or

(iii) the neutral third-party's findings could narrow factual issues for contested case hearing.

(4) Mini-trial.

(A) A mini-trial is a summary proceeding before a representative of upper management from each party who has authority to settle and a neutral third-party selected by agreement of the parties. A mini-trial is usually divided into a limited information-exchange phase, the hearing, and post-hearing settlement discussions. No written or oral statement made in the proceeding may be used as evidence or an admission in any other proceeding.

(B) The information-exchange stage should be brief, but it shall be sufficient for each party to understand and appreciate the key issues. At a minimum, the parties should exchange key exhibits, introductory statements, and a summary of witnesses' testimony.

(C) At the hearing, representatives of the parties present a summary of the anticipated evidence and any legal issues that shall be decided before the case can be resolved. The neutral third-party presides over the presentation and may question witnesses and counsel, as well as comment on the arguments and evidence. Each party may agree to put on abbreviated direct and cross-examination testimony. The hearing generally takes no longer than one [~~(1)~~] to two [~~(2)~~] days.

(D) Settlement discussions, facilitated by the neutral third-party, take place after the hearing. The parties may ask the neutral third-party to formally evaluate the evidence and arguments and provide an advisory opinion as to the issues in the case. If the parties cannot reach an agreed resolution to the dispute, either side may declare the mini-trial terminated and proceed to a resolution of the dispute by other means.

(E) Mini-trials may be appropriate when:

(i) the dispute is at a stage where substantial costs can be saved by a resolution based on limited information gathered;

(ii) the matter justifies the senior executive's time required to complete the process;

(iii) the issues include highly technical mixed questions of law and fact;

(iv) the matter involves trade secrets or other confidential or proprietary information; or

(v) the parties seek to narrow the large number of issues in dispute.

(bb) Approval. Any settlement reached pursuant to this section [~~rule~~] may require the approval of the TBCJ, the attorney general [~~Attorney General~~] of Texas, the governor [~~Governor~~] of Texas, or the Texas Legislature, as required by TBCJ policy, statutes, and rules of the state [~~State~~] of Texas, and the *General Appropriations Act.*

(cc) Intent. It is the intent of the TDCJ to comply with the provisions of [~~the~~] Texas Government Code[~~,~~] Chapter 2260. To the extent that any term or provision of this section [~~rule~~] is in conflict with Chapter 2260, the terms and provisions of Chapter 2260 shall prevail.

(dd) Disclaimer. The TDCJ and the TBCJ do not waive sovereign immunity from suit or liability due to the establishment of this section [~~rule~~]. The TDCJ and the TBCJ consider the procedure described in Chapter 2260 and this section [~~rule~~] to be the exclusive means of resolving breach of contract claims against the TDCJ [~~state agencies~~].

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 February 13, 2012.

TRD-201200787
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 463-9693

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

CHAPTER 106. DIVISION FOR BLIND SERVICES

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Assistive and Rehabilitative Services (DARS), proposes the repeal of 40 TAC Chapter 106, Division for Blind Services, Subchapter G, Business Enterprises of Texas; and new Chapter 106, Division for Blind Services, Subchapter N, Business Enterprises of Texas.

Specifically, DARS proposes the repeal of the following rules: Subchapter G, Business Enterprises of Texas, §§106.1201, 106.1203, 106.1205, 106.1207, 106.1209, 106.1211, 106.1213, 106.1215, 106.1217, 106.1219, 106.1221, 106.1223, 106.1225, 106.1227, 106.1229, 106.1231, and 106.1233.

In addition, DARS proposes the following new rules: Subchapter N, Business Enterprises of Texas, §106.1901, Purpose; §106.1903, Legal Authority; §106.1905, Definitions; §106.1907, General Policies; §106.1909, BET Administration; §106.1911, Training of Potential Applicants and Licensees; §106.1913, BET Licenses; §106.1915, Initial and Career Advancement Assignment Procedures; §106.1917, Fixtures, Furnishings, and Equipment; Initial Inventory; and Expendables; §106.1919, Set-Aside Fees; §106.1921, Duties and Responsibilities of Managers; §106.1923, Responsibilities of the Department of Assistive and Rehabilitative Services, Division for Blind Services; §106.1925, BET Elected Committee of Managers; §106.1927, Termination of License for Reasons Other Than Unsatisfactory Performance; §106.1929, Administrative Action Based on Unsatisfactory Performance; §106.1931, Procedures for Resolution of Manager's Dissatisfaction; §106.1933, Establishing and Closing Facilities; and §106.1935, Forms.

The repeal and new rules are proposed in accordance with DARS' four-year rule review of Chapter 106, Subchapter G, Business Enterprises of Texas, as required by Texas Government Code §2001.039. DARS determined that the reasons for initially adopting these rules continue to exist. However, DARS is repealing all of Chapter 106, Subchapter G, Business Enterprises of Texas, and replacing with new in Chapter 106, Subchapter N, Business Enterprises of Texas.

Elsewhere in this issue of the *Texas Register,* DARS contemporaneously proposes the rule review of Chapter 106.

Overall, the specific changes regarding the repeal of Subchapter G, Business Enterprises of Texas and replacement of the subject matter in new Subchapter N, Business Enterprises of Texas, is necessary to represent the renumbering and new subchapter within Chapter 106, Division for Blind Services. In addition, nonsubstantive changes to rule language have been executed to be consistent with DARS rules writing style.

Proposed new §106.1901, Purpose, adds a purpose statement to be consistent with other DARS program rules.

Proposed new §106.1911, Training of Potential Applicants and Licensees, adds a mandatory annual education requirement to encourage BET managers to keep their skills and knowledge current in a constantly changing industry environment.

Proposed new §106.1919, Set-Aside Fees, is revised in the form of a flat five percent fee against the net proceeds of a facility with triggers to raise or lower the percentage fee rate based on potential events that could affect maintaining the current level of cash reserves.

Proposed new §106.1921, Duties and Responsibilities of Managers, tightens procedures regarding correction of operational deficiencies to better comply with customer expectations.

Proposed new §106.1927, Termination of License for Reasons Other Than Unsatisfactory Performance, addresses change to unassigned period for licensee.

Proposed new §106.1929, Administrative Action Based on Unsatisfactory Performance, lowers the number of repetitive administrative actions from four to three in the form of manager probations within a three year period that could result in termination of license.

Proposed new §106.1931, Procedures for Resolution of Manager's Dissatisfaction, lowers the deadline for informal proceedings for licensee request to initiate informal proceedings from six months to no later than 20 business days.

Proposed new §§106.1903, 106.1905, 106.1907, 106.1909, 106.1913, 106.1915, 106.1917, 106.1923, 106.1925, 106.1933 and 106.1935 were renumbered from Subchapter G and the rules were revised for clear and concise language.

The proposed repeals and new rules are authorized by federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and approved by the federal Rehabilitation Services Administration.

Mary Wright, DARS chief financial officer, has determined that for each year of the first five years the proposed repeal and new rules are in effect, there will be fiscal implications for state government. Due to the estimated set-aside flat five percent, assessed against the net proceeds of the Business Enterprises of Texas facilities, there will be an increase in dedicated general revenue, in the amount of $156,250 in fiscal year (FY) 2012; $595,000 in FY 2013; $600,000 in FY 2014; $605,000 in FY 2015; $610,000 in FY 2016; and $615,000 in FY 2017. There will be no fiscal implications for local government.

Ms. Wright has determined that for each year of the first five years the proposed repeal and new rules will be in effect, the public benefit anticipated because of enforcing the changes will be increased revenues to maintain the needed level of funding for DARS Randolph-Sheppard Act activities.

Ms. Wright has also determined there will be a probable economic cost to persons who are required to comply with the proposed rules. These costs will match the revenue stream amounts as discussed. Further, in accordance with Texas Government Code §2001.022, Ms. Wright has determined that the proposed repeals and new rules will not affect a local economy.

Finally, Ms. Wright has determined that the proposed repeals and new rules will have an adverse economic effect on small businesses or micro-businesses who are required to comply with the proposed rules, as there will be a reduction in business income as a result of paying this fee.

Written comments on the proposal may be submitted within 30 days of publication of this proposal in the *Texas Register* to Nancy Mikulencak, Rules Coordinator, Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 150-A-2, Austin, Texas 78756 or electronically to DARS.Rules@dars.state.tx.us.

SUBCHAPTER G. BUSINESS ENTERPRISES OF TEXAS

40 TAC §§106.1201, 106.1203, 106.1205, 106.1207, 106.1209, 106.1211, 106.1213, 106.1215, 106.1217, 106.1219, 106.1221, 106.1223, 106.1225, 106.1227, 106.1229, 106.1231, 106.1233

(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 Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed in accordance with HHSC's statutory rulemaking authority under Texas Government Code Chapter 531, §531.0055(e), which provides the executive commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1201. Legal Authority.
§106.1203. Definitions.
§106.1205. General Policies.
§106.1207. BET Administration.
§106.1209. Training of Potential Managers.
§106.1211. BET Licenses.
§106.1213. Initial and Career Advancement Assignment Procedures
§106.1215. Fixtures, Furnishings, and Equipment; Initial Inventory and Expendables.
§106.1217. Set-Aside Fees.
§106.1219. Duties and Responsibilities of Managers.
§106.1221. Responsibilities of the Department of Assistive and Rehabilitative Services/Division for Blind Services.
§106.1223. BET Elected Committee of Managers.
§106.1225. Termination of License for Reasons Other Than Unsatisfactory Performance.
§106.1227. Administrative Action Based on Unsatisfactory Performance.
§106.1229. Procedures for Resolution of Manager's Dissatisfaction.
§106.1231. Establishing and Closing Facilities.
§106.1233. Forms.

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 February 13, 2012.

TRD-201200839
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 424-4050

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SUBCHAPTER N. BUSINESS ENTERPRISES OF TEXAS

40 TAC §§106.1901, 106.1903, 106.1905, 106.1907, 106.1909, 106.1911, 106.1913, 106.1915, 106.1917, 106.1919, 106.1921, 106.1923, 106.1925, 106.1927, 106.1929, 106.1931, 106.1933, 106.1935

The new rules are proposed in accordance with HHSC's statutory rulemaking authority under Texas Government Code Chapter 531, §531.0055(e), which provides the executive commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§106.1901. Purpose.

The purpose of the Business Enterprises of Texas program is to provide training and employment opportunities on state, federal, and private properties throughout Texas for Texans who are legally blind.

§106.1903. Legal Authority.

(a) Program name. The Department of Assistive and Rehabilitative Services, Division for Blind Services (DARS DBS) shall carry out its responsibilities for licensing blind persons to operate vending facilities on state, federal, and other property through its state program entitled Business Enterprises of Texas, formerly known as Business Enterprises Program. Any references still in existence to Business Enterprises Program shall mean Business Enterprises of Texas.

(b) Federal authority. DARS DBS operates Business Enterprises of Texas under the authority of the Randolph-Sheppard Act (20 U.S.C. §107 et seq.) and implementing regulations (34 CFR §395.1 et seq.).

(c) State authority. DARS DBS operates Business Enterprises of Texas under the authority of Texas Human Resources Code, Title 5, Chapter 94, and is authorized in §94.016 to administer Business Enterprises of Texas in accordance with the provisions of the Randolph-Sheppard Act.

(d) Statutory references. Unless expressly provided otherwise, a reference to any portion of a statute, rule, or regulation applies to all reenactments, revisions, or amendments of the statute, rule, or regulation.

§106.1905. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. Unless expressly provided otherwise, words in the present or past tense include the future tense, and the singular includes the plural and the plural includes the singular.

(1) Act--Randolph-Sheppard Act (20 U.S.C, Chapter 6A, §107 et seq.).

(2) Application--The "BET Facility Assignment Application" form used by licensees to apply for a facility.

(3) Assistant commissioner--Assistant commissioner for the Division for Blind Services.

(4) BET--Business Enterprises of Texas.

(5) BET assignment--The document that sets forth the terms and conditions for management of a BET facility by the person named as manager.

(6) BET director--The administrator of Business Enterprises of Texas; or, if there be no person in that capacity, the person designated by the assistant commissioner for the DARS DBS to perform that function; or if there be none, the assistant commissioner.

(7) BET facility--Automatic vending machines, cafeterias, snack bars, cart service, shelters, counters, and other equipment that may be operated by BET managers and that is necessary for the sale of newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws, and including the vending or exchange of tickets for any lottery authorized by state law.

(8) BET manual--"Business Enterprises of Texas Manual of Operations," which contains this subchapter adopted by DARS DBS and related instructions and procedures by which BET facilities are to be managed.

(9) Blind (person who is)--A person whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses or whose visual acuity, if better than 20/200, is accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater than 20 degrees.

(10) Business day--A day on which state agencies are officially required to be open during their normal business hours.

(11) DARS DBS--Department of Assistive and Rehabilitative Services, Division for Blind Services.

(12) DARS DBS staff--Employees of DARS DBS who have been delegated the authority by the assistant commissioner or his or her designee to take an action contained in this subchapter.

(13) ECM--Elected Committee of Managers.

(14) Expendables--Items that require a low capital outlay and have a short life expectancy, such as, by way of illustration and not limitation, small wares, thermometers, china, glass, silverware, sugar and napkin dispensers, salt and pepper shakers, serving trays, knives, spreaders, serving spoons, and ladles.

(15) Individual with a significant disability--A person who has a severe physical or mental impairment that seriously limits one or more functional capacities (such as mobility or communication).

(16) Initial assignment--The first BET facility to which a manager is assigned after being licensed.

(17) Level 1 facility--A BET facility that in the prior year generated a net income after set-aside fees equal to or less than 170 percent of the median net income after set-aside fees of all BET managers for the prior year or, in the case of a new BET facility, is reasonably expected to generate that income.

(18) Level 2 facility--A BET facility that in the prior year generated a net income after set-aside fees greater than 170 percent of the median net income after set-aside fees of all BET managers for the prior year or, in the case of a new BET facility, is reasonably expected to generate that income.

(19) Licensee--A person who has been licensed by DARS DBS as qualified to apply for and operate a BET facility, and which shall have the same meaning assigned to "blind licensee" in 34 CFR §395.1.

(20) Manager--A licensee who is operating a BET facility, and which shall have the same meaning assigned to "vendor" in 34 CFR §395.1.

(21) Net sales--All sales, excluding sales tax.

(22) Other income--Money received by a manager from sources other than direct sales, such as vending commissions or subsidies.

(23) Proper and authorized instruction by DARS DBS staff members--Instructions in accordance with applicable statutes and program rules, regulations, and procedures.

(24) Sanitation and cleaning supplies--Items that require a low capital outlay and have a short life expectancy, such as, by way of illustration and not limitation, mops, brooms, detergents, bleach, gloves, oven mitts, trash bags, food wrapping supplies, foil, and cleaning supplies for food equipment.

(25) State property--Lands and buildings owned, leased, or otherwise controlled by the State of Texas; and equipment and facilities purchased and/or owned by the State of Texas.

(26) Vending machine--For the purpose of assigning vending machine income, a coin- or currency-operated machine that dispenses articles or services, except those machines operated by the United States Postal Service for the sale of postage stamps or other postal products and services. Machines providing services of

a recreational nature and telephones shall not be considered to be vending machines.

§106.1907. General Policies.

(a) Objectives. The objectives of Business Enterprises of Texas shall be:

(1) to provide employment opportunities for qualified individuals; and

(2) to administer a continuing process of career development for managers that encourages them to move into the private sector of business.

(b) Relationship of BET to the Vocational Rehabilitation (VR) Program. The intent of Business Enterprises of Texas, as authorized in the Randolph-Sheppard Act and the Texas Human Resources Code, is to stimulate and enlarge the economic opportunities for the citizens of Texas who are blind or visually impaired by establishing a vending facility program in which these persons who are in need of employment are given priority in the operation of vending facilities selected and installed by DARS DBS. DARS DBS is required to administer BET in accordance with the DARS DBS vocational rehabilitation objectives. Therefore, a consumer receiving services from the Vocational Rehabilitation Program whose employment goal is to be a licensed manager shall have reached an employment outcome as that term is used in the Rehabilitation Act of 1973, as amended, when the consumer is licensed by DARS DBS and is managing a BET facility. The licensed manager shall not be considered an employee of DARS DBS, or of state or federal government.

(c) Full-time employment. Managing a BET facility shall constitute full-time employment. Full-time shall mean being actively engaged in the management of a BET facility for the number of hours necessary to achieve satisfactory operation of the facility. The manager shall be available for necessary visits by DARS DBS staff members to allow inspection, advice, and consultation as may be required to ensure satisfactory operation. Management means the personal supervision of the day-to-day operation of the assigned BET facility by the assigned manager.

(d) Subcontracting. The management of a BET facility shall not be subcontracted except for temporary periods of time approved by DARS DBS or in those circumstances in which DARS DBS considers that subcontracting the operation of some parts of the facility is in the best interest of BET. In all events, subcontracting shall require the prior written consent of DARS DBS. This subsection shall not affect subcontracts in existence on the effective date of this subsection. This subsection does not apply to equipment or machines allowed to be placed within the facility and not owned by or arranged for by DARS DBS.

(e) Availability of funds. The administration of BET and the implementation of these policies are contingent upon the availability of funds for the purposes stated in this subchapter.

(f) BET manual. All BET policies adopted by DARS DBS shall be included in the BET manual. The BET director shall ensure that each licensee is provided with a copy of the manual and any revisions to it. The licensee shall be responsible for reading the manual and acknowledging in writing that he or she has read and understands its contents. The BET director shall ensure that the BET manual contains procedures from which licensees may obtain assistance in understanding BET policies and procedures.

(g) Accessibility of BET materials. All information produced by and provided to licensees by DARS DBS shall be in an accessible format. When possible, materials are sent in the format requested by the licensee.

(h) Nondiscrimination.

(1) VR and BET participants. DARS DBS shall not discriminate against any blind person who is participating in or who may wish to participate in BET on the basis of sex, age, religion, color, creed, national origin, political affiliation, or physical or mental impairment, if the impairment does not preclude satisfactory performance.

(2) BET facilities. Managers shall operate BET facilities without discriminating against any present or prospective supplier, customer, employee, or other individual who might come into contact with the facility on the basis of sex, age, religion, color, creed, national origin, political affiliation, or physical or mental impairment.

(i) Emergencies. The BET director is authorized to expend funds on an emergency basis to protect the state's investment in a BET facility not to exceed $15,000 in a fiscal year or $2,500 per facility incident.

(j) Temporary management. From time to time it becomes necessary to designate a temporary manager to an unassigned facility to ensure uninterrupted service to the host and customers. Temporary assignments shall be for the period stated in the assignment document. After the time frame stated in the assignment expires, the BET director shall review the temporary assignment every 90 days to determine the need for continuation of the temporary assignment. The temporary arrangement shall terminate when a new manager is assigned to the facility. DARS DBS shall choose temporary managers from licensees; if a licensee is not available, DARS DBS may contract with a private entity. Before a licensee is offered a temporary opportunity, the regional BET staff and local ECM representative shall discuss which licensee in the geographical location has the requisite skills to successfully manage the facility temporarily. Preference shall be given to lower income managers, in order to temporarily improve their income, when more than one person is qualified.

§106.1909. BET Administration.

(a) The assistant commissioner is authorized to:

(1) supervise DARS DBS;

(2) establish BET plans, which at a minimum shall provide for all services, assistance, training, supervision, and planning necessary for the implementation and administration of BET; and

(3) delegate authority to implement this subchapter to the BET director.

(b) BET director. In addition to the responsibilities delegated to the BET director by the assistant commissioner, the BET director shall be responsible for:

(1) implementing BET personnel policies and development plans; and

(2) disseminating the information developed by the assistant commissioner related to BET plans and policies to all licensees.

(c) Consultants.

(1) If DARS DBS determines that a consultant is necessary to assist a manager or protect the interests of DARS, DARS DBS shall contract with a consultant and may pay for the consultant out of the facility revenues. DARS DBS shall not contract with a consultant when it possesses the expertise and staffing level to provide the consulting services.

(2) If DARS DBS determines that a consultant is necessary to assist a manager who is currently in a facility, the BET director shall consult with the manager before contracting with a consultant. The

final authority, however, for contracting with a consultant shall rest with DARS DBS.

(3) All consultant contracts entered into by DARS DBS for the provision of support and mentoring services to the manager shall not exceed three years in duration, provided, however, that the contract may be extended for additional periods not to exceed one year each. No contract shall be extended until the manager has been consulted. The final discretion to extend the contract shall rest with DARS DBS.

(4) If DARS DBS determines it necessary to contract with a consultant to protect the interests of DARS DBS, DARS DBS shall enter into a separate agreement for that purpose with terms and conditions that DARS DBS may consider appropriate.

§106.1911. Training of Potential Applicants and Licensees.

(a) Prerequisites for training. To be eligible for BET training, a consumer desiring a career with BET as an employment outcome in the vocational rehabilitation program must meet the following criteria:

(1) be at least 18 years of age;

(2) be a United States citizen residing in Texas (a birth certificate or other applicable documentation must be submitted with the application);

(3) be blind;

(4) have demonstrated proficiency in math, writing, and reading comprehension;

(5) have adequate general health and stamina required to perform the basic functions of a manager;

(6) have adequate mobility skills to safely operate a BET facility; and

(7) not have a history of substance abuse for the previous 12 months.

(b) Application process. Each eligible consumer interested in applying for BET training may submit an application and shall receive an interview and be informed of the results of the application.

(c) Annual continuing education requirements for licensees:

(1) DARS DBS shall help the ECM conduct an annual training conference for all licensees to inform them of new BET developments and to provide instruction on relevant topics to enhance licensees' business competence and upward mobility in the program. Licensees must attend the DARS DBS Training Conference or a DARS DBS-approved alternative training event every year to maintain their license and eligibility to bid on available facilities. They must document their attendance at the DARS DBS Training Conference by signing attendance records provided at the conference. A licensee who is unable to attend the DARS DBS Training Conference may satisfy the continuing education requirement by attending an approved course or training conference. Such training includes, but is not limited to, either attending the national training conferences for blind vendors conducted by the Randolph Sheppard Vendors of America or the National Association of Blind Merchants, or successfully completing a business-related course from the Hadley School for the blind or a business-related course offered by an accredited community college.

(2) Licensees wishing to attend an alternative training course or conference must request preapproval through their local DARS DBS staff. The local DARS DBS staff forwards the request to the BET director for preapproval. The licensee must also provide proof of successful completion of any business-related course or attendance at a training conference through the local DARS DBS staff to the director to receive credit for attendance. All costs associated with travel, lodging, meals, and registration when attending any training other than the DARS DBS Training Conference will be the sole responsibility of the licensee.

(3) Licensees may use an alternative approved training course or training conference to satisfy the continuing education requirement only if they are unable to attend the DARS DBS Training Conference because of personal medical reasons, the death of a family member, or a medical emergency or condition of an immediate family member, or if there is not a DARS DBS Training Conference offered during the licensee's 12-month evaluation period. Licensees must provide written documentation of the medical issues or death of a family member to their local DARS DBS staff.

(4) Licensees who fail to complete continuing education requirements may be subject to administrative action up to and including termination of license.

§106.1913. BET Licenses.

(a) Natural persons. Licenses to manage a BET facility shall be issued only to natural persons.

(b) Prerequisites. No person may be licensed until the person has satisfactorily completed all required BET training and otherwise continues to satisfy the criteria for entry into BET.

(c) Issuance. A license issued by DARS DBS shall contain the name of the licensee, the date of issue, and other information that the assistant commissioner considers to be appropriate. The license shall be signed by the assistant commissioner on behalf of DARS DBS and State of Texas.

(d) Display. The license or a copy of the license shall be displayed prominently in each BET facility to which the manager is assigned.

(e) Property right. A license shall not create any property right in the licensee to whom it is issued and shall be considered only to inform the public and other interested parties that the licensee has successfully completed BET training and is qualified and authorized to operate a BET facility.

(f) Transferability. A license is not transferable.

(g) Term. A license issued by DARS DBS shall be valid for an indefinite period, subject, however, to termination, revocation, or suspension under conditions specified in these policies pertaining to termination of license for reasons other than unsatisfactory performance and administrative action based on unsatisfactory performance.

§106.1915. Initial and Career Advancement Assignment Procedures.

(a) Purpose. This section defines the process for the initial and career advancement assignments of managers. It is the goal of the process to provide a fair, unbiased, and impartial process for selection, transfer, and promotion.

(b) Initial assignment. When a person successfully completes BET training, the BET director shall make the initial assignment for the newly licensed person. The initial assignment shall be for a minimum of 12 months. The BET director shall make the assignment based on the following:

(1) availability of a Level 1 facility;

(2) recommendations from the BET training specialist and the ECM chair;

(3) licensee's training records;

(4) licensee's geographical concerns; and

(5) any other circumstances on a case-by-case basis.

(c) Career advancement assignments.

(1) Availability. All career advancement opportunities depend on the availability of BET facilities. No facility with a projected annual income equal to the annual median income level of all managers or $30,000, whichever is the greater after set-aside fees, shall be used for an initial assignment unless it has first been advertised and made available to all licensees in the BET Program and no one has been assigned to the facility as a result of the advertising process.

(2) Notice. As BET facilities become available and ready for permanent assignment, written notice of the availability shall be given to all licensees within 30 business days.

(3) On-site visits. An advertised facility shall be available for on-site visits upon reasonable notice by applicants.

(4) Eligibility. To apply for an available facility, a licensee must meet the following requirements:

(A) The licensee must have successfully managed a BET facility for a minimum of one year.

(B) The licensee must have been current on all accounts payable for the preceding 12 months before the date of the facility announcement. Accounts payable include known debts to state and federal entities as well as any BET business-related debt. Current means performing in accordance with written established or alternate payment plans associated with the accounts payable debts.

(C) The licensee must not be on probation under §106.1929 of this subchapter (relating to Administrative Action Based on Unsatisfactory Performance).

(D) The licensee must meet eligibility requirements of the facility's host organization.

(E) The licensee must not have submitted two or more insufficient funds checks to DARS DBS within the 12 months before the date of the facility announcement.

(F) The licensee must not have submitted two or more late reports within the 12 months before the date of the facility announcement.

(G) If unassigned, the licensee must have fulfilled all resignation requirements in the licensee's last facility or be displaced and eligible to apply for a facility.

(H) The manager must have an inventory of merchandise and expendables in the manager's current facility as DARS DBS has determined sufficient for its satisfactory operation.

(I) The licensee must satisfy DARS DBS that he or she can acquire the merchandise and expendables required for the available facility.

(J) A licensee who has been placed on probation is not eligible for promotion and transfer for 30 days following release from probation.

(K) A licensee who has been placed on probation twice within a twelve-month period is not eligible for promotion or transfer for six months following release from probation.

(L) A licensee who has been placed on probation three times within a two-year period is not eligible for promotion or transfer for one year following release from probation.

(5) BET application deadline. A licensee may apply for an available facility by submitting an application not later than the 12th business day (exclusive of date of mailing) after the date the facility notice was mailed. The submission date shall be:

(A) the date the application is delivered to DARS DBS; or

(B) three days after deposit of the application in the United States mail, whichever is earlier; or

(C) the date the application is delivered to an overnight courier.

(6) BET application contents. A copy of the current form of the application shall be included in the BET manual. The substance of the application form shall not be modified except by action of DARS DBS. Modifications shall be provided to all licensees before their effective date. Upon request by the manager and before the submission deadline, assistance is available from the local BET staff and ECM representative in completing the BET Application form.

(7) Preliminary review of applications. The DARS DBS staff and the ECM representative in each geographic area in which the applying licensees are currently located shall review all applications from their areas and shall verify the applicants' eligibility. If an ECM representative is an applicant for an available BET facility, the ECM chair shall appoint another ECM member for the review. Completed applications shall then be forwarded to the BET director, who shall provide copies to the ECM and DARS DBS staff in the area in which the available facility is located.

(8) Level 1 assignments. Assignments to Level 1 facilities shall be made by the BET director after reviewing the recommendations and assessments of all applicants conducted by the ECM representative and DARS DBS staff for the regions in which the available facilities are located. Panel members shall rank all eligible applicants using a panel worksheet that weights the applicant's performance by 50 percent for the applicant's most recent annual performance evaluation completed before the date of the facility advertisement, 25 percent for interview performance, and 25 percent for the submitted BET Application form. Any other materials submitted by the applicants must be provided by the same deadline as the BET Application form and will be included in the 25 percent interview performance weighting component.

(9) Level 2 assignments. For Level 2 assignments, the following procedures, in addition to Level 1 procedures, shall apply:

(A) Business plan. An applicant must submit a business plan to the BET director no later than the 20th business day after the postmark date on the notice of facility availability. Upon request by an applicant, the DARS DBS staff in the area in which the available facility is located shall provide a standard packet of information to the applicant containing information necessary to prepare the business plan. The DARS DBS staff shall deliver the packet to the applicant no later than the 3rd business day after receiving a request.

(B) Establishment of a pool of impartial and qualified individuals. DARS DBS shall establish and maintain a pool of qualified individuals. The pool members shall be individuals who:

(i) have no personal, professional, or financial interest that would be in conflict with the objectivity of the individual;

(ii) neither have nor have had any association with DARS DBS or Business Enterprises of Texas before being considered as a pool member; and

(iii) have at least 5 years' experience in business at a managerial or executive level, including experience in budget preparation and administration, personnel supervision or management, and administration of business plans or equivalents to business plans in the sector of business in which the person has experience.

(C) Evaluation of business plans. All business plans shall be reviewed and evaluated by an individual chosen at random from the pool of impartial and qualified individuals. Business plans shall be evaluated and scored based on a scoring system of 100 points. The evaluations and scores shall then be forwarded to the BET director for consideration by the selection panel in the selection process.

(D) Selection panel. A selection panel consisting of one representative from the ECM, one DARS DBS staff member, and one individual from the pool of impartial and qualified individuals shall be chosen by means of a computer program that selects randomly from a database. The selection of each panel member shall be from among all persons within their respective categories, except that the impartial member may not be the individual who evaluated the business plans. If the member of a category of panel members who is selected is unable or refuses to serve, the BET director shall use the same method of random selection until three members are chosen.

(E) Presiding officer. The impartial panel member shall serve as the presiding officer of the selection panel.

(F) Interview notices. Applicants shall be notified by first class U.S. Mail of the date, place, and time of the selection panel interview no fewer than 10 business days before the convening of the selection panel.

(G) Selection panel materials. Completed applications, business plans, and each applicant's most recent performance evaluation completed before the date of the facility advertisement shall be provided to the selection panel members no fewer than 5 business days before the date the selection panel is to convene.

(H) Duties of selection panel. The selection panel shall review the documents provided and interview the applicants. The panel shall prepare a tabulation sheet for each applicant on which the panel member will enter the business plan score and performance evaluation score previously received by the applicant. A third score shall be awarded by each panel member for the interview performance of the applicant. Each interview shall be rated on a maximum score of 100 based on such areas as the quality of the applicant's presentation, knowledge of the submitted business plan, and preparation for the assignment. Each applicant shall be interviewed on the same areas and given a similar amount of time to present his or her case. While questions must necessarily be tailored to each applicant's business plan, presentation, and knowledge, the panel should strive to conduct the interviews as similarly as possible. The selection panel shall then rank the top three applicants. An applicant's ranking shall be determined after weighting each applicant's business plan score by 25 percent, weighting each applicant's most recent performance evaluation completed before the date of the facility advertisement by 50 percent, and weighting the average interview score awarded by panel members by 25 percent. If there is a tie in scores, the panel will award one point to whichever applicant has the greater length of accumulated service as an assigned manager in a BET facility according to BET records, thereby breaking the tie. The selections shall be transmitted to the BET director, who shall in turn notify the highest ranked applicant of the decision of the selection panel. The available facility shall be offered to the applicants in order of ranking.

(I) Reports of improper contact. Members of the selection panel must report alleged improper contacts to the BET director or the assistant commissioner. Improper contact is defined as communication with a member of the selection panel for the purpose of improperly influencing or manipulating the selection of an applicant for the facility being considered for assignment by offering a thing or act of value, including promises of future benefit, or by threat. Nothing contained in this section, however, shall be considered to prohibit any licensee from endorsing or supporting any candidate for selection by furnishing a letter or other document to that effect to be included with the applying licensee's application. At the conclusion of the selection panel's responsibilities, each panel member shall be required to sign a statement certifying whether the member had, or had knowledge of, an improper contact during the selection proceedings.

(J) Process for investigating reports of improper contact. When alleged improper contact is reported, each applicant for the facility under consideration and the ECM chair shall be informed of the occurrence of an alleged improper contact. The information provided to the applicants shall describe the nature of the alleged improper contact but shall not divulge the identities of any persons allegedly participating in such improper contact. Each applicant may make objection to continuation by the existing panel and request that a new panel be formed to select the manager for the available facility. The BET director, upon the request of any applicant for the facility, shall determine if the improper contact requires that the panel be disbanded and a new panel formed. In making that decision, the BET director shall consider all relevant factors, including the objections, if any, of the applicants, to determine if the improper contact is likely to influence the decision of the selection panel. If the BET director determines that the improper contact is likely to influence the selection process, the BET director shall direct that the panel be disbanded and that a new panel be formed to consider the selection for the available facility. The BET director shall inform all applicants of the decision to continue the selection process with the existing panel or to form a new panel and shall state the basis of the decision. The actions prescribed as a consequence of improper contact set forth in rules pertaining to administrative actions shall apply whether or not any improper contact results in the panel being disbanded.

(K) Exceptions to assignment and selection procedures. Unusual circumstances may require exceptions to assignment and selection procedures. Exceptions to these procedures shall be made only if the circumstance is not covered by assignment procedures and failure to react to the circumstance would be detrimental to BET or a licensee. Notwithstanding anything in this section, no exceptional procedure shall result in the removal of a manager from a facility except for reasons contained in rules pertaining to administrative actions. Assignment and selection decisions that are exceptions to these procedures shall be made by the BET director after discussing relevant information with the ECM chair and receiving the chair's recommendation. Should a decision contrary to the ECM chair's recommendation be made, the BET director shall provide a written explanation of the decision to the ECM chair.

§106.1917. Fixtures, Furnishings, and Equipment; Initial Inventory; and Expendables.

(a) Survey. When a BET facility becomes available for assignment, the DARS DBS staff shall conduct a survey of the site to determine the fixtures, furnishings, and equipment required to allow the facility to operate in accordance with projections by the DARS DBS staff of the potential for the facility. When the facility is an existing one, the survey shall consider the need for replacement or repair of fixtures, furnishings, and equipment.

(b) Facility plan. The DARS DBS staff shall prepare a detailed schedule of the requirements for fixtures, furnishings, and equipment for the facility, including specifications for each item required and a site plan of the facility depicting the placement of the fixtures, furnishings, and equipment within the facility.

(c) Acquisition, placement, and installation. When satisfied with the fixtures, furnishings, and equipment required for the facility, the DARS DBS staff shall cause the necessary fixtures, furnishings, and equipment to be purchased or otherwise acquired and placed or

installed in the facility in accordance with the approved plans. Necessary fixtures, furnishings, and equipment may be placed away from the facility only in the case of off-site storage and with the prior approval of DARS DBS. A manager's responsibilities as noted in rule apply to off-site equipment.

(d) Ownership.

(1) All state fixtures, furnishings, and equipment within the facility shall at all times remain the property of the State of Texas. Their use by the facility manager shall be as a licensee only.

(2) DARS DBS shall have the sole authority to direct, control, transfer, and dispose of the fixtures, furnishings, and equipment as it determines to be appropriate and necessary.

(e) Modifications. No modifications or alterations shall be made to state-owned fixtures, furnishings, and equipment by any person, firm, or entity without the express prior written approval of DARS DBS, which shall be granted or not granted solely at the discretion of DARS DBS.

(f) Upkeep and maintenance.

(1) The manager assigned to a facility shall be provided with manuals, instructions, and guides in an accessible format for state-owned fixtures, furnishings, and equipment within the facility. The manager is responsible for ensuring that all provided manuals, instructions, and other related material are available in the facility when the manager leaves.

(2) It shall be the responsibility of the manager to keep DARS DBS fixtures, furnishings, and equipment in a clean and sanitary condition and to perform maintenance required or recommended by the manufacturers or vendors of the fixtures, furnishings, and equipment.

(3) The manager shall keep and maintain accurate records of all maintenance performed on DARS DBS fixtures, furnishings, and equipment. Any failure or refusal of the manager to perform the maintenance referred to in this section shall result in the manager being required to reimburse DARS DBS for any cost or expense resulting from the failure or refusal.

(g) Repairs and replacements.

(1) DARS DBS shall be responsible for all necessary repairs of any of the state-owned fixtures, furnishings, and equipment located within the facility except for repairs necessitated by the negligence, abuse, or misuse of the fixtures, furnishings, or equipment by the manager or the manager's employees. The cost of repairs necessitated by negligence, abuse, or misuse by the manager or the manager's employees shall be the sole responsibility of the manager. Failure to make such repairs shall result in administrative action under this subchapter.

(2) The BET director shall establish and implement procedures for facilitating the timely necessary repairs and for the payment for such services. There shall be included in these procedures specific procedures for initiating repairs by the manager and a list of approved vendors for repairs, which shall be provided to each manager as published and as revised from time to time.

(3) Under no circumstances is a manager authorized to have the cost of repairs charged to DARS DBS or to have repairs made by anyone other than approved vendors unless specific authority to do so has been given to the manager in writing by the DARS DBS staff. Each vendor included in the approved list of vendors for repairs shall be informed by DARS DBS staff of this prohibition and of the procedures for authorized repairs and for payment for services.

(4) DARS DBS staff members on their own initiative or upon request by a manager shall determine the need for replacement of any fixtures, furnishings, or equipment. If they determine the need, they shall report it to the BET director. If authorized by the BET director, replacement fixtures, furnishings, or equipment shall be acquired from available BET funds.

(5) Fixtures, furnishings, and equipment shall not include sanitation and cleaning supplies. Each manager of a facility shall be responsible for replacing all such items with items of comparable quality as those being replaced and originally furnished by DARS DBS.

(h) Initial inventory of merchandise and expendables for newly licensed managers. DARS DBS shall furnish without charge the initial inventory of merchandise and expendables for the initial assignment of a newly licensed licensee. The initial inventory of merchandise and expendables shall be sufficient to assist the manager with starting the business.

(i) Subsequent inventory of merchandise, sanitation and cleaning supplies, and expendables.

(1) The manager shall maintain an inventory of merchandise, sanitation and cleaning supplies and expendables in the same quantities as were transferred to the manager upon assignment to the facility. If DARS DBS determines that changed circumstances require different quantities of merchandise, sanitation and cleaning supplies, and expendables, DARS DBS shall communicate in writing to the manager the new quantities required. If the new quantities of merchandise, sanitation and cleaning supplies and expendables are necessary to provide for the satisfactory operation of the facility, those new quantities of inventory must be maintained by the manager.

(2) Managers assigned to any facility other than their initial assignment in Texas shall acquire the merchandise, sanitation and cleaning supplies, and expendables as determined by DARS DBS to be sufficient to satisfactorily operate the facility. To effectively expedite the changeover in facilities, when a facility is already stocked with merchandise, sanitation and cleaning supplies, and expendables, the existing stock shall become part of the required inventory stock level of the incoming manager. The amount owed by the incoming manager for the existing stock shall be the amount agreed to by the affected parties. If the existing inventory is the property of the state, the amount owed by the incoming manager shall be the amount paid with state funds.

(j) Purchases on credit. During the first three years of being an active manager in the program, managers must notify DARS DBS in advance of any purchase of merchandise, sanitation and cleaning supplies and expendables on credit.

(k) Obtaining an advance from DARS DBS for initial inventory. A manager may apply to DARS DBS for an advance to purchase an initial inventory of merchandise, sanitation and cleaning supplies, and expendables. The manager must satisfy any advance received from DARS DBS to purchase merchandise on subsequent assignments within a 12-month period and make monthly payments in the amount established by DARS DBS. The granting of an advance is discretionary and may be done only under the following conditions:

(1) The manager must satisfy DARS DBS in writing about why the advance is needed and why the funds are not available from other sources.

(2) The manager must submit evidence satisfactory to DARS DBS that the financing has been sought from at least two commercial financial institutions, such as, by way of example, the Small Business Administration, banks, savings and loans, credit unions, or like institutions.

(3) The manager shall satisfy DARS DBS about the manager's ability to repay the advance within 12 months.

(4) Managers with outstanding balances on advances are not eligible for transfer to another assignment.

(l) Transfer of fixtures, furnishings, equipment, and inventory of merchandise, sanitation and cleaning supplies, and expendable items. When a manager is assigned to an existing BET facility, the responsibility for the fixtures, furnishings, and equipment of that facility, as well as its inventory of merchandise, sanitation and cleaning supplies, and expendable items shall be transferred to the incoming manager. The BET director shall develop and implement procedures for affecting such transfers to ensure that both the incoming and outgoing managers have full knowledge of the nature and condition of the items being transferred.

§106.1919. Set-Aside Fees.

(a) Purpose. DARS DBS requires managers to pay a set-aside fee based on the monthly net proceeds of their BET facilities. The purposes of requiring this payment are:

(1) to promote to the greatest possible extent the concept of a manager being an independent business person;

(2) to cause BET to be to the greatest extent possible, with due regard to other considerations, self-supporting;

(3) to encourage and stimulate growth in BET; and

(4) to provide incentives for the increased employment opportunities for blind Texans.

(b) Use of funds. To the extent permitted or required by applicable laws, rules, and regulations, the funds collected as set-aside fees shall be used by DARS DBS for the following purposes:

(1) maintenance and replacement of equipment for use in BET;

(2) purchase of new equipment for use in BET;

(3) management services;

(4) ensuring a fair minimum return to managers; and

(5) the establishment and maintenance of retirement or pension funds, health insurance contributions, and provision for paid sick leave and vacation time if it is so determined by a majority vote of managers assigned to a facility, after DARS DBS provides to each such manager information on all matters relevant to these proposed purposes.

(c) Method of computing net proceeds.

(1) Net proceeds is the amount remaining from the sale of merchandise of a BET facility, all vending machine income, and other income accruing to the manager from the facility after deducting the reasonable and necessary cost of such sale, but excluding set-aside charges required to be paid by the manager. Net sales are all sales, excluding sales tax. The manager may not remove any items from the inventory or other stock items of the facility unless the manager pays for those items at the actual cost basis.

(2) Costs of sales that may be deducted from net sales to calculate net proceeds in a reporting period shall be limited to:

(A) cost of merchandise sold;

(B) wages paid to employees;

(C) payroll taxes; and

(D) the following reasonable miscellaneous operating expenses that are directly related to the operation of the BET facility:

(i) discretionary expenses, not to exceed 1.5 percent of the monthly net sales, or $150, whichever is greater;

(ii) rent and utilities authorized in the permit or contract;

(iii) business taxes, licenses, and permits;

(iv) telecommunication services;

(v) liability, property damage, and fire insurance;

(vi) worker's compensation insurance;

(vii) employee group hospitalization or health insurance;

(viii) employee retirement contributions (the plans must be IRS-approved and not for the manager);

(ix) janitorial services, supplies, and equipment;

(x) bookkeeping and accounting services;

(xi) trash removal and disposal services;

(xii) service contracts on file with DARS DBS;

(xiii) legal fees directly related to the operation of the facility (legal fees directly or indirectly related to actions against governmental entities are not deductible);

(xiv) medical expenses directly related to accidents that occur to employees at the facility, not to exceed $500;

(xv) purchase of personally owned or leased equipment that has been approved by DARS DBS for placement in the facility;

(xvi) repairs and maintenance to personally owned or leased equipment that has been approved by DARS DBS to be placed in the facility;

(xvii) consumable office supplies;

(xviii) exterminator or pest control services; and

(xix) mileage expenses for vehicles required for the direct operation of vending facilities at the rate and method allowed by the Internal Revenue Service at the time the expenses are incurred.

(3) All reports by managers shall be accompanied by any supporting documents required by DARS DBS.

(d) Method of computing monthly set-aside fee. The monthly set-aside fee of each manager shall be a percentage of the net proceeds of the facility as determined in accordance with this section. The provisions relative to the percentage required to be paid as set-aside fees shall be reviewed by the DARS DBS with the active participation of the ECM at least annually each state fiscal year. The purpose of the review shall be to determine whether the percentage needs to be adjusted in order to meet the needs of the program. The percentage assessed against the net proceeds of facilities may be lowered or raised to meet the needs of the program while maintaining, to within 30 percent the level of cash reserves available at the time of enactment of this subchapter. The ECM shall be provided with all relevant financial and other information concerning the financial requirements of the program no fewer than 60 days before any review by DARS DBS in which the percentage is to be considered. For the period from the effective date of this amended rule until DARS DBS undertakes its first annual review of the set-aside fee, the percentage shall be five percent.

(e) Payment of set-aside fee. The set-aside fee shall be submitted with the manager's monthly statement of facility operations. The manager shall use "BET Monthly Facility Report, BE-117," to report monthly activities. The BET director shall develop and implement procedures for the preparation and submittal of monthly statements.

(f) Adjustments to monthly set-aside fee.

(1) To encourage managers to hire individuals with significant disabilities, managers shall deduct from their set-aside payment up to 50 percent of the wages or salary paid to a blind or otherwise significantly disabled employee as defined by the Americans with Disabilities Act during any month up to an amount not to exceed 5 percent of the set-aside payment amount for that month or $250, whichever is less. A manager may make this deduction for any number of employees who are blind or otherwise significantly disabled so long as that deduction from the set-aside payment amount does not exceed 25 percent of the total set-aside payment due, or $1,250, whichever is less. The manager shall provide documentation to DARS DBS as required by DARS DBS to verify such employment and the right to the reduction in set-aside fees. For the purposes of this paragraph, the term "blind or otherwise significantly disabled employee" does not include:

(A) the manager;

(B) a blind or otherwise significantly disabled person within the first degree of consanguinity or affinity to the manager; or

(C) a blind or otherwise significantly disabled person claimed as a dependent, either in whole or in part, on the manager's United States income tax return.

(2) Any adjustments provided for in paragraph (1) of this subsection shall not apply for any month in which the set-aside fee is not paid in a timely manner.

(3) To encourage managers to promptly file their monthly statement of facility operations and pay their monthly set-aside fee, managers shall have their monthly set-aside fee increased by 5 percent of the total amount due if either their monthly statement or the monthly set-aside fee is not timely received by DARS DBS in accordance with BET procedures for their preparation and submittal. None of the terms of this rule shall ever be construed to create a contract to pay, as consideration for the use, forbearance, or detention of money, interest at a rate in excess of the maximum rate permitted by applicable laws. This adjustment to the set-aside fee is not imposed as interest, but if for any reason whatever this adjustment is considered to be interest, DARS DBS shall refund to the manager any and all amounts as shall be necessary to cause the "interest" paid to produce a rate equal to the maximum rate permitted by applicable laws.

§106.1921. Duties and Responsibilities of Managers.

(a) Managers must comply with applicable law, this subchapter, written agreements with hosts, the BET Assignment, the requirements of the BET manual, and any proper and authorized instruction by the DARS DBS staff.

(b) Managers must comply with procedures prescribed by the Comptroller of Public Accounts for the payment of sales taxes and provide evidence to DARS DBS of timely sales tax remittances.

(c) Managers must not engage in conduct that demonstrably jeopardizes the DARS DBS right, title, and interest in the BET facility, its equipment, or the lease or agreement with the property managers.

(d) Managers must maintain a professional appearance and act in a professional manner while managing a BET facility.

(e) Managers must open a commercial business account in which they maintain sufficient funds to operate the BET facility.

(f) Managers must make payments for insurance provided by DARS DBS. The host shall be added as an insured when required.

(g) Managers must hire sufficient employees to ensure the efficient operation of the BET facility and to provide adequate service to customers. Should the facility be remodeled or operational areas changed, the manager must have sufficient employees on hand for the necessary shutdown and reopen cleanup.

(h) Managers must be actively engaged in the management of a BET facility the number of hours necessary to achieve satisfactory operation of the facility. With prior notice from DARS DBS, managers shall be available for all necessary visits to the facilities for the purpose of advice, consultation, and inspections. Should the business be closed for remodel or improvement, the manager must be available for the opening, closing, and overall security of the business and assets.

(i) Managers must take appropriate actions to correct deficiencies noted on BET facility audits or reviews within seven business days.

(j) Managers must provide satisfactory service to the BET facility host and customers.

(k) Managers shall notify DARS DBS in advance if they intend to be absent from their assigned facility for more than two days.

(l) Managers must provide DARS DBS with the following information and must notify DARS DBS of any changes to any item no later than 10 business days after a change occurs:

(1) the BET facility telephone number;

(2) an address to which BET correspondence is to be sent;

(3) a phone number for use in emergencies; and

(4) the manager's preferred reading format.

(m) Managers are accountable to DARS DBS for the proceeds of the business.

(n) Managers must keep all records supporting the monthly facility report for three calendar years.

(o) Managers shall report the actual value of resale inventory by taking a physical count in the facility each month and submitting a written inventory quarterly (March, June, September, and December) with the monthly facility report.

(p) Managers, upon request by DARS DBS, must make available all records pertinent to the facilities to which they have been assigned for the purpose of audit or review.

§106.1923. Responsibilities of the Department of Assistive and Rehabilitative Services, Division for Blind Services.

(a) Management services. DARS DBS shall provide each manager with regular and systematic management services, which shall, at a minimum, includes:

(1) explanations of DARS DBS rules, procedures, policies, and standards;

(2) recommendations on ways in which the facility may be made more profitable for the manager;

(3) techniques to develop positive relationships with customers, assistants, and management of the host organization;

(4) possible solutions to problems recognized by the manager or brought to the manager's attention by the DARS DBS staff or the facility host;

(5) continuing education and training courses and opportunities for managers designed to enhance skills, productivity, and profitability; and

(6) information about laws, rules, and regulations affecting the operation of a BET facility.

(b) Training. DARS DBS shall assist the ECM to conduct a special training seminar each year for all licensees to inform them of new BET developments and to provide instruction on new, relevant topics to enhance upward mobility.

(c) Facility operating conditions. DARS DBS shall establish the conditions for operation of a BET facility in accordance with this subchapter and any requirements of the host. The operating conditions shall include, among other things, pricing requirements, hours of operation, and menu items or product lines. DARS DBS may revise the operating conditions from time to time as market conditions warrant. The final authority and ultimate responsibility for determining the prices to be charged for products sold through BET facilities shall rest with DARS DBS.

(d) BET financial data. Upon request, DARS DBS shall provide licensees with access to BET financial data. Also upon request, the DARS DBS staff shall provide assistance to the licensee in interpreting the data.

(e) Inventory payment. When a manager leaves the manager's initial assignment, DARS DBS shall pay the manager or the manager's heirs the value of the usable stock and supplies above the amount provided to the manager upon initial assignment.

§106.1925. BET Elected Committee of Managers.

(a) Authority. The Elected Committee of Managers (ECM) is created and shall operate under Section 107b-1 of the Act.

(b) Relationship to DARS DBS. The ECM shall be presumed as the sole representative of all licensees to DARS DBS in matters contained in the Act and implementing regulations requiring the active participation of the ECM. Active participation means an ongoing process of good-faith negotiations between the Elected Committee of Managers and DARS DBS in the development of BET policies and procedures before implementation. DARS DBS shall have the ultimate responsibility for the administration and operation of all aspects of BET and has final authority in decisions affecting BET.

(c) Relationship to licensees.

(1) It shall be the sole responsibility of the licensees who elect the members of ECM to ensure that the persons elected represent all licensees.

(2) The ECM shall, in addition to all other matters set forth in this subchapter or by law or regulation affecting the administration of BET, act as advocates for licensees and shall strive to improve, expand, and make profitable and successful BET to the greatest possible extent for the mutual benefit of DARS DBS and of the consumers who participate in the program.

(d) BET policies, rules, and procedures. In all matters related to policies and rules, DARS DBS has the ultimate responsibility and the ultimate authority for their establishment and adoption. The ECM shall actively participate in the consideration of significant BET decisions and in deliberations of rules and policies affecting BET. Whenever DARS DBS or the ECM wishes to consider policies or rules related to BET, DARS DBS shall request that the ECM participate in DARS DBS rule drafting workshops to be conducted by the BET director. The BET director will work with the ECM in a good-faith effort to come to agreement in matters related to rule and policy changes.

(e) BET administrative decisions. In matters concerning the administration of BET, the ultimate responsibility and authority for making administrative decisions affecting BET is that of DARS DBS. The BET director shall establish and maintain a continuing dialogue and exchange of information with the ECM about decisions regarding the administration of BET and shall seek ECM input and advice on all decisions affecting the administration of the program. In cooperation with the ECM chair and other members of the ECM that the ECM chair considers necessary and appropriate, the BET director shall develop and implement methods of establishing and maintaining the dialogue and exchange of information. The methods developed shall be set out in detail in a written format and shall be included in the BET manual.

(f) Exclusions from participation. Neither the ECM, nor any of its members, nor any manager is an employee, officer, or official of the State of Texas. Therefore, the ECM shall not participate in any decision-making process regarding personnel of DARS DBS, personnel policies, or personnel administration.

(g) Structure. The ECM shall, to the extent possible, be composed of licensees who are representative of all licensees in BET based on such factors as geography and facility type and size. Two representatives shall be elected from each designated ECM district created by DARS DBS with the active participation of the ECM and as may be revised or modified.

(h) Qualifications. The ECM shall establish qualifications for candidates, and the procedures for voting, tabulating, and announcing results. DARS DBS shall provide such advice and counsel as may be requested by the ECM to accomplish all elections of representatives to the ECM.

(i) Term of office. The term of office for ECM members shall be two years beginning on January 1 following the election. Even- and odd-numbered districts shall alternate election years. Any ECM member elected to fill a vacancy shall serve the remainder of the unexpired term of the manager who vacated a position.

(j) Meetings. The ECM shall meet once during each calendar year to elect officers and again as it may establish by bylaw. The ECM chair shall provide the BET director with a written meeting agenda ten business days before each meeting.

(k) Internal procedures of the ECM. The ECM shall establish bylaws to govern its internal operation and order of business and shall provide DARS DBS with a copy.

(l) Travel expenses.

(1) Expenses for travel, meals, lodging, or other related expenses incurred by ECM representatives must be preapproved by DARS DBS.

(2) When representing a manager at a full evidentiary hearing, the ECM representative shall be reimbursed for travel, meals, and lodging at the rate allowed for travel by DARS DBS staff members.

§106.1927. Termination of License for Reasons Other Than Unsatisfactory Performance.

(a) Causes for termination. The license of a licensee shall be terminated upon the occurrence of any one of the following:

(1) The licensee's visual acuity is improved by any means to the point at which the licensee no longer satisfies the definition of blind.

(2) The licensee becomes otherwise permanently disabled and as a result of such permanent disability is unable to perform the essential functions of operating and maintaining a BET facility. Permanently disabled is a condition that is medically documented and has

existed or is expected to exist for at least twelve months. The determination of permanently disabled shall be made by the assistant commissioner or designee after review of medical documentation and other information relevant to the issue. Other information relevant to the issue shall include recommendations from the DARS DBS staff and the ECM, pertinent information from the licensee's BET file or provided by the licensee, and reports of examinations or evaluations, if any, obtained by DARS DBS and the licensee.

(3) The licensee is unassigned and has not accepted assignment offers or applied for an assignment when facilities are available for a period of six consecutive months. The six-month deadline may be extended by periods of 30 days when facilities are not available for assignment. Any unassigned period of 12 months or more requires retraining for the licensee to become eligible to bid for, or be assigned to, available facilities.

(b) Examination and evaluation. In any situation in which the vision or other disability of a licensee is at issue with respect to termination of a license, DARS DBS or the licensee may require an examination or evaluation by professionals to determine whether the licensee is otherwise permanently disabled and as a result of such permanent disability is unable to perform the essential functions of operating and maintaining a BET facility. The reports of such professionals shall be furnished to DARS DBS and the licensee. Any failure of the licensee to participate in required examinations or evaluations shall be grounds for administrative action.

(c) Restoration of license. A license terminated under the provisions of this section may be restored at the discretion of DARS DBS if the condition or conditions causing the termination have been satisfactorily resolved. In considering a decision whether to restore a license terminated according to this section, the assistant commissioner shall consult with appropriate BET staff members, the ECM chair, and any advocate for the licensee and shall consider all pertinent information and documentation provided by any of the persons described in this subsection.

(d) Conditional restoration. If the assistant commissioner determines that a license terminated according to this section should be restored, the assistant commissioner may condition the restoration of the license on any reasonable matters, such as, by way of illustration, continued medical treatment or therapy, or completion of refresher or other courses of training.

§106.1929. Administrative Action Based on Unsatisfactory Performance.

(a) Causes for administrative action based on unsatisfactory performance. The happening of any one or more of the following acts or omissions by a manager shall subject a manager to administrative action for unsatisfactory performance:

(1) Failing to personally operate the assigned facility as set forth in the permit or contract with the host and/or in the manager's record of assignment unless prior written approval to operate the facility in another manner has been obtained from DARS DBS.

(2) Failing to pay money due from the operation of the facility, including, but not limited to, taxes, fees, or assessments to a governmental entity or supplier, or knowingly giving false or deceptive information to or failing to disclose required information to or misleading in any manner a governmental entity (including DARS DBS) or a supplier.

(3) Failing to file required financial and other records with DARS DBS or preserve them for the time required by this subchapter.

(4) Failing to cooperate in a timely manner with audits conducted by DARS DBS or other state or federal agencies.

(5) Failing to maintain insurance coverage required by these policies and procedures.

(6) Using BET equipment or facility premises to operate another business.

(7) Failing to properly maintain facility equipment in a clean and operable condition within the scope of the manager's level of maintenance authorization.

(8) Intentionally abusing, neglecting, using, or removing facility equipment without written DARS DBS authorization.

(9) Operating a facility under the influence of substances that interferes with the operation of the facility.

(10) Operating a BET facility in a manner that demonstrably jeopardizes the DARS DBS investment in the facility.

(11) Using privileged information concerning an existing facility to compete with DARS DBS for the facility.

(12) Failing to comply with any federal or state law prohibiting discrimination and failure to ensure that services are provided without distinction on the basis of race, gender, color, national origin, religion, age, political affiliation, or disability.

(13) Failing to maintain the necessary skills and abilities for effectively managing a facility.

(14) Using a facility to conduct unlawful activities.

(15) Failing to comply with the manager's responsibilities under applicable law, this subchapter, the requirements of the BET manual, or any proper and authorized instruction by DARS DBS personnel.

(16) Communicating or causing another person to communicate with a member of a selection panel or an applicant for a facility then being considered for assignment for the purpose of influencing or manipulating the selection of an applicant by offering to give a thing or act of value, including promises of future benefit, or by threat.

(17) Failing to complete annual continuing education requirements.

(b) Administrative action pending an appeal. DARS DBS may at its discretion suspend administrative action pending the outcome of an appeal.

(c) Types of administrative actions. There are five types of administrative actions based on unsatisfactory performance:

(1) Written reprimand. Written reprimand means a formal statement describing violations of applicable law, this subchapter, the requirements of the BET manual, or any proper and authorized instruction by DARS DBS personnel.

(2) Probation. Probation means allowing a licensee to continue in BET in an effort to satisfactorily remedy a condition that is not acceptable under this subchapter. If the condition causing probation is satisfactorily remedied within the time periods specified in the written notice of probation, the probation will be lifted. If the unacceptable condition is not remedied within the time specified, additional and more serious administrative actions may ensue. When a licensee who has been on probation two times in a three-year period qualifies for probation for the third time within those three years, the licensee's license may be revoked according to DARS DBS procedures.

(3) Loss of facility. Loss of facility means the removal of a manager from the manager's current facility for administrative reasons when the manager's actions or inactions are endangering the state's investment in the facility.

(4) Termination. Termination means the cessation of a license issued to a licensee to operate a facility and the removal of the individual from BET.

(5) Emergency removal of manager.

(A) A manager may be summarily removed from a facility in an emergency. An emergency shall be considered to exist when DARS DBS, in consultation with the ECM chair, determines that some act or acts or some failure to act of that manager or any person who is an employee, servant, or agent of such manager, will, if such removal does not occur:

(i) result in a clear danger to the health, safety, or welfare of any person or to the property of any person in or around the facility; or

(ii) result in a deterioration of the existing or future relationship with the host, thereby putting the continuation of the facility in jeopardy; or

(iii) present a clear potential of substantial loss or damage to the property of the State of Texas.

(B) In any case in which a manager has been summarily removed from a facility on an emergency basis for any of the reasons set forth in subparagraph (A) of this paragraph, the manager shall be entitled to have a hearing about the necessity of the removal within ten days after the removal has occurred.

(C) The time period for the hearing may be extended only by mutual agreement of the manager and DARS DBS provided that if an official holiday of the State of Texas falls within the period, then the period shall be extended by the time of the holiday; or if the services of an arbitrator cannot be obtained in time to afford the hearing within the period, then the period shall be extended by the time necessary to obtain the services of an arbitrator and schedule the hearing.

(D) If the manager desires to have a hearing, the manager shall notify DARS DBS in writing within 48 hours following the removal. The written notification need only state the name of the manager, the location of the facility, and that the manager desires to have a hearing about the need for summary removal. The request may be delivered to the BET director, the assistant commissioner, or any local BET staff member in the geographical area in which the facility is located.

(E) Upon receipt of any such request, the BET director shall obtain the services of an arbitrator from the American Arbitration Association ("AAA") or other similar organization to conduct the hearing.

(F) The manager shall be notified of the date, time, and place of the hearing. To the extent possible, the hearing shall be conducted in an area near the location of the facility.

(G) The hearing shall be conducted in accordance with the rules of the American Arbitration Association, except that the arbitrator shall be requested to announce orally a decision at the conclusion of the hearing.

(H) If the arbitrator determines that no emergency necessitating the removal of the manager existed, then the manager shall be immediately restored to the operation of the facility.

(I) No determination made as a result of the hearing shall operate to prejudice the rights of the manager to proceed with a grievance in accordance with the terms of this subchapter and the Act.

(d) Administrative procedures.

(1) DARS DBS shall decide what administrative action to take based on the seriousness of the violation, the damage to BET, and the licensee's record.

(2) Upon receipt of information which indicates that administrative action may be appropriate, DARS DBS shall take the following actions before making a determination about taking administrative action:

(A) DARS DBS shall notify the licensee in writing of the allegations and reasons that administrative action is being considered. The notice shall either be hand delivered and read to the licensee, or be delivered to the licensee's work or home address.

(B) The licensee shall have 5 business days to respond, either in person or in writing, to the notice. The response shall be made to the individual designated in the notice. After receiving the licensee's response, DARS DBS shall decide what administrative action, if any, is appropriate. If no response is timely received from the licensee, DARS DBS shall decide without the licensee's response what administrative action, if any, will be taken.

(C) If a decision is made to issue a written reprimand, the written reprimand will be accompanied by a brief summary of the evidence justifying the reprimand, suggested steps for correcting the violation, and consequences of not correcting the violation. All reprimands shall contain notice of the licensee's right to appeal the reprimand and a statement that failure to correct the violation may result in further administrative action.

(D) If a decision is made to place a licensee on probation, DARS DBS shall deliver to the licensee a letter of probation containing the following:

(i) the specific reasons for probation;

(ii) the remedial action required to remove the licensee from probation;

(iii) the time within which the remedial action must take place;

(iv) the consequences of failure to take remedial action within the prescribed time frame; and

(v) notice of the licensee's right to appeal.

(E) Upon satisfactory completion of the remedial action outlined in the letter of probation, a licensee shall be removed from probation.

(F) Failure of the licensee to complete remedial requirements within the prescribed time frame shall result in one or more of the following actions:

(i) required training;

(ii) extension of probation;

(iii) restrictions on applying for another facility;

(iv) removal from the facility; or

(v) termination of license.

(G) If, after the manager has had an opportunity to respond, a decision is made that sufficient grounds exist to remove the manager from a facility, DARS DBS shall notify the manager in writing by hand delivery or certified U.S. Mail, return receipt requested, that the manager's assignment to the BET facility has been terminated and the manager must vacate the facility. The removal letter shall contain the following information:

(i) specific reasons for removal from the facility;

(ii) actions required by the manager, if any;

(iii) requirements for obtaining reassignment; and

(iv) notice of the manager's right to appeal under the Act.

(H) If, after the manager has had an opportunity to respond, a decision is made that sufficient grounds exist for termination, DARS DBS shall notify the manager in writing by hand delivery or certified U.S. Mail, return receipt requested, that DARS DBS has decided that sufficient cause exists to terminate the manager's license. The manager shall be instructed to vacate the facility if he or she has not already done so. The termination letter shall contain the following information:

(i) specific reasons for termination;

(ii) actions required by the licensee, if any;

(iii) procedures for applying for any other DARS DBS services for which the person may be eligible; and

(iv) notice of the licensee's rights under the Act.

(3) The provisions of paragraph (2) of this subsection notwithstanding, pending a determination with respect to administrative action, a manager may be removed from a facility if DARS DBS considers such removal in the best interest of BET and efforts to correct the deficiencies have been unsuccessful.

(4) During the license termination process, the manager shall not be eligible for assignment to any other BET facility.

(e) Before termination of a license, DARS DBS shall afford the licensee an opportunity for a full evidentiary hearing.

§106.1931. Procedures for Resolution of Manager's Dissatisfaction.

(a) Appealable actions. This section provides the procedures for licensees who are dissatisfied with a DARS DBS action arising from the operation of BET.

(b) Actions not subject to appeal. The phrase "DARS DBS action arising from the operation of BET" in subsection (a) of this section does not include the following actions of the DARS DBS:

(1) the hiring, firing, or discipline of DARS DBS employees;

(2) the challenge of federal or state law, or rules previously approved by the Secretary of Education under the Act; or

(3) an action by DARS DBS unless it is alleged that the action is in violation of applicable law, this subchapter, the requirements of the BET manual, or any proper and authorized instruction by DARS DBS personnel or is unreasonable. Unreasonable shall mean without rational basis or arbitrary and capricious.

(c) DARS DBS discretion and sovereign immunity. DARS DBS does not waive its right and duty to exercise its lawful and proper discretion. DARS DBS does not waive its sovereign immunity.

(d) Remedies. Remedies available to resolve dissatisfaction shall correct the action complained of from the earlier time of:

(1) agreement by the parties about an appropriate remedy; or

(2) a final resolution under the Act that DARS DBS acted in violation of applicable law, this subchapter, the requirements of the BET manual, or any proper and authorized instruction by DARS DBS personnel or acted unreasonably.

(e) Informal procedures to review dissatisfactions. At the request of a licensee, DARS DBS shall arrange for and participate in informal meetings in an effort to quickly resolve a matter of dissatisfaction arising from the operation or administration of BET. The informal process is for the purpose of quickly and amicably resolving an issue in controversy. It is not for the purpose of denying or delaying the manager's right to pursue resolution of a matter through a full evidentiary hearing. At any point during the informal process, either party may elect to terminate the following informal process procedures:

(1) A licensee may initiate informal procedures by notifying DARS DBS in writing through the BET director that the licensee is dissatisfied with a matter arising from the operation or administration of BET. The written notice must describe with reasonable particularity the specific matter in controversy, the date the action occurred, or an approximate date if the exact date is not known, and the licensee's desired relief or remedy. If the licensee is dissatisfied with a series of the same or related actions over a period of time, the notice should describe to the best of the licensee's ability the time frame of the events and include the date of the most recent event about which the licensee is dissatisfied.

(2) To ensure that informal resolution is possible in a timely manner, the licensee's request to initiate informal proceedings must be filed with DARS DBS no later than 20 business days after the most recent event specified in the request. DARS DBS shall within a reasonable time arrange a meeting at a location, date, and time satisfactory to all parties.

(3) The licensee must notify DARS DBS when filing a request for informal proceedings if the licensee will be represented by counsel during mediation. DARS DBS will be represented by counsel only when the licensee is represented by counsel.

(4) Meetings shall take place in an informal environment and shall be attended by the licensee, a BET staff person, and a neutral third party who shall serve as an informal mediator during the discussions.

(5) The neutral third party shall be a person certified in conducting mediations.

(6) The neutral third party's responsibility is to report to DARS DBS only that the effort to resolve the matter to the licensee's satisfaction was or was not successful. If an agreement is reached, then the actions agreed to with respect to the facility or licensee shall be immediately taken.

(7) The provisions concerning mediation under Chapter 101 of this title (relating to Administrative Rules and Procedures) shall not apply to or control the informal resolution procedures in this subchapter.

(f) Full evidentiary hearing. A manager has the right to request a full evidentiary hearing to resolve dissatisfaction according to the following:

(1) A manager has the right to request a full evidentiary hearing without first going through mediated meetings described in subsection (e) of this section.

(2) A request for an evidentiary hearing must be made no later than the 20th business day after the occurrence of the agency action about which the manager complains. The assistant commissioner, upon request of the complaining party, may extend the time period for filing a grievance upon the showing of good cause by the complaining party for such additional period if such request is made no later than the 20th business day after the occurrence of the agency action about which the manager complains.

(3) A manager requesting a full evidentiary hearing after the conduct of mediated meetings described in subsection (e) of this section must request such hearing in writing no later than the 20th business day after receipt of the assistant commissioner's decision.

(4) A request for a full evidentiary hearing must be in writing and transmitted to the assistant commissioner. A request that is postmarked within the applicable time frame shall be considered timely delivered if properly posted.

(5) The request for a full evidentiary hearing must describe the specific action with reasonable particularity sufficient to provide notice as to the action which is alleged to be unreasonable or in violation of applicable law, this subchapter, the requirements of the BET manual, or any proper and authorized instruction by DARS DBS personnel. The request must, to the best of the complainant's knowledge, contain the date the action occurred and the law or regulation must be reasonably identified if an action is alleged to be in violation of law, this subchapter, the requirements of the BET manual, or regulation. The request must also identify the desired relief or remedy.

(6) The manager may be represented in the evidentiary hearing by legal counsel or other representative of the manager's choice, at the manager's expense.

(7) Reader or other communication services, if needed, shall be arranged for the manager by DARS DBS upon request by the manager at least three business days prior to the hearing date.

(8) The manager shall be notified in writing of the time and place fixed for the hearing and of the manager's right to be represented by legal or other counsel.

(9) Selection of the hearing officer.

(A) The hearings coordinator, DARS Legal Services, shall select, on a random basis, a hearing officer from a pool of persons qualified according to this section.

(B) The hearing officer shall be an impartial and qualified individual who:

(i) has no involvement either with the DARS DBS action that is at issue or with the administration or operation of BET;

(ii) is not an employee of a public agency (other than an administrative law judge, hearing examiner, or employee of an institution of higher education);

(iii) has knowledge of the Act and any applicable state and federal regulations governing the appeal;

(iv) has received training specified by DARS with respect to the performance of official duties; and

(v) has no personal, professional, or financial interest that would be in conflict with the objectivity of the individual.

(C) An individual is not considered to be an employee of a public agency for the purposes of subparagraph (B)(ii) of this paragraph solely because the individual is paid by the agency to serve as a hearing officer.

(10) Hearings shall be conducted in accordance with the Act, Texas Government Code §2001.051 et seq., and this subchapter to the extent those procedures do not conflict with the Act and its implementing regulations or this subchapter.

(11) Licensees bringing complaints shall have the burden of proving their cases by the preponderance of evidence. Licensees shall present their evidence first. When a hearing is requested as a result of administrative action by DARS DBS against a licensee, DARS DBS shall have the burden of proving its case by a preponderance of the evidence and shall present its evidence first.

(12) Transcription of Proceedings.

(A) Unless precluded by law, the hearing shall be recorded electronically by tape recorder or similar device either by the hearing officer or by someone designated by the hearing officer. Such tape recording shall be the official record of the testimony recorded during the hearing. Any party, however, may request, at the party's expense, that the hearing be recorded by a court reporter if the request is made within ten days of the date for the hearing.

(B) In lieu either of a recording of the testimony electronically or of the reporting of testimony by a court reporter, the parties to a hearing may agree upon a statement of the evidence, to use taped transcription as a statement of the testimonial evidence, or agree to the summarization of testimony before the hearing officer; provided, however, that proceedings or any part of them must be transcribed on written request of any party.

(C) Unless otherwise provided in this subchapter, the party requesting a transcription of any electronic recording of the proceedings shall bear the cost for transcribing any such electronically recorded testimony. Nothing provided for in this section limits DARS DBS to a stenographic record of the proceedings.

(D) The record of the proceedings, including exhibits and any transcription, shall be made available to the parties by DARS DBS no later than the 30th business day after the close of the hearing.

(13) The hearing officer shall issue a recommendation which shall set forth the principal issues and relevant facts adduced at the hearing and the applicable provisions of law, rule, the requirements of the BET manual, or any proper and authorized instruction by DARS DBS personnel. The recommendation shall contain findings of fact and conclusions with respect to each of the issues, and the reasons and bases for the conclusions.

(14) In formulating a recommendation, the hearing officer shall not evaluate whether the DARS DBS actions were wise, efficient, or effective. Rather, the hearing officer is limited to determining whether the DARS DBS actions were unreasonable, or violated applicable law, this subchapter, the requirements of the BET manual, or any proper and authorized instruction by DARS DBS personnel.

(15) Should the hearing officer find that the actions taken by DARS DBS unreasonable, or violated applicable law, this subchapter, the requirements of the BET manual, or any proper and authorized instruction by DARS DBS personnel, the hearing officer shall also recommend any prospective action necessary to correct the violations.

(16) The hearing officer's recommendation shall be made no later than the 30th business day after the receipt of the official transcript. The recommendation shall be delivered promptly to the assistant commissioner.

(17) The assistant commissioner shall review the recommendation of the hearing officer and forward a decision to the manager no later than the 20th business day after receipt of the hearing officer's recommendation. The assistant commissioner's decision shall include findings of fact and conclusions of law based on the evidence in the record and separately stated.

(18) Subject to the provisions of Texas Government Code §2001.144 and §2001.146, the assistant commissioner's decision shall be the final decision of DARS DBS. Any such decision becomes the final decision of DARS DBS if a timely motion for rehearing or reconsideration is not filed.

(g) Arbitration. A manager appealing the DARS DBS decision must file a complaint with the Secretary of Education in conformity with the provisions of the implementing regulations at 34 CFR, §395.13 of the Act, pertaining to arbitration of vendor complaints.

§106.1933. Establishing and Closing Facilities.

(a) Establishing facilities. On its own initiative, at the request of an agency that controls federal or state property, at the request of the ECM, or at the request of a private organization, DARS DBS shall survey the property, blueprints, or other available information concerning the property to determine whether the installation of a BET facility is feasible and consonant with applicable laws and regulations and with DARS DBS vocational rehabilitation objectives.

(1) If the installation of a BET facility is determined to be feasible, the DARS DBS shall proceed to develop plans for the establishment of a facility in accordance with procedures promulgated and implemented by the DARS DBS staff and, when the facility is developed, shall assign a manager to the facility.

(2) If it is determined that a blind person could not properly operate a vending facility at a particular location, the pertinent facility data will be presented to the assistant commissioner of the Department of Assistive and Rehabilitative Services to determine if a person whose disability is not of a visual nature could operate the facility in a proper manner. The phrase "could not properly operate a vending facility" includes the existence, at the time of the establishment of the facility, of laws or regulations that restrict the blind from operating a particular vending facility as defined under state and federal laws.

(b) Closing facilities. Except for temporary closings by the DARS DBS staff, no BET facility shall be closed by DARS DBS until each of the following has occurred:

(1) The BET director has certified to the assistant commissioner that the facility is no longer a feasible or viable BET facility and provides reasons for that opinion.

(2) The assistant commissioner has approved the proposed closing of the facility.

§106.1935. Forms.

DARS DBS adopts the following forms by reference. Copies may be requested from any local DARS DBS office or by calling DARS' toll-free line (1-800-628-5115).

(1) BET Application (BE-114) dated November 1, 2007.

(2) Business Enterprises of Texas Monthly Facility Report, (BE-117), dated November 1, 2007.

(3) BET Assignment--Requirements for Operation of a Vending Facility Under Randolph-Sheppard Act and Applicable State Statutes Between DARS DBS and a Licensed Vendor (BE-121), dated November 1, 2007.

(4) Equipment Loan Agreement (BE-122) dated November 1, 2007.

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 February 13, 2012.

TRD-201200840

Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 424-4050

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CHAPTER 108. DIVISION FOR EARLY CHILDHOOD INTERVENTION SERVICES

The Texas Health and Human Services Commission (HHSC), on behalf of the Texas Department of Assistive and Rehabilitative Services (DARS), proposes amendments, repeals, and new rules for DARS rules in Title 40, Part 2, Chapter 108, Division for Early Childhood Intervention Services. DARS proposes amendments to the rules in Subchapter A, General Rules; Subchapter B, Procedural Safeguards and Due Process Procedures; Subchapter C, Staff Qualifications; Subchapter G, Referral, Pre-Enrollment, and Developmental Screening; Subchapter H, Eligibility; Subchapter I, Evaluation and Assessment; Subchapter J, Individualized Family Service Plan (IFSP); Subchapter K, Service Delivery; Subchapter L, Transition; Subchapter N, System of Fees; and Subchapter O, Public Outreach. DARS is proposing to repeal rules: in Subchapter G, Referral, Pre-Enrollment, and Developmental Screening; Subchapter K, Service Delivery; and Subchapter L, Transition. DARS also proposes new rules for Subchapter B, Procedural Safeguards and Due Process Procedures; Subchapter H, Eligibility; and Subchapter O, Public Outreach. Specifically DARS proposes amendments to §§108.101, 108.103, 108.201, 108.203, 108.205, 108.207, 108.211, 108.213, 108.215, 108.221, 108.223, 108.303, 108.309, 108.313, 108.315, 108.317, 108.701, 108.707, 108.709, 108.801, 108.803, 108.805, 108.807, 108.901, 108.903, 108.909, 108.1001, 108.1003, 108.1007, 108.1009, 108.1011, 108.1015, 108.1017, 108.1019, 108.1021, 108.1103, 108.1105, 108.1107, 108.1111, 108.1201, 108.1203, 108.1207, 108.1211, 108.1213, 108.1215, 108.1219, 108.1401, 108.1403, 108.1411, 108.1413, 108.1419, 108.1421, 108.1503, 108.1505 and 108.1515; new §§108.218, 108.804 and 108.1502 and the repeal of §§108.703, 108.1109, 108.1209 and 108.1417.

The purpose of the proposed changes to Chapter 108 is to amend, repeal, and add rules to update federal citations, revise requirements when corresponding federal regulations were revised, increase clarity for ECI contractors and families receiving ECI services; modify certain requirements for ECI contractors; and revise the process for determining family cost share amounts. On September 28, 2011, the U.S. Department Education issued final regulations governing the Early Intervention Program for Infants and Toddlers with Disabilities. Those regulations are found at 34 CFR, Part 303. DARS has participated in multiple conference calls and training sessions regarding these new regulations and has also received specific guidance from the U.S. Department of Education regarding their application in Texas.

The following rules were amended, repealed, or added in order to bring Chapter 108 into compliance with these newly revised federal requirements: Subchapter A, General Rules: §108.103, Definitions; Subchapter B, Procedural Safeguards and Due Process Procedures: §108.201, Purpose; §108.203, Responsibilities; §108.205, Prior Written Notice and Procedural Safeguards Notice; §108.207, Parental Consent; §108.211, Parent; §108.213, Surrogate Parents; §108.215, Early Childhood

Intervention Procedures for Filing Complaints, §108.221 Access Rights; and §108.223, Fees for Records; and the addition of new §108.218, Mediation; Subchapter G, Referral, Pre-Enrollment, and Developmental Screening: §108.701, Referral Requirements; §108.707, Pre-Enrollment Activities, and §108.709, Optional Developmental Screenings; Subchapter I, Evaluation and Assessment: §108.901, Definitions; and §108.909, Comprehensive Needs Assessment; Subchapter J, Individualized Family Service Plan (IFSP): §108.1001, Definitions; §108.1003, IFSP; §108.1007, Interim IFSP; §108.1009, Participants in Initial and Annual Meetings to Evaluate the IFSP; and §108.1017, Complete Periodic Review; Subchapter K, Service Delivery: §108.1103, Early Childhood Intervention Services Delivery; and §108.1105, Capacity to Provide Early Childhood Intervention Services; and the repeal of §108.1109, Co-visits; Subchapter L, Transition: §108.1201, Purpose; §108.1203, Definitions; §108.1207, Transition Planning; §108.1211, LEA Notification of Potentially Eligible Special Education Services; §108.1213, LEA Notification Opt Out; §108.1215, Reporting Late LEA Notifications of Potentially Eligible For Special Education Services; and §108.1219, Transition to LEA Services; and the repeal of §108.1209, LEA Child Find Notification; Subchapter N, System of Fees: §108.1401, Purpose; §108.1403, Definitions; §108.1411, IFSP Services Subject to the Family Cost Share Amount; §108.1413, Family Cost Share Amount (Figure); §108.1419, Third-Party Payors; §108.1421, Review of Family Cost Share Amount; and repeal of §108.1417, Zero Family Cost Share Amount; Subchapter O, Public Outreach: §108.1503, Child Find; and §108.1515, Interagency Coordination with Local Agencies; and the addition of new §108.1502, Definitions.

In reviewing the new federal regulations, along with implementation challenges of existing rules, the following rules are amended, repealed, or added to either make current, implicit requirements more clearly explicit or to provide guidance where the operational requirements of existing rules were silent: Subchapter A, General Rules: §108.103, Definitions; Subchapter C, Staff Qualifications: §108.313, Early Intervention Specialist (EIS); §108.315, Service Coordinator; and §108.317, Staff Who Do Not Hold a License or EIS Credential and Provide Early Childhood Intervention Services to Children and Families; Subchapter G, Referral, Pre-Enrollment, and Developmental Screening: §108.707, Pre-Enrollment Activities, §108.709, Optional Developmental Screenings; and the repeal of §108.703, Child Referred Who Is Not Eligible. Subchapter H, Eligibility: §108.801, Definitions; §108.803, Eligibility; §108.805, Initial Eligibility Requirements; and §108.807, Continuing Eligibility Requirements; and the addition of new §108.804, Eligibility Statement; Subchapter I, Evaluation and Assessment: §108.903, Evaluations; Subchapter J, Individualized Family Service Plan (IFSP): §108.1001, Definitions; §108.1003, IFSP; §108.1007, Interim ISFP; §108.1011, Participants in Meetings for a Child with Auditory or Visual Impairments; §108.1015, Content of the IFSP; §108.1017, Complete Periodic Review; §108.1019, Annual Meeting to Evaluate the IFSP; and §108.1021, Partial Review of the IFSP; Subchapter K, Service Delivery: §108.1103, Early Childhood Intervention Services Delivery; §108.1107, Group Services; and §108.1111, Service Delivery Documentation Requirements; and the repeal of §108.1109, Co-visits; Subchapter O, Public Outreach: §108.1505, Public Awareness.

Finally, DARS proposes the following amendments to rules for the following reasons:

Subchapter A, General Rules: §108.101, Purpose: to clearly outline and define the separate, but interconnected roles of the State (as carried out by DARS) and of DARS contractors, as well as to articulate the goals of the ECI program.

Subchapter C, Staff Qualifications: §108.303, Definitions and §108.309, Minimum Requirements for All Direct Service Staff: to clarify the type of fingerprint check required by ECI Direct Service Staff in order to provide flexibility necessary given existing barriers in the current fingerprint check process.

Subchapter C, Staff Qualifications: §108.313, Early Intervention Specialist: to remove the option for college course credit hours in human development to qualify a person with a bachelor's degree in an unrelated field as either an Early Intervention Specialist (EIS) or an EIS supervisor. The inclusion of this option in the current rules was an oversight.

Subchapter C, Staff Qualifications: §108.315, Service Coordinator: to increases the minimum qualifications to work as a service coordinator by removing the qualification option of only having a high school diploma or equivalent and two years working experience with children and families in order to ensure that the qualifications required for this position are commensurate with the responsibilities given new Federal requirements that the Service Coordinator be one of the two professionals required as members of the IFSP team. The rule change also clarifies that registered nurses meet the minimum qualifications.

Subchapter H, Eligibility: §108.803, Eligibility: to provide guidance to ECI contractors and families about how to meet requirements in the eligibility process and provide appropriate due process, the changes to this rule establish a time frame for the contractor to send prior written notice of ineligibility if a parent fails to consent or fails to cooperate in re-determinations of eligibility.

Subchapter I, Evaluation and Assessment: §108.903, Evaluations: to provide guidance to ECI contractors and families about how to meet requirements in the evaluation process and provide appropriate due process, the changes to this rule allows the contractor to discount or disregard evaluations and assessments performed by outside entities if the parent does not allow full access to those records or does not cooperate in assisting the contractor with verifying their findings.

Subchapter J, Individualized Family Service Plan (IFSP): §108.1019, Annual Meeting to Evaluate the IFSP: to provide guidance to ECI contractors and families about how to meet requirements in the IFSP review and planning process and provide appropriate due process, the changes to this rule provides the contractor procedures for when IFSP services are not based on current evaluation and current assessment of needs.

Subchapter N, System of Fees: to bring the subchapter into compliance with the newly issued federal guidance, as well as aide DARS in its federally-required duty to ensure consistent access to ECI services for all families throughout the state, regardless of which ECI contractor is delivering the service. In addition, changers were made to improve clarity by removing criteria that is confusing and redundant with other rules.

The proposed new rules are authorized by the Texas Human Resources Code, Chapters 73 and 117; and the Individuals with Disabilities Education Act, as amended, 20 USC §1400 et seq., and its implementing regulations, 34 CFR Part 303, as amended.

Mary Wright, DARS chief financial officer, has determined that for each year of the first five years that the proposed amendments,

repeals, and new rules will be in effect, there is no fiscal impact expected as a result of enforcing or administering the proposed amendments, repeals, and new rules.

Ms. Wright also has determined that for each year of the first five years the proposed amendments, repeals, and new rules will be in effect, the public benefit anticipated as a result of enforcing the proposal will be assurances to the public that the necessary rules are in place to provide clear guidance to ECI contractors and families, relating to the compliance of DARS and ECI contractors with Federal regulations. Ms. Wright has also determined that there is no probable economic cost to persons who are required to comply with the proposed amendments, repeals, and new rules.

Further, in accordance with Texas Government Code §2001.022, Ms. Wright has determined that the proposed amendments, repeals, and new rules will not affect a local economy, and, therefore, no local employment impact statement is required. Finally, Ms. Wright has determined that the proposed amendments, repeals, and new rules will have no adverse economic effect on small businesses or micro-businesses.

Written comments on the proposed amendments, repeals, and new rules may be submitted within 60 days of publication of this proposal in the *Texas Register* to Nancy Mikulencak, Rules Coordinator, Texas Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 150-A-2, Austin, Texas 78756 or electronically to DARSRules@dars.state.tx.us.

SUBCHAPTER A. GENERAL RULES

40 TAC §108.101, §108.103

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.101 Purpose.

(a) This chapter is intended to implement the provisions of the Interagency Council on Early Childhood Intervention Act, Texas Human Resources Code, Chapter 73, the Individuals with Disabilities Education Act, Part C (20 USC §§1431 - 1444), and federal regulations 34 CFR Part 303, or their successors. This chapter shall be interpreted to be consistent with these statutes and rules to the extent possible. If such an interpretation is not possible for a portion of this chapter, the federal statutes and regulations [~~rules~~] shall prevail. The Texas statutes and this chapter shall then be given effect to the extent possible.

(b) The purpose of the statutes, regulations and rules cited in subsection (a) of this section, and the purpose of this chapter are to:

(1) develop and implement a statewide, comprehensive, coordinated, multidisciplinary, interagency system that provides early childhood intervention services for infants and toddlers with disabilities and their families;

(2) facilitate the coordination of payment for early childhood intervention services from federal, state, local, and private sources (including public and private insurance coverage);

(3) enhance state and local capacity to provide quality early childhood intervention services and expand and improve existing early childhood intervention services being provided to infants and toddlers with disabilities and their families;

(4) enhance the capacity of state and local agencies and service providers to identify, evaluate, and meet the needs of all children, including historically underrepresented populations, particularly minority, low-income, inner-city, and rural children, and infants and toddlers in foster care; and

(5) expand opportunities for children under three years of age who would be at risk of having substantial developmental delay if they did not receive early childhood intervention services.

(c) In general, the provisions of this chapter apply to DARS, any DARS contractor which operates an early childhood intervention program, any provider of services for the system whether or not funding comes from DARS, and all children referred to the Part C program and their families. Specific sections and portions thereof may limit the applicability of portions of this chapter, however any reasonable ambiguity shall be decided in favor of application to all parties listed in this section.

§108.103. Definitions.

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

(1) Assistive Technology Devices and Services--As defined in 34 CFR §303.13(b)(1) [~~§303.12~~].

(2) Audiology Services--As defined in 34 CFR §303.13(b)(2) [~~§303.12~~], including services provided by local educational agency personnel.

(3) Behavioral Intervention Services:

(A) strengthening developmental skills while decreasing severely challenging behaviors;

(B) identifying the specific behaviors to change;

(C) identifying environmental events that may currently be supporting or failing to support those behaviors;

(D) utilizing behavior modification techniques in ways that help achieve the desired behavior change; and

(E) using specific behavior analysis plans that may be carried out by persons without professional credentials when designated by the family.

(4) Child--An infant or toddler as defined in 34 CFR §303.21 [~~As defined in 34 CFR §303.16~~].

(5) Child Find--As described in 34 CFR §§303.115, 303.302 and 303.303, activities [~~Activities~~] and strategies designed to locate and identify, as early as possible, infants and toddlers with developmental delay.

(6) Complaint--A formal written allegation submitted to DARS stating that a requirement of the Individuals with Disabilities Education Act, or an applicable federal or state regulation has been violated.

(7) Comprehensive Evaluation--The procedures used by qualified personnel to determine a child's initial and continuing eligibility for early childhood intervention services that comply with the requirements described in 34 CFR §303.21 and §303.321.

(8) Condition With a High Probability of Resulting in Developmental Delay--A medical diagnosis known and widely accepted within the medical community to result in a developmental delay over the natural course of the diagnosis.

(9) [~~(7)~~] Consent--As defined in 34 CFR §303.7 [~~§303.401(a)~~] and meeting [~~meets~~] all requirements in 34 CFR §303.420 [~~§303.404~~].

(10) [~~(8)~~] Contractor--A local private or public agency with proper legal status and governed by a board of directors or governing authority that accepts funds from DARS to administer an early childhood intervention program.

(11) [~~(9)~~] Counseling Services--Counseling services are provided when the parent-child relationship impedes the child's developmental process. In addition to 34 CFR §303.13(b)(3) [~~§303.12(d)(3)~~]:

(A) conducting evaluation and assessment of the family's strengths and stressors related to the child's disabilities;

(B) consultation with family members, teachers and caregivers to promote function, learning, and development across all domains, with an emphasis on the parent-child relationship as related to the IFSP;

(C) assisting the family in achieving adjustments and decreasing stresses related to their child's delay or disability; and

(D) assisting the family in solving problems and making decisions related to the child's delay or disability.

(12) Co-visits--When two or more service providers deliver different services to the child during the same period of time.

(13) [~~(10)~~] Days--Calendar days.

(14) [~~(11)~~] DARS--The Texas Department of Assistive and Rehabilitative Services. The entity designated as the lead agency by the governor under the Individuals with Disabilities Education Act, Part C. DARS has the final authority and responsibility for the administration, supervision, and monitoring of programs and activities under this system. DARS has the final authority for the obligation and expenditure of funds and compliance with all applicable laws and rules.

(15) [~~(12)~~] DARS ECI--The Texas Department of Assistive and Rehabilitative Services Division for Early Childhood Intervention Services. The state program responsible for maintaining and implementing the statewide early childhood intervention system required under the Individuals with Disabilities Education [~~Educational~~] Act, Part C as amended in 2004.

(16) Developmental Delay--As defined in Texas Human Resources Code §73.001(3) and determined to be significant in compliance with the criteria and procedures in Subchapter H of this chapter (relating to Eligibility.)

(17) [~~(13)~~] Developmental Screenings--General screenings [~~screening~~] provided by the early childhood intervention program to assess the child's need for further evaluation.

(18) [~~(14)~~] Early Childhood Intervention Program--In addition to the definition of early intervention service program as defined in 34 CFR §303.11, a [~~A~~] program operated by the contractor with the express purpose of implementing a system to provide early childhood intervention services to children with developmental delays and their families.

(19) [~~(15)~~] Early Childhood Intervention Services--Individualized early childhood intervention services determined by the IFSP team to be necessary to enhance the child's development. Early childhood intervention services are further defined in 34 CFR §303.13 and §303.16 [~~§303.12(a)~~] and Subchapter K (relating to Service Delivery) of this chapter.

(20) [~~(16)~~] ECI Professional--An individual who meets the requirements of qualified personnel as defined in 34 CFR §303.13(c) and §303.31, and [~~A qualified service provider~~] who is knowledgeable in child development and developmentally appropriate behavior, possesses the requisite education and experience, and demonstrates competence to provide ECI services.

(21) [~~(17)~~] EIS--Early Intervention Specialist. A credentialed professional [~~specialist~~] who meets specific educational requirements established by DARS ECI and has specialized knowledge in early childhood cognitive, physical, communication, social-emotional, and adaptive development.

[~~(18) Family--A group of individuals in the same household who identify themselves as a family. Family includes parents, children, adult dependents, and other people residing in the household who are considered members of the family.~~]

(22) [~~(19)~~] Family Education and Training--In addition to 34 CFR §303.13(b)(3) [~~§303.12(d)(3)~~], parent-focused training provided by the contractor's early childhood intervention program or accessed through other community services.

(23) [~~(20)~~] FERPA--Family Educational Rights and Privacy Act of 1974, 20 USC §1232g, as amended, and implementing regulations at 34 CFR Part 99. Federal law that outlines privacy protection for parents and children enrolled in the ECI program. FERPA includes rights to confidentiality and restrictions on disclosure of personally identifiable information, and the right to inspect records.

[~~(21) Full Year Services--The availability of the array of early childhood intervention services throughout the calendar year.~~]

(24) Group Services--Early childhood intervention services provided at the same time to multiple non-related children and their parents or routine caregivers.

(25) [~~(22)~~] Health Services--As defined in 34 CFR §303.16 [~~§303.13~~].

[~~(23) High Probability of Resulting in Developmental Delay--For a child who has a medical diagnosis with a high probability for a delay to qualify for early intervention services, it must be known and widely accepted within the medical community that the natural course of the diagnosis will result in a developmental delay.~~]

(26) [~~(24)~~] IFSP--Individualized Family Service Plan as defined in 34 CFR §303.20 [~~§303.14~~]. A written plan of care for providing early childhood intervention services and other medical, health and social services to an eligible child and the child's family when necessary to enhance the child's development.

(27) [~~(25)~~] IFSP Services--The individualized early childhood intervention services listed in the IFSP that have been determined by the IFSP team to be necessary to enhance an eligible child's development.

(28) [~~(26)~~] IFSP Team--As described in 34 CFR §303.24(b) and meeting the requirements in §108.1009 of this chapter (relating to Participants in Initial and Annual Meetings to Evaluate the IFSP) [~~An interdisciplinary team that includes the parent and is responsible for developing the IFSP~~].

(29) [~~(27)~~] Interdisciplinary Team--A team that consists of at least two professionals from different disciplines.

(30) LEA--Local educational agency as defined in 34 CFR §303.23.

(31) [~~(28)~~] LPHA--Licensed Practitioner of the Healing Arts. A licensed physician, registered nurse, licensed physical

therapist, licensed occupational therapist, licensed speech language pathologist, licensed professional counselor, licensed clinical social worker, licensed psychologist, licensed dietitian, licensed audiologist, licensed physician assistant, licensed specialist in school psychology [psychologist], licensed marriage and family therapist, or advanced practice nurse.

(32) [(29)] Medicaid--The medical assistance entitlement program administered by the Texas Health and Human Services Commission.

(33) [(30)] Medical Services--As defined in 34 CFR §303.13(b)(5), services provided by a licensed physician for diagnostic or evaluation purposes to determine a child's developmental status and need for early childhood intervention services [§303.12].

(34) [(31)] Natural Environments--As defined in 34 CFR §303.26, settings that are natural or typical for a same-aged infant or toddler without a disability, may include the home or community settings, and must be consistent with the provisions of 34 CFR §303.126 [§303.18].

(35) [(32)] Nursing Services--In addition to 34 CFR §303.13(b)(6) [§303.12]:

(A) promoting function, learning and development across all domains, with an emphasis on the special healthcare needs of the child as related to the IFSP; and

(B) collaborating with other medical providers outside of the ECI system to gather and provide information regarding the healthcare of an enrolled child.

(36) [(33)] Nutrition Services--In addition to 34 CFR §303.13(b)(7) [§303.12]:

(A) addressing development across all domains with an emphasis on the nutritional needs of the child as related to the IFSP;

(B) conducting individual assessments and evaluations regarding nutritional history, dietary intake, body measurements, biochemical and clinical variables, feeding skills and problems, and food habits and preferences;

(C) developing and monitoring plans to address the nutritional needs of the eligible child [children]; and

(D) referring to appropriate community resources to carry out nutrition goals.

(37) [(34)] Occupational Therapy Services--In addition to 34 CFR §303.13(b)(8) [§303.12]:

(A) promoting function, learning and development across all domains, with an emphasis on adaptive behavior, self-help skills, fine and gross motor development, postural development, mobility, sensory development, behavior, play and oral motor functioning as related to the IFSP;

(B) promoting mobility and participation through design or acquisition of assistive and orthotic devices; and

(C) improving the child's functional ability in the home and community setting.

(38) [(35)] Parent--As defined in 20 USC §1401 and 34 CFR §303.27.

(39) Personally Identifiable Information--As defined in 34 CFR §99.3 and 34 CFR §303.29.

(40) [(36)] Physical Therapy Services--In addition to 34 CFR §303.13(b)(9) [§303.12]:

(A) promoting learning and development across all domains, with an emphasis on mobility, positioning, fine and gross motor development, strength and endurance, specific motor disorders, sensory development and other areas as related to the IFSP;

(B) promoting mobility and participation through design or acquisition of assistive and orthotic devices; and

(C) promoting sensorimotor function through enhancement of musculoskeletal status, neurobehavioral organization, perceptual and motor development, cardiopulmonary status, and effective environmental adaptation.

(41) [(37)] Pre-Enrollment--All family related activities from the time the referral is received up until the time the parent signs the initial IFSP.

(42) [(38)] Primary Referral Sources--As defined in 34 CFR §303.303(c) [§303.321].

(43) [(39)] Psychological Services--In addition to 34 CFR §303.13(b)(10) [§303.12]:

(A) promoting function, learning, and development with an emphasis on the social and emotional needs of the child as related to the IFSP;

(B) administering and interpreting psychological tests and interviews; and

(C) providing the eligible child intensive remediation of mental, emotional, interpersonal, behavioral and learning disorders [in eligible children].

(44) [(40)] Public Agency--DARS and any other state agency or political subdivision of the state that is responsible for providing early childhood intervention services to eligible children under the Individuals with Disabilities Education Act, Part C.

(45) Public Outreach--Comprises public awareness, child find, and interagency coordination.

(46) [(41)] Referral Date--The date the child's name and sufficient information to contact the family was obtained by the contractor.

(47) Routine Caregiver--An individual who participates in the child's daily routines; who knows the child's likes, dislikes, strengths, and needs; and cares for the child on a regular basis. Routine caregivers may include relatives and childcare providers. Routine caregiver does not include medical practitioners.

(48) [(42)] Service Coordinator--The contractor's employee or subcontractor who:

(A) meets all applicable requirements in Subchapter C of this chapter;

(B) is assigned to be the single contact point for the family;

(C) is responsible for providing case management services as described in §108.405 of this title (relating to Case Management Services); and

(D) is from the profession most relevant to the child's or family's needs or is otherwise qualified to carry out all applicable responsibilities.

(49) Sign Language and Cued Language--As defined in 34 CFR §303.13(b)(12).

(50) [(43)] Social Work Services--In addition to 34 CFR §303.13(b)(10) [§303.12]:

(A) promoting function, learning, and development across all domains, with an emphasis on providing supports to decrease family stressors and maximize the family's ability to benefit from early childhood intervention services;

(B) collaborating with community resources to improve family functioning in their environment; and

(C) evaluating living conditions and family interactions as they relate to the child.

(51) [~~(44)~~] Specialized Skills Training (Developmental Services)--Rehabilitative services to promote age-appropriate development by providing skills training to correct deficits and teach compensatory skills for deficits that directly result from medical, developmental or other health-related conditions.

(52) [~~(45)~~] Speech-Language Pathology [~~Speech and Language Therapy~~] Services--In addition to 34 CFR §303.13(b)(15) [~~§303.12(d)(14)~~]:

(A) promoting learning and development across domains, with an emphasis on communication skills, language and speech development, [~~sign language and cued language services,~~] oral motor functioning, and identification of specific communication disorders;

(B) providing evaluation and ongoing assessment;

(C) promoting of communication and participation through design or acquisition of assistive devices; and

(D) providing services designed to promote rehabilitation and remediation of delays or disabilities in language-related symbolic behaviors, communication, language, speech, emergent literacy, and/or feeding and swallowing behavior.

(53) [~~(46)~~] Surrogate Parent--A person assigned to act as a surrogate for the parent in compliance with the Individuals with Disabilities Education Act, Part C and this chapter.

(54) [~~(47)~~] Transportation and Related Costs--As defined in 34 CFR §303.13(b)(16) [~~§303.12~~].

(55) [~~(48)~~] Vision Services--In addition to 34 CFR §303.13(b)(17) [~~§303.12~~], including vision impairment services (VI) and orientation and mobility services (O&M) and services provided by local education agency [~~Local Education Agency~~] personnel.

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 February 13, 2012.

TRD-201200823
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 424-4050

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SUBCHAPTER B. PROCEDURAL SAFEGUARDS AND DUE PROCESS PROCEDURES

40 TAC §§108.201, 108.203, 108.205, 108.207, 108.211, 108.213, 108.215, 108.218, 108.221, 108.223

The amendments and new rule are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.201. Purpose.

The purpose of this subchapter is to describe general requirements for procedural safeguards pertaining to early childhood intervention services. In addition to the requirements described in this subchapter, the contractor must comply with all federal and state requirements related to procedural safeguards and due process pertaining to early childhood intervention services including: 20 USC §§1431 - 1444; 20 USC §1232g; 42 USC §§2000d - 2000d-7; implementing regulations 34 CFR Part 99 and 34 CFR §§303.123, 303.400 - 303.417, 303.421, 303.422, 303.430 - 303.436 [~~§§303.170, 303.172, 303.342, 303.400 - 303.406, 303.460, 303.510, and 303.512~~]; and §§101.8011, 101.8013, and 101.8015 of this title (relating to Administrative Hearings Concerning Individual Child Rights, Motion for Reconsideration, and Appeal of Final Decision). In cases of conflict between this subchapter and the federal authorities, the interpretation must be in favor of the higher safeguards for children and families.

§108.203. Responsibilities.

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

(c) The contractor must provide the family the DARS ECI family rights publication. The contractor must document the following were explained:

(1) the family's rights;

(2) the early childhood intervention process; and

(3) [~~available~~] early childhood intervention services.

§108.205. Prior Written Notice and Procedural Safeguards Notice.

(a) IFSP meeting arrangements must be made with, and written notice provided to, the family and other participants early enough before the meeting date to ensure that they will be able to attend. See 34 CFR §303.340(d). [~~In addition to the requirements in 34 CFR §303.403, the notice must be in sufficient detail to inform the parent about each record or report considered when the contractor proposes, or refuses to initiate or change the identification, evaluation, or the provisions of appropriate early childhood intervention services to the child and the child's family.~~]

(b) If, at any time, the contractor proposes, or refuses to initiate or change the identification, evaluation, or the provisions of appropriate early childhood intervention services to the child and the child's family, the contractor must provide prior written notice as described in 34 CFR §303.421.

(c) In addition to the requirements in 34 CFR §303.421, the notice must be in sufficient detail to inform the parent about each record or report considered when the contractor proposes or refuses to initiate or change the items in subsection (b).

§108.207. Parental Consent.

(a) In addition to the requirements in 34 CFR §303.420 [~~§303.404~~], written parental consent must be obtained before:

(1) beginning any screening, except when performing a developmental screening on a child in the conservatorship of the Texas Department of Family and Protective Services;

(2) conducting any evaluation or [~~comprehensive~~] assessment procedures;

(3) providing early childhood intervention services listed in the IFSP;

(4) changing the type, intensity, or frequency of early childhood intervention services;

(5) contacting medical professionals and other outside sources to coordinate and gather information about the child and family;

(6) reporting personally identifiable information, including disposition of referral, electronically to statewide databases unless release is authorized without consent in FERPA; or

(7) releasing personally identifiable information except as allowed by §108.241 of this title (relating to Release of Records).

(b) In addition to 34 CFR §303.420(b) [~~§303.404(b)~~], the contractor must adopt procedures designed to encourage the parent to consent to recommended assessment or evaluation procedures and recommended early childhood intervention services that the parent has refused. The procedures may include:

(1) providing the parent relevant literature or other materials; and

(2) offering the parent peer counseling to enhance their understanding of the value of early childhood intervention and to allay their concerns about participation in Part C programs.

(c) (No change.)

§108.211. Parent.

When situations arise in which more than one person meets the definition of parent, as defined in 20 USC §1401, the contractor must have a method of resolving conflicts in a manner that gives proper deference to the opinions and decisions of the individual or individuals who has the best legal right to act as the child's parent. Written rules or policies developed by the contractor must not violate other state or federal laws.

(1) The biological or adoptive parent, unless such parent does not have legal authority to make health, educational or early childhood intervention services decisions for the child, has priority to act as the parent for the purposes of this chapter.

(2) If a judicial decree or order identifies a specific person or persons to act as the child's parent to make health, educational, or early childhood intervention service decisions on behalf of a child, then the contractor acknowledges that person or persons to be the "parent."

(A) The exception to this rule is that no state agency, no DARS ECI contractor or provider, and no public agency that provides any [~~early childhood intervention or other~~] paid services to a child or any family member of that child may act as the parent for the purposes of ECI.

(B) Notwithstanding the preceding exception, an individual who is a biological or adoptive parent or family member of the child who has also been identified by a judicial decree to act as the "parent" of the child is not disqualified to act as parent.

§108.213. Surrogate Parents.

(a) (No change.)

(b) The [~~duty of the~~] contractor must determine the need for and assign [~~includes the assignment of an individual to act as~~] a surrogate parent for the child [~~in a way~~] consistent with 34 CFR §303.422 and existing state laws and regulations. This must include a method for:

(1) determining whether a child needs a surrogate parent;

(2) assigning a surrogate parent to the child; and

(3) providing training to ensure that the surrogate parent fully understands their role and responsibilities to represent the best interest of the child.

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

§108.215. Early Childhood Intervention Procedures for Filing Complaints.

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

(c) The alleged violation must have occurred not more than one year before the date that the complaint is received by the public agency unless a longer period is reasonable because[~~:~~]

(1)] the alleged violation continues for that child or other children.[~~; or~~]

(2) the complainant is requesting reimbursement or corrective action for a violation that occurred not more than three years before the date on which the complaint is received by the public agency].

(d) (No change.)

§108.218. Mediation.

(a) If the parties to a request for a due process hearing as described in 40 TAC §101.8011 (relating to Administrative Hearings Concerning Individual Child Rights) agree to mediate the dispute in accordance with §101.7047 of this chapter (relating to Mediation Procedures), those procedures shall apply, but the mediation shall also comply with the requirements of federal regulation 34 CFR §303.431.

(b) If the parties to a complaint filed with DARS under §108.215 of this chapter (relating to Early Childhood Intervention Procedures for Filing Complaints) agree to mediate the dispute in accordance with §108.217 of this chapter (relating to Procedures for Investigations and Resolution of Complaints), the procedures in this section apply except for those in subsections (a) and (c) of this section.

(c) At any time, a party or all parties to a dispute involving a matter with respect to the provision of appropriate early childhood intervention services or a potential or actual violation of Part C or other applicable federal or Texas statutes or regulations or rules may request mediation of that dispute by sending the request in writing to the DARS ECI Assistant Commissioner. If the request for mediation is also a complaint pursuant to §108.215 of this chapter, it will be handled both as a complaint and as a request for mediation under subsection (b) of this section. If the request for mediation is also a request for due process hearing, it will be handled both as a request for due process hearing and a request for mediation under subsection (a) of this section. If the request for mediation does not clearly designate itself as a complaint or request for due process hearing, or if it does not comply with the filing requirements for those procedures, it will be handled only as a request for mediation under this section. A request for mediation must:

(1) be in writing and be signed by the requesting party;

(2) state the dispute to be mediated with some detail showing that it is a matter with respect to the provision of appropriate early childhood intervention services to a particular child or children or that it is a matter with respect to a potential or actual violation of Part C or other applicable federal or Texas statutes or regulations or rules;

(3) name the opposing party or parties and, if they have agreed to mediation, contain their signatures;

(4) give contact information for all parties to the extent known by the requestor; and

(5) show that the request for mediation has also been sent to all other parties or that attempts have been made to do so.

(d) If not all parties have agreed to mediation, DARS will make reasonable efforts to contact the other parties and to give them the opportunity to agree or to decline mediation. If neither DARS nor the requesting party is able to obtain agreement to mediate by all parties within a reasonable time, DARS may notify the requesting party and treat the original request for mediation as having been declined by the other party or parties.

(e) The parties may agree to mediate some or all of the disputes described in the request for mediation, and they may amend the disputes to be mediated by agreeing in writing.

(f) The requirements of 34 CFR §303.341 will apply to the mediation.

(g) If DARS is not a party to the dispute being mediated, DARS will not be a party to any mediation resolution agreement and will not sign it, but DARS may assist in the enforcement of it if requested.

§108.221. Access Rights.

(a) The parent of a child eligible under this chapter must be afforded the opportunity to inspect and review any records relating to evaluations and assessments, eligibility determination, development and implementation of the IFSP, individual complaints dealing with the child, and any other area under this chapter involving records about the child and the child's family. The records are covered by FERPA. Any participating agency, institution, or program which collects, maintains, or uses personally identifiable information from which information is obtained for the purpose of determining eligibility for or providing early childhood intervention services will be subject to these provisions. The contractor shall comply with a request without unnecessary delay and before any meeting regarding an IFSP or hearing relating to the identification, evaluation, or placement of the child, and in no case, more than 10 [~~45~~] days after the request has been made.

(b) - (e) (No change.)

§108.223. Fees for Records.

(a) The contractor must make available to parents an initial copy of the child's early childhood intervention services record at no cost to the parents.

(b) [~~(a)~~] The contractor may charge a fee for copies of records which are made for the parent under this section if the fee does not effectively prevent the parent from exercising their right to inspect and review those records.

(c) [~~(b)~~] The contractor may not charge a fee to search for or to retrieve information under this section.

(d) The contractor must provide copies to parents according to 34 CFR §303.405 and §303.409.

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-201200824

Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 424-4050

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SUBCHAPTER C. STAFF QUALIFICATIONS

40 TAC §§108.303, 108.309, 108.313, 108.315, 108.317

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.303. Definitions.

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

(1) Criminal Background Check--Review of fingerprint-based criminal history record information.

(2) [~~(1)~~] Dual Relationships--When the person providing early childhood intervention services engages in activities with the family that go beyond his or her professional boundaries.

(3) [~~(2)~~] Early Intervention Specialist (EIS) Active Status--When an EIS is employed or subcontracting with a contractor and holds a current active credential.

(4) [~~(3)~~] Early Intervention Specialist (EIS) Inactive Status--When an EIS is not employed or subcontracting with a contractor or does not hold a current active credential.

(5) [~~(4)~~] EIS Registry--A system used by DARS ECI to maintain current required EIS information submitted by contractors. DARS ECI designates Early Intervention Specialists. The EIS credential is only valid within the Texas IDEA Part C system.

[~~(5) National Criminal History Record Information Review--Fingerprint-based national criminal history record information.~~]

(6) Professional Boundaries--Financial, physical and emotional limits to the relationship between the professional providing early childhood intervention services and the family.

(7) Service Coordinator Active Status--When a service coordinator is employed or subcontracting with a contractor and is current with continuing education requirements specified by DARS ECI.

(8) Service Coordinator Inactive Status--When a service coordinator is not employed or subcontracting [~~subcontracted~~] with a [~~the~~] contractor or is not current with continuing education requirements specified by DARS ECI.

§108.309. Minimum Requirements for All Direct Service Staff.

(a) (No change.)

(b) The contractor must complete a fingerprint-based [~~national~~] criminal background check [~~history record information review~~] on any employee, volunteer, or other person who will be working under the auspices of the contractor before the person has direct contact with children or families.

(1) Any conviction of the following misdemeanors or felonies precludes a person from having direct contact with ECI children and families:

(A) Offenses Against the Person (Texas Penal Code, Title 5);

(B) Offenses Against the Family (Texas Penal Code, Title 6);

(C) Robbery (Texas Penal Code, Title 7, Chapter 29);

(D) Public Indecency (Texas Penal Code, Chapter 43);

(E) Stalking (Texas Penal Code, Title 9, §42.072);

(F) Criminal Solicitation of a Minor (Texas Penal Code, Title 4, §15.031);

(G) Failure to Stop or Report Aggravated Sexual Abuse of a Child (Texas Penal Code, Title 8, §38.17); or

(H) any like offenses of the law of another state or federal law.

(2) A conviction within the previous 10 years of the following misdemeanors or felonies precludes a person from having direct contact with ECI children and families:

(A) Violations of the Texas Controlled Substances Act (Texas Health and Safety Code, Chapter 481);

(B) Violations of the Civil Rights of Person in Custody; Improper Sexual Activity with Person in Custody (Texas Penal Code, §39.04);

(C) Abuse of Corpse (Texas Penal Code, §42.08);

(D) Cruelty to Livestock Animals (Texas Penal Code, §42.09);

(E) Attack on Assistance Animal (Texas Penal Code, §42.091);

(F) Cruelty to Nonlivestock Animals (Texas Penal Code, §42.092);

(G) Dog Fighting (Texas Penal Code, §42.10);

(H) Making a Firearm Accessible to a Child (Texas Penal Code, §46.13);

(I) Intoxication and Alcoholic Beverage Offenses (Texas Penal Code, Chapter 49);

(J) Purchase of Alcohol for a Minor; Furnishing Alcohol to a Minor (Texas Alcoholic Beverage Code, §106.06);

(K) any other felony committed within the previous 10 years under the Texas Penal Code; or

(L) any like offense of the law of another state or federal law.

(3) A person who has pending charges or who has received deferred adjudication covering an offense listed in this section is precluded from having direct contact with children and families if he or she has not completed the probation successfully or had the pending charges dismissed.

(c) - (g) (No change.)

§108.313. Early Intervention Specialist (EIS).

(a) The contractor must comply with DARS ECI requirements related to minimum qualification for an EIS. An EIS must either:

(1) hold a bachelor's degree which includes a minimum of 18 hours of semester course credit relevant to early childhood intervention including three hours of semester course credit in early childhood development[~~, human development,~~] or early childhood special education; or

(2) be registered as an EIS before September 1, 2011.

(b) The contractor must comply with DARS ECI requirements related to continuing education for an EIS. An EIS must complete:

(1) a minimum of ten contact hours of approved continuing education each year; and

(2) an additional three contact hours of continuing education in ethics every two years.

(c) The contractor must comply with DARS ECI requirements related to supervision of an EIS.

(1) The contractor must provide an EIS documented supervision as defined in 40 TAC §108.309(f) of this title (relating to Minimum Requirements for All Direct Service Staff) as required by DARS ECI.

(2) An EIS supervisor must:

(A) have two years of experience providing ECI services, or two years of experience supervising staff who provide other early childhood intervention services to children and families; and

(B) hold a bachelor's degree or graduate degree from an accredited university with a specialization in:

(i) child development, special education, psychology, social work, sociology, nursing, rehabilitation counseling, human development, or related field; or

(ii) an unrelated field and have at least 18 hours of semester course credit in child development [~~or human development~~].

(d) EIS Active Status and EIS Inactive Status.

(1) Only an EIS with active status is allowed to provide early childhood intervention services to children and families. An EIS goes on inactive status when the EIS fails to submit the required documentation by the designated deadline. An EIS on inactive status may not perform activities requiring the EIS active status. EIS active status is considered reinstated after the information is entered into the EIS Registry and is approved by DARS ECI. An EIS may return to active status from inactive status by submitting 10 contact hours of continuing education for every year of inactive status. An EIS returning to active status must submit documentation of three contact hours of ethics training within the last two years.

(2) An EIS who has been on inactive status for longer than 24 months must complete the orientation training.

(e) (No change.)

§108.315. Service Coordinator.

(a) ECI case management may only be provided by an employee or subcontractor of an ECI contractor. The contractor must comply with DARS ECI requirements related to minimum qualifications for service coordinators.

(1) A service coordinator must meet one of the following criteria:

(A) be a licensed professional in a discipline relevant to early childhood intervention;

(B) be an EIS;

(C) be a Registered Nurse (with a diploma, an associate's, bachelor's or advanced degree) licensed by the Texas Board of Nursing; or

(D) [~~(C)~~] hold a bachelor's degree or graduate degree from an accredited university with a specialization in:

(i) child development, special education, psychology, social work, sociology, nursing, rehabilitation counseling, or human development or a related field, or

(ii) an unrelated field with at least 18 hours of semester course credit in child development or human development.[~~; or~~]

[~~(D) hold a high school diploma or certificate recognized by the state as the equivalent of a high school diploma and two years of documented paid work experience with children and families~~].

(2) Before performing case management activities, a service coordinator must complete DARS ECI required case management training that includes, at a minimum, content which results in:

(A) knowledge and understanding of the needs of infants and toddlers with disabilities and their families;

(B) knowledge of Part C of the Individuals with Disabilities Education Act;

(C) understanding of the scope of early childhood intervention services available under the early childhood intervention program and the medical assistance program; and

(D) understanding of other state and community resources and supports necessary to coordinate care.

(3) A service coordinator must effectively communicate in the family's primary language or use an interpreter or translator.

(b) The contractor must comply with DARS ECI requirements related to continuing education for service coordinators. A service coordinator must complete:

(1) three contact hours of training in ethics every two years;

(2) an additional three contact hours of training specifically relevant to case management every year; and

(3) if the service coordinator does not hold a current license or credential that requires continuing professional education, an additional seven contact hours of approved continuing education.

(c) The contractor must comply with DARS ECI requirements related to supervision of service coordinators.

(1) A contractor's ECI program staff member who meets the following criteria is qualified to supervise a service coordinator:

(A) has completed all service coordinator training as required in subsection (a)(2) of this section;

(B) has two years experience providing case management in an ECI program or another applicable community-based organization; and

(C) holds a bachelor's degree or graduate degree from an accredited university with a specialization in:

(i) child development, special education, psychology, social work, sociology, nursing, rehabilitation counseling, human development or a related field, or

(ii) an unrelated field with at least 18 hours of semester course credit in child development or human development;

(2) The contractor must provide a service coordinator a minimum of three hours per quarter of documented supervision.

(d) Service Coordinator Active Status and Service Coordinator Inactive Status.

(1) A service coordinator may return to active status from inactive status by submitting 10 contact hours of continuing education for every year of inactive status.

(2) A service coordinator returning to active status must submit documentation of three contact hours of ethics training within the last two years.

(3) In order to provide case management, a [~~A~~] service coordinator who has been on inactive status for longer than 24 months must complete the orientation training, including the Family Centered Case Management module and other required initial training activities when returning to work for an ECI contractor. [~~in addition to the other training requirements in order to provide case management.~~]

(e) (No change.)

§108.317. Staff Who Do Not Hold a License or EIS Credential and Provide Early Childhood Intervention Services to Children and Families.

(a) (No change.)

(b) The contractor must comply with DARS ECI requirements related to continuing education of direct service staff members who do not hold a license or EIS credential. A direct service staff member who does not hold a license or EIS credential must complete:

(1) a minimum of ten contact hours of approved continuing education each year; and

(2) an additional three contact hours of training in ethics every two years.

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

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

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TRD-201200825
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 424-4050

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SUBCHAPTER G. REFERRAL, PRE-ENROLLMENT, AND DEVELOPMENTAL SCREENING

40 TAC §§108.701, 108.707, 108.709

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.701. Referral Requirements.

(a) The contractor must have written procedures establishing a system for:

(1) accepting referrals for children less than 36 months of age;

(2) documenting the referral date and source; and

(3) contacting the family in a timely manner after receiving the referral.

(b) The contractor must follow all requirements described in this chapter when a referral is received 45 days or more before the child's third birthday.

(c) In accordance with 34 CFR §303.209(b)(iii), when a referral is received less than 45 days before the child's third birthday, the contractor is not required to conduct pre-enrollment procedures, an evaluation, an assessment, or an initial IFSP meeting.

§108.707. Pre-Enrollment Activities.

(a) Pre-enrollment begins at the point of referral and ends when the parent signs the IFSP or a final disposition is reached.

(1) The contractor must assign an initial service coordinator for the family and document the name of the service coordinator in the child's record.

(2) The contractor must provide the family the DARS ECI family rights publication and document the following were explained:

(A) the family's rights,

(B) the early childhood intervention process; [,] and

(C) [~~available~~] early childhood intervention services.

(3) The contractor provides pre-IFSP service coordination as defined in 34 CFR §303.13(b)(11) [~~§303.12(d)(11)~~] and §303.34 [~~§303.23~~].

(4) The contractor must collect information on the child throughout the pre-enrollment process.

(5) The contractor must assist the child and family in gaining access to the evaluation and assessment process. The contractor:

(A) schedules the interdisciplinary initial comprehensive evaluation and assessment; and

(B) prepares the family for the evaluation and assessment process.

(b) (No change.)

(c) The contractor must determine the need for and appoint a surrogate parent in accordance with 34 CFR §303.422 and 40 TAC §108.213.

(d) The contractor must comply with all requirements in Subchapter B of this chapter (relating to Procedural Safeguards and Due Process Procedures).

§108.709. Optional Developmental Screenings.

(a) (No change.)

(b) The parent has the right to decide whether to proceed to a comprehensive evaluation after a developmental screening or request a comprehensive [~~an~~] evaluation instead of a developmental screening at any time.

(c) (No change.)

(d) The contractor must coordinate with the Texas Department of Family and Protective Services (DFPS) to accept referrals for children under 36 months of age who are in foster care, involved in a substantiated case of child abuse or neglect, identified as being affected by illegal substance abuse, or withdrawal symptoms resulting from prenatal drug exposure, or suspected of having a disability or developmental delay.

(1) If the contractor receives a completed developmental screening from a foster child's physician indicating the child has a developmental delay, the contractor must offer a comprehensive evaluation to determine eligibility for early childhood intervention services.

(2) If the contractor receives a referral on a child who has not been placed in foster care, but who is involved in a substantiated case of child abuse or neglect, the contractor must offer a developmental screening to determine the need for a comprehensive evaluation. The contractor may use professional judgment to conduct a comprehensive evaluation without a developmental screening.

(3) If the contractor receives a referral on a child who is identified as being affected by illegal substance abuse, or withdrawal symptoms resulting from prenatal drug exposure, the contractor must offer a developmental screening to determine the need for a comprehensive evaluation. The contractor may use professional judgment to proceed to comprehensive evaluation without first conducting a developmental screening.

(4) If the contractor receives a referral from DFPS due to suspected disability or developmental delay, the contractor follows their local procedures for accepting referrals, screening, and evaluating when [~~and~~] the child is: [~~not a foster child, not involved in a substantiated case of child abuse or neglect, or not identified as being affected by illegal substance abuse, or withdrawal symptoms resulting from prenatal drug exposure, the contractor follows their local procedures for accepting referrals.~~]

(A) not a foster child;

(B) not involved in a substantiated case of child abuse or neglect; and

(C) not identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure.

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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For further information, please call: (512) 424-4050

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40 TAC §108.703

(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 Department of Assistive and Rehabilitative Services or in the Texas

Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeal is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.703. Child Referred Who Is Not Eligible.

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 February 13, 2012.

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Sylvia F. Hardman
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Earliest possible date of adoption: March 25, 2012
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SUBCHAPTER H. ELIGIBILITY

40 TAC §§108.801, 108.803 - 108.805, 108.807

The amendments and new rule are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.801. Definitions.

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

[~~(1)~~] Adjusted Age--The chronological age of a child minus the number of weeks or months of prematurity.

[~~(2) Developmental Delay--As defined in Texas Human Resources Code §73.001(3) and determined to be significant in compliance with the criteria and procedures in this subchapter.~~]

§108.803. Eligibility.

(a) The contractor must determine that a child meets eligibility requirements in order to provide early childhood intervention services to the child and family.

(b) (No change.)

(c) The contractor must:

(1) establish a system of management oversight to ensure consistent eligibility determination;

(2) determine the child's eligibility for early childhood intervention services based on the decision of an interdisciplinary team that includes the parent and at least two professionals from different disciplines;

[~~(3) include in the child's record an eligibility statement from the interdisciplinary team that:~~]

[~~(A) verifies medical eligibility or describes the details for a determination of developmental delay; and~~]

[~~(B) is updated when eligibility changes or is re-determined;~~]

(3) [~~(4)~~] maintain all test protocols and other documentation used to determine eligibility in the child's record;

(4) [~~(5)~~] re-determine the child's eligibility for early childhood intervention services at least annually; and

(5) [~~(6)~~] provide prior written notice to the parent when the child is determined to be ineligible for early childhood intervention services.

(d) If the parent fails to consent or fails to cooperate in re-determinations of eligibility, the child becomes ineligible. The contractor must send prior written notice of ineligibility and consequent discontinuation of all ECI services to the family at least 14 days before the contractor discharges the child from the program, unless the parent:

(1) immediately consents to and cooperates in all necessary evaluations and assessments, and

(2) consents to all or part of a new IFSP.

(e) The family retains all rights to oppose the actions described in subsection (d) of this section.

(f) The contractor must comply with all requirements in Subchapter B of this chapter (relating to Procedural Safeguards and Due Process Procedures) when determining eligibility.

§108.804. Eligibility Statement.

(a) The interdisciplinary team must document the child eligibility decisions on an eligibility statement containing the elements required by DARS ECI.

(b) The eligibility statement verifies medical eligibility, an auditory or visual impairment, or describes the elements required by DARS ECI for a determination of developmental delay.

(c) The eligibility statement must be:

(1) included in the child's record; and

(2) updated when eligibility changes or is re-determined.

§108.805. Initial Eligibility Criteria.

(a) A [~~To be eligible for early intervention services, a~~] child must be under 36 months of age and meet initial [~~one of the following~~] eligibility criteria to receive early childhood intervention services. Initial eligibility is established by [~~The child must have~~]:

(1) a medically diagnosed condition that has a high probability of resulting in developmental delay and which has been approved by the DARS ECI Assistant Commissioner based on prevailing medical opinion. Copies of the list of medically qualifying diagnoses can be obtained from DARS. To determine eligibility for a child who has a qualifying medical diagnosis the interdisciplinary team must:

(A) review medical documentation to determine initial and continuing eligibility; and

(B) determine and document a need for early childhood intervention services.

(2) an auditory or visual impairment as defined by the Texas Education Agency rule at 19 TAC §89.1040 (relating to Eligibility Criteria).

(3) a developmental delay based on [~~that meets one of the following criteria~~]:

(A) a comprehensive evaluation using a standardized tool designated by DARS ECI. To be eligible to receive early childhood intervention services, the child must have:

(i) [~~(A)~~] a documented delay of at least 25% in one or more of the following developmental areas: communication, cognitive, gross motor, fine motor, social emotional or adaptive;

(ii) [~~(B)~~] a documented delay of at least 33% for children whose only delay is in expressive language; or

(B) [~~(C)~~] a qualitative determination of delay, as indicated by responses or patterns that are disordered or qualitatively different from what is expected for the child's age, and significantly interfere with the child's ability to function in the environment. When the interdisciplinary team determines there is evidence that the results of the standardized tool do not accurately reflect the child's development, eligibility must be established using a supplemental protocol designated by DARS ECI. [~~When the team finds, after administration, that the standardized test is inadequate to accurately represent the child's development, qualitative criteria for determining developmental delay are used.~~]

(b) (No change.)

§108.807. Continuing Eligibility Criteria.

(a) Qualifying Medically Diagnosed Condition.

(1) A child remains eligible for comprehensive early childhood intervention services as long as:

(A) the qualifying medical diagnosis is present; and

(B) the child continues to need early childhood intervention services.

(2) The contractor must ensure that the child's record contains written documentation of any change in medical diagnosis.

(b) (No change.)

(c) Developmental Delay.

(1) Continuing eligibility must be determined annually through a comprehensive evaluation using [~~and be based on the child's results on~~] a standardized tool designated by DARS ECI.

(2) A child whose initial eligibility was based on a qualitative determination of delay is eligible for up to six months. For a child to remain eligible beyond six months the continuing eligibility criteria for percent of delay described in §108.807(c)(3) of this title (relating to Continuing Eligibility Criteria) must be met.

(3) For all other children to remain eligible the child must demonstrate a documented delay of at least 15% in one or more areas of development.

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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For further information, please call: (512) 424-4050

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SUBCHAPTER I. EVALUATION AND ASSESSMENT

40 TAC §§108.901, 108.903, 108.909

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.901. Definitions.

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

(1) Assessment--As defined in 34 CFR §303.321(c)(2)(ii) [~~§303.322(a)(2)~~], the ongoing procedures used by appropriate qualified personnel throughout the period of a child's eligibility for early childhood intervention services.

(2) Comprehensive Needs Assessment--The process for identifying a child's unique strengths and needs, and the family's resources, concerns, and priorities in order to develop an IFSP. The assessment process gathers complete information regarding the child's abilities to participate in the everyday routines and activities of the family.

(3) Evaluation--As defined in 34 CFR §303.321(c)(2)(i) [~~§303.322(a)(1)~~], the procedures used by appropriate qualified personnel to determine a child's initial and continuing eligibility for early childhood intervention services.

(4) Ongoing assessment--The continuous monitoring of a child's functional progress.

§108.903. Evaluations.

(a) The contractor must conduct an interdisciplinary, comprehensive evaluation to determine initial and continuing eligibility under §108.805(a)(3) and §108.807(c) of this chapter (relating to Initial Eligibility Criteria). The contractor and the family must determine the most appropriate setting, circumstances, time of day, and participants for the evaluation in order to capture the most accurate picture of the child's ability to function in their [~~his or her~~] natural environment.

(b) (No change.)

(c) Evaluation must be conducted using a standardized tool [~~test protocol~~] designated by DARS ECI and each developmental area must be evaluated as defined in 34 CFR §303.321 [~~§303.322~~]. When the interdisciplinary team determines there is evidence that the results of the standardized tool do not accurately reflect the child's development, the interdisciplinary team must document evidence from a supplemental protocol designated by DARS ECI. [~~When the designated test protocol is inadequate to accurately evaluate the child's development, the interdisciplinary team must document corroborating evidence from a supplemental protocol designated by DARS ECI.~~]

The contractor must ensure that evaluations are conducted by qualified personnel.

(d) (No change.)

(e) The contractor must consider other evaluations and assessments performed by outside entities when requested by the family. [~~The contractor must determine whether outside evaluations and assessments:~~]

(1) The contractor must determine whether outside evaluations and assessments:

(A) [~~(1)~~] are consistent with DARS ECI policies;

(B) [~~(2)~~] reflect the child's current status; and

(C) [~~(3)~~] have implications for IFSP development.

(2) If the family does not allow full access to those records or to those entities or does not consent to or does not cooperate in evaluations or assessments to verify their findings, the contractor may discount or disregard the other evaluations and assessments performed by outside entities.

(f) The contractor must comply with all requirements in Subchapter B of this chapter (relating to Procedural Safeguards and Due Process Procedures) when conducting evaluations and assessments.

§108.909. Comprehensive Needs Assessment.

The contractor must conduct and document an initial and annual comprehensive needs assessment for every eligible child. In addition to requirements in 34 CFR §303.321(a)(i-ii) and (c)(2)(ii-iii) [~~§303.322(b)(2)~~], the comprehensive needs assessment must include information about the interests, activities, and routines of the family.

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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Sylvia F. Hardman
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Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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SUBCHAPTER J. INDIVIDUALIZED FAMILY SERVICE PLAN (IFSP)

40 TAC §§108.1001, 108.1003, 108.1007, 108.1009, 108.1011, 108.1015, 108.1017, 108.1019, 108.1021

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.1001. Definitions.

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

(1) Frequency--The [~~As defined in 34 CFR §303.344, the~~] number of days or sessions that a service will be provided within a specified period of time.

(2) Functional Ability--A child's ability to carry out meaningful behaviors in the context of everyday living, through skills that integrate development across domains.

(3) IFSP Outcomes--Statements of the measurable results that the family wants to see for their child or themselves.

[~~(4) IFSP Services--Individualized early childhood intervention services as determined by the IFSP team and listed in the IFSP.~~]

(4) [~~(5)~~] Intensity--The length of time a service is provided during a session expressed as a specific amount of time instead of a range.

(5) [~~(6)~~] Method--If the service is delivered in a group or on an individual basis.

§108.1003. IFSP.

(a) The IFSP team must develop a written initial IFSP during a face-to-face meeting with the family[~~, with parental consent,~~] in accordance with 20 USC §1436[~~, 34 CFR §303.321,~~] and 34 CFR §303.340 through §303.346.

(b) The IFSP must be developed based on evaluation and assessment described in 34 CFR §303.321 [~~§303.322~~] and §§108.901, 108.903, 108.905, 108.907, 108.909, 108.911, 108.913, 108.915 and 108.917 of this title (relating to Evaluation and Assessment).

(c) - (g) (No change.)

(h) The contractor must comply with all requirements in Subchapter B of this chapter (relating to Procedural Safeguards and Due Process Procedures) during the IFSP process.

§108.1007. Interim IFSP.

(a) (No change.)

(b) Comprehensive evaluation, needs assessment, and the IFSP must be completed within the time frames required in 34 CFR §303.310 [~~§303.322(e)~~].

§108.1009. Participants in Initial and Annual Meetings to Evaluate the IFSP.

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

(c) In addition to the requirements [~~participants required~~] in 34 CFR §303.343(a), the IFSP team must include a minimum of two professionals from different disciplines. At least one of the two ECI professionals from different disciplines must be an LPHA who was directly involved in conducting the evaluation and assessment. [~~:~~]

[~~(1) have been directly involved in conducting the evaluation and assessment; and~~]

[~~(2) be a licensed practitioner of the healing arts (LPHA).~~]

(d) (No change.)

§108.1011. Participants in Meetings for a Child with Auditory or Visual Impairments.

(a) In addition to the requirements in §108.1009 of this title (relating to Participants in Initial and Annual Meetings to Evaluate the IFSP), the IFSP team for an initial IFSP meeting or annual meetings to evaluate the IFSP must include a certified teacher of the deaf and hard of hearing or a certified teacher of the visually impaired if the child has a documented [~~diagnosed~~] auditory or visual impairment as described in 19 TAC §89.1040 (relating to Eligibility Criteria).

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

§108.1015. Content of the IFSP.

(a) The IFSP team must develop a written IFSP containing all requirements in 20 USC §1436(d) and 34 CFR §303.344. The IFSP must include an IFSP services page and the required elements designated by DARS ECI [~~additional elements as required by the DARS ECI~~].

(b) If the IFSP team determines co-visits are necessary to help the child reach outcomes on the IFSP, the contractor must:

(1) list each service on the IFSP; and

(2) document in the child's record a justification of how the child and family received greater benefit from the services being provided at the same time.

(c) If the IFSP team determines group services are necessary to help the child reach outcomes on the IFSP:

(1) the group services must be planned in an IFSP that also contains individual IFSP services; and

(2) the planned group services must be documented in the child's IFSP.

(d) If the IFSP team determines that an IFSP outcome cannot be achieved satisfactorily in a natural environment, the IFSP must contain a justification as to why an early childhood intervention service will be provided in a setting other than a natural environment, as determined appropriate by the parent and the rest of the IFSP team.

(e) The contents of the IFSP must be fully explained to the parent.

(f) The contractor must obtain the parent and other team members' signatures on the IFSP services page. The parent's signature on the IFSP services page serves as written parental consent to provide the IFSP services. The written parental consent is valid for up to one year or until the IFSP team changes the type, intensity, or frequency of services. The contractor must not provide IFSP services without current written parental consent.

(g) The contractor must provide the parent a copy of the signed IFSP.

§108.1017. Complete Periodic Review.

(a) Periodic reviews must be completed in compliance with 34 CFR §303.342(b).

(b) [~~(a)~~] If the team determines that changes to the type, intensity, or frequency of services are required, the team must document and provide to the parent the following changes to the IFSP:

(1) the reason for the changes and new outcome pages as applicable;

(2) the start date for all early childhood intervention services as:

(A) the date of the periodic review; [~~,~~] or

(B) the date services are to begin;

(3) the name of the service coordinator;

(4) the signature of the entire team, signifying their agreement with the changes.

(c) [~~(b)~~] If the team determines that changes to the type, intensity, or frequency of services are not needed, no changes are required to the IFSP document. If an outcome is changed but does not result in changes to the type, intensity, or frequency of services, the team must:

(1) provide to the parent any newly developed and dated outcome pages;

(2) note the new outcome pages in the progress notes; and

(3) add the new pages to the IFSP.

(d) [~~(c)~~] Additional periodic reviews to evaluate the IFSP may be conducted more frequently than six-month intervals if requested by the parent or other IFSP team members. Reviews are conducted with the service coordinator and the parent face-to-face or by other means acceptable to the parents. Other IFSP team members must be present as needed. Factors that informed decisions to change or not change the IFSP as part of a periodic review [~~All discussions with team members and the family~~] must be documented in the child's record.

§108.1019. Annual Meeting to Evaluate the IFSP.

(a) The annual meeting to evaluate the IFSP is done following determination of continuing eligibility. In addition to all requirements in 34 CFR §303.342, the documentation of an Annual Meeting to Evaluate the IFSP must meet the requirements for Complete Review and include a documented team discussion of:

(1) reviews of the current evaluations and other information available from ongoing assessment of the child and family needs;

(2) progress toward achieving the IFSP outcomes;

(3) any needed modification of the outcomes and early childhood intervention services.

(b) Services provided under an IFSP that has not been evaluated and is not based on a current evaluation and current assessment of needs are not fully approved ECI services.

(1) If the contractor is at fault, DARS may disallow and recoup expenditures.

(2) If the parent has not consented to or has not cooperated with the re-determination of eligibility, the contractor must follow the procedures in §108.803(d) of this chapter (relating to Eligibility).

(3) If the parent fails to consent or fails to cooperate in necessary re-evaluations or re-assessments, no developmental delay or needs may be legitimately determined. The contractor must send prior written notice that the child has no documented current delay or no documented current needs at least 14 days before the contractor discontinues services on the IFSP, unless the parent:

(A) immediately consents to and cooperates with all necessary evaluations and assessments, and

(B) consents to all or part of a new IFSP.

(c) The family retains all rights to oppose the actions described in subsection (b) of this section.

§108.1021. Partial Review of the IFSP.

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

(d) The contractor must ensure that a partial review of the IFSP is conducted by the service coordinator and parent in a face-to-face meeting or other means acceptable to the parent [~~parents~~] and other IFSP team members. Other IFSP team members must be present as needed.

(e) (No change.)

[~~(f) Documentation of a partial review must meet the requirements for Complete Review.~~]

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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Sylvia F. Hardman
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Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 424-4050

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SUBCHAPTER K. SERVICE DELIVERY

40 TAC §§108.1103, 108.1105, 108.1107, 108.1111

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.1103. Early Childhood Intervention Services Delivery.

[~~(a) The contractor must:~~]

[~~(1) plan and provide early childhood intervention services that meet the needs of the eligible child in natural environments as defined in 34 CFR §303.18; or~~]

[~~(2) provide written justification in the IFSP if early childhood intervention services are not provided in natural environments.~~]

(a) [~~(b)~~] Early childhood intervention services needed by the child must be initiated in a timely manner as planned in the IFSP [~~defined by DARS ECI~~].

(b) [~~(c)~~] The contractor must ensure that early childhood intervention services are appropriate, as determined by the IFSP team, and based on scientifically based research, to the extent practicable. In addition to the requirements in 34 CFR §303.13 [~~§303.12~~], all early childhood intervention services must be provided:

(1) to address the development of the whole child within the framework of the family;

(2) in the context of natural learning activities; and

(3) according to a plan and with a frequency that is individualized to the parent and child.

(c) [~~(d)~~] The contractor must make reasonable efforts to provide flexible hours in programming in order to allow the [~~options for~~] parent or routine caregiver to participate.

(d) The contractor must comply with all requirements in Subchapter B of this chapter (relating to Procedural Safeguards and Due Process Procedures) when planning and delivering early childhood intervention services.

§108.1105. Capacity to Provide Early Childhood Intervention Services.

The contractor must have the capacity to provide all early childhood intervention services in 34 CFR §303.13 [~~§303.12~~] and additional early childhood intervention services described in this chapter.

§108.1107. Group Services.

[~~(a) The IFSP team plans group IFSP services:~~]

[~~(1) when necessary to help the child reach an IFSP outcome; and~~]

[~~(2) as part of an IFSP that also contains individual IFSP services.~~]

[~~(b) Planned group IFSP services must be documented in the child's IFSP.~~]

[~~(c)~~] When early childhood intervention services are provided in a group setting, the [~~The~~] parent or other routine caregiver [~~significant caregiver(s)~~] must participate in group services.

§108.1111. Service Delivery Documentation Requirements.

Documentation of each service contact must include:

(1) the name of the child;

(2) the name of the ECI contractor and service provider;

(3) the date, start time, length of time, and place of service;

(4) method (individual or group);

(5) a description of the contact including a summary of activities and the family or routine [~~primary~~] caregiver's participation;

(6) the IFSP outcome [~~goal~~] that was the focus of the intervention;

(7) the child's progress;

(8) relevant new information about the child provided by the family or other routine [~~significant~~] caregiver; and

(9) the service provider's signature.

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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Sylvia F. Hardman
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Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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40 TAC §108.1109

(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 Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeal is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.1109. Co-visits.

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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Sylvia F. Hardman
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SUBCHAPTER L. TRANSITION

40 TAC §§108.1201, 108.1203, 108.1207, 108.1211, 108.1213, 108.1215, 108.1219

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.1201. Purpose.

The purpose of this subchapter is to implement all federal requirements in 20 USC §1437 and 34 CFR §303.209 [~~§303.148~~] related to transition planning and services.

§108.1203. Definitions.

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

(1) Community Transition Meeting--A meeting with the family, the contractor's ECI program staff, and community representatives to assist the family with transitioning from early childhood intervention services to community services, activities, places, or programs the family would like the child to participate in after exiting early childhood intervention services.

~~[(2) LEA--Local Educational Agency as defined in 20 USC §7801(26)(A).]~~

~~[(3) LEA Child Find Notification--Notification to the LEA that the child will shortly reach the age of eligibility for preschool services under the Individuals with Disabilities Education Act, Part B. The parent may opt out of the LEA Child Find Notification.]~~

(2) [~~(4)~~] LEA Notification of Potentially Eligible for Special Education Services--Notification to the LEA that a child is potentially eligible for LEA services. The parent may opt out of the LEA Notification of Potentially Eligible for Special Education Services.

(3) [~~(5)~~] LEA Notification Opt Out--The parent's choice not to allow the contractor to send the child's limited personally identifiable information to the LEA to meet [~~LEA Child Find Notification or~~] LEA Notification of Potentially Eligible for Special Education Services requirements.

(4) [~~(6)~~] LEA Transition Conference--A meeting with the parent, the contractor's ECI program staff, and if possible, an LEA representative to assist a child potentially eligible for LEA special education services to transition from early childhood intervention services to LEA special education services.

(5) [~~(7)~~] Limited Personally Identifiable Information--The child's and parent's names, addresses, and phone numbers, child's date of birth, service coordinator's name and language spoken by the child and family.

(6) [~~(8)~~] Transition Planning--The process of identifying and documenting appropriate steps and transition services to support the child and family to smoothly and effectively transition from early childhood intervention services to LEA special education services or other community activities, places, or programs the family would like the child to participate in after exiting early childhood intervention services.

§108.1207. Transition Planning.

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

(d) The IFSP team, which includes the parent, must meet, in accordance with 34 CFR §§303.342(d) and (e) and 303.343, to plan appropriate steps and transition services. Except as provided in subsections [~~subsection~~] (f) through (h) of this section, this can occur after the child's second birthday but no later than 30 months of age for a child exiting the program. The appropriate steps and transition services that the IFSP team plans must be documented in the IFSP and must include:

(1) timelines and responsible party for each transition activity;

(2) the family's choice for the child to transition into a community or educational program or for the child to remain in the home;

(3) appropriate steps and transition services to support the family's exit from early childhood intervention services to LEA special education services or other appropriate activities, places, or programs the family would like the child to participate in after exiting early childhood intervention services; and

(4) program options, if the child is potentially eligible for special education services, for the period from the child's third birthday through the remainder of the school year.

(e) (No change.)

(f) At any time during the child's enrollment in early childhood intervention services, the IFSP team must, upon parental request, meet to [~~the parent may also request that the IFSP team~~] plan steps to support the child and family to transition:

(1) from one contractor to another contractor;

(2) from one family setting to another family setting; or

(3) when the family is moving out of state.

(g) If the child is referred 45 days to six months before the child's third birthday, the IFSP team must plan and document appropriate steps and transition services as a part of the initial IFSP development.

(h) [~~(g)~~] If the child is referred fewer than 45 days before the child's third birthday, the IFSP team is not required to plan appropriate steps and transition services. The contractor can refer the child directly to the LEA with prior written parental consent.

(i) The contractor must comply with all requirements in Subchapter B of this chapter (relating to Procedural Safeguards and Due Process Procedures).

§108.1211. LEA Notification of Potentially Eligible for Special Education Services.

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

(d) To assist the LEA in determining eligibility, the contractor, with written parental consent, must send the LEA the most recent [~~With written parental consent, the contractor may send the LEA other pertinent records that would assist the LEA in determining eligibility, such as~~]:

(1) evaluations [~~screening tools~~];

(2) assessments [~~assessment tools~~]; and

[~~(3) evaluation tools;~~]

[~~(4) medical information;~~]

(3) [~~(5)~~] IFSPs. [~~;~~]

[~~(6) progress notes; and~~]

[~~(7) other information determined by local agreements.~~]

§108.1213. LEA Notification Opt Out.

(a) The parent may choose not to allow the contractor to send the child's limited personally identifiable information to the LEA. The contractor must:

(1) inform the parent of the [~~LEA Child Find Notification and the~~] LEA Notification of Potentially Eligible for Special Education Services requirements before the parent signs the initial IFSP; and

(2) explain LEA Notification Opt Out to the parent and the consequences of this choice.

(b) The parent may choose to opt out of [~~LEA Notification Opt Out for either or both of~~] the LEA Notification of Potentially Eligible for Special Education Services [~~Notifications~~]. The parent may inform the contractor of their LEA Notification Opt Out choice:

(1) either in writing or verbally; and

(2) at any time up until the time the child's information is released to the LEA.

(c) The contractor must provide the parent written communication regarding LEA Notification that includes the following information:

(1) what information will be disclosed to the LEA;

(2) the scheduled LEA Notification date;

(3) a clear statement that the parent can inform the contractor of their LEA Notification Opt Out choice:

(A) either in writing or verbally; [~~,~~] and

(B) at any time up until the time the child's information is released to the LEA;

[~~(4) The child's limited personally identifiable information will be sent for LEA Child Find Notification no later than 90 days before the child's third birthday, unless the parent contacts the program to opt out before the scheduled notification date.~~]

(4) [~~(5)~~] the [~~The~~] child's limited personally identifiable information will be sent for LEA Notification of Potentially Eligible for Special Education Services, unless the parent contacts the program to opt out before the scheduled notification date.

(d) The contractor must provide the parent the written communication regarding LEA Notification as required in subsection (c) of this section[~~:~~]

[~~(1) at least 10 days before the limited personally identifiable information is scheduled to be sent for LEA Child Find Notification no later than 90 days before the child's third birthday; and~~]

[~~(2)~~] at least 10 days before limited personally identifiable information is scheduled to be released[~~:~~]

[~~(A)~~] for LEA Notification of Potentially Eligible for Special Education Services.[~~;~~]

[~~(B) as a part of the invitation to the LEA Transition Conference, or~~]

[~~(C) at the LEA Transition Conference.~~]

(e) If the parent opts out of [~~LEA Child Find Notification or~~] LEA Notification of Potentially Eligible for Special Education Services at any time before the notification is sent, the contractor must:

(1) not send the child's limited personally identifiable information to the LEA;

(2) inform the parent that even if he or she opts out of [~~either~~] LEA Notification, he or she can later request that the child's limited personally identifiable information be sent to the LEA; and

(3) document in the child's record:

(A) the date the written communication regarding LEA notification was provided to the parent; [~~,~~] and

(B) the parent's request to opt out of [~~LEA Child Find Notification or~~] LEA Notification of Potentially Eligible for Special Education Services.

(f) (No change.)

§108.1215. Reporting Late LEA Notifications of Potentially Eligible for Special Education Services.

When the contractor provides the LEA Notification of Potentially Eligible for Special Education Services to districts or charter schools less than 90 days before the child's third birthday, the contractor's ECI program must include in the notification the reason for the delay [~~provide a written report to the district or charter school~~].

§108.1219. Transition to LEA Services.

(a) (No change.)

(b) Early childhood intervention services may be discontinued if the child begins receiving the same services from the LEA when[~~:~~]

[~~(1)~~] prior written notice is given to the parent regarding the discontinuation of early childhood intervention services and the IFSP is revised at an IFSP meeting. [~~; or~~]

[~~(2) the parent provides prior written consent to discontinue early childhood intervention services.~~]

[~~(c) The contractor must participate in LEA planning conferences, Admission Review and Dismissal (ARD) meetings, and other LEA meetings at the request of the parent.~~]

(c) [~~(d)~~] All transition activities must be documented in the child's record.

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

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40 TAC §108.1209

(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 Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeal is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.1209. LEA Child Find Notification.

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

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SUBCHAPTER N. SYSTEM OF FEES

40 TAC §§108.1401, 108.1403, 108.1411, 108.1413, 108.1419, 108.1421

The amendments are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.1401. Purpose.

(a) (No change.)

(b) This subchapter also establishes procedures to determine the family cost share amount the contractor bills the parent for IFSP services.

~~[(c) For children and families enrolled in ECI services before the effective date of this subsection, payments (family cost share amount) shall be pursuant to §§108.601, 108.604, 108.605, 108.607, 108.609, 108.611, 108.613, 108.615, 108.619, 108.621, and 108.623 of this title (relating to System of Fees) until the family's next periodic review or annual meeting to evaluate the IFSP. Thereafter, the family cost share amount for that family shall be pursuant to §§108.1403, 108.1405, 108.1407, 108.1409, 108.1411, 108.1413, 108.1415, 108.1417, 108.1419, 108.1421, 108.1423, 108.1425, 108.1427, and 108.1429 of this title (relating to System of Fees).]~~

~~[(d) For children and families who enroll in ECI services on or after the effective date of this subsection, payments (family cost share amount) shall be pursuant to §§108.1403, 108.1405, 108.1407, 108.1409, 108.1411, 108.1413, 108.1415, 108.1417, 108.1419, 108.1421, 108.1423, 108.1425, 108.1427, and 108.1429 of this title.]~~

§108.1403. Definitions.

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

(1) Ability to Pay--The family, as defined in this section, is financially able to contribute to the cost of IFSP services[~~,~~] either through a family fee or through the use of public or private insurance benefits.

(2) Adjusted Income--The gross income of the family, as defined in this section, minus allowable deductions. Adjusted income is used to determine a family's ability to pay and to determine the family cost share amount.

(3) Allowable Deductions--Certain unreimbursed out-of-pocket expenses, not paid for by another source, deducted from gross income to calculate adjusted income.

(4) CHIP--The Children's Health Insurance Program (CHIP) administered by the Texas Health and Human Services Commission.

~~[(5) CIHCP--County Indigent Health Care Program (CIHCP) administered by the Texas Department of State Health Services.]~~

~~[(6) CSHCN--Children with Special Health Care Needs (CSHCN) administered by the Texas Department of State Health Services.]~~

(5) [~~(7)~~] Dependent--Any person who meets the definition of 26 USC §152 Dependent Defined.

(6) [~~(8)~~] Family--When used in this subchapter, family shall mean the child's parent, the child, and other dependents of the parent.

(7) [~~(9)~~] Family Cost Share Amount--The maximum amount [~~of money the family must pay~~] per month based on the family's adjusted income, family size, and, when applicable, certain other factors as described in this subchapter.

(8) [~~(10)~~] Family Cost Share System--The system of collecting fees for early childhood intervention services including the collection of private insurance, public insurance and benefits, and fees charged to the parent.

(9) [~~(11)~~] Federal Poverty Guidelines [~~Level~~]--The poverty guidelines updated periodically in the Federal Register by the United States Department of Health and Human Services under the authority of 42 USC §9902(2).

(10) [~~(12)~~] Gross Income--All income received by the family, as defined in this section, for determination of family cost share amount, from whatever source, that is considered income by the Internal Revenue Service before federal allowable deductions are applied.

(11) [~~(13)~~]) Inability to Pay--The determination that the family, as defined in this section, is not able to financially contribute

to the cost of early childhood intervention services. [~~Placement on the sliding fee scale at $0 indicates an inability to pay.~~]

[~~(14) PHC--Primary Health Care (PHC) administered by the Texas Department of State Health Services.~~]

(12) [~~(15)~~] Sliding Fee Scale--The federal poverty guidelines [~~level~~] based scale of graduated family cost share amounts developed by DARS.

[~~(16) SNAP--Supplemental Nutrition Assistance Program (SNAP) administered by the Texas Health and Human Services Commission.~~]

[~~(17) SSI--Supplemental Security Income (SSI) is a Federal income supplement program funded by general tax revenues.~~]

[~~(18) TANF--The Temporary Assistance for Needy Families (TANF) program administered by the Texas Health and Human Services Commission.~~]

(13) [~~(19)~~] Third-Party Payor--A company, organization, insurer, or government agency that makes payment for early childhood intervention services received by a child and family. Third-party payors include commercial insurance companies, TRICARE, Medicaid, CHIP, HMOs and PPOs.

(14) [~~(20)~~] TRICARE--The U. S. Department of Defense health care entitlement for active duty, Guard and Reserve and retired members of the military, and their eligible family members and survivors.

[~~(21) WIC--Women, Infants and Children (WIC) nutrition program administered by the Texas Department of State Health Services.~~]

§108.1411. IFSP Services Subject to the Family Cost Share Amount.

IFSP services subject to the family cost share amount include:

(1) behavioral intervention;

(2) occupational therapy services;

(3) physical therapy services;

(4) speech-language pathology [~~speech therapy~~] services;

(5) nutrition services;

(6) counseling services;

(7) nursing services;

(8) psychological services;

(9) health services;

(10) medical services for determining developmental status and need for early childhood intervention services;

(11) social work services;

(12) transportation; and

(13) specialized skills training (previously known as developmental services).

§108.1413. Family Cost Share Amount.

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

(c) The contractor determines the family's assigned family cost share amount based on the family's placement on the DARS ECI sliding fee scale. Placement on the sliding fee scale is based on family size and annual adjusted income. The sliding fee scale is based on the formula in the figure in this subsection. The sliding fee scale must be provided to the parent and additional copies can be obtained from DARS.

Figure: 40 TAC §108.1413(c)

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

§108.1419. Third-Party Payors.

(a) (No change.)

(b) The contractor must always obtain prior written parental consent before:

(1) releasing personally identifiable information to any third-party payor; or

(2) billing third-party payors [~~unless the child is enrolled in Medicaid or CHIP~~].

[~~(c) The contractor must obtain prior written parental consent before releasing personally identifiable information, as required in subsection (b) of this section, but the contractor is not required to obtain parental consent before billing:~~]

[~~(1) Medicaid or CHIP for early childhood intervention services; or~~]

[~~(2) private insurance if the parent has private insurance for the child in addition to Medicaid or CHIP.~~]

(c) [~~(d)~~] If the parent refuses to give consent for the contractor to bill the third-party payor for early childhood intervention services, the parent is considered to have an ability to pay and the contractor must bill the parent the highest family cost share amount on DARS ECI sliding fee scale.

(d) [~~(e)~~] The contractor must assist the parent with enrolling a potentially eligible child in Medicaid or CHIP.The contractor may waive the family cost share amount while Medicaid or CHIP eligibility is being determined, not to exceed 90 days. [~~If the parent refuses to apply for Medicaid or CHIP, the contractor must bill the parent the family cost share amount based on the sliding fee scale or $10, whichever is greater. If the contractor receives full or partial payment for the month the IFSP service was delivered, the contractor must not bill the parent for refusing to apply for Medicaid or CHIP.~~]

(e) [~~(f)~~] Payment from a [~~Full or partial~~] third-party contributes toward [~~payment satisfies~~] the family cost share amount for the month the IFSP service was delivered. The family must not be charged in excess of the family cost share amount. DARS ECI absorbs any additional cost of insurance co-pays and co-insurance.

(f) [~~(1)~~] The parent is responsible for the assigned family cost share amount for any month the third-party payor completely denies payment for all IFSP services subject to fees. Payment may be denied because the service is not covered under the child's individual policy, because the insurance deductible has not been met, or for other reasons specific to the terms of the individual policy.

(g) [~~(2)~~] The contractor must adjust the amount billed to the family if the contractor or parent successfully disputes a denied claim and full or partial payment is received.

[~~(g) Effectively, DARS ECI absorbs the cost of insurance co-pays and co-insurance because these fees are not billed to the family when the contractor receives full or partial third-party payment. The contractor must bill the parent for insurance deductibles up to the family cost share amount for the month IFSP services are delivered only when the third-party payor denies all payment. The contractor must not bill the parent more than the assigned family cost share amount for the month the IFSP services are delivered even if the insurance deductible exceeds the assigned family cost share amount.~~]

§108.1421. Review of Family Cost Share Amount.

(a) The contractor must review the assigned family cost share amount at the annual meeting [~~meetings~~] to evaluate the IFSP, and anytime the family requests a review. [~~The contractor may also review the assigned family cost share amount at periodic reviews.~~]

[~~(b) The contractor may review the family's financial situation without completing a new family cost share agreement when there has been no change in third-party coverage, gross income or family size since the previous review.~~]

(b) [~~(c)~~] The parent must sign an updated family cost share agreement at least annually. [~~if there have been changes in third-party coverage, gross income, or family size since the previous review.~~] The updated family cost share agreement takes effect the beginning of the following month.

(c) [~~(d)~~] The contractor must determine the [~~review all assigned~~] family cost share amount [~~amounts~~] using current federal poverty guidelines issued by [~~any time~~] the United States Department of Health and Human Services. [~~changes the federal poverty level. If a change in the federal poverty level results in a change in a family's assigned family cost share amount, the parent must sign an updated family cost share agreement.~~]

(d) If a family is enrolled in ECI, rule changes by DARS between the date of the enrollment and the date of the next annual review of the family cost share agreement, or between two annual reviews, may not be used to increase the family cost share amount until the effective date of the agreement following the later annual review. If a family requests a review before the annual review, the family cost share amount may be lowered or may remain the same based on the new rules, but no increase will become effective until the date of the annual review that would have been scheduled.

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 February 13, 2012.

TRD-201200835
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 424-4050

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40 TAC §108.1417

(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 Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeal is proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.1417. Zero Family Cost Share Amount.

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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Sylvia F. Hardman
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SUBCHAPTER O. PUBLIC OUTREACH

40 TAC §§108.1502, 108.1503, 108.1505, 108.1515

The amendments and new rule are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§108.1502. Definitions.

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

(1) Central Directory--As described in 34 CFR §303.117.

(2) Public Awareness--As described in 34 CFR §303.116 and §303.301.

§108.1503. Child Find.

(a) The contractor must document that primary referral sources listed in 34 CFR §303.303(c) [~~§303.321(d)(3)~~] have been provided current information on:

(1) ECI eligibility criteria;

(2) the ECI array of services;

(3) how to explain ECI service delivery to families, including the family's role;

(4) how to make a referral to ECI;

(5) the importance of informing families when a referral is made; and

(6) the family cost share system of payments for early childhood intervention services.

(b) (No change.)

(c) The contractor must have written procedures that establish a system to:

(1) inform primary referral sources of the requirement to refer children suspected of having a developmental delay or a medical diagnosis with a high probability of resulting in a developmental delay in a timely manner as established in 34 CFR §303.321 [~~inform primary referral sources of the 34 CFR §303.321 requirement that referrals are made within two business days of the date the child is suspected of having a developmental delay or a medical diagnosis with a high probability of resulting in a developmental delay~~];

(2) create an effective method for accepting referrals; and

(3) monitor referral dates and sources.

§108.1505. Public Awareness.

(a) The contractor must document that families and the general public are provided current DARS ECI materials [~~information~~] on:

(1) ECI service delivery, including the family's role;

(2) eligibility criteria;

(3) ECI array of services;

(4) how to make a referral to ECI; and

(5) the family cost share system of payments for early childhood intervention services.

(b) The contractor's program staff must be able [~~have the competency~~] to explain to families and the public the information listed in subsection (a) of this section.

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

§108.1515. Interagency Coordination with Local Agencies.

(a) The contractor must document coordination of ECI services with local agencies, as required by 34 CFR §303.302 [~~§303.321~~] and others identified by DARS ECI.

(b) (No change.)

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

Filed with the Office of the Secretary of State on February 13, 2012.

TRD-201200837
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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CHAPTER 109. OFFICE FOR DEAF AND HARD OF HEARING SERVICES

SUBCHAPTER B. BOARD FOR EVALUATION OF INTERPRETERS (BEI) GENERAL CERTIFICATE

40 TAC §109.228

The Texas Health and Human Services Commission (HHSC), on behalf of the Texas Department of Assistive and Rehabilitative Services (DARS), proposes amendments to its rule in Title 40, Part 2, Chapter 109, Office for Deaf and Hard of Hearing Services, Subchapter B, Board for Evaluation of Interpreters (BEI) General Certificate or Certification, §109.228, Qualifications and Requirements for Board for Evaluation of Interpreters (BEI) General Certificate or Certification; and amendment to the title of Subchapter B, to "Board for Evaluation of Interpreters (BEI) General Certificate".

Specifically, DARS is proposing to amend §109.228, to further clarify and expand the qualifications and requirements an individual must have to take a BEI interpreter certification examination and to hold a BEI certification. The amendments also add college or university education requirements and provides for exemptions from those requirements for current BEI certificate holders. DARS is also proposing amending the title of the subchapter to reflect the name of the certificate that is issued.

This amended rule and subchapter title are being proposed under the authority of Texas Human Resources Code, Chapters 81 and 117.

Mary Wright, DARS Chief Financial Officer, estimates that for each year of the first five years that the proposed amended rule is in effect, there will be no foreseeable fiscal implications for state or local governments' costs or revenues because of enforcing or administering the proposed rule. She has determined there is no probable economic cost to persons who are required to comply with the proposed amended rule.

Ms. Wright also has determined that for each year of the first five years the proposed amended rule is in effect, the public benefit anticipated because of the proposed amended rule will be greater clarification of the qualification requirements for BEI certification and expansion of the educational background of BEI certificate holders, which will improve the level of capabilities of interpreters and the services they provide to the community of persons who are deaf.

Additionally, in accordance with Texas Government Code §2001.022, Ms. Wright has determined that the proposed amended rule will not affect a local economy, and, therefore, no local employment impact statement is required. Finally, Ms. Wright has also determined that the proposed amended rule will have no adverse economic effect on small businesses or micro-businesses.

Written comments on this proposal may be submitted within 30 days of publication of this proposal in the *Texas Register* to Nancy Mikulencak, Rules Coordinator, Texas Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 150-A-2, Austin, Texas, 78756 or electronically to DARS.Rules@dars.state.tx.us.

The amended rule and subchapter title are proposed pursuant to HHSC's statutory rulemaking authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of HHSC with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

No other statute, article, or code is affected by this proposal.

§109.228. Qualifications and Requirements for Board for Evaluation of Interpreters (BEI) General Certificate [~~or Certification~~].

(a) To apply for or to take any examination for a BEI General Certificate [~~or BEI General Certification~~], an applicant must:

(1) be at least 18 years old;

(2) possess a high school diploma or its equivalent;

(3) not have a criminal conviction that could [~~would~~] qualify as grounds for denial, probation, suspension, or revocation of a BEI certificate [~~certification~~], or other disciplinary action against any holder of a BEI certificate; [~~and~~]

(b) [~~(4)~~] To be eligible to take the written Test of English Proficiency, an applicant must meet all the criteria in subsection (a) of this section and possess at least 30 credit hours from an accredited college or university, with a cumulative GPA of 2.0 or higher. [~~commencing~~

~~on or after January 1, 2012, must possess at least an Associate degree from an accredited college or university.~~]

(c) To be eligible to take a BEI performance test, an applicant must meet all the criteria in subsections (a) and (b) of this section and possess an associate degree and/or a minimum of 60 credit hours from an accredited college or university, with a cumulative GPA of 2.0 or higher.

(d) [~~(b)~~] A BEI certificate holder must: [~~To be awarded or to continue to hold a BEI General Certificate or BEI General Certification, an individual or certificate holder must:~~]

(1) be at least 18 years old;

(2) possess a high school diploma or its equivalent;

(3) not have a criminal conviction that could [~~would~~] qualify as grounds for denial, probation, suspension, or revocation of a BEI certification, or other disciplinary action against any holder of a BEI certificate; and

(4) pass the requisite examination for the certification level sought, which includes:

(A) Test of English Proficiency; and

(B) the requisite performance examination; and

(5) except as provided in subsections (e) and (f) of this section, possess an associate degree and/or a minimum of 60 credit hours from an accredited college or university, with a cumulative GPA of 2.0 or higher. [~~commencing on or after January 1, 2012, must possess at least an Associate degree from an accredited college or university.~~]

(e) A BEI certificate holder who holds an active and valid BEI certification awarded as a result of proceedings initiated prior to January 1, 2012, is exempt from the educational or degree requirements in subsections (b), (c) and (d) of this section, as long as the BEI certification remains active and valid.

(f) A BEI certificate holder who holds an active and valid BEI certification awarded as a result of proceedings initiated prior to January 1, 2012, and who applies for an additional BEI certification level after January 1, 2012, may be exempt from the educational or degree requirements of subsections (b), (c) and (d) of this section, if, at the time the certificate holder applies for, takes, and passes any BEI examination for the additional certification, the BEI certificate holder:

(1) has an active and valid BEI certification that is fully compliant with BEI's annual certificate maintenance and five-year certificate renewal rules and requirements;

(2) is not under any type of active or pending disciplinary action from BEI/Office for Deaf and Hard of Hearing Services; and

(3) satisfies all other rules and requirements applicable to the additional BEI certification level sought.

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 February 13, 2012.

TRD-201200838

Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 424-4050

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TITLE 43. TRANSPORTATION

PART 10. TEXAS DEPARTMENT OF MOTOR VEHICLES

CHAPTER 219. OVERSIZE AND OVERWEIGHT VEHICLES AND LOADS SUBCHAPTER H. ENFORCEMENT

43 TAC §219.121

The Texas Department of Motor Vehicles (department) proposes amendments to §219.121, Administrative Penalties, relating to oversize and overweight vehicles and loads.

EXPLANATION OF PROPOSED AMENDMENTS

Senate Bill 1420, 82nd Legislature, Regular Session, 2011, transferred certain functions related to oversize and overweight vehicles from the Texas Department of Transportation (TxDOT) to the department. Some of the TxDOT administrative rules were administratively transferred to the department. The January 27, 2012, issue of the *Texas Register* (37 TexReg 359) published a rule conversion chart for the transferred rules, which includes the current §219.121.

Transportation Code, §623.271 provides the department with authority to impose administrative penalties for violations of Transportation Code, Subtitle E, Vehicle Size and Weight, Chapters 621, 622, and 623, as well as for violations of a rule or order adopted under these chapters of the Transportation Code. Transportation Code, §623.272 provides the department with authority to impose an administrative penalty on a shipper who provides false information on a shipper's certificate of weight. The amount of an administrative penalty imposed under Transportation Code, §623.271 and §623.272 is calculated in the same manner as the amount of an administrative penalty imposed under Transportation Code, §643.251, which relates to administrative penalties that may be levied against motor carriers that are required to be registered under Chapter 643, Motor Carrier Registration.

The department previously interpreted Transportation Code, §643.251 in 43 TAC §218.71 (relating to Administrative Penalties), regarding administrative penalties for motor carrier violations of Transportation Code, Chapters 643 and 645. The proposed amendments to §219.121 make this rule consistent with 43 TAC §218.71 because both rules interpret Transportation Code, §643.251 regarding the calculation of an administrative penalty.

The current rule language in §219.121 has led to some confusion since the maximum administrative penalty amounts specified by Transportation Code, §643.251 appear to be dollar limits on individual enforcement actions, while the current rule's wording appears to be a dollar limit on each violation within that enforcement action. The proposed amendments clarify the rule and conform it to Transportation Code §643.251 and 43 TAC §218.71.

The proposed amendments to §219.121(a) clarify that the department's ability to impose administrative penalties is limited by the long-standing constitutional requirement of notice and opportunity for hearing. This change emphasizes the right of the person to request a due process hearing.

The proposed amendments to §219.121(a) add "or the holder of the permit" to conform the language to Transportation Code, §623.271 regarding the person or entity that may be subject to an administrative penalty.

The proposed amendments to §219.121(a)(1) replace "provided to" with "required by" to conform the language to Transportation Code, §623.271 regarding the forms that may subject a person or holder of the permit to an administrative penalty.

Proposed amendments to §219.121(b) conform the rule terminology to the language in Transportation Code, §643.251 to reflect the nature of the penalty as being administrative.

The proposed amendments to §219.121(b)(1) clarify that the $5,000 limit for violations that are not knowingly committed applies to the entire enforcement action and not to each violation within that enforcement action.

The proposed amendments to §219.121(b)(2) clarify that the $15,000 limit for violations that are knowingly committed applies to each violation within that enforcement action and that violations of a rule or order adopted under Transportation Code, Chapters 621, 622, or 623 are included within the scope of violations that can be knowingly committed. The words "constitutes or" are deleted because they are not necessary.

The proposed amendments to §219.121(b)(3) clarify that the $15,000 limit for violations that are knowingly committed is additionally limited to $30,000 per enforcement action. Language relating to the meaning of "multiple violations" is deleted as unnecessary, since the limitation applies to an enforcement action, not "multiple violations."

Proposed amendments to §219.121(b)(4) delete the words "under this section" because these words are not necessary.

Proposed amendments to §219.121(b)(5) delete the heading "Amount of penalty." because the heading is not necessary and the heading is inconsistent with the structure of the rest of the rule.

FISCAL NOTE

Linda Flores, Chief Financial Officer, has determined that for each of the first five years the amendments as proposed are in effect, there will be no significant fiscal implications for state or local governments as a result of enforcing or administering the amendments.

William Harbeson, Enforcement Division Director, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments.

PUBLIC BENEFIT AND COST

Mr. Harbeson has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be the continuation of industry practices that have reduced consumer complaints. The reputation and sales practices of the industry may improve and the public's confidence in the industry may rise. There will be no adverse economic effect on small businesses or individuals.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §219.121 may be submitted to Brett Bray, General Counsel, Texas Department of Motor Vehicles, 4000 Jackson Avenue, Austin, Texas 78731. The deadline for receipt of comments is 5:00 p.m. on March 26, 2012.

STATUTORY AUTHORITY

These amendments are proposed under Transportation Code, §1002.001, which authorizes the board to adopt rules as necessary and appropriate to implement the powers and duties of the department; Transportation Code, §623.002, which authorizes the board to adopt rules necessary to implement and enforce Transportation Code, Chapter 623; Transportation Code, §623.271, which authorizes the department to investigate and impose an administrative penalty concerning a violation of Transportation Code, Chapters 621, 622, and 623, as well as a violation of a rule or order adopted under these chapters of the Transportation Code; and Transportation Code, §623.272, which authorizes the department to investigate and impose an administrative penalty on a shipper who provides false information on a shipper's certificate of weight.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapters 621, 622, and 623, and Transportation Code, §643.251.

§219.121. Administrative Penalties.

(a) Authority. The department, after notice and opportunity for hearing, may impose an administrative penalty against a person or the holder of the permit who:

(1) provides false information on a permit application or another form required by [~~provided to~~] the department concerning the issuance of an oversize or overweight permit;

(2) violates this chapter or Transportation Code, Chapters 621, 622, or 623;

(3) violates an order adopted under this chapter or Transportation Code, Chapters 621, 622, or 623; or

(4) fails to obtain an oversize or overweight permit that is required under this chapter or Transportation Code, Chapters 621, 622, or 623.

(b) Amount of administrative penalty.

(1) In an action brought by the department, the aggregate amount of administrative penalty shall not exceed $5,000 unless it is found that the person or the holder of the permit knowingly committed a violation. [~~Except as provided by this section, the amount of the penalty may not exceed $5,000 for each violation.~~]

(2) In an action brought by the department, if [~~If~~] it is found that the person or the holder of the permit knowingly committed a violation, the aggregate amount of administrative penalty shall not [~~penalty for that violation may be in an amount not to~~] exceed $15,000. A person or the holder of the permit acts knowingly if the person or the holder of the permit acts with knowledge that the act [~~constitutes or~~] violates Transportation Code, Chapters 621, 622, or 623, or a rule or an order adopted under Transportation Code, Chapters 621, 622, or 623. [~~this chapter, or an order adopted under this chapter.~~]

(3) In an action brought by the department, if [~~If~~] it is found that the person or the holder of the permit knowingly committed multiple violations, the aggregate amount of administrative penalty for the multiple violations shall not exceed $30,000. [~~may be in an amount not~~

~~to exceed $30,000. Multiple violations are all violations arising during a single episode under one scheme or course of conduct.~~]

(4) Each day a violation continues or occurs is a separate violation for purposes of imposing an administrative [~~a~~] penalty [~~under this section~~].

(5) [~~Amount of penalty.~~] Any recommendation that an administrative [~~a~~] penalty should be imposed must be based on the following factors:

(A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited acts, and the hazard or potential hazard created to the health, safety, or economic welfare of the public;

(B) the economic harm to property or the environment caused by the violation;

(C) the history of previous violations;

(D) the amount necessary to deter future violations;

(E) efforts made to correct the violation; and

(F) any other matters that justice may require.

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 February 13, 2012.

TRD-201200788
Brett Bray
General Counsel
Texas Department of Motor Vehicles
Earliest possible date of adoption: March 25, 2012
For further information, please call: (512) 467-3853

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Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 351. COORDINATED PLANNING AND DELIVERY OF HEALTH AND HUMAN SERVICES

1 TAC §351.507

The Texas Health and Human Services Commission (HHSC) adopts new §351.507, concerning adverse licensing, listing, or registration decisions by health and human services (HHS) agencies, without changes to the proposed text as published in the December 30, 2011, issue of the *Texas Register* (36 TexReg 9117). The section will not be republished.

Background and Justification

The new section is adopted to comply with Senate Bill (S.B.) 78, 82nd Legislature, Regular Session, 2011, which added Subchapter W to Chapter 531 of the Texas Government Code. Subchapter W governs adverse licensing, listing, and registration decisions made by HHS agencies that license or regulate specific entities described in the statute, including youth camps, home and community support services agencies, hospitals, and long-term care facilities.

Until the new statute went into effect, an HHS agency had authority to consider only an adverse action it had taken against an entity in considering the entity's application for or renewal of a license. The new statute authorizes each HHS agency to consider adverse decisions made by other HHS agencies when considering an application or renewal filed with that agency by another agency's licensee. Each licensing or regulating HHS agency must maintain records regarding adverse decisions made by the agency regarding its licensees and must share those records with the other HHS agencies.

The HHS agencies affected by the adopted rule are: the Department of Aging and Disability Services (DADS), the Department of Family and Protective Services (DFPS), and the Department of State Health Services (DSHS). DADS, DFPS, and DSHS have worked with HHSC to prepare for its implementation. HHSC is developing a database into which the records will be placed for ease of sharing between agencies.

The adopted rule tracks the language of the statute and sets out the types of information the HHS agencies are required to maintain under Subchapter W of Chapter 531, Government Code.

Comments

HHSC received no comments regarding adoption of the new section.

Legal Authority

The new section is adopted under Texas Government Code, §531.0055, which provides the Executive Commissioner of HHSC with rulemaking authority; and §2 of S.B. 78, which requires the Executive Commissioner of HHSC to adopt the rules necessary to implement Subchapter W, Chapter 531, Texas Government 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 February 8, 2012.

TRD-201200637
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: March 1, 2012
Proposal publication date: December 30, 2011
For further information, please call: (512) 424-6900

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CHAPTER 353. MEDICAID MANAGED CARE

The Texas Health and Human Services Commission (HHSC) adopts the amendments to §§353.1 - 353.5, concerning general provisions of Medicaid managed care, §§353.101, 353.102, 353.104, and 353.105, concerning provider and member education programs, §§353.201 - 353.203, concerning member bill of rights and responsibilities, §§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 §§353.601, 353.603, 353.605, and 353.607, concerning the STAR+PLUS program; adopts the repeal of §§353.701 - 353.703, concerning the Integrated Care Management program; adopts new §353.701 and §353.702, concerning the STAR Health program; and adopts new §353.801 and §353.802, concerning the STAR program, in Chapter 353, Medicaid Managed Care.

The amendments to §353.2 and §353.411 are adopted with changes to the proposed text as published in the December 23, 2011, issue of the *Texas Register* (36 TexReg 8639) and will be republished. The amendments to §§353.1, 353.3 - 353.5, 353.101, 353.102, 353.104, 353.105, 353.201 - 353.203, 353.403, 353.405, 353.407, 353.409, 353.413, 353.415, 353.417, 353.419, 353.421, 353.601, 353.603, 353.605, and 353.607; the repeal of §§353.701 - 353.703; and new

§§353.701, 353.702, 353.801, and 353.802 are adopted without changes to the proposed text as published in the December 23, 2011, issue of the *Texas Register* (36 TexReg 8639) and will not be republished.

Background and Justification

The amendments, new rules, and repeals are adopted to comply with certain provisions of Senate Bill 7 (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 sought a waiver under Section 1115 of the federal Social Security Act (42 U.S.C. §1315) (1115 waiver), which was approved by the Centers for Medicare and Medicaid Services (CMS) on December 12, 2011.

The 1115 waiver 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 adopted 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 rules adopted concurrently and published elsewhere 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 rules are adopted to delete references to PCCM throughout Chapter 353. Adopted 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 adopted 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 rules are adopted to: (1) add definitions related to the addition of dental services, including dental MCO, dental contractor, and dental home; (2) add requirements for dental MCOs to participate in Medicaid managed care; (3) identify which requirements are applicable to dental MCOs, as opposed to health care MCOs; (4) describe standards for access to dental services; and (5) include 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 adopted 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, the amendments and repeals are adopted to delete references to ICM.

Further, the rules are adopted 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.

In addition to the changes made to the proposed rule text in response to public comments, as described in the "Comments" section of this preamble, HHSC made the following changes to the proposed text to further clarify the provisions:

(1) In §353.2(55), concerning the definition of medically necessary, HHSC added a reference to dental services in subparagraph (A)(i), consistent with the federal definition of Early Periodic Screening, Diagnosis, and Testing (EPSDT) services in §1905(r)(3) of the Social Security Act.

(2) In §353.411(b)(6), HHSC added a period at the end of the paragraph.

Comments

HHSC received comments on the proposed rules from one individual and from Children's Rehabilitation Clinic, Disability Rights Texas, Mercy Rehabilitation Services, and the Texas Dental Association, including at a public hearing held in Austin on January 17, 2012. A summary of the comments and HHSC's responses follow.

Comment: Three commenters expressed concern that MCOs in the Hidalgo service area are not ready for managed care expansion. Further, one of the three commenters requested that implementation be suspended due to this concern, and another asked a question regarding the time frame the state uses to determine when the MCOs are ready.

Response: The comments do not relate to the proposed rules.

Comment: Two commenters expressed concern that the 20-day time frame for clients in the Hidalgo service area to select an MCO before they are defaulted into an MCO is too short.

Response: The comments do not relate to the proposed rules.

Comment: Regarding §353.2(22), the definition of "dental services" does not include "a device for a craniofacial abnormality." It is critical that treatment for craniofacial abnormalities be included in both managed care and non-managed care areas of the state.

Response: Dental devices for craniofacial anomalies, as well as treatment rendered in a hospital, urgent care center, or ambulatory surgical center for craniofacial abnormalities are Medicaid covered services provided through a health care MCO or HHSC's claims administrator as health care services, as opposed to dental services provided by a dental MCO. In response

to the comment, HHSC has revised the definition to make this clarification.

Comment: Regarding §353.2(45), the definition of "long term service and support" (LTSS) should be corrected or clarified to include LTSS services available to Supplemental Security Income (SSI) recipients or those eligible for such services under the 1915(c) nursing facility waiver. The proposed definition limits the scope of LTSS available in Texas managed care to those related to activities of daily living. Maintaining the current definition, or revising it to clarify the full scope of LTSS, will ensure that individuals have access to the appropriate scope of services in managed care when medically necessary, including all state plan services and services available to persons who qualify for nursing facility services under a home and community based services waiver, such as the Community Based Alternatives waiver program.

Response: The reference to 1915(c) nursing facility waiver services no longer applies under HHSC's 1115 waiver. In response to the comment, HHSC has revised the definition to clarify that LTSS includes services provided to all SSI recipients under the Texas State Plan as well as STAR+PLUS Home and Community-Based Waiver Services, as defined in §353.2(75).

Comment: Regarding proposed §353.2(55)(B)(i), one commenter requested that the term "handicap" be replaced with the term "disability" in the definition of "medically necessary." The commenter also requested that the definition be revised to ensure services that "are reasonable and necessary to: prevent illness or medical conditions; provide early screening, interventions, or treatments for conditions; prevent suffering or pain; improve, maintain or prevent deterioration of functioning; and prevent endangering life or worsening a disability or condition."

Response: Based on the comment, HHSC has changed the word "handicap" in subparagraph (B)(i) to "disability." HHSC did not make other changes to the proposed definition in response to this comment. Based on federal requirements related to Medicaid coverage for children under age 21, the definition of medically necessary is different for children and adults in Medicaid. The definition HHSC proposed for adult non-behavioral health services in (B)(i) is consistent with the definition the agency used previously, and HHSC believes the definition is appropriate and comprehensive.

Comment: Regarding §353.2(55)(B), one commenter recommended adding a new clause (viii) to state that adult non-behavioral health services "are furnished in the most appropriate and least restrictive setting in which services can safely be provided." The commenter asserted that this language is critical to the state's obligation to serve individuals with disabilities in the most integrated setting appropriate to their needs and is included in the portion of this definition that concerns adult behavioral health services.

Response: HHSC did not change the proposed rule in response to this comment. The proposed definitions of medically necessary for adult non-behavioral health services and adult behavioral health services are consistent with the definitions the agency used previously. HHSC believes the definitions are appropriate and comprehensive. HHSC believes that the intent of what the commenter requested for new clause (viii) is covered in subparagraph (B)(ii) and (v): (ii) "provided at appropriate facilities and at the appropriate levels of care for the treatment of a member's health conditions" and (v) "no more intrusive or restrictive than necessary to provide a proper balance of safety, effectiveness, and efficiency."

Comment: One commenter expressed concern about the possible negative impact of a managed care model on the delivery of Medicaid dental services in Texas and stated that it will continue to work closely with HHSC to help ensure a smooth transition.

Response: HHSC appreciates the comment.

SUBCHAPTER A. GENERAL PROVISIONS

1 TAC §§353.1 - 353.5

Legal Authority

The amendments are adopted 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.

§353.2. Definitions.

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

(1) Action--

(A) An action is defined as:

(i) the denial or limited authorization of a requested Medicaid service, including the type or level of service;

(ii) the reduction, suspension, or termination of a previously authorized service;

(iii) the failure to provide services in a timely manner;

(iv) the denial in whole or in part of payment for a service;

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

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

(B) "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 an 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) 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 Medicaid managed care funds such as investment income, earned interest, or third party administrator earnings from services to delegated networks.

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

(8) Behavioral health service--A covered service for the treatment of mental, emotional, 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--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.

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

(14) Complaint--Any dissatisfaction expressed by a complainant, orally or in writing, to the MCO about any matter related to the MCO other than an action. Subjects for complaints may include:

(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 member's rights.

(15) Covered 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:

(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) 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.

(17) Day--A calendar day, unless specified otherwise.

(18) Default enrollment--The process established by HHSC to assign a Medicaid managed care enrollee to an MCO when the enrollee has not selected an MCO.

(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 dental devices for craniofacial anomalies; treatment rendered in a hospital, urgent care center, or ambulatory surgical center setting for craniofacial anomalies; or emergency services 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) 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) 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.

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

(26) Elective enrollment--Selection of a primary care provider (PCP) and MCO by a client during the enrollment period established by HHSC.

(27) Emergency 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) Emergency service--A covered inpatient and outpatient service, furnished by a network provider or out-of-network provider that is qualified to furnish such service, that is 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.

(29) Emergency 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) 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) EPSDT--The federally mandated Early and Periodic Screening, Diagnosis and Treatment program defined in 25 TAC Chapter 33. The State of Texas has adopted the name Texas Health Steps (THSteps) for its EPSDT program.

(33) 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).

(34) 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 Medicaid coverage.

(35) 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.

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

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

(38) 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) Federal 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) 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.

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

(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.

(45) Long term service and support (LTSS)--A service provided to a qualified member in his or her 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. LTSS includes services provided to all SSI recipients under the Texas State Plan as well as services available only to persons who qualify for STAR+PLUS Home and Community-Based 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) 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) 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) Medical Assistance Only (MAO)--A person who qualifies financially for Medicaid but does not receive Supplemental Security Income (SSI) payments.

(54) Medical 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 MCO contracted with HHSC.

(55) Medically necessary--Means:

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

(i) screening, vision, dental, 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 disability, 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.

(56) 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.

(57) 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.

(58) 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.

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

(60) Outside 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) Participating MCO--An MCO that has a contract with HHSC to provide services to members.

(62) Post-stabilization care service--A covered service, related to an emergency medical condition, that is 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) 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.

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

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

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

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

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

(69) 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) Service area--The counties included in any HHSC-defined service area as applicable to each MCO.

(71) Significant traditional provider (STP)--A provider identified by HHSC as having provided a significant level of care to the target population, including a DSH.

(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) 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 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).

(78) 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) Value-added service--A service provided by an MCO that is not "medical assistance," as defined by §32.003 of the Human Resources 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 February 10, 2012.

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For further information, please call: (512) 424-6900

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SUBCHAPTER B. PROVIDER AND MEMBER EDUCATION PROGRAMS

1 TAC §§353.101, 353.102, 353.104, 353.105

Legal Authority

The amendments are adopted 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.

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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Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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SUBCHAPTER C. MEMBER BILL OF RIGHTS AND RESPONSIBILITIES

1 TAC §§353.201 - 353.203

Legal Authority

The amendments are adopted 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.

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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Steve Aragon
Chief Counsel
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

Legal Authority

The amendments are adopted 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.

§353.411. Accessibility of Services.

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

(1) A health care MCO 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) A health care MCO 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) A health care MCO 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) A health care MCO 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) A health care MCO must ensure the reasonable availability and accessibility of specialists for all covered services requiring specialty care. Specialists must also be reasonably accessible to members in time, distance, cultural competency, and language.

(6) 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) and (d) 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) 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) of this section, the MCO must submit to HHSC for approval data that indicates covered health care services or dental services are not available to the member within the required distance.

(d) Service or provider outside the service area. The provisions in subsections (a)(3), (a)(6), (b)(3), and (b)(6) 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 treatment of cancer, burns, and cardiac diseases.

(e) Provider education and training.

(1) A health care MCO must provide education and training to providers on the specific health and behavioral health problems and needs of 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 the contract and rule requirements for accessibility and availability. MCOs and HHSC will cooperate and coordinate education and training activities for providers.

(f) Cultural competency plan. An MCO 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 policy-making process, administration, and daily practices; and

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

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

(h) Significant traditional providers. An MCO must not exclude Significant Traditional Providers from its network for a period of time and under conditions determined by HHSC and specified in the contract.

(i) Provider manual. An MCO must develop a written provider manual 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.

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 G. STAR+PLUS

1 TAC §§353.601, 353.603, 353.605, 353.607

Legal Authority

The amendments are adopted 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.

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 H. INTEGRATED CARE MANAGEMENT PROGRAM

1 TAC §§353.701 - 353.703

Legal Authority

The repeals are adopted 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.

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 H. STAR HEALTH

1 TAC §353.701, §353.702

Legal Authority

The new rules are adopted 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.

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 I. STAR

1 TAC §353.801, §353.802

Legal Authority

The new rules are adopted 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.

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SUBCHAPTER F. SPECIAL INVESTIGATIVE UNITS

1 TAC §§353.501 - 353.505

The Texas Health and Human Services Commission (HHSC) adopts the amendments to Subchapter F, §§353.501 - 353.505, concerning special investigative units of managed care organizations (MCOs), in Chapter 353, Medicaid Managed Care.

The amendment to §353.505 is adopted with changes to the proposed text as published in the December 23, 2011, issue of the *Texas Register* (36 TexReg 8662) and will be republished. The amendments to §§353.501 - 353.504 are adopted without changes to the proposed text as published in the December 23, 2011, issue of the *Texas Register* (36 TexReg 8662) and will not be republished.

Background and Justification

The amendments are adopted 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 rules in Chapter 353, concerning the expansion of managed care in Texas, adopted 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 adopted to update the rules to reflect current policy and contract language; to revise Texas Administrative Code references as appropriate; and to clarify language.

HHSC made a change to the proposed text in §353.505(a)(2), adding "as described in this subchapter" to clarify what constitutes completion of ordinary due diligence regarding a suspected overpayment.

Comments

HHSC received no comments regarding adoption of the amendments, including at a public hearing held in Austin on January 17, 2012.

Legal Authority

The amendments are adopted 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.

§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 as described in this subchapter, 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.

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 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) adopts 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 Chapter 353, Medicaid Managed Care.

New §353.905 and §353.911 are adopted with changes to the proposed text as published in the December 23, 2011, issue of the *Texas Register* (36 TexReg 8667) and will be republished. New §§353.901, 353.903, 353.907, 353.909, 353.913, and 353.915 are adopted without changes to the proposed text as published in the December 23, 2011, issue of the *Texas Register* (36 TexReg 8667) and will not be republished.

Background and Justification

The new rules are adopted 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 (MCO) 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 MCO 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 MCOs include provisions that require each MCO 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 Sections 32.028 and 32.0281, Human Resources Code."

Government Code §536.005, which also was enacted as part of S.B. 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 MCO 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 S.B. 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 sought a waiver under Section 1115 of the federal Social Security Act (42 U.S.C. §1315a) (1115 waiver), which was approved by the Centers for Medicare and Medicaid Services (CMS) on December 12, 2011. The new rules in Subchapter J are adopted 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 S.B. 7 in the 82nd Legislature's first called session, the new rules in Subchapter J are adopted to do the following: (1) require MCOs 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.

In addition to the changes made to the proposed rule text in response to public comments, as described in the "Comments" section of this preamble, HHSC made a change to §353.905 to remove an unnecessary "and" in subsection (h)(3).

Comments

HHSC received comments on the proposed rules from American Pharmacies, H.E.B., the National Association of Chain Drug Stores and the Texas Federation of Drug Stores, and Texas True-Care Pharmacies.

Comment: One commenter believes that HHSC has misinterpreted S.B. 7, because S.B. 7 does not require a statewide expansion of managed care or the inclusion of the outpatient pharmacy benefit, nor does it require Medicaid beneficiaries to receive drug benefits through managed care.

Response: HHSC did not modify the proposed rules in response to this comment. The new rules are adopted to comply with recent legislation. Section 1.02 of S.B. 7 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 service delivery in the South Texas counties of Cameron, Hidalgo, and Maverick. Furthermore, Section 1.02 of S.B. 7 established requirements for administering the outpatient pharmacy benefit through this model. Texas Government Code §533.005(a)(23), as added by S.B. 7, requires HHSC's contracts with MCOs to contain outpatient pharmacy benefit plans that comply with a number of enumerated requirements, such as use of HHSC's vendor drug program formulary and adherence to HHSC's preferred drug list. Finally, as noted in the preamble to the proposed rules, the General Appropriations Act reduced HHSC's appropriations to account for the anticipated cost savings generated by adding of outpatient pharmacy services to managed care.

Comment: One commenter expressed concerns about HHSC's abandonment of its statutory obligation to regulate pharmacy benefits under the new Medicaid managed care program.

Response: HHSC did not modify the proposed rules in response to this comment. HHSC has met its statutory obligations to administer the Medicaid program, and has adopted rules consistent with the requirements of state law. Subchapter J, regarding outpatient pharmacy services, establishes requirements for the administration of outpatient pharmacy benefits through Medicaid managed care, and complies with the Legislative direction set forth in S.B. 7. For example, the subchapter requires that MCOs adopt and exclusively use HHSC's formulary and preferred drug lists, and establishes requirements for specialty drug contracts.

Comment: Two commenters expressed concern over HHSC's interpretations of S.B. 7, Chapter 32 of the Texas Human Resources Code, and federal Medicaid regulations with respect to reimbursement rates for pharmacy benefits and with respect to the standard for determining adequate patient access to Medicaid benefits. One of the commenters stated that HHSC should not abdicate its responsibility to follow the federal regulations by transferring the reimbursement process in the MCOs and PBMs. One of the commenters requested that the proposed rules be tabled and modified until HHSC has a sound factual and legal basis for its regulations.

Response: HHSC did not modify the proposed rules in response to these comments. HHSC disagrees with the commenters' interpretation of state and federal laws. The commenters incorrectly apply the rate setting requirements in Chapter 32 of the

Texas Human Resources Code to a managed care model. Section 32.028 of the Human Resources Code requires HHSC to "adopt reasonable rules and standards governing the determination of fees, charges, and rates for medical assistance payments."

The agency's long-standing interpretation, applied to the operation of the Medicaid managed care program since its inception in 1995 and approved by nine sessions of the Texas Legislature and by the federal Centers for Medicare and Medicaid Services in dozens of amendments to the state's managed care waivers, is that this provision applies only to payments made by the state to medical service providers in a fee-for-service model. HHSC has never interpreted "medical assistance payment" to include either payments made by HHSC to MCOs under a capitated, risk-based managed care model, or to payments made by MCOs to network providers. To do so would contradict the underlying principles of risk-based managed care (see 42 U.S.C. §1396b(m) and 42 C.F.R. §438.2 (relating to Medicaid managed care), see also 42 U.S.C. §1395mm (relating to Medicare managed care)).

Under the Social Security Act, a state is offered the option of furnishing medical assistance under a managed care delivery system. If the state opts to implement a managed care model, it may do so by employing either a Medicaid agency regulated model, under which the state Medicaid agency approves and authorizes managed care organizations, or a state-regulated model, under which the Medicaid agency contracts with managed care organizations licensed or certified to do business in the state under state law. Texas opted for the latter model. Managed care organizations serving Medicaid recipients in Texas are licensed or certified by the Texas Department of Insurance, and are required to bear risk and negotiate provider rates.

In state-regulated managed care, MCOs receive per-member-per-month (PMPM) payments in exchange for providing members all covered services, and are placed at risk if the PMPM payment does not cover all of the MCO's medical and administrative expenses. Federal regulations require that the rates paid to MCOs be actuarially sound (42 CFR §438.6). MCOs must negotiate rates with providers, based in large part on market conditions in the service area, but must also ensure that its provider networks are sufficient to provide members access to all covered service (42 CFR §438.206(b)(1)). If HHSC determines patient access is not adequate, HHSC will address this with the MCO regardless of the cause. Absent federal or state legislative direction to the contrary, to impose Chapter 32's rate setting requirements on a managed care model would contradict HHSC's longstanding interpretation and greatly diminish the MCOs' ability to provide cost-effective services through independent rate negotiations with providers, and would undermine the state's ability to maximize state and federal resources.

This interpretation is consistent with CMS' historical interpretation of 42 CFR §438.60. CMS interprets this rule to prevent states from directing MCOs to pay providers at specific amounts, and has provided HHSC with guidance to this effect. As addressed in the preamble to the proposed rules in Subchapter J, the Texas Legislature has also confirmed this policy in several legislative enactments.

Following state and federal direction, the rules do not establish minimum payment thresholds or requirements, and therefore allow negotiations between the MCOs and their network providers to determine the most appropriate reimbursement amounts. Under 42 C.F.R. §438.6(c)(2), rates paid to MCOs must be actuarially sound. Assuming, for the sake of argument, that it was possible for HHSC to establish provider payment thresholds under state and federal laws, imposing Chapter 32's rate setting requirements would likely violate this regulation. Adopting rules that impose minimum pharmacy payment requirements would impact the cost assumptions used to develop the MCO's contracted rates, and likely render the rates actuarially unsound.

It is important to recognize that provider participation in Medicaid is voluntary and providers are not required to accept an MCO's rates or enter into a network provider agreement with the MCO. If the MCO is unable to develop an adequate network at the rates it offers, and therefore cannot meet the state's access to care requirements, then HHSC is delegated the statutory responsibility to address and remedy this deficiency and HHSC will take prompt enforcement action. For example, HHSC will place a violating MCO under a corrective action plan that requires the MCO to add a sufficient number of pharmacy providers to its network. HHSC will impose other contractual remedies based on the severity of the violation, including accelerated monitoring, enrollment suspension, or even contract termination.

Comment: Two commenters expressed concern that the proposed rules are based on factually faulty assumptions that pharmacies have any effective or meaningful power or opportunity to negotiate rates with MCOs and and/or pharmacy benefits managers (PBMs).

Response: HHSC disagrees with these comments and did not modify the proposed rules in response. As noted in responses to previous comments, providers who are unwilling to accept an MCO's rates or other contractual terms are not required to enter into network provider agreements..

Comment: One commenter stated that the proposed rules fail to address the effect of the proposed rules on patient access to pharmacy benefits.

Response: HHSC did not modify the proposed rules in response to the comment. MCOs must comply with all applicable state and federal requirements regarding access to covered services. As indicated in HHSC's responses to other comments, the agency will actively monitor and enforce requirements regarding members' access to outpatient pharmacy services. Moreover, as of this date, all contracted health care MCOs have met the outpatient pharmacy access standards in the rules.

Comment: One commenter stated that, although the proposed rules clearly specify that health care MCOs cannot require Medicaid beneficiaries to obtain covered medications through mail-order pharmacies and establish a process wherein any pharmacy willing to accept the terms and conditions of the health care MCO's contract can participate in the provider network, the rules do not address the other ways that third-party payers limit provider networks: namely, differential copayments, arbitrary dispensing limits, and other inducements that encourage patients to use one network provider over another. The commenter requested that HHSC add language to the proposed rules to clearly prohibit such practices.

Response: HHSC did not modify the proposed rules in response to this comment. The rules and HHSC's contracts encourage MCOs to develop robust pharmacy provider networks. Under the terms of their contracts with HHSC, MCOs must develop provider networks that support member access to all covered services. To ensure sufficient access to pharmacy providers, §353.905(d) requires a health care MCO to contract with all pharmacy providers that meet its credentialing requirements, agree

to its financial terms, and agree to other reasonable administrative and professional terms. The MCO's credentialing standards must comply with the Texas Department of Insurance's requirements. MCOs have discretion in developing provider payment rates, but at the same time must develop rates that are sufficient to enroll a provider network that meets the rule's and contract's access standards.

HHSC did not include restrictions on differential copayments in the rules because Medicaid members are not responsible for copayments under HHSC's managed care waiver agreement with the Centers for Medicare and Medicaid Services (CMS).

The rules do not prohibit health care MCOs from imposing dispensing limits. HHSC will actively monitor the MCO's network access reports, as well as member and provider complaints, to ensure that members have sufficient access to pharmacy providers and covered services. If MCO-imposed dispensing limits result in inadequate pharmacy networks or the failure to provide covered services, then HHSC will take appropriate contract enforcement actions and ensure that covered services are provided. As previously addressed, such actions can include accelerated monitoring, requiring a corrective action plan, enrollment suspension, or contract termination.

Comment: Three commenters expressed concern that HHSC improperly performed the economic impact analysis in the preamble. The commenters asserted that: (1) HHSC underestimated the number of independent pharmacies in its analysis, (2) HHSC failed to acknowledge and address the full economic impact of the proposed rules on pharmacies that constitute small businesses, (3) HHSC did not disclose the assumptions used for Maximum Allowable Cost (MAC) pricing, (4) HHSC assumed that ingredient costs would be higher and thus failed to consider the impact of reduced dispensing fees or gross profits, and (5) dispensing fee reductions alone would be at least 0.3%, which is the percentage HHSC concluded would be the total reduction in pharmacy reimbursements.

Response: HHSC did not modify the proposed rules in response to these comments. HHSC understands that chapter 2006 was intended, first, to apply particularly to administrative agencies that are delegated the duty to regulate the practice of a profession or operation of a business. HHSC does not bear such statutory responsibility over the pharmacy industry. HHSC also understands, however, that Chapter 2006 applies to non-regulatory agencies such as HHSC. Under these circumstances, HHSC believes chapter 2006 requires a non-regulatory agency to reconsider a proposed administrative rule that imposes costs or other financial burdens on the operation of small and micro-businesses. The proposed rules do not impose such burdens, and HHSC is unaware of any authority that requires a state agency, in performing its duties under chapter 2006, to reject a proposed rule that implements a statutory mandate and applies policies that are intended to achieve legislatively-mandated savings in favor of private, commercial expectations of taxpayer-subsidized income.

In light of the agency's obligation to conduct an analysis under chapter 2006, HHSC conducted the analysis with the best data available to the agency, in a manner that was both reasonable and consistent with state law. Government Code §2006.001(2) defines a "small business" as a for profit business that is independently owned and operated, and has fewer than 100 employees or less than $6 million in annual gross receipts. Under Government Code §2006.002(a), if a rule has a potential adverse economic effect on a small business, a state agency "shall reduce that effect if doing so is legal and feasible considering the purpose of the statute under which the rule is to be adopted." Before adopting such a rule, the state agency must prepare an economic impact statement that "estimates the number of small businesses subject to the proposed rule, projects the economic impact of the rule on small businesses, and describes the alternative methods of achieving the purpose of the rule" (Texas Government Code §2006.(c)(1)). The Attorney General's guidelines provide that an agency should make a "reasonable, good faith effort to prepare an economic impact statement," and "must assess for itself the quantity and quality of the data needed" to prepare the statement (see HB 3430 Small Business Impact Final Guidelines, Texas Attorney General, April 2008, at p. 1 and p. 4). HHSC's analysis included reasonable and good faith estimates of the number of small businesses impacted by the rules, as well as reasonable and good faith projections of the economic impact. To identify small businesses impacted by a rule, the Attorney General's guidelines direct agencies to the Comptroller of Public Account's and the Texas Workforce Commission's web sites. Neither of these web sites contain data specific to the pharmacy industry, and HHSC therefore could not use these sources to determine the number of small business pharmacies that are enrolled as Medicaid providers. Furthermore, because HHSC does not regulate the pharmacy industry, it does not collect information on the size or gross revenues of pharmacies. HHSC therefore estimated of the number of small pharmacies impacted by the rule based on the best information available to the agency. Specifically, HHSC estimated that 996 independent pharmacies may be small businesses or micro-businesses by applying the Centers for Medicare and Medicaid Services' (CMS') estimates regarding Medicaid claims. In the 2010 National Health Expenditure Study, the CMS estimated that, on the average, Medicaid claims account for 7.7% of a pharmacy's total outpatient drug business. HHSC applied this estimate to the total amount of pharmacy claims paid by HHSC's Vendor Drug Program to project the total amount of a pharmacy's revenues for outpatient drugs. Based on this analysis, HHSC estimated that 996 pharmacies had outpatient drug revenues below the $6 million. HHSC acknowledges that this number may overestimate the number of small business pharmacies, as its projections relate to total outpatient drug costs as opposed to total gross revenues for all products sold by the pharmacies.

To project the economic impact on small businesses, HHSC applied pharmacy reimbursement information provided by contracted MCOs to actual Vendor Drug Program fee-for-service claims experience for fiscal year 2011. HHSC used a sample of over 37 million claims. HHSC analyzed both dispensing fees and ingredient costs when determining the overall reductions in pharmacy reimbursement. For purposes of projecting the fiscal impact, HHSC defined "independent pharmacies" as all Medicaid-enrolled pharmacies with four or fewer store locations, and identified 1681 Texas pharmacies that would be impacted by the rule under this analysis. The rule's preamble recognized that this definition of "independent pharmacies" likely resulted in a greater number of pharmacies than would qualify under Government Code §2006.001. HHSC estimated that independent pharmacies would see a 6% total reduction in reimbursement under managed care.

HHSC did not publish information on MAC pricing assumptions in preamble. Neither Texas Government Code §2006 nor the Texas Attorney General's guidelines for developing a Small Business Impact Statement require this level of detail to be published with the analysis.

The alternative methods HHSC considered for reducing outpatient pharmacy costs are addressed in the agency's responses to other comments.

As addressed in the preamble to HHSC's draft rules, the full impact of the proposed rules on small businesses is largely dependent on external forces, including rate negotiations between small business pharmacies and MCOs. Given this uncertainty, HHSC completed the small business impact analysis in a reasonable manner, based on the best information available to the agency. When estimating the number of small businesses/independent pharmacies impacted by the rule, HHSC erred on the side of over-inclusion.

Comment: One commenter stated that HHSC failed to consider all legal, feasible alternatives in the regulatory flexibility analysis, including: (1) eliminating Subchapter J, since SB 7 does not require Medicaid recipients to receive outpatient drugs through managed care; (2) setting minimum pharmacy reimbursement rates as required under Chapter 32 of the Texas Human Resources; and (3) exempting small business pharmacies from Subchapter J.

Response: HHSC did not modify the proposed rules in response to these comments. HHSC made a reasonable and good-faith effort to prepare a regulatory flexibility analysis that provides the public and affected small businesses with information about the potential adverse impact of the proposed rule, as well as potentially less-burdensome alternatives. Section 2006.002 does not require the agency to consider all legal, feasible alternatives to the rule. Instead, the law requires the agency to include "several proposed methods of reducing the adverse impact" of the proposed rule on a small business if those methods are consistent with the economic welfare of the state. Texas Government Code §2006.002(c-1). HHSC has met this statutory requirement by presenting three of the alternatives HHSC considered. Texas Government Code §2006.002 requires an agency to reduce adverse economic impact "if doing so is legal and feasible considering the purpose of the statute under which the rule is to be adopted." One of the main purposes of S.B. 7 was to reduce the cost of providing Medicaid services by carving outpatient pharmacy services into managed care. HHSC does not believe it is feasible to ignore this legislature's directive. Furthermore, HHSC does not believe that "exempting small business pharmacies from Subchapter J" is a feasible way of achieving S.B. 7's or the General Appropriation's Act's cost savings requirements.

Comment: One commenter stated that an economist has estimated that the $1.35 dispensing fee being offered by one of the MCO pharmacy benefit managers will cause 1,300 Texas pharmacies to close at a loss of 73,000 health care related jobs.

Response: HHSC did not modify the proposed rules in response to these comments. HHSC understands the concern, but notes that maintaining the agency's current fee-for-service payment levels and system is not an option, based on legislative direction to carve the outpatient pharmacy benefit into managed care and to achieve the cost savings assumed by the carve-in. Furthermore, the Legislature took these actions with knowledge of the commenters' arguments and the economist's study referred to in the comment.

On at least four occasions, pharmacy representatives presented this same information to the Texas Legislature regarding the impact of lower dispensing fees on pharmacy providers under managed care. The Legislature, however, was unpersuaded and passed Senate Bill 7 and reduced the agency's budget to account for anticipated savings. HHSC does not believe it is at liberty to disregard these decisions and therefore must attempt to proceed with the managed care carve-in.

HHSC will actively monitor pharmacy network adequacy to ensure that the anticipated reduction in dispensing fees does not impact member access to care.

Comment: Two commenters expressed concern about HHSC's cost assumptions in the proposed rules' impact on employment in a local economy. The commenters assert that HHSC's analysis notes that independent pharmacies will be impacted, but that there will be no impact on local economies. Chain pharmacies will have the same business model as independents, so the local economy will be affected.

Response: HHSC did not modify the proposed rules in response to these comments. HHSC agrees with the comment, and notes that, considering the discussion that immediately follows the statement, the statement is obviously an error. However, this error does not impair the legal effect of the rules under Texas Government Code §2001.002(c). HHSC provided a detailed analysis of the proposed impact on small businesses in the preamble to the rules, as well as its estimates of the overall cost impact for Medicaid pharmacy providers. However, it is difficult to determine with any certainty the rules' employment impact, because pharmacies do not report operating costs to HHSC, and pharmacy rates are negotiated directly with the MCOs. Moreover, provider participation in the Medicaid program is voluntary, and the proposed rules do not impose duties or obligations on pharmacies to participate.

Comment: One commenter stated that decreasing pharmacy utilization will increase costs elsewhere in the health care system.

Response: HHSC did not modify the proposed rules in response to this comment. HHSC's small business impact analysis notes that MCOs' utilization control measures will result in lower utilization and therefore likely reduce pharmacy revenues. HHSC disagrees with the commenter's claim that lower utilization will result in increased costs elsewhere in the system. MCOs' increased utilization controls generally result in more cost-effective and coordinated care. To ensure that managed care members receive all necessary covered services, however, HHSC will actively monitor both access to and the quality of care provided by the MCOs.

Comment: One commenter stated that the preamble does not substantially comply with chapters 2001 or 2006 of the Texas Government Code, specifically noting: (1) §2006.002(a), which requires an agency to reduce the adverse economic effect on small businesses and micro-businesses if doing so is legal and feasible, and (2) §2006.002(d), which requires the agency to include an economic impact statement and regulatory flexibility analysis and to provide copies of the notice filed with the secretary of state to the standing committee of each house of the legislature that is charged with reviewing the proposed rule. HHSC acknowledges that there will be a disparate impact on independent pharmacy reimbursement but does not impose any standards on MCOs or PBMs to reduce the impact.

Response: HHSC did not modify the proposed rules in response to these comments. Section 2006.002(a) does not require an agency to reduce the impact on small businesses or micro-businesses if doing so is not legal or feasible "considering the purpose of the statute under which the rule is to be adopted."

Senate Bill 7 and the General Appropriations Act direct HHSC to carve outpatient pharmacy benefits into managed care. The purpose of these laws is to improve the cost-effectiveness of the Medicaid program by enabling Medicaid recipients to receive medically necessary services at a lower overall cost through a managed care model. Some commenters advocated reducing the economic impact by establishing minimum payment thresholds in the rules. As discussed in previous responses, state and federal laws prevent HHSC from establishing pharmacy reimbursement thresholds in a managed care model. Doing so is neither legal nor feasible, and furthermore it would place the agency's federal financial participation at risk. As set forth in the preamble to the proposed rule, HHSC considered several other options for reducing the rule's economic impact, but none of the options were feasible considering the cost-saving purpose of the laws.

To address the second comment, HHSC has complied with all applicable notice requirements.

Comment: Concerning the economic impact statement in the preamble, one commenter stated that no federal law or regulation prohibits HHSC from preventing MCOs and PBMs from discriminating between pharmacies in their administration of pharmacy benefits, or from prohibiting disparate treatment of providers that are similarly situated, and that HHSC's failure to do so is an abdication of its responsibility to oversee the implementation of Medicaid Managed Care.

Response: HHSC did not modify the proposed rules in response to this comment. Section 353.905(d) of the rule requires each MCO to open its network to all willing providers who meet the MCO's credentialing requirements (as established by the Texas Department of Insurance), and agree to the MCO's financial terms and other reasonable administrative and professional terms. The only exception is that MCOs can limit their networks for specialty drug providers, as required by Section 1.02 of Senate Bill 7 and set forth in §353.905(e) of the rules. If any MCO is discriminating against a provider for any reason that is unrelated to these statutory and regulatory requirements, HHSC can take appropriate corrective action against the offending MCO.

With respect to the second comment, the proposed rules were, in fact, proposed in an effort to fulfill HHSC's duty to regulate the administration of the implementation of managed care.

Comment: One commenter asserted that 42 C.F.R. §483.1 expressly prohibits HHSC from entering into contracts with MCOs without establishing intermediate sanctions that the agency will impose if the MCOs fail to comply with applicable law and regulations.

Response: HHSC did not modify the proposed rules in response to this comment. The cited federal regulation imposes requirements on HHSC's contracts with MCOs. As required by federal regulations at 42 C.F.R. §438.1 and 42 C.F.R. Part 438, Subpart I, HHSC's contracts include appropriate remedies for breach, such as monetary damages, appointment of temporary management, enrollment suspension, and terminations.

Comment: One commenter stated that the MCO contracts are subject to state and federal approval and must meet the requirements set forth in 42 CFR §438.6. Those standards require that the contract be based on actuarially sound rates that are stated in the contract. Those requirements include the requirement that the MCOs comply with all applicable state and federal laws.

Response: HHSC agrees, but notes that the cited federal regulations place the responsibility to regulate compliance with the CMS and do not require HHSC to adopt rules. As required by federal law, HHSC's managed care contracts include rates that are certified as actuarially sound. HHSC did not modify the proposed rules in response to this comment.

Comment: One commenter stated that HHSC has failed to ensure that MCOs comply with the requirement that reimbursement rates be sufficient to assure access consistent with 42 U.S.C. §1396a(a)(30)(A). The commenter asserted that there is a vast difference between mandating that specific rates be paid and "interfering" to the extent necessary to prevent MCOs and PBMs from self-dealing, discriminating, and from diminishing patient access. The commenter also asserted that nothing in the federal regulations prohibits HHSC from imposing on MCOs provisions that require compliance with federal patient access requirements. Rates must be the product of sound government decision-making, must consider the cost of providing service, and cannot be based solely on a desire to cut costs. In addition, access must be assured that is "at least" equal to that available to the non-Medicaid consumer. Reimbursement rates cannot be based solely on budgetary constraints.

Response: HHSC did not modify the proposed rules in response to this comment. HHSC agrees that MCOs must comply with federal patient access requirements, and this requirement is already in the contract and rules. The comment, however, fails to cite the correct access standard for managed care, 42 CFR §438.206(b)(1). This regulation requires states to ensure that Medicaid MCOs' networks are "sufficient to provide adequate access to all services covered under the (terms of the MCO) contract." HHSC's proposed rules are consistent with this requirement, as well as the terms of HHSC's waiver agreement with the CMS for the Texas Healthcare Transformation and Quality Improvement Program, No. 11-W-00278/6. Part III, Item 24 of the Waiver's Special Terms and Conditions includes the network provider requirements, and provides that the MCO's network "must be sufficient to provide access to covered services to the low-income population." If access is inadequate due to low payment rates or any other cause, HHSC will take appropriate action. To ensure compliance with federal access requirements, HHSC will investigate member and provider complaints regarding access to care, and will closely monitor the MCO's network adequacy reports.

Comment: One commenter stated that federal regulations at 42 CFR §438.60 do not prohibit HHSC from making direct supplemental payments; the regulations are simply a prerequisite to the receipt of federal funds.

Response: HHSC did not modify the proposed rules in response to this comment. The CMS has historically interpreted 42 CFR §438.60 to prevent states from directing MCOs on provider payment amounts and has specifically cautioned HHSC on this point in relation to the implementation of the managed care expansion under the Texas Healthcare Transformation and Quality Improvement Program waiver. Furthermore, CMS guidance clearly indicates that §438.60 "prohibits direct payments to providers *for services available* under a contract with an MCO"(emphasis added). 67 Fed. Reg. 40987, 41022 (2002).

Comment: Regarding §353.905, one commenter stated that the section should contain provisions regarding member access, network adequacy, reasonable reimbursement methodology, provider complaints, and corrective actions plans for MCOs.

Response: HHSC did not modify the proposed rules in response to this comment. The rules address member access and pharmacy network requirements, as well as corrective action plans for MCO that do not comply with HHSC's out-of-network payment requirements. Member access and pharmacy network adequacy requirements are included in §353.915. As an additional measure to ensure that health care MCOs build sufficient pharmacy networks, §353.905(d) includes a requirement that a health care MCO contract with all pharmacy providers who meet the MCO's credentialing requirements (as established by the Texas Department of Insurance), and agree to the MCO's financial terms and other reasonable administrative and professional terms.

Section 353.913(e) includes requirements regarding out-of-network provider complaints and corrective action plans for non-compliant MCOs.

The agency's response to concerns regarding reimbursement methodology is found in the response to other public comments.

HHSC did not propose rules prescribing the procedures MCOs must follow to handle network provider complaints. There procedures are addressed in HHSC's contracts with the MCOs. MCOs that do not comply with these procedures are subject to contract enforcement actions.

Comment: Regarding §353.905(b), one commenter stated that HHSC has erred in failing to prohibit the negotiation of rebates by PBMs in addition to MCOs.

Response: HHSC did not modify the proposed rules in response to this comment. To the extent that a health care MCO subcontracts the functions described in this subchapter to a PBM, the requirements of the subchapter also apply to the PBM. See §353.407, which provides that entities that subcontract with MCOs must meet the same qualifications and requirements as the MCO.

Comment: One commenter stated that HHSC has erred in failing to impose the requirements of state and federal law on MCOs, as required under 42 CFR §438.6(f) and in failing to provide for intermediate sanctions for MCOs' failure to comply, as required in 42 CFR §438.1.

Response: HHSC did not modify the proposed rules in response to this comment. The cited federal regulation includes mandatory requirements for the state's MCO contracts. The state has included appropriate remedies provisions in its MCO contracts, as required by 42 CFR §438.700, but is not required by state or federal law to address these provisions in administrative rules. The Texas Administrative Procedures Act (APA) requires rulemaking for any "statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of a state agency" (Texas Government Code §2001.003(6)(A)). Contractual terms that apply only to the MCO are not statements of general applicability under the APA.

Comment: Regarding §353.905(d), two commenters expressed concern that the subsection was too vague and would allow health care MCOs to set their own credentialing requirements that would ultimately limit the network of pharmacy provides. Credentialing requirements must reflect industry or HHSC standards.

Response: HHSC did not modify the proposed rules in response to these comments. MCOs are required to follow the standard credentialing processes as approved by the Texas Department of Insurance and the National Committee for Quality Assurance (see Texas Administrative Code, Title 28, Part 1, Chapter 11, Subchapter T).

Comment: Regarding §353.905(d), one commenter expressed concern that HHSC has not imposed a requirement that the MCOs and PBMs negotiate with pharmacies.

Response: HHSC did not modify the proposed rules in response to this comment. Section 353.905(d) requires an MCO, and therefore its subcontracted PBM, to enter into network provider agreements with all pharmacy providers that meet its credentialing requirements, agree to its financial terms, and agree to other reasonable administrative and professional terms.

Comment: Regarding §353.905(e), two commenters requested that the rule language be clarified to specify that health care MCOs may not contract with a pharmacy provider for specialty drug services that would require Medicaid beneficiaries to obtain such services from a mail-order pharmacy. The commenter was concerned that the rule language as proposed did not explicitly mirror the parameters set for specialty pharmacy services in the law.

Response: HHSC has revised §353.905(e) and §353.911(c) to clarify the requirements regarding contracts for specialty drugs.

Comment: Regarding §353.905(e), one commenter asserted that HHSC should extend the prohibition on specialty drug contracts between MCOs and pharmacies owned in full or part by PBMs contracted with the MCO to all pharmacy contracts. The prohibition should not be limited to specialty drug contracts because the risks of self-dealing and bias are not limited to situations in which exclusive contracts are authorized between an MCO and pharmacies owned in full or part by PBMs contracted with the MCO.

Response: HHSC did not modify the proposed rules in response to this comment. HHSC understands the concern, but notes that the restrictions in Texas Government Code §533.005(a)(23)(G) apply only to specialty pharmacies owned in part or full by PBMs contracted with MCOs. The rules comply with this statutory requirement.

Comment: One commenter commented on a separately proposed rule concerning specialty drugs, to emphasize the commenter's concern about how HHSC will define specialty drugs.

Response: This comment does not relate to the proposed rules.

Comment: One commenter expressed concern that proposed §353.909 imposes obligations on pharmacies and requires regulatory compliance.

Response: HHSC did not modify the proposed rules in response to this comment. HHSC does not regulate the pharmacy industry. Moreover, pharmacy providers are not required to participate in Medicaid. The rules establish requirements for providers that choose to participate in the program.

Comment: One commenter stated that proposed §353.911 is unnecessary in light of the already highly efficient Vendor Drug Program. S.B. 7 does not require that every Medicaid beneficiary obtain their pharmacy benefit through the MCO's pharmacy network. Response: HHSC did not modify the proposed rules in response to this comment. As noted in previous responses, Senate Bill 7 and the General Appropriations Act direct HHSC to carve the outpatient pharmacy benefit into managed care. Section 1.02 of Senate Bill 7 contemplates the managed care carve-in of outpatient pharmacy services, and estab-

lishes requirements for administering the benefit through this model. Relevant sections of Section 1.02, now codified in Texas Government Code §533.005(a)(23), require HHSC's contracts with MCOs to contain outpatient pharmacy benefit plans that comply with a number of legislative requirements, such as use of HHSC's vendor drug program formulary and adherence to HHSC's preferred drug list. Furthermore, the 2012-13 General Appropriations Act reduced HHSC's appropriations to account for the anticipated cost savings generated by the inclusion of outpatient pharmacy services in managed care.

Comment: Regarding proposed §353.913, one commenter believed the proposed rule misstates the applicable federal Medicaid standard for network adequacy. The standard stated in the proposed rule is "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 network...."* As indicated, 42 U.S.C. §1396a(a)(30)(A) requires a network with "enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general public in the geographic area." A "sufficient" or "adequate" network is not sufficient--it must be at least what is available to the general public.

Response: HHSC did not modify the proposed rules in response to this comment. The commenter does not cite the correct access standard for managed care, 42 CFR §438.206(b)(1). This regulation requires states to ensure that MCOs' networks are "sufficient to provide adequate access to all services covered under the contract." HHSC's access standard is consistent with this regulation.

Comment: Regarding proposed §353.915, three commenters asserted that the 15-mile access standard for network pharmacies is inadequate, especially in suburban and urban areas of the state, and requested that HHSC adopt the federal standards for Medicare Part D.

Response: HHSC did not modify the proposed rules in response to these comments. Section 353.915 establishes mileage requirements and generally requires that all members have access to at least one network provider within 15 miles of his or her residence, and a network provider with 24-hour coverage within 75 miles. The rule establishes minimum thresholds, which are more stringent that the Texas Department of Insurance's (TDI's) 30-mile requirement for primary care providers (note that TDI does not have access standards for pharmacies). Medicaid regulations do not require states to use Medicare Part D standards. Given this and the vast geographic differences in the service areas served by Texas Medicaid managed care organizations, HHSC sought to implement minimum thresholds in the rule. HHSC has the discretion to implement more stringent requirements in its managed care agreements, provided the minimum thresholds set forth in the rule are met. Effective September 1, 2012, HHSC will require MCOs to comply with more stringent access requirements, which are modeled in part on Medicare Part D standards.

Comment: One commenter asserted that proposed §353.915(c) fails to set forth consequences for not having enough providers to deliver care and services under the plan at least to the extent that such care and services are available to the general public in the geographic area.

Response: HHSC did not modify the proposed rules in response to this comment. Please refer to HHSC's previous responses regarding the correct access standards for Medicaid managed care.

HHSC's MCO contracts include remedies for breach of contract, including remedies for failure to provide sufficient access to covered services. HHSC will complete readiness reviews prior to the operational start date. These reviews will include a determination regarding the adequacy of the MCOs' pharmacy networks. HHSC will not allow an MCO to provide outpatient pharmacy services until it has satisfied all readiness requirements. After operations begin, HHSC will actively monitor member access to care and the sufficiency of the MCOs' pharmacy networks. If an MCO fails to meet the contract's access standards, HHSC will take appropriate contract enforcement actions, such as placing the MCO under a corrective action plan, suspending new enrollment, or even terminating the contract.

Legal Authority

The new sections are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority, and §533.005, 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.

§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 subpart (e), 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 can enter into selective pharmacy provider agreements for specialty drugs, as defined in §354.1853 of this title (relating to Specialty Drugs), subject to the following limitations:

(1) A health care MCO is prohibited from entering into an exclusive contract for specialty drugs with a pharmacy owned in full or part by a pharmacy benefits manager contracted with the health care MCO.

(2) The selective contracting agreement cannot require the pharmacy provider to contract exclusively with the health care MCO.

(3) A health care MCO cannot require a member to obtain a specialty drug from a mail-order pharmacy.

(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);

(4) Division 6 (relating to Pharmacy Claims); and

(5) Section 354.3047 (relating to Quantity Limitations).

§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 specialty drug or other covered outpatient drug from a mail-order pharmacy unless a mail-order pharmacy is the only available dispensing source for the drug. A health care MCO cannot charge the member for mail-order services, including the cost of the drug, fees, or other related services.

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 February 10, 2012.

TRD-201200779
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Effective date: March 1, 2012
Proposal publication date: December 23, 2011
For further information, please call: (512) 424-6900

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CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

The Texas Health and Human Services Commission (HHSC) adopts the amendments to §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, in Chapter 354, Medicaid Health Services. The amendments are adopted without changes to the proposed text as published in the December 23, 2011, issue of the *Texas Register* (36 TexReg 8673) and, therefore, will not be republished.

Background and Justification

The amendments are adopted as conforming changes to adopted amendments and new rules in Chapter 353 of this title, published elsewhere 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 1481, 82nd Texas Legislature, Regular Session, 2011, regarding person-first respectful language.

Comments

HHSC received no comments regarding adoption of the amendments, including at a public hearing held in Austin on January 17, 2012.

DIVISION 11. GENERAL ADMINISTRATION

1 TAC §354.1189

Legal Authority

The amendment is adopted 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.

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 February 10, 2012.

TRD-201200780
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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DIVISION 32. TEXAS MEDICAID WELLNESS PROGRAM

1 TAC §354.1416, §354.1417

Legal Authority

The amendments are adopted 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.

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 February 10, 2012.

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Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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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) adopts the amendment to §357.1, concerning definitions for its uniform fair hearing rules, without changes to the proposed text as published in the December 23, 2011, issue of the *Texas Register* (36 TexReg 8675) and, therefore, the section will not be republished.

Background and Justification

The amendment is adopted, in part, as a conforming change to proposed amendments, new rules, and repeals of rules in Chapter 353 of this title, published elsewhere 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 adopted to eliminate an obsolete definition. The definition of Integrated Care Management (ICM) Program requires deletion because the program no longer exists.

Comments

HHSC received no comments regarding adoption of the amendment, including at a public hearing held in Austin on January 17, 2012.

Legal Authority

The amendment is adopted 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.

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 February 10, 2012.

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Steve Aragon
Chief 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) adopts the amendments to §§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, renewal, disenrollment, and cost sharing 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; adopts the repeal of §370.451, concerning definitions; and adopts 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.

The amendment to §370.4 is adopted with changes to the proposed text as published in the December 23, 2011, issue of the *Texas Register* (36 TexReg 8677) and will be republished. The repeal, the new rules, and the amendments to §§370.1, 370.10, 370.11, 370.21, 370.49, 370.301, 370.303, 370.305, 370.307, 370.321, 370.325, 370.451, 370.452, 370.454, 370.455, 370.501, 370.502, 370.504, 370.505, 370.601, 370.602, and 370.701, are adopted without changes to the proposed text as published in the December 23, 2011, issue of the *Texas Register* (36 TexReg 8677) and will not be republished.

Background and Justification

The amendments, repeal, and new rules are adopted primarily as conforming changes to rules adopted 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 2012-2013 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 and Safety Code §62.051(b) and the cost-savings initiatives in the 2012-2013 General Appropriations Act. New Subchapter G is adopted to govern standards for CHIP managed care. New Subchapter H is adopted 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 required amending the rules to reflect that members will have a choice of dental MCOs. Where possible, the adopted amendments regarding dental services conform

to the language in the proposed Medicaid managed care rules in Chapter 353.

The amendments are also adopted to make minor grammatical corrections to clarify the text.

To make conforming changes to the definitions in Chapter 353 adopted elsewhere in this issue of the *Texas Register*, HHSC revised the definitions of "dental service" and "medically necessary" in §370.4 as follows:

(1) In the definition of "dental service" in paragraph (31), HHSC revised the proposed text to clarify that treatment rendered in a hospital, urgent care center, or ambulatory surgical center for craniofacial abnormalities is a Medicaid covered service provided through a health care MCO or HHSC's claims administrator as a health care service, as opposed to a dental service provided by a dental MCO.

(2) In the definition of "medically necessary" in paragraph (53), HHSC replaced the word "handicap" with "disability" in subparagraph (A)(i).

Comments

HHSC received one comment on the proposed rules from American Pharmacies. A summary of the comment and HHSC's response follow.

Comment: Regarding §370.701, the commenter believes that HHSC has misinterpreted S.B. 7, because S.B. 7 does not require a statewide expansion of managed care or the inclusion of the outpatient pharmacy benefit, nor does it require Medicaid beneficiaries to receive drug benefits through managed care.

Response: HHSC disagrees with the comment. The new rule is consistent with the directives of S.B. 7 and the cost-saving initiatives in the 2012-2013 General Appropriations Act. 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 and Safety Code §62.051(b), and the cost-savings initiatives in the 2012-13 General Appropriations Act.

SUBCHAPTER A. PROGRAM ADMINISTRATION

1 TAC §§370.1, 370.4, 370.10

Legal Authority

The amendments are adopted 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.

§370.4. Definitions.

The following words and terms, when used in this chapter, 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) denial of CHIP eligibility;

(ii) disenrollment from CHIP; or

(iii) the failure of HHSC or its designee to act within 45 days on an applicant's request for CHIP eligibility determination.

(B) "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) 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) 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) 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) 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) Child--An individual under the age of 19.

(15) 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.

(18) 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) Cost Sharing--Any enrollment fees or co-payments the member is responsible for paying.

(22) 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) Countable Liquid Assets--Personal Property that is cash or that an 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) 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 dental devices for craniofacial anomalies; treatment rendered in a hospital, urgent care center, or ambulatory surgical center setting for craniofacial anomalies; or emergency services 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.

(32) 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) Enrollment--The process by which a child determined to be eligible for CHIP is enrolled in a CHIP MCO serving the 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) 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) FPL--Federal Poverty Level Income Guidelines.

(40) 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.

(45) 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 disability, 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) Member--A child enrolled in a CHIP MCO.

(57) 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) 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) SSI--Supplemental Security Income.

(69) 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.

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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Steve Aragon
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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 adopted 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.

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 4. ELIGIBILITY CRITERIA

1 TAC §370.49

Legal Authority

The amendment is adopted 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.

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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 adopted 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.

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 2. COST-SHARING REQUIREMENTS

1 TAC §370.321, §370.325

Legal Authority

The amendments are adopted 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.

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. PROVIDER REQUIREMENTS

1 TAC §370.451

Legal Authority

The repeal is adopted 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.

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1 TAC §§370.452, 370.454, 370.455

Legal Authority

The amendments and new rule are adopted 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 fol-

lowed 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.

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 F. SPECIAL INVESTIGATIVE UNITS

1 TAC §§370.501, 370.502, 370.504, 370.505

Legal Authority

The amendments are adopted 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.

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SUBCHAPTER G. STANDARDS FOR CHIP MANAGED CARE

1 TAC §370.601, §370.602

Legal Authority

The new rules are adopted 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.

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SUBCHAPTER H. OUTPATIENT PHARMACY SERVICES

1 TAC §370.701

Legal Authority

The new rule is adopted 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.

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TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 80. MANUFACTURED HOUSING

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department) adopts amendments to 10 Texas Administrative Code §80.3; and new 10 Texas Administrative Code §§80.40, 80.41, 80.70 - 80.73, 80.80, and 80.90 - 80.94, concerning to the regulation of the manufactured housing program. Section 80.41 and §80.90 are adopted with changes and will be republished in the *Texas Register*. Sections 80.40, 80.70 - 80.73, 80.80, and 80.91 - 80.94 are adopted without changes to the propsal and will not be republished. The proposed new and amended rules were published in the November 18, 2011, issue of the *Texas Register* (36 TexReg 7736).

The amendments and new rules are adopted to comply with Senate Bill (SB) 1 (82nd Legislature, 2011, 1st special session) that amends the Manufactured Housing Standards Act; to re-propose repealed rules in order to re-organize in new Subchapters D - G; to clarify the definition of a criminal record for license applicants; to remove the fee of $1.50 for a certified copy of the Statement of Ownership and Location; and to clarify what criteria the Department will use to determine that any liens on real property have been released.

The rules are effective thirty (30) days following the date of publication in the *Texas Register* with notice that the rules are adopted.

There were no requests received for a public hearing to take comments on the rules.

Set forth below are comments from TMHA (Texas Manufactured Housing Association) suggesting revisions to the proposed rules and the analysis and recommendations of staff.

Section 80.90(h): TMHA commented that requiring an applicant to obtain a deed record to confirm the applicant declaring the home as abandoned is the owner of the real property can be a burdensome, timely process and contains an additional cost factor for land owners trying to declare a home abandoned. It may also be a burden on property owners that do not reside in the state or live a great distance from the county in which their property lies.

TMHA also commented that the rule may not prevent an individual from committing fraud because an unscrupulous individual can falsify or create fraudulent deed records.

TMHA recommends postponing or withdrawing the last sentence of the proposed rule for further examination and consideration.

Department Response: The Department agrees to remove the proposed last sentence in subsection (h) for further examination and consideration.

Department Correction: An error was corrected in §80.41(d)(4) by changing the wording "a letter application" to "an application.

The rules as proposed on November 18, 2011, are adopted as final rules except for changes to §80.41 and §80.90.

The following is a restatement of the rules' factual basis:

Section 80.3(d) is adopted (without changes) to revise the education fee to comply with the changes made in SB 1 (82nd Legislature, 2011, 1st special session) by breaking down the fees into three courses (Core Education Fee, Retailer Education Fee and Installer Education Fee).

Section 80.3(e) is adopted (without changes) to remove text relating to approving a third-party to provide an initial licensing instruction course because the Department does not currently provide an option for third-party initial licensing instruction.

Section 80.3(k) is adopted (without changes) to remove the charge of $1.50 for additional copies of the Statement of Ownership and Location because it cost more to process the payment than to provide a copy at no charge.

Subchapter D is adopted (without changes) to include §80.40 and §80.41 previously located in Subchapter E.

Section 80.40 is adopted (without changes) to place the rule in a new subchapter. The text remains the same as the repealed version.

Section 80.41 is adopted (with changes) to place the rule in a new subchapter.

Section 80.41(c)(1) is adopted (without changes) to comply with the changes made in SB 1 (82nd Legislature, 2011, 1st special session) by breaking down the hours required and types of courses (eight (8) hours for initial instruction course; four (4) hours for retailer course and four (4) hours for installer course).

Section 80.41(c)(2) is adopted (without changes) requiring each course be required to test separately and a score of 70% correct is required to pass each test. Also, changed the word "prepared" to "approved" relating to the approval of questions by the director.

Section 80.41(c)(3) is adopted (without changes) changing the word "terminated" in the first sentence to "suspended." Added a sentence explaining while the license is in a suspended status the salesperson may not act as a manufactured housing salesperson.

Section 80.41(c)(4), (5) and (6) is adopted (without changes) deleting the paragraphs from the new rule because there is no requirement to list the curriculum in the rules.

Section 80.41(d)(4) is adopted (with changes) to correct an error in by changing the wording "a letter application" to "an application."

Section 80.41(f)(3) is adopted (without changes) revising the criteria in determining whether to issue a license to an applicant based on the applicants criminal record, instead of only considering denial of the license or suspension if the applicant has a criminal conviction.

Section 80.41(f)(4), (5) and (6) is adopted (without changes) to change wording from having a criminal conviction to having a criminal record.

Subchapter E is adopted (without changes) to include §§80.70 - 80.73 previously located in Subchapter F.

Section 80.70 is adopted (without changes) to place the rule in a new subchapter. The text remains the same as the repealed version.

Section 80.71 is adopted (without changes) to place the rule in a new subchapter. The text remains the same as the repealed version.

Section 80.72 is adopted (without changes) to place the rule in a new subchapter. The text remains the same as the repealed version.

Section 80.73 is adopted (without changes) to place the rule in a new subchapter. The text remains the same as the repealed version.

Subchapter F is adopted (without changes) to include §80.80 previously located in Subchapter G.

Section 80.80 is adopted (without changes) to place the rule in a new subchapter. The text remains the same as the repealed version.

Subchapter G is adopted (without changes) to include §§80.90 - 80.94 previously located in Subchapter H.

Section 80.90 is adopted (with changes) to place the rule in a new subchapter. The last sentence in §80.90(h) was removed for further examination and consideration.

Section 80.90(d) is adopted (without changes) to remove the certified copy fee of $1.50 because the fee is insignificant and is more costly to process for the Department when applications are rejected because the fee is missing. Providing a copy for free enables the user to reprint certified copies from their own computer which is more efficient for the consumer and the Department.

Section 80.90(f)(2)(D) and (3)(C) is adopted (without changes) to add new subparagraphs to clarify what criteria the Department will use to determine that any liens on real property have been released. The criteria is the same as stated in §1201.2076(b) of the Occupations Code.

Section 80.90(h) is adopted (with changes) by removing the proposed last sentence requiring an applicant to provide a copy of the deed to confirm that the applicant declaring the home as abandoned is the owner of the real property.

Section 80.91 is adopted (without changes) to place the rule in a new subchapter. The text remains the same as the repealed version.

Section 80.92 is adopted (without changes) to place the rule in a new subchapter. The text remains the same as the repealed version.

Section 80.93 is adopted (without changes) to place the rule in a new subchapter. The text remains the same as the repealed version.

Figure: 10 TAC §80.93(b) is adopted (without changes). The Tax Lien Layout form remains the same as the repealed version.

Section 80.94 is adopted (without changes) to place the rule in a new subchapter. The text remains the same as the repealed version.

SUBCHAPTER A. CODES, STANDARDS, TERMS, FEES AND ADMINISTRATION

10 TAC §80.3

The new rule is adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by adoption of the new and amended rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. LICENSING

10 TAC §80.40, §80.41

The new rules are adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.No other statutes, codes, or articles are affected by adoption of the new rules.

§80.41. License Requirements.

(a) General License Requirements. In order to apply to obtain a license, the promulgated form of application for such license must be fully completed and executed and submitted to the Department, accompanied by the required fee, required security, and all other required supporting documentation. The Department may request any reasonably related additional information or documentation to clarify or support any application.

(1) Additional provisions applicable to salespersons.

(A) A salesperson is an agent of their sponsoring retailer or broker. The sponsoring retailer or broker is liable and responsible for the acts or omissions of a salesperson in connection with any activity subject to the Standards Act or this Chapter. It is a violation of the Standards Act and this chapter for a retailer or broker of manufactured housing to employ a salesperson who is not licensed with the Department or permit them to conduct business subject to the Standards Act on their behalf.

(B) If a salesperson,s sponsoring retailer or broker is no longer licensed, that salesperson's ability to act and a salesperson is automatically terminated until such time as he or she is acting under a duly licensed sponsoring retailer or broker and such sponsorship is on record with the Department. A salesperson shall surrender his or her license to the Department within ten (10) calendar days of termination from his or her sponsoring retailer.

(C) A sponsoring retailer or broker shall notify the Department in writing when a salesperson has been terminated or is no longer sponsored by said retailer or broker.

(D) A salesperson's sponsoring retailer or broker shall be issued a license card by the Department containing effective date and license number and name and license number of the sponsor. A salesperson shall be required to present a copy of a valid license card upon request.

(2) Additional provisions applicable to installers.

(A) A provisional installer's license shall become a full installer's license as outlined in §1201.104(f) of the Standards Act when the Department inspects a minimum of five (5) manufactured home installations and found not to have any identified installation violations.

(B) It is the responsibility of an installer who is still on a provisional status to notify the Department of each installation performed promptly. As used in this section, "promptly" means sufficiently early to enable the home to be inspected prior to any skirting being installed, in any event within three business days following the date of completion of the installation.

(C) It is the responsibility of the Department's field office to notify the Department's licensing section when a provisional installer's license is eligible for upgrade to a full installer's license.

(b) Applicable License Holder Ownership Changes.

(1) A license holder shall not change the location of a licensed business unless the license holder first files with the Department:

(A) a written notification of the address of the new location;

(B) an endorsement to the bond reflecting the change of location; and

(C) the original license.

(2) The change of location is not effective until all requirements are received by the Department.

(3) For a change in ownership of less than fifty percent (50%) of the licensed business entity, no new license is required provided that the existing bond or other security continues in effect. However, the current Articles of Incorporation or Assumed Name Certificate must accompany the request.

(4) For a change in ownership of fifty percent (50%) or more, the license holder must file with the Department, along with the appropriate fee and Articles of Incorporation or Assumed Name Certificate:

(A) a license addendum by the purchaser providing information as may be required by the Department; and

(B) certification by the surety that the bond for the licensed business entity continues in effect after the change in ownership; or

(C) an application for a new license along with a new bond or other security and proof that the education requirements of §1201.113 of the Standards Act, have been met.

(c) Education.

(1) The Standards Act requirement for an initial eight (8) hour course of instruction in the law, including instruction in consumer protection regulations; four (4) hour retailer education course; and/or four (4) hour installer education course shall be offered quarterly by the Department. Subject to limitations on Department resources, the Department will make special licensing classes available upon written request.

(2) Each test to be administered in connection with the course(s) will consist of a representative selection of questions from an approved set of questions approved by the Director. The test(s) will be open-book. A score of 70% correct is required to pass each test.

(3) For initial licensing of a salesperson, if the salesperson does not attend and successfully complete the initial licensing class provided by the Department within 90 days after the date of licensure, the license will automatically be suspended until the salesperson has attended and successfully completed that class. While the license is in a suspended status the salesperson may not act as a manufactured housing salesperson.

(d) Continuing Education.

(1) Continuing education courses must include any revisions to the Code within the preceding two years and the Department's current complaint resolution process and may also include any of the following:

(A) installation requirements;

(B) manufactured home financing;

(C) operation of manufactured home parks and communities; or

(D) other subjects determined by the Department to relate directly to the lawful operation of a business subject to the Code.

(2) Acceptable evidence that the requirements of §1201.113(b) of the Standards Act have been satisfied by the license holder or their related person on record with the Department, would be a certificate, letter, or similar statement provided by the approved education provider indicating that the course was timely completed. Such evidence may be submitted by fax, mail, e-mail, or in person.

(3) For license renewal, evidence of any required completion, with reference to license number, must be received by the Department before a license may be renewed.

(4) Approval of courses and providers. In order to be considered for approval by the Board to provide continuing education courses a party wishing to be considered for such approval must submit, for each course for which approval is sought, an application, accompanied by the nonrefundable processing fee, and the following:

(A) A narrative overview of the course, describing subject matter to be covered;

(B) Brief biographies, including credentials of each instructor demonstrating in depth knowledge of the subject matter to be taught;

(C) A copy of any course materials to be used. If the course materials are deemed to be proprietary they should be placed in a separate envelope, marked confidential, and accompanied by a written statement as to why they should not be treated as open records. There is no assurance that such materials will ultimately be accorded any exemption from disclosure under the Open Records provisions of the Government Code;

(D) A schedule of any fees to be charged for the course;

(E) If completion of the course is limited to any particular group, a description of the limitation;

(F) As such information becomes available, an indication as to the locations, times, and dates for offerings; and

(G) Such other information as the Department may require.

(5) Once the Department determines that a request for approval is complete, that request will be placed on the next regularly scheduled meeting of the Board for consideration. The Department will provide the board with a written recommendation on each such request. The staff will advise the applicant of the board's action within ten (10) business days of the date of the board meeting, including a written statement as to any limitations, conditions, or other requirements imposed.

(A) Approvals shall be for a period not to exceed two years. The Department may, at no cost, attend or send a representative to attend any approved course to determine that the course is being taught in accordance with the terms of approval.

(B) The Department may revoke or suspend approval of a course if the Department determines that the course is not being taught in accordance with the terms of approval or that the course is not being administered in accordance with the law or these rules. Any action to revoke or suspend such an approval is a contested matter under Chapter 2001, Government Code, and the party against whom revocation or suspension is sought may make a written request for a hearing before an Administrative Law Judge. If no such hearing is requested within thirty (30) calendar days after receipt of notice from the Department, the Department order of suspension or revocation shall become final.

(e) License Application and Renewal.

(1) Initial Application Processing.

(A) It is the policy of the Department to issue the license within seven (7) business days after receipt of all required information and the following conditions have been met:

(i) all required forms are properly executed; and

(ii) all requirements of applicable statutes and this Chapter have been met.

(B) License applications and accompanying documents found to be incomplete or not properly executed shall be returned to the applicant with an explanation of the specific reason and what information is required to complete license.

(C) Upon request, the Department will disclose the license number assigned and the effective date for a license that has been approved but not yet delivered to the license holder.

(2) License Renewal Requirements. It is the responsibility of a license holder to renew the license prior to its expiration date.

(A) In order to prevent the expiration and lapse of a license, a complete application for license renewal must be received by the Department prior to the date on which the current license expires.

(B) If an application for license renewal is received by the Department after the date on which the current license expires, the license will not be issued without the required late fees identified in §1201.116(d) and (e) of the Standards Act.

(3) Payment of license fees.

(A) All required fees must be paid in order to obtain a valid license, including a renewal license, from the Department.

(B) Any license issued by the Department is void and of no effect if based upon a check or other form of payment that is later returned for insufficient funds, closed account, or other reason, regardless of whether the Department notifies the applicant of the insufficiency of payment or the invalidity of the license.

(C) It is the applicant's responsibility to ensure that all licensing fees are paid in valid U.S. funds.

(f) License Application or Renewal Denial.

(1) In the evaluation of an applicant for a license other than a salesperson's license, the Director shall consider whether the applicant or any related person involved with the applicant has previously:

(A) been found in a final order to have participated in one or more violations of the Standards Act that served as grounds for the suspension or revocation of a license;

(B) been found to have engaged in activity subject to the Standards Act without possessing the required license;

(C) caused the trust fund to incur unreimbursed payments or claims;

(D) failed to abide by the terms of a final order or agreed final order, including the payment of any assessed administrative penalties; or

(E) had any state license revoked for violations of a law or rule.

(2) If any of the preceding factors is present with respect to the applicant or any related person involved with the applicant, the director will further determine:

(A) whether all appropriate corrective action has been taken;

(B) whether the applicant has adopted policies and procedures or taken other appropriate measures to prevent recurrences; and

(C) whether additional conditions or limitations on the license would be appropriate.

(3) In determining whether an applicant should be issued a license if that applicant states in his/her application for said license that he/she has a criminal record, which may include a conviction, deferred adjudication, plead guilty, or nolo contendere for any felony or misdemeanor offense, other than a Class C Misdemeanor for traffic violations, within five (5) years preceding the date of the application, the Director shall consider the factors set out in Texas Occupations Code, §53.022:

(A) the nature and seriousness of the crime;

(B) the relationship of the crime to the intended manufactured housing business activity;

(C) the extent to which a license holder might engage in further criminal activity of the same or similar type as that in which the applicant previously had been involved;

(D) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the functions and responsibilities of the license holder's occupation or industry; and

(E) whether the offenses were defined as crimes of moral turpitude by statute or common law, from Class A misdemeanors to first, second, and third degree felonies carrying fines and/or imprisonment or both. Special emphasis shall be given to the crimes of robbery, burglary, theft, embezzlement, sexual assault, and conversion.

(4) In addition to the factors that may be considered in paragraph (3) of this subsection, the Department, in determining the present fitness of a person who has a criminal record, may consider the following:

(A) the extended nature of the person's past criminal activity;

(B) the age of the person at the time of the commission of the crime;

(C) the amount of time that has elapsed since the person's last criminal record;

(D) the conduct and work activity of the person prior to and following the criminal record; and

(E) evidence of the person's rehabilitation or attempted rehabilitation effort while incarcerated or following release.

(5) The applicant shall furnish proof in any form, as may be required by the Department, that he/she has maintained a record of steady employment and has otherwise maintained a record of good

conduct and has paid all outstanding court costs, supervision fees, fines, and restitution as may have been ordered in all criminal cases.

(6) If the Department suspends or revokes a valid license, or denies a person a license or the opportunity to be considered for a license in accordance with this subsection because of the person's prior criminal record and the relationship of the crime to the license, the Department shall:

(A) notify the person in writing stating reasons for the suspension, revocation, denial, or disqualification; and

(B) offer the person the opportunity for a hearing on the record. If the person does not request a hearing on the matter within thirty (30) calendar days from receipt of the Department's decision, the suspension, revocation, or denial becomes final.

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. ENFORCEMENT

10 TAC §§80.70 - 80.73

The new rules are adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.No other statutes, codes, or articles are affected by adoption of the new rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. MANUFACTURERS HOMEOWNERS' RECOVERY TRUST FUND

10 TAC §80.80

The new rule is adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.No other statutes, codes, or articles are affected by adoption of the new rule.

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SUBCHAPTER G. STATEMENTS OF OWNERSHIP AND LOCATION

10 TAC §§80.90 - 80.94

The new rules are adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division. No other statutes, codes, or articles are affected by adoption of the new rules.

§80.90. Issuance of Statements of Ownership and Location.

(a) Application Requirements. In order to be deemed complete, an application for a Statement of Ownership and Location must include, as applicable:

(1) A completed and fully executed Application for Statement of Ownership and Location on the Department's prescribed current form;

(2) The required fee;

(3) If the statement of ownership and location is to reflect the recordation of a lien, other than a tax lien, for which the Department does not have the owner's consent, copies of documentation establishing the creation and existence of each such lien, and an affidavit of fact explaining the circumstances of the lien;

(4) When one or more existing liens are to be released, assigned, or foreclosed, appropriate supporting documentation;

(5) When an application for Statement of Ownership and Location indicates a change in ownership but no change in lien, supporting documentation that clearly establishes that the lien holder consented to that change; and

(6) When a manufactured home is to be designated for use as a dwelling after the home has been designated for business use, salvage, or as real property, evidence of a satisfactory habitability inspection by the Department.

(b) Right of Survivorship: If a right of survivorship election is made, then the Department will issue a new Statement of Ownership and Location to the surviving person(s) upon receipt of a copy of the death certificate of the deceased person(s), and a properly executed application for Statement of Ownership and Location, and the applicable fee.

(c) Corrections to Statements of Ownership and Location.

(1) If a correction is required as a result of a Department error, it will be corrected at no charge.

(2) If a correction is requested because of an error made by a party other than the Department, the correction will not be made until the Department receives the following:

(A) A complete corrected application for Statement of Ownership and Location; and

(B) Any necessary supporting documentation.

(d) Upon issuance of a Statement of Ownership and Location, the Department will mail one certified copy to the owner and one certified copy to the lienholder. If an additional certified copy is desired for a third party it should be noted on the application with appropriate mailing information.

(e) Exchanging a Document of Title for a Statement of Ownership and Location: The Department will issue a Statement of Ownership, with no change in status, to replace a title at no charge upon receipt of the original title and the physical location of the home. If a manufactured home title showed that it was personal property, that will be presumed to be its status until and unless a revised Statement of Ownership and Location is applied for and issued. Likewise, if a manufactured home has had a certificate of attachment issued and had title cancelled to real property, that shall be presumed to be its status until and unless a revised Statement of Ownership and Location is applied for and issued.

(f) Updating of Statements of Ownership and Location on Manufactured Homes Transferred as Real Property.

(1) When a manufactured home has become real property because the owner completed the conversion process required by the Standards Act, the home may be sold, transferred, or encumbered as real property by the customary means used for real property transactions. As long as the home remains real property at the same location, ownership of the home is confirmed in the same manner as any other real property, rather than by verifying Department records. A new Statement of Ownership and Location does not have to be applied for until and unless:

(A) the home is moved from the location specified on the statement of ownership and location;

(B) the current owner of the manufactured home wishes to convert it to personal property status;

(C) the use of the property is changed to business use or salvaged; or

(D) the manufactured home no longer meets the requirements to be classified as real property (such as the home being on property subject to a long term lease which is not assignable to the buyer or transferee).

(2) To convert a manufactured home from real property to personal property, the owner of the home must submit a completed Application for Statement of Ownership and Location to the Department with supporting documentation as follows:

(A) If the applicant is not the owner of record with the Department, satisfactory proof of ownership under a complete chain of title. Acceptable evidence would include, but not be limited to, authenticated copies of all intervening transfer documents, a court order confirming ownership, or title insurance policy in such owner's name issued by a title insurance company licensed to do business in Texas.

(B) Satisfactory evidence that any liens on the manufactured home have been discharged or that all lienholders have consented to the change.

(C) Evidence of either a satisfactory habitability inspection by the Department or an election to convert the status of the home to business use or salvage.

(D) For the purposes of subparagraph (B) of this paragraph, the Department may rely on a commitment for title insurance, a title insurance policy, or a lawyer's title opinion to determine that any liens on real property have been released.

(3) To update the ownership on a manufactured home already elected and perfected as real property, and remaining in the same location as real property, the new owner of the home must submit a completed Application for Statement of Ownership and Location to the Department with supporting documentation as follows:

(A) If the applicant is not the owner of record with the Department, satisfactory proof of ownership under a complete chain of title. Acceptable evidence would include, but not be limited to, authenticated copies of all intervening transfer documents, a court order confirming ownership, or title insurance policy in such owner's name issued by a title insurance company licensed to do business in Texas.

(B) Satisfactory evidence that any liens on the manufactured home have been discharged or that all lienholders have consented to the change.

(C) For the purposes of subparagraph (B) of this paragraph, the Department may rely on a commitment for title insurance, a title insurance policy, or a lawyer's title opinion to determine that any liens on real property have been released.

(4) When a home is being converted to real property, a copy stamped "filed" by the county must be submitted to the Department as evidence that the requirements of §1201.2055 of the Standards Act have been satisfied and the real property election has been perfected. This must be done within sixty (60) days from the issuance date reflected on the Statement of Ownership and Location.

(g) When a title company or attorney's office fails to complete the conversion of a manufactured home to real property, the holder or servicer of the loan may apply for a statement of ownership and location electing real property status after-the-fact, providing that evidence of notice to all parties is sent via certified mail and that proof of such efforts is provided along with an affidavit of fact describing such efforts, pursuant to §1201.2055(i)(3) of the Standards Act.

(h) Submitting an application for Statement of Ownership and Location pursuant to the abandonment provision in §1201.217 of the Standards Act, should include an affidavit of fact, on the prescribed form, attesting to that all statutory notifications have been made to the appropriate parties, including the tax assessor-collector of the county where the home is located, and evidence that all notification was sent via certified mail.

(i) A Priority Handling Service may be offered by the Department for an additional fee of $55, each time an application for statement of ownership and location (SOL) is reviewed on a priority basis, whether the application is complete or incomplete. Initial or resubmitted applications submitted with priority handling requested and including the additional fee, will be processed within five working days from the date the application is recognized as received in the Department (applications received after 3:30 p.m. become part of the following day's mail).

(1) If the application is received complete, a Statement of Ownership and Location will be issued and mailed within the established time.

(2) If the application is received incomplete, a Request for Additional Information will be issued and mailed within the established time.

(3) Applications requiring habitability or salvage rebuilding inspections are not eligible for the Priority Handling Service.

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) 475-2206

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CHAPTER 80. MANUFACTURED HOUSING

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (Department) adopts the repeal of 10 Texas Administrative Code §§80.40, 80.41, 80.70 - 80.73, 80.80, and 80.90 - 80.94, concerning the manufactured housing program, in order to repeal Subchapters E through H and propose the rules as new Subchapters D through G. The repeals are adopted without changes as published in the November 18, 2011, issue of the *Texas Register* (36 TexReg 7746) and will not be republished.

The repeal is effective thirty (30) days following the date of publication in the *Texas Register* with notice that the repeal is adopted.

There were no comments received during the comment period and no requests were received for a public hearing to take comments on the proposed repealed rules.

SUBCHAPTER E. LICENSING

10 TAC §80.40, §80.41

The repeals are adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by adoption of the repealed rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 10, 2012.

TRD-201200758
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: March 25, 2012
Proposal publication date: November 18, 2011
For further information, please call: (512) 475-2206

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SUBCHAPTER F. ENFORCEMENT

10 TAC §§80.70 - 80.73

The repeals are adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by adoption of the repealed rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 10, 2012.

TRD-201200759
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: March 25, 2012
Proposal publication date: November 18, 2011
For further information, please call: (512) 475-2206

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SUBCHAPTER G. MANUFACTURERS HOMEOWNERS' RECOVERY TRUST FUND

10 TAC §80.80

The repeal is adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by adoption of the repealed rule.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 10, 2012.

TRD-201200760
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: March 25, 2012
Proposal publication date: November 18, 2011
For further information, please call: (512) 475-2206

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SUBCHAPTER H. STATEMENTS OF OWNERSHIP AND LOCATION

10 TAC §§80.90 - 80.94

The repeals are adopted under §1201.052 of the Texas Occupations Code, which provides the Director with authority to amend, add, and repeal rules governing the Manufactured Housing Division of the Department and §1201.053 of the Texas Occupations Code, which authorizes the board to adopt rules as necessary and the director to administer and enforce the manufactured housing program through the Manufactured Housing Division.

No other statutes, codes, or articles are affected by adoption of the repealed rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 10, 2012.

TRD-201200761
Joe A. Garcia
Executive Director, Manufactured Housing Division
Texas Department of Housing and Community Affairs
Effective date: March 25, 2012
Proposal publication date: November 18, 2011
For further information, please call: (512) 475-2206

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.78

The Railroad Commission of Texas (Commission) adopts amendments to §3.78 relating to Fees and Financial Security Requirements without changes to the proposed version that was published in the September 9, 2011, issue of the *Texas Register* (36 TexReg 5771). The amendments implement portions of Article 19 of Senate Bill (SB) 1, 82nd Legislature (First Called Session, 2011) that became effective September 28, 2011. SB 1, Article 19, amended the Texas Natural Resources Code by adding new §§81.067 - 81.070 to create the Oil and Gas Regulation and Cleanup Fund and to provide for the imposition of reasonable surcharges as necessary on fees imposed by the Commission in amounts sufficient to enable the Commission to recover from those fees and surcharges the costs of performing the functions specified in the Oil and Gas Regulation and Cleanup Fund's purpose (new Texas Natural Resources Code, §81.068).

In addition, the Commission adopts amendments to §3.78 to implement portions of House Bill (HB) 2694, relating to the continuation and functions of the Texas Commission on Environmental Quality (TCEQ), 82nd Legislature (Regular Session, 2011), which became effective September 1, 2011. Article 2 of HB 2694 transfers from the TCEQ to the Commission those duties related to determining the depth to which fresh water must be protected by surface casing when drilling an oil or gas well wells under the jurisdiction of the Commission. New Texas Natural Resources Code, §91.0115(b), relating to casing; letter of determination, as added by HB 2694, allows the Commission to charge a fee for a request from an applicant for a permit for a well to be drilled into oil or gas bearing rock, a letter of determination stating the total depth of surface casing required for the well by Texas Natural Resources Code, §91.011. That subsection also provides that the fee amount is to be determined by the Commission. In addition, Texas Natural Resources Code, §91.0115(c), requires that the Commission charge a fee not to exceed $75, in addition to the application fee allowed by §91.0115(b), for processing a request to expedite a letter of determination. Section 91.0115(c) further states that money collected from the expedite fee may be used to study and evaluate electronic access to geologic data and surface casing depths under Texas Natural Resources Code, §91.020. The TCEQ currently charges a fee of $75 for each request to expedite a letter of determination. *(See* 30 Texas Administrative Code §339.3, relating to Groundwater Protection Letter Requests, Expedited Processing, and Fee.) The Commission adopts amendments to §3.78 to include the expedite fee. The Commission did not propose to include a fee for a non-expedited letter of determination, but may include such a fee at some time in the future.

The statutory amendments in SB 1 provide that money deposited in the Oil and Gas Regulation and Cleanup Fund may be used by the Commission or its employees or agents for any purpose related to: the regulation of oil and gas development, including oil and gas monitoring and inspections, oil and gas remediation, oil and gas well plugging, public information and services related to those activities, and administrative costs and state benefits for personnel involved in those activities. SB 1 limits the amount of a surcharge to 185 percent of the fee on which the surcharge is to be imposed.

SB 1 amended the Texas Natural Resources Code to address the funding issues raised by the Sunset Advisory Commission in its analysis of the Commission. With the creation of the Oil and Gas Regulation and Cleanup Fund as a General Revenue-Dedicated account and the imposition of fee surcharges, SB 1 implements the Sunset Advisory Commission's recommendation that funding from General Revenue for regulatory functions and staff, including benefits, be offset by fees or other collections from the regulated industry.

The Commission adopts amendments to its rules to implement the new statutorily allowed surcharges. As set forth in the amendments to the Texas Natural Resources Code, the

surcharges have been set by the Commission at amounts determined, in aggregate, to cover the costs of strategies in the 2012-2013 biennium making up the Oil and Gas program, including Energy Resource Development, Oil and Gas Monitoring and Inspections, Oil and Gas Remediation, Oil and Gas Well Plugging, and Public Information and Services. Consistent with the statutes, the surcharge is not being added to the oil-field cleanup regulatory fee imposed on crude petroleum produced in this state in the amount of five-eighths of one cent on each barrel of 42 standard gallons or added to the oil-field cleanup regulatory fee imposed on gas initially produced and saved in this state in the amount of one-fifteenth of one cent for each thousand cubic feet.

The Commission received one comment from an association, the Texas Independent Producers and Royalty Owners Association (TIPRO). TIPRO currently represents over 2,300 members and is the largest association in the country representing both independent producers and royalty owners. TIPRO appreciates the efforts of the Commission in the development of these rules and commends staff's efforts to promptly and efficiently implement the enacted legislation of the 82nd Legislative Session. TIPRO supports the transfer of surface casing and fresh water protection determinations from the Texas Commission on Environmental Quality (TCEQ) to the Commission. Also, TIPRO strongly supports the Commission receiving sufficient funding to allow the agency to function at a level that fosters a healthy oil and gas industry presence in Texas. The Commission has determined that surcharges at 150% of the underlying eligible fee will provide the agency with the money it needs to boost performance, improve employee retention, and absorb unforeseen drops in production. TIPRO fully supports these goals; acknowledges that the Commission has the authority to impose surcharges up to the 185% level and did not; and commends the Commission's prudence in this decision. The Commission agrees with TIPRO's comments.

The Commission adopts new §3.78(b)(14) to impose the $75 expedite fee for each application for a letter of determination regarding the total depth of surface casing required for a well by Texas Natural Resources Code, §91.0115(b).

The Commission adopts new §3.78(n) to add surcharges for existing oil and gas fees excluding regulatory fees. In accordance with Texas Natural Resources Code, §81.070(c), which requires that the Commission by rule establish the methodology for determining the amount of a surcharge, the Commission took into account various factors and determined that:

(1) For all fees subject to a surcharge under §3.78, the Commission employed a projected cost-based recovery methodology derived from budgeted cost projections approved by the Legislature in the General Appropriations Act, which is dependent upon revenue projections issued by the Comptroller in the most recent Biennial Revenue Estimate.

(2) The time required to complete the regulatory work associated with the activity in connection with which the surcharge is imposed has been calculated by using the number of full-time equivalent positions (FTEs) (533.1) authorized by the Legislature for that purpose multiplied by the work hours in a fiscal year (2,080) and then divided by the anticipated number of total permit applications processed in a fiscal year (23,000). Using this methodology for fiscal year 2012, the Commission assumed 48.21 hours of regulatory work to be associated with each permit application processed through the life cycle of the permit.

(3) The Commission used the number of P-5 Organization Reports as a proxy to determine the number of individuals or entities from which the Commission's costs may be recovered. An Organization Report must be filed and renewed annually by any organization, including any person, firm, partnership, corporation, or other organization, domestic or foreign, operating wholly or partially within this state, that performs operations within the jurisdiction of the agency. The Commission developed its surcharge methodology based on approximately 7,900 individuals or entities operating oil or gas wells.

(4) The Commission determined that the surcharge will affect four operators considered to be large, based on operating more than 10,000 oil or gas wells; 45 operators considered to be medium, based on operating more than 1,000 oil or gas wells but fewer than 10,000 wells; and 7,851 operators considered to be small, based on operating fewer than 1,000 oil or gas wells. The surcharge will affect operators in proportion to the number of wells they operate.

(5) When creating the methodology to develop a surcharge rate, the Commission assumed a fund balance of approximately $18 million for the fiscal year beginning September 1, 2011.

(6) When creating the methodology to develop a surcharge rate the Commission depended heavily on the assumption of legislative intent that the agency's oil and gas regulatory program be self-funded. The Commission also sought to maintain an adequate fund balance for the Oil and Gas Regulation and Cleanup Fund such that the regulatory program can withstand a decrease in industry activity without sacrificing the health and public safety aspects of its regulatory work, while having funds available to respond to any emergency related to oil and gas activity throughout the state. The Commission also sought to maintain an unencumbered fund balance that is within the statutory fund limit of $20 million.

Using all of these factors, the Commission determined that for fiscal years 2012 and 2013, a surcharge rate of 150% would be necessary on all eligible fees to be deposited in the Oil and Gas Regulation and Cleanup Fund. However, the Commission has determined that the effective date of the amendments should be May 1, 2012, for two reasons. First, a robust industry has increased collections of fees in the Oil and Gas Regulation and Cleanup Fund. The Commission projects that the Biennial Revenue Estimate will be exceeded by $5 million. In addition, in Fiscal Year 2012, the Commission should receive Coastal Impact Assistance reimbursements totaling $9.4 million for prior year well-plugging expenditures. These factors have contributed to a healthy fund balance and a slight delay in the need to implement surcharges. Second, the Commission must make computer programming changes to implement the surcharges and distribute notice to the industry to ensure a smooth transition to the new fee structure.

The Commission adopts the amendments pursuant to Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission; Texas Natural Resources Code, §81.067, related to Oil and Gas Regulation and Cleanup Fund; and Texas Natural Resources Code, §81.070, relating to Establishment of Surcharges on Fees, as enacted by SB 1, 82nd Legislature (First Called Session, 2011), which became effective on September 28, 2011.

Texas Natural Resources Code, §81.051, §81.052, §81.067, and §81.070 are affected by the amendments.

Statutory authority: Texas Natural Resources Code, §81.051, §81.052, §81.067, and §81.070.

Cross-reference to statute: Texas Natural Resources Code, §81.051, §81.052, §81.067, and §81.070.

Issued in Austin, Texas, on February 7, 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 February 7, 2012.

TRD-201200614
Mary Ross McDonald
Director, Pipeline Safety Division
Railroad Commission of Texas
Effective date: May 1, 2012
Proposal publication date: September 9, 2011
For further information, please call: (512) 475-1295

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 75. AIR CONDITIONING AND REFRIGERATION

16 TAC §75.20, §75.21

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 75, §75.20 and §75.21, regarding the Air Conditioning and Refrigeration Program. The amendments to §75.20 are adopted with changes to the proposed text as published in the November 25, 2011, issue of the *Texas Register* (36 TexReg 7955) and will be republished. The amendments to §75.21 are adopted without change to the proposed text as published in the November 25, 2011, issue of the *Texas Register* (36 TexReg 7955) and will not be republished. The adoption takes effect March 1, 2012.

The amendments are necessary to implement House Bill 2643, 82nd Legislature, Regular Session (2011), relating to the licensing and regulation of air conditioning and refrigeration contractors and technicians. House Bill 2643 established new practical experience requirements under Texas Occupations Code §1302.255. The amount of practical experience was increased from 36 months in the preceding five years to 48 months in the preceding 72 months. In addition, House Bill 2643 expanded the existing list of educational degrees that could be used toward meeting the practical experience requirements and added certain work experience that would qualify as practical experience under the statute.

The revised practical experience requirements under Texas Occupations Code §1302.255 will be effective for applications filed on or after November 1, 2012. The amendments to the rules are necessary to reflect these new statutory requirements.

The amendments revise §75.20, Contractor Licensing Requirements--Application and Experience Requirements. The amendments revise subsection (a) to reference the amount of practical experience required by the statute under Texas Occupations Code §1302.255 based on the date the application is filed with the Department. The amendments also add a reference to the proof of insurance, which is required under Texas Occupations Code §1302.260 and 16 TAC §75.40 to be submitted as part of the license application process. This change consolidates the application requirements into one rule, but does not make any changes to the insurance requirements under 16 TAC §75.40. In response to the public comments, which are explained below, a clarification was added that the proof of insurance is submitted after passing the examination. As proposed, the amendments would have deleted §75.20(b); however, in response to the public comments received, which are explained below, the adopted amendments retain this subsection with changes.

The amendments revise §75.21, Contractor Licensing Requirements-Examinations. The amendments clarify that the applicant must obtain the requisite amount of experience as prescribed under Texas Occupations Code §1302.255, based on the date the application is filed with the Department, prior to taking an examination.

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 November 25, 2011 (36 TexReg 7955). The 30-day public comment period closed on December 27, 2011.

The Department received four public comments, all from individuals. The comments are summarized below followed by the Department's responses.

Public Comment: The first individual stated that he is a registered technician and a full time student, and he expressed concerns that it would be more difficult and would take him longer now to qualify for a contractor license.

Department Response: It appears that the individual is expressing concerns with the statute not the proposed rules. House Bill 2643 increased the amount of practical experience from 36 months in the preceding five years to 48 months in the preceding 72 months. House Bill 2643 also expanded the existing list of educational degrees that could be used toward meeting the practical experience requirements and added certain work experience that would qualify as practical experience under the statute. The Department did not make any changes to the proposed rules as published based on this comment.

Public Comment: The second individual expressed several concerns. First, the individual expressed concerns with the erosion of qualifications to operate an air conditioning and refrigeration company. Second, the individual expressed concerns with including references in the proposed rules to Texas Occupations Code §1302.255, which sets out the amount and types of practical experience that must be obtained to apply for a contractor license. The individual expressed a desire to eliminate the statutory references and include all of the necessary language in the rules. The individual also stated that he wants the rules left as they are. Third, the individual expressed concerns with eliminating §75.20(b) and the requirement that applicants submit a diploma or transcript as proof of their college experience.

Department Response: Regarding the first concern, it appears that the individual is expressing concerns with the statute not the proposed rules. House Bill 2643 increased the amount of

practical experience from 36 months in the preceding five years to 48 months in the preceding 72 months. House Bill 2643 also expanded the existing list of educational degrees that could be used toward meeting the practical experience requirements and added certain work experience that would qualify as practical experience under the statute. The Department did not make any changes to the proposed rules as published based on this comment.

Regarding the second concern, the Department included in the rules the reference to Texas Occupations Code §1302.255, since the statute sets out in detail the amounts and types of practical experience that must be obtained to apply for a contractor license. The Department did not find it necessary to repeat the statutory language in the rules. While the individual also expressed a desire to keep the rules the same, the rules must be updated to reflect the statutory changes.

Regarding the third concern, the Department is not eliminating the requirement that applicants submit proof of meeting the practical experience requirements. As part of submitting a completed application form, as currently required under §75.20(a)(1), an applicant must attach an experience verification form and any transcripts or diplomas as applicable to prove the applicant has met the practical experience requirements that are recognized under the statute. As part of implementing House Bill 2643, the Department plans to update the current application form and to require the necessary attachments to reflect the other types of practical experience that are recognized under the statute pursuant to House Bill 2643.

Based on this public comment, however, the Department has changed proposed §75.20 as published. The Department will retain subsection (b), which was proposed to be deleted, to reassure the public that the Department will still require proof that the applicant had completed the practical experience requirements. In addition, the Department has updated the language under subsection (b) to reference the amounts and the types of practical experience that are now recognized under the statute pursuant to House Bill 2643.

Public Comment: The third individual expressed concerns about submitting proof of insurance with the initial application because it would increase the costs to the applicant to pay for insurance prior to passing the required examination.

Department Response: Section 75.20 includes documentation and actions required by the applicant to obtain a contractor license. Not all of the items listed under §75.20 are required to be submitted with the application form, such as passing the examination, but are part of the application process. Under the current application process, the applicant must submit proof of insurance after the applicant passes the examination and before the license is issued. The Department intends to continue the current process and wants to eliminate any possible confusion with the proposed rule. Based on this public comment, the Department has changed proposed §75.20 as published by adding clarifying language that the proof of insurance will be submitted subsequent to passing the examination.

Public Comment: The fourth individual expressed concerns that the proposed rules would not address the issues he sees in the industry.

Department Response: It does not appear that the Department could address this comment within the scope of the current proposed rules. The Department did not make any changes to the proposed rules based on this comment.

On November 9, 2011, the Air Conditioning and Refrigeration Contractors Advisory Board met to review and discuss the draft proposed rules. The advisory board recommended that the proposed rules be published in the *Texas Register* for public comment. The proposed rules were published in the November 25, 2011, issue of the *Texas Register* (36 TexReg 7955). The deadline for public comments was December 27, 2011.

On January 11, 2012, the Air Conditioning and Refrigeration Contractors Advisory Board met to review the proposed rules, the public comments, and the Department's recommended changes to the proposed rules in response to the public comments received. The public comments are summarized above, along with the Department's responses. The Advisory Board recommended that the proposed rules, along with the Department's recommended changes that were made based on the public comments, be sent to the Commission for consideration and adoption.

On January 25, 2012, the Commission considered and adopted the proposed amendments to existing rules 16 TAC Chapter 75, §75.20 and §75.21, with changes to §75.20 based on the public comments. The adopted rules are effective March 1, 2012.

The amendments are adopted under Texas Occupations Code Chapters 51 and 1302, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter or a law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 1302. No other statutes, articles, or codes are affected by the adoption.

§75.20. Contractor Licensing Requirements--Application and Experience Requirements.

(a) To obtain a contractor license, an applicant must:

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

(2) have the requisite amount of experience as prescribed under Occupations Code §1302.255 based on the date the application is filed with the department;

(3) pass the examination;

(4) submit the required fees;

(5) submit proof of insurance, as prescribed under §75.40, subsequent to passing the examination; and

(6) complete all requirements, including passing the exam, within one year of the date the application is filed.

(b) An applicant must submit the proper documentation as prescribed by the department to receive credit for the amount and type of practical experience claimed by the applicant.

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 February 10, 2012.

TRD-201200763

William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: March 1, 2012
Proposal publication date: November 25, 2011
For further information, please call: (512) 463-5386

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CHAPTER 77. SERVICE CONTRACT PROVIDERS AND ADMINISTRATORS

16 TAC §§77.10, 77.20 - 77.23, 77.40 - 77.42, 77.44, 77.70, 77.71, 77.80, 77.91

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 77, §§77.10, 77.20 - 77.23, 77.40 - 77.42, 77.70, and 77.80; and new §§77.44, 77.71 and 77.91, regarding the Service Contract Providers and Administrators program.

The amendments to §§77.10, 77.20 - 77.23, 77.40 - 77.42, and 77.80; and new §§77.44, 77.71 and 77.91 are adopted without changes to the proposed text as published in the December 9, 2011, issue of the *Texas Register* (36 TexReg 8285) and will not be republished. The amendments to §77.70 are adopted with changes to the proposed text as published in the December 9, 2011, issue of *Texas Register* (36 TexReg 8285) and will be republished. The adoption takes effect March 1, 2012.

The amended and new rules are necessary to implement Senate Bill 1169, 82nd Legislature, Regular Session (2011), which amends Texas Occupations Code, Chapter 1304. The amended and new rules are also necessary to align these rules under 16 TAC Chapter 77, with the existing, amended, and new rules for the Identity Recovery Service Contract Providers and Administrators program under 16 TAC Chapter 90. The amended and new rules for the Identity Recovery Service Contract Providers and Administrators program are published separately in this issue of the *Texas Register.* The amended and new rules are also necessary to address public comments the Department received during the four-year rule review of the Service Contract Providers and Administrators program rules (notice of intent to review, *Texas Register* (35 TexReg 10062); extension of time notice, *Texas Register* (35 TexReg 11078); and adoption notice, *Texas Register* (36 TexReg 1696)).

A brief summary of each amended and new rule is included below. A detailed summary of each amended and new rule was included in the notice of proposed rules published in the December 9, 2011, issue of the *Texas Register* (36 TexReg 8285).

Under §77.10, Definitions, the amendments add a new definition for "qualified financial institution" and delete the definition of "service contract seller."

As amended, §77.20, Registration Requirement--Provider, requires a controlling person to submit a streamlined personal information form instead of the current biographical affidavit. Current subsections (e) and (f) are deleted since these provisions are already addressed in the statute.

Under §77.21, Registration Renewal Requirements--Provider, the amendments replace the current biographical affidavit with a personal information form and eliminate the "no change form." At the first registration renewal on or after March 1, 2012, each controlling person must complete a personal information form. At any subsequent renewals, a controlling person will only have to complete a new personal information form if there have been any changes or if the person has not previously submitted a personal information form. The provider is required to indicate on the registration renewal form every year if there have been any changes in the information previously provided by any of its controlling persons. Current subsections (d) and (e) are deleted since these provisions are already addressed in the statute.

Under §77.22, Registration Requirements--Administrator, current subsections (d) and (e) are deleted since these provisions are already addressed in the statute.

Under §77.23, Registration Renewal Requirements--Administrator, current subsections (d) and (e) are deleted since these provisions are already addressed in the statute.

Under §77.40, Financial Security--General Requirements, the amendments add clarifying language to subsection (b) and amend subsections (d) and (e) to reflect the updated statutory language.

As amended, §77.41, Financial Security--Reimbursement Insurance Policy, requires providers to use the Service Contract Provider Texas Endorsement form.

As amended, §77.42, Financial Security--Funded Reserve Account and Security Deposit, requires submission of the audited financial statements as prescribed by the statute and adds a reference to the funded reserve calculation form. The amendments update the list of acceptable forms of security deposit and add a new subsection to reflect the additional financial reports that providers may be required to submit in accordance with the statute.

Section 77.44, Financial Security--Transition Provisions, is a new rule that applies to providers registered with the Department on August 31, 2011, and who used the funded reserve account and security deposit option to financially secure their service contracts on August 31, 2011. The section addresses how these providers shall meet the new financial security requirements for existing and new service contracts.

Under §77.70, Responsibilities of Providers and Administrators, subsection (d) is amended to update the list of information that providers and administrators must disclose to consumers and that reflects the new statutory requirements regarding contract cancellations and refunds. Subsections (e) and (f) are amended to recognize that the seller may provide a copy of the contract and receipt at the point of sale. These subsections require that a copy of the contract and receipt be provided to the consumer within a reasonable amount of time after the date of purchase to still allow the contract holder to cancel the contract and receive a full refund. Subsection (g), regarding marketing and sales activities, is deleted since the statute addresses this issue. Subsections (k), (l), and (m) are deleted and replaced with new §77.71.

Under §77.70, the proposal added a new subsection (j) that provided examples of the prohibited acts under Texas Occupations Code §1304.161(a), regarding making false, deceptive or misleading statements or omitting material statements in service contracts, literature or written communications. However, based on the public comments received, as explained below, proposed subsection (j) was deleted from the adopted rules.

Section 77.71, Responsibilities of Providers Ceasing Operations or Discontinuing Business, is a new rule that consolidates the provisions formerly located under §77.70(k), (l), and (m) and ad-

dresses the public comments received during rule review regarding the former provisions. This section also incorporates statutory requirements regarding these providers maintaining records and financial security.

Under §77.80, Fees, the amendments add clarifying language but do not change the fee amounts.

Section 77.91, Other Enforcement Authority, is a new rule that addresses the Commission's and Department's other enforcement authority.

The Department drafted and distributed the proposed rules to persons internal and external to the agency. The proposed amendments and new rules were published in the *Texas Register* on December 9, 2011. The 30-day public comment period closed on January 9, 2012.

The Department received public comments from two interested parties during the 30-day public comment period: (1) GS Administrators, Inc. (GSA), a service contract provider and administrator; and (2) the Service Contract Industry Council (SCIC), a national trade association. The public comments are summarized below by rule section along with the Department's responses.

Section 77.70(d)(3), as amended, states that the "provider and/or any administrator appointed by the provider must disclose the following information to service contract holders: (3) the procedures and timeframes for a provider to refund the purchase price of the service contract and pay any applicable penalty to the service contract holder in accordance with Texas Occupations Code §1304.1581." The proposed amendments to §77.70(d)(3): (1) add clarifying language that it is the provider who is issuing the refund; (2) add a reference to the statutory penalty for late refunds; and (3) update the statutory reference to the new cancellation provision, §1304.1581, Cancellation by Service Contract Holder; Refund.

Public Comment 1: GSA stated that to "the extent that section 77.70(d)(3) of the proposed rules will require service contract providers to revise printed forms, we propose a 120-180 day implementation date. In the alternative, we request that the Department re-evaluate whether the language changes are necessary. Providers just completed necessary language changes and implemented new forms to comply with the January 1 implementation date of the new law. To require additional language changes to the customer contracts on the heels of deployment of new forms in the recent past is costly to providers."

Public Comment 2: SCIC commented on the "inclusion of the phrase 'and pay any applicable penalty' which would require a disclosure to include a reference to the penalty associated with failing to timely refund the service contract holder after cancellation. The SCIC contends that Texas Occupations Code §1304.1581, does not direct that such language be included as a disclosure. Texas Occupations Code §1304.156, sets forth the required disclosures and only states that service contracts must include language notifying the holder that they may apply for reimbursement directly to the insurer if a refund or credit is not timely provided. The SCIC respectfully requests that the addition of this language be reconsidered as its inclusion is not anticipated by statute and will contribute to cluttering of the form and consumer confusion."

Department Response: The public comments appear to express concerns that the proposed amendments to this rule require that providers disclose to consumers information that is not in the statute. The statute, specifically Texas Occupations Code §1304.156, Form of Service Contract and Required Disclosures, requires that certain information be included in the contract: "(a) A service contract marketed, sold, offered for sale, issued, made, proposed to be made, or administered in this state must: (4) state the terms and restrictions governing cancellation of the contract by the provider or the service contract holder before the expiration date of the contract;" New Texas Occupations Code §1304.1581, Cancellation by Service Contract Holder; Refund, sets out the terms and restrictions governing the cancellation of the contract by the contract holder before the expiration date of the contract. This section addresses the right of a contract holder to receive a refund, the timeframes for receiving full and prorated refunds, the terms by which refunds are prorated, administrative cancellation fees, and penalty payments for late refunds.

Section 77.70(d) sets out a consolidated list of information that must be disclosed to consumers. Subsection (d)(1) serves as a reminder to providers of the required contract provisions and disclosures in accordance with Texas Occupations Code §1304.156, and §77.70(d)(3) serves as a reminder that all of the terms regarding cancellations as set out under Texas Occupations Code §1304.1581, including penalties for late refunds, must be disclosed to consumers. There is no need to extend the implementation date for the rules because the rules simply require disclosure to consumers and the statute requires the information to be included in the contract. The Department did not make any changes to the proposed rules based on the public comments.

Section 77.70(g), which is proposed to be deleted, states that a provider is responsible for the seller's marketing and sales activities as they relate to the marketing and sale of the provider's service contracts. This provision then creates a safe harbor from liability for the provider for the seller's actions if the provider meets all of the listed requirements.

Public Comment 1: GSA, Inc. opposed the proposed deletion of subsection (g). GSA, Inc. stated that this "was the subject of extensive discussion with the industry in 2009 and sets a standard that provides clarity to service contract providers."

Public Comment 2: SCIC opposed the proposed deletion of subsection (g) and strongly urged the Department to keep the existing language. SCIC stated that this "language was adopted after much discussion and negotiation between the Industry and Department." SCIC stated that the "existing language is critical for the Industry as it makes clear that although a provider is responsible for the conduct of those persons selling or marketing its service contracts, a provider is only responsible for such conduct that is related to the actual marketing and sale of the provider's service contracts and not generally responsible for unrelated conduct of a seller." The language ensures "that a provider is not being held responsible for seller conduct that is outside the scope of the authority delegated by a provider to its sellers." Furthermore, SCIC stated that the existing language "creates a clear framework for how a provider is to engage those persons that are marketing or selling the provider's service contracts," and it "provides clear direction to providers as to the course of action that should be taken should a provider discover a seller that is engaging in conduct not permitted by statue or rule."

Department Response: The new statutory provision Texas Occupations Code §1304.1531, Service Contract Sellers; Responsibilities, addresses the scope of a provider's responsibilities for its sellers' sales and marketing activities. Section 1304.1531 states in part: "(a) A provider may employ or contract with a

seller to be responsible for: (1) all or any part of the sale or marketing of service contracts for the provider; and (2) compliance with this chapter in connection with the sale or marketing of service contracts. (b) The hiring of or contracting with a seller under this section does not affect a provider's responsibility to comply with this chapter." The new statutory provision keeps the ultimate responsibility on the provider, although it does limit the scope of responsibility to the seller's sales and marketing of the provider's service contracts. It does not make the provider responsible for the seller's activities that are not related to the sale and marketing of the provider's service contracts. However, §1304.1531 does not include any provisions to allow exemption from liability. This new statutory provision supersedes the existing rule and requires that the rule be deleted. The Department has not made any changes to the proposed rules in response to these comments. The Department adopts to delete §77.70(g).

Proposed new §77.70(j) provides examples of the prohibited acts under Texas Occupations Code §1304.161(a), which prohibits a provider, administrator, seller, or other representative of a provider from making a false, deceptive or misleading statement or omitting a material statement in any service contract, literature or written communication.

Public Comment 1: GSA, Inc. stated that "the language at the end of the first sentence, 'including but not limited to' is misplaced and should be struck."

Public Comment 2: SCIC stated that "the proposed language is overly broad and vague. Specifically, with respect to subsection (j)(2) the SCIC requests that the Department add language incorporating some sort of materiality standard or a time period within which a provider must respond to an assertion that it has failed to honor a term within its service contract before it will be deemed to have acted in a false, deceptive or misleading manner. Without such language the proposed rule is overly restrictive and overreaching. In addition, the SCIC requests that the Department consider revising subsection (j)(3) to provide clarity as to what is an eligible claim. ... The language as proposed by the Department oversimplifies the process with the result being that providers could be deemed to have acted in a false, deceptive, or misleading manner when in fact that is not at all the case. The SCIC request that the Department redraft these provisions to provide clarity and to avoid the overbreadth of the language as currently drafted."

Department Response: The Department attempted to provide guidance to the industry on how the Department will interpret and enforce Texas Occupations Code §1304.161(a) by adding new §77.70(j); however, the Department believes the requirements under §1304.161(a) are clear. Any attempts by a provider, administrator, seller or other representative of the provider to make false, deceptive or misleading statements or omit a material statement in any service contract, literature or written communication will be enforced under Texas Occupations Code §1304.161(a). In response to the public comments, the Department has deleted new §77.70(j).

Proposed §77.71(b) requires service contract providers that are ceasing operations or discontinuing business in Texas to notify the department as soon as possible.

Public Comment: GSA, Inc. stated that the language "as soon as possible" in subsection (b) "as a regulatory standard is ambiguous and unworkable."

Department Response: The Department proposed the current language in response to the public comments offered by SCIC during the rule review on former §77.70(k). The proposed language was explained in the preamble of the proposed rules *Texas Register* (36 TexReg 8285), along with a summary of the SCIC public comment. The proposed subsection is necessary because: (1) it provides important notice to the Department when a provider ceases operations or discontinues business in Texas; (2) it aligns with the new statutory requirements; (3) it is narrowly tailored to apply only to service contract providers that are ceasing operations or discontinuing business in Texas, and (4) it provides flexibility to address a variety of situations. GSA, Inc. did not offer any additional explanation or any suggested language on how to make the provision unambiguous and workable. The Department did not make any changes to the proposed rule in response to this public comment.

In addition, as part of the proposal, the Department sought public comments on how to implement through agency rules the new statutory provision under Texas Occupations Code §1304.161(c), relating to telemarketing. Public comments received in response to this request will assist the Department in drafting a proposed rule that may be published and open for additional public comment in a future proposed rulemaking.

Public Comment 1: GSA, Inc. stated that the request for comments was "too broad for a response." It also stated that "the statute adequately defines the framework. However, to the extent that the Department believes additional clarification is necessary, we are interested in working with members of the Department on implementation."

Public Comment 2: SCIC stated that "there is no reason to adopt a rule implementing this section as the related requirements are clearly set forth by statute. All essential terms are defined by statute, and the language of Senate Bill 1169 regarding the telemarketing of service contracts is clear. Accordingly, no rule is needed to implement this new statutory provision."

Department Response: As stated in the preamble of the proposed rules *Texas Register* (36 TexReg 8285), the Department will consider these public comments as part of any future proposed rulemaking to implement this statutory provision by agency rule.

The Department also received a general comment regarding the rule proposal from SCIC.

Public Comment: SCIC expressed concerns that the Department had not addressed all of its concerns that were included in the comment letter that SCIC submitted in response to the rule review notice. SCIC stated that it was reiterating those concerns which were not addressed by the Department in the current proposed rules.

Department Response: As explained in the preamble of the proposed rules *Texas Register* (36 TexReg 8285), the Department responded to all public comments received in response to the rule review publication (original notice, *Texas Register* (35 TexReg 10062); extension of time notice, *Texas Register* (35 TexReg 11078); adoption notice, *Texas Register* (36 TexReg 1696)). In the preamble of the proposed rules *Texas Register* (36 TexReg 8285), the Department summarized and addressed all of the comments received from SCIC and all persons and entities that submitted comments in response to the rule review notice. The Department agreed to make some of the changes suggested by SCIC, and the Department explained why it did not make other changes suggested by SCIC. The Department responded to all of the public comments that were submitted.

The Department did not make any changes to the proposed rules in response to this public comment.

On January 25, 2012, the Commission considered the proposed rules, the two public comments received during the 30-day public comment period, and the Department's recommended changes based on those public comments. The Commission also received a late public comment on the day of the Commission meeting from Marathon Administrative Co., Inc. The Commission adopted the amendments to existing rules at 16 Texas Administrative Code Chapter 77, §§77.10, 77.20 - 77.23, 77.40 - 77.42, 77.70, and 77.80 and new §§77.44, 77.71 and 77.91, with changes to the proposed text of §77.70 as published based on the public comments. The adopted amendments and new rules are effective March 1, 2012.

The amendments and new rules are adopted under Texas Occupations Code, Chapters 51 and 1304, which authorizes the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter or a law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51, 1304, and 1306. No other statutes, articles, or codes are affected by the adoption.

§77.70. Responsibilities of Providers and Administrators.

(a) The provider must clearly and conspicuously identify itself on all written service contracts and on all written advertising materials that are used by the provider, its administrator(s), or its seller(s).

(b) The provider and/or any administrator appointed by the provider must provide service contract holders with a notification that meets all of the following requirements.

(1) The notification must provide the name, mailing address, and telephone number of the department.

(2) The notification must contain a statement that unresolved complaints concerning providers and administrators or questions concerning the regulation of service contract providers and administrators may be addressed to the department.

(3) The notification must be included on all written service contacts. The notification may be stamped on the contract or printed on a separate sheet and stapled to the contract.

(c) The provider and/or any administrator appointed by the provider must provide service contract holders with the provider's complaint resolution procedures.

(d) The provider and/or any administrator appointed by the provider must disclose the following information to service contract holders:

(1) the specific contract provisions and required disclosures in accordance with Texas Occupations Code §1304.156;

(2) the procedures and timeframes for a service contract holder to cancel a service contract in accordance with Texas Occupations Code §1304.1581;

(3) the procedures and timeframes for a provider to refund the purchase price of the service contract and pay any applicable penalty to the service contract holder in accordance with Texas Occupations Code §1304.1581; and

(4) the conditions in which the provider may cancel a service contract and issue a refund in accordance with Texas Occupations Code §1304.159.

(e) If not provided by the seller at the time of sale, the provider and/or any administrator appointed by the provider must provide a copy of the service contract to the service contract holder within a reasonable amount of time after the date of purchase that still allows the service contract holder the opportunity to cancel the contract and receive a full refund.

(f) If not provided by the seller at the time of sale, the provider and/or any administrator appointed by the provider must provide a receipt for or other written evidence of the purchase of a service contract to the service contract holder within a reasonable amount of time after the date of purchase that still allows the service contract holder the opportunity to cancel the contract and receive a full refund.

(g) A provider shall report to the department within 30 days any change in information required by §77.20 and §77.21.

(h) An administrator shall report to the department within 30 days any change in information required by §77.22 and §77.23.

(i) Upon notification by the department, the provider and/or any administrator appointed by the provider shall allow the department to audit records required to be maintained by Texas Occupations Code Chapter 1304. These records include copies of the service contracts marketed, sold, administered or issued in this state.

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 February 10, 2012.

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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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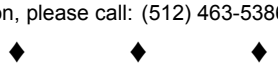

CHAPTER 90. IDENTITY RECOVERY SERVICE CONTRACT PROVIDERS AND ADMINISTRATORS

16 TAC §§90.10, 90.20, 90.21, 90.23, 90.24, 90.40 - 90.42, 90.70, 90.71

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 90, §§90.10, 90.20, 90.21, 90.23, 90.24, 90.40 - 90.42, and 90.70; and new §90.71, regarding the Identity Recovery Service Contract Providers and Administrators program.

The amendments to §§90.10, 90.20, 90.21, 90.23, 90.24, 90.40 - 90.42; and new rule §90.71 are adopted without changes to the proposed text as published in the December 9, 2011, issue of the *Texas Register* (36 TexReg 8309), and will not be republished. The amendments to §90.70 are adopted with changes to the proposed text as published in the December 9, 2011, issue of the *Texas Register* (36 TexReg 8309) and will be republished. The adoption takes effect March 1, 2012.

The amended and new rules are necessary to implement Senate Bill 1169, 82nd Legislature, Regular Session (2011), which amends Texas Occupations Code Chapter 1306. The amended and new rules are also necessary to align these rules under 16 TAC Chapter 90 with the existing, amended, and new rules for the Service Contract Providers and Administrators program under 16 TAC Chapter 77. The amended and new rules for the Service Contract Providers and Administrators program are published separately in this issue of the *Texas Register.*

A brief summary of each amended and new rule is included below. A detailed summary of each amended and new rule was included in the notice of proposed rules published in the December 9, 2011, issue of the *Texas Register* (36 TexReg 8309).

Under §90.10, Definitions, the amendments add a new definition for "qualified financial institution" and delete the definition of "identity recovery service contract seller."

As amended, §90.20, Registration Requirements--Provider, requires a controlling person to submit a streamlined personal information form instead of the current biographical affidavit. Current subsections (d) and (e) are deleted since these provisions are already addressed in the statute.

Under §90.21, Registration Renewal Requirements--Provider, the amendments replace the current biographical affidavit with a personal information form and eliminate the "no change form." At the first registration renewal on or after March 1, 2012, each controlling person must complete a personal information form. At any subsequent renewals, a controlling person will only have to complete a new personal information form if there have been any changes or if the person has not previously submitted a personal information form. The provider is required to indicate on the registration renewal form every year if there have been any changes in the information previously provided by any of its controlling persons. Current subsections (d) and (e) are deleted since these provisions are already addressed in the statute.

Under §90.23, Registration Requirements--Administrator, current subsections (d) and (e) are deleted since these provisions are already addressed in the statute.

Under §90.24, Registration Renewal Requirements--Administrator, current subsections (d) and (e) are deleted since these provisions are already addressed in the statute.

Under §90.40, Financial Security--General Requirements, the amendments revise subsection (c) and delete subsection (d) regarding maintaining financial security to conform these rules with those under the Service Contract Providers and Administrators program, 16 TAC Chapter 77.

As amended, §90.41, Financial Security--Reimbursement Insurance Policy, requires providers to use the Identity Recovery Service Contract Provider Texas Endorsement form.

As amended, §90.42, Financial Security--Funded Reserve Account and Security Deposit, requires submission of the audited financial statements as prescribed by the statute and adds a reference to the funded reserve calculation form. The amendments update the list of acceptable forms of security deposit and add a new subsection to reflect the additional financial reports that providers may be required to submit in accordance with the statute.

Under §90.70, Responsibilities of Providers and Administrators, subsection (d) is amended to update the list of information that providers and administrators must disclose to consumers and that reflects the new statutory requirements regarding contract cancellations and refunds. Subsections (e) and (f) are amended to recognize that the seller may provide a copy of the contract and receipt at the point of sale. These subsections require that a copy of the contract and receipt be provided to the consumer within a reasonable amount of time after the date of purchase to still allow the contract holder to cancel the contract and receive a full refund. Subsection (g), regarding marketing and sales activities, is deleted since the statute addresses this issue. Subsections (k), (l), and (m) are deleted and replaced with new §90.71.

Under §90.70, the proposal added a new subsection (j) that provided examples of the prohibited acts under Texas Occupations Code §1306.111(a), regarding making false, deceptive or misleading statements or omitting material statements in contracts, literature or written communications. However, based on the public comments received, as explained below, proposed subsection (j) was deleted from the adopted rules.

Section 90.71, Responsibilities of Providers Ceasing Operations or Discontinuing Business, is a new rule that consolidates the provisions formerly located under §90.70(k), (l), and (m) and incorporates statutory requirements regarding maintaining records and financial security.

The Texas Department of Licensing and Regulation (Department) drafted and distributed the proposed rules to persons internal and external to the agency. The proposed amendments and new rules were published in the *Texas Register* on December 9, 2011. The 30-day public comment period closed on January 9, 2012. The Department did not receive any public comments on the proposed rules during the comment period; however, based on the public comments the Department received on the Service Contract Provider and Administrator proposed rules under 16 TAC Chapter 77, the Department deleted proposed new §90.70(j). The Department made this change to keep the two sets of rules aligned.

Proposed new §90.70(j) provided examples of the prohibited acts under Texas Occupations Code §1306.111(a), which addresses making a false, deceptive or misleading statement or omitting a material statement in any identity recovery service contract, literature or written communication. A very similar provision was proposed to be added to the Service Contract Providers and Administrators under new 16 TAC §77.70(j), which would provide examples of the prohibited acts under Texas Occupations Code §1304.161(a).

The Department received two public comments on 16 TAC §77.70(j) from: (1) GS Administrators, Inc., a registered service contract provider and administrator; and (2) Service Contract Industry Council (SCIC), a national trade association.

Public Comment 1: GS Administrators, Inc. stated that "the language at the end of the first sentence, 'including but not limited to' is misplaced and should be struck."

Public Comment 2: SCIC stated that "the proposed language is overly broad and vague. Specifically, with respect to subsection (j)(2) the SCIC requests that the Department add language incorporating some sort of materiality standard or a time period within which a provider must respond to an assertion that it has failed to honor a term within its service contract before it will be deemed to have acted in a false, deceptive or misleading manner. Without such language the proposed rule is overly restrictive and overreaching. In addition, the SCIC requests that the Department consider revising subsection (j)(3) to provide clarity as to what is an eligible claim. The language as proposed by

the Department oversimplifies the process with the result being that providers could be deemed to have acted in a false, deceptive, or misleading manner when in fact that is not at all the case. The SCIC request that the Department redraft these provisions to provide clarity and to avoid the overbreadth of the language as currently drafted."

Department Response: The Department attempted to provide guidance to the industry on how the Department will interpret and enforce Texas Occupations Code §1304.161(a) by adding new §77.70(j) and how it will interpret and enforce Texas Occupations Code §1306.111(a) by adding new §90.70(j). However, the Department believes the requirements under Texas Occupations Code §1304.161(a) and §1306.111(a) are clear. Any attempts by a provider, administrator, seller or other representative of the provider to make false, deceptive or misleading statements or omit a material statement in any service contract, literature or written communication will be enforced under Texas Occupations Code §1304.161(a) and §1306.111(a), respectively. In response to the public comments to the Service Contract Providers and Administrators proposed rules, the Department has deleted proposed §77.70(j). Likewise, under the Identity Recovery Service Contract Providers and Administrators proposed rules, the Department has deleted §90.70(j) to keep the two sets of rules aligned.

In addition, as part of the proposal, the Department sought public comments on how to implement through agency rules the new statutory provision under Texas Occupations Code §1306.111(c), relating to telemarketing, for a possible future proposed rulemaking. The Department did not receive any public comments in response to this request for comments.

On January 25, 2012, the Commission considered and adopted the amendments to existing rules at 16 Texas Administrative Code Chapter 90, §§90.10, 90.20, 90.21, 90.23, 90.24, 90.40 - 90.42, and 90.70; and new §90.71, with changes to the proposed text of §90.70 as published based on the public comments. The adopted amendments and new rules are effective March 1, 2012.

The amendments and new rules are adopted under Texas Occupations Code Chapter 51 and 1306, which authorizes the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter or a law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code Chapters 51, 1304, and 1306. No other statutes, articles, or codes are affected by the adoption.

§90.70. Responsibilities of Providers and Administrators.

(a) The provider must clearly and conspicuously identify itself on all written identity recovery service contracts and on all written advertising materials that are used by the provider, its administrator(s), or its seller(s).

(b) The provider and/or any administrator appointed by the provider must provide identity recovery service contract holders with a notification that meets all of the following requirements.

(1) The notification must provide the name, mailing address, and telephone number of the department.

(2) The notification must contain a statement that unresolved complaints concerning identity recovery service contract providers or administrators or questions concerning the regulation of identity recovery service contract providers and administrators may be addressed to the department.

(3) The notification must be included on all written identity recovery service contracts. The notification may be stamped on the contract or printed on a separate sheet and stapled to the contract.

(c) The provider and/or any administrator appointed by the provider must provide identity recovery service contract holders with the provider's complaint resolution procedures.

(d) The provider and/or any administrator appointed by the provider must disclose the following information to identity recovery service contract holders in writing and in clear understandable language that is easy to read:

(1) the person or persons who are covered under the identity recovery service contract;

(2) the price of the identity recovery service contract separate from the purchase price of the automobile and any other products or services that are financed with the vehicle;

(3) the term of the identity recovery service contract;

(4) any conditions that may change the stated term of the identity recovery service contract, including if the identity recovery service contract holder:

(A) pays off the automobile early;

(B) makes late payments or defaults on the payments on the automobile;

(C) refinances the automobile; or

(D) sells or transfers title to the automobile;

(5) all required disclosures in accordance with Texas Occupations Code §1306.106;

(6) any exclusions, limitations, conditions or restrictions regarding the scope of services, cancellation, or transferability of the identity recovery service contract in accordance with Texas Occupations Code §1306.106;

(7) the procedures and timeframes for an identity recovery service contract holder to cancel an identity recovery service contract in accordance with Texas Occupations Code §1306.1081;

(8) the procedures and timeframes for a provider to refund the purchase price of the identity recovery service contract and pay any applicable penalty to the identity recovery service contract holder in accordance with Texas Occupations Code §1306.1081; and

(9) the conditions in which the provider may cancel an identity recovery service contract and issue a refund in accordance with Texas Occupations Code §1306.109.

(e) If not provided by the seller at the time of the sales, the provider and/or any administrator appointed by the provider must provide a copy of the identity recovery service contract to the identity recovery service contract holder within a reasonable amount time after the date of purchase that still allows the service contract holder the opportunity to cancel the contract and receive a full refund.

(f) If not provided by the seller at the time of the sales, the provider and/or any administrator appointed by the provider must provide a receipt for or other written evidence of the purchase of an identity recovery service contract to the identity recovery service contract holder within a reasonable amount time after the date of purchase that still allows the service contract holder the opportunity to cancel the contract and receive a full refund.

(g) A provider shall report to the department within 30 days any change in information required by §90.20 and §90.21.

(h) An administrator shall report to the department within 30 days any change in information required by §90.23 and §90.24.

(i) Upon notification by the department, the provider and/or any administrator appointed by the provider shall allow the department to audit records required to be maintained by Texas Occupations Code Chapter 1306. These records include copies of the identity recovery service contracts marketed, sold, administered or issued in this state.

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 February 10, 2012.

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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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Proposal publication date: December 9, 2011
For further information, please call: (512) 463-5386

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CHAPTER 94. PROPERTY TAX PROFESSIONALS

16 TAC §§94.24 - 94.28, 94.80

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 94, §94.25 and §94.80; and new §§94.24 and §§94.26 - 94.28, regarding the Property Tax Professionals, without changes to the proposed text as published in the December 9, 2011, issue of the *Texas Register* (36 TexReg 8316) and will not be republished. The adoption takes effect March 1, 2012.

These rules are necessary to implement changes delineated in House Bill (HB) 1179, 82nd Legislature, Regular Session (2011) which amended Texas Occupations Code, Chapter 1151. A summary of each rule was included in the notice of proposed rules published in the December 9, 2011, issue of the *Texas Register* (36 TexReg 8316).

Section 94.24 establishes inactive status for registrants to comply with the mandates of HB 1179. Inactive status had not been previously available for registrants. The rule provides the administrative procedure by which inactive status may be obtained or ended.

Section 94.25 simply rewords the continuing education provision related to renewal to clarify when education for newly certified registrants is due.

Section 94.26 establishes provisions for obtaining break in service credit to comply with the mandates of HB 1179. The rule provisions simply provide the underlying administrative procedure to obtain break in service credit that is allowed by statute. These provisions include providing evidence acceptable to the department to support the application.

Section 94.27 establishes provisions for a one-year extension for registrants to complete their certification. These provisions are established to comply with the mandates of HB 1179. The rule provides the underlying administrative procedure to obtain a one-year extension including providing acceptable documentation to support the application for extension. The extension will begin on the day after the original deadline for certification regardless of when the extension is requested or on the discretion of the department. By creating a standard for determining a point of origin of the extension allowance in rule, the department has a marker needed to award and time the extension.

Section 94.28 establishes reasonable qualifications for re-application of registrants, or past registrants, to comply with the mandates of HB 1179. The rule provides the underlying administrative procedure and standards for re-application of a registrant required by statute. A person may re-apply for registration after a period of non-registration of two years if the applicant meets the qualifications of a class II registrant in their respective field at the time of application. The two-year period of non-registration insures that the re-application process does not become an immediate revolving door for registrants that have not met their statutory deadline for certification.

Section 94.80 describes the fees applicable to the department and are dictated by the cost of the program. The fees are necessary to comply with the mandates of HB 1179.

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 December 9, 2011. The 30-day public comment period closed on January 9, 2012. The Department did not receive any public comments on the proposed rules.

The substance of these rule changes were recommended by the Tax Professional Advisory Committee (Committee) at its meeting on November 10, 2011.

The amendments and new rules are adopted under Texas Occupations Code, Chapters 51 and 1151, which authorizes the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter or a law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 1151. No other statutes, articles, or codes are affected by the adoption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 10, 2012.

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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-5386

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 4. RULES APPLYING TO ALL PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER E. FINANCIAL LITERACY TRAINING

19 TAC §§4.110 - 4.115

The Texas Higher Education Coordinating Board (Coordinating Board) adopts new §§4.110 - 4.115, concerning Financial Literacy Training, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7227).

The intent of these new sections is to require general academic teaching institutions to offer training in personal financial literacy to students of the institution. The topics that may be covered by the training are: budgeting, managing debt and credit, saving and investing, preventing identity theft, and retirement planning. This course may be offered online.

No comments were received concerning the new sections.

The new sections are adopted under Texas Education Code, Chapter 51, Subchapter F, §51.305, which provides the Coordinating Board with the authority to establish rules for general academic teaching institutions to offer training in personal financial literacy.

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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Bill Franz
General Counsel
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For further information, please call: (512) 427-6114

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SUBCHAPTER O. UNIFORM RECRUITMENT AND RETENTION STRATEGY

19 TAC §§4.240 - 4.245

The Texas Higher Education Coordinating Board adopts the repeal of §§4.240 - 4.245, concerning the Uniform Recruitment and Retention Strategy, without changes to the proposal as published in the November 4, 2011, issue of the *Texas Register* (36 TexReg 7458).

Specifically, Senate Bill (SB) 5, passed by the 82nd Legislature, repealed §61.086 (Uniform Recruitment and Retention Strategy) of the Texas Education Code (TEC), which required institutions to file a report on the recruitment and retention strategies that have been implemented by the institution to recruit and retain students that reflect the population of this state and authorized the Coordinating Board to develop guidelines for the report. The repeal of TEC §61.086 requires the repeal of the aforementioned rules in order to be in compliance with SB 5.

No comments were received regarding the repeal of these sections.

The repeal of these sections is adopted under SB 5, 82nd Legislature, Texas Education Code, §130.001 and §61.027, which gives the Coordinating Board the authority to adopt rules applying to Institutions of Higher Education in Texas.

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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Bill Franz
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CHAPTER 6. HEALTH EDUCATION, TRAINING, AND RESEARCH FUNDS

SUBCHAPTER E. TEXAS EMERGENCY AND TRAUMA CARE EDUCATION PARTNERSHIP PROGRAM

19 TAC §§6.91 - 6.96

The Texas Higher Education Coordinating Board (Coordinating Board) adopts new §§6.91 - 6.96, concerning the Texas Emergency and Trauma Care Education Partnership Program. Section 6.94 is adopted with changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7228). Sections 6.91 - 6.93, 6.95, and 6.96 are adopted without changes and will not be republished.

The intent of these new sections is to specify the Board's criteria and process for awarding grants under the program to eligible partnerships that provide education and training in emergency and trauma care to registered nurses and physician fellows. The partnership must make use of the existing expertise and facilities of the hospitals and education programs in the partnership.

Three comments were received concerning these new sections.

Comment: Scott and White Healthcare submitted a letter in support of the rules as proposed.

Comment: Texas Hospital Association (THA) recommended clarification to the definition of partnership eligibility. THA recommended that the phrase "or a related area" be clarified or removed from the definition of eligible graduate nursing education program partnerships. THA also recommended more specificity in the "sufficient number" of additional nursing students and/or physicians in the participating graduate education programs.

Response: Staff concurred that the phrase "or in a related area" is too broad and proposed deleting the phrase from §6.94(b)(1)(B). However, staff recommended retaining the term "sufficient number" of additional nursing students and/or physicians in the participating graduate education programs.

Staff agreed that "sufficient number" should be clearly defined in the Request for Application. Staff also recognized that the "sufficient number" may vary in future grant periods, based on available resources provided to support the program.

Comment: The University of Texas Health Science Center at Houston (UTHSC-H) submitted a letter with comments recommending two revisions. UTHSC-H recommended that hospital eligibility include those hospitals owned, maintained, or operated by the federal government. This recommendation would allow the San Antonio-based Brooke Army Medical Center to be eligible for funding. The UTHSC-H also recommended that tracking of participants enrolled in the program was unnecessary while the residents and nursing students were participating and enrolled in the program and recommended limiting followup related to practice information to two years post completion of either the nursing or residency training program.

Response: Staff recognized the important role of Brooke Army Medical Center. However, residents completing federal military residency programs or nursing programs are required to serve the staffing needs of the military. Therefore, staff recommended no change to the proposed rules. Staff also recognized that training additional health professionals with specialized expertise in emergency and trauma care will improve the health care for many Texans. To ensure accurate monitoring of the benefits of this program, staff recommended no change to the tracking and monitoring of these health professionals.

The new rules are adopted under Texas Education Code, Chapter 61, Subchapter HH, §61.9806, which provides the Coordinating Board with the authority to adopt rules for the administration of the Texas Emergency and Trauma Care Education Partnership Program.

§6.94. Eligibility.

(a) A grant under this subchapter may be spent only on costs related to the operation or to the development and operation of a Texas Emergency and Trauma Care Education Partnership.

(b) The following emergency and trauma education partnerships are eligible to participate in the program and apply for support:

(1) Graduate Nursing Education Program Partnerships that:

(A) consist of one or more Hospitals and one or more graduate nursing programs in this state; and

(B) prepare students to complete a graduate professional nursing program with a specialty focus or post-master's certificate in emergency and trauma care; or

(2) Graduate Medical Education and Fellowship Programs Partnerships, that:

(A) consist of one or more Hospitals and one or more graduate medical education programs in this state; and

(B) prepare the physician to earn a board certification by the American Board of Medical Specialties or the Bureau of Osteopathic Specialties.

(c) Emergency and Trauma Care Education Partnerships must:

(1) certify an increase of a sufficient number of additional nursing students and/or physicians in the participating graduate education programs; and

(2) use existing facilities and expertise of the hospitals and graduate education programs participating in the partnership.

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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Bill Franz
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CHAPTER 13. FINANCIAL PLANNING
SUBCHAPTER J. TEXAS FUND FOR GEOGRAPHY EDUCATION

19 TAC §13.187

The Texas Higher Education Coordinating Board (Coordinating Board) adopts the repeal of §13.187, concerning Reporting, without changes to the proposal as published in the November 4, 2011, issue of the *Texas Register* (36 TexReg 7459).

Specifically, this repeal concerns Reporting that relates to the Texas Fund for Geography Education. Senate Bill (SB) 5, passed by the 82nd Legislature, repealed Texas Education Code (TEC) §61.9685, which required the board to report to the governor and legislature each even-numbered year the value of the Texas Fund for Geography Education, the membership of the advisory committee, a summary of each project supported by a grant during the preceding state fiscal biennium and other information the Coordinating Board deemed appropriate. The repeal of TEC §61.9685 requires the Coordinating Board to repeal §13.187 in order to be in compliance with SB 5.

No comments were received regarding the repeal of this section.

The repeal of this section is adopted under SB 5, 82nd Legislature, Texas Education Code, §130.001 and §61.027, which gives the Coordinating Board the authority to adopt rules applying to Institutions of Higher Education in Texas.

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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Bill Franz
General Counsel
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CHAPTER 21. STUDENT SERVICES

SUBCHAPTER B. DETERMINATION OF RESIDENT STATUS

19 TAC §21.22

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §21.22, concerning Definitions for the Determination of Resident Status, without changes to the proposed text as published in the November 4, 2011, issue of the *Texas Register* (36 TexReg 7459).

Specifically, the amendments to §21.22 add a definition for "independent institution."

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §54.075, which provides the Coordinating Board with the authority to adopt rules to carry out the purposes of Texas Education Code, §§54.0501 - 54.075.

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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Bill Franz
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19 TAC §21.30

The Texas Higher Education Coordinating Board (Coordinating Board) adopts new §21.30, concerning the Special Procedures for Documenting Compliance, with changes to the proposed text as published in the November 4, 2011, issue of the *Texas Register* (36 TexReg 7460).

Specifically, the new section addresses concerns that have been expressed about the obligation of institutions towards students who are not U.S. Citizens or Permanent Residents, but who have been classified as residents for higher education purposes in accordance with Texas Education Code, §54.052(a)(3). Such students must provide their institutions a signed copy of an affidavit, by which they pledge to apply for permanent resident status as soon as they are able to do so. Current federal legislation makes most of the students ineligible to apply. The new section requires institutions to retain the signed affidavits permanently and to instruct students when they are admitted, annually while they are enrolled, and upon graduation of their obligation to apply for permanent resident status. It also calls for the institutions to refer students to the proper federal agency for instructions on how to apply for such status. Based on comments received, the new section was changed from the proposed text to clarify that institutions may retain the signed affidavits either in paper or electronic format.

The following comments were received regarding the new section.

Comment: The Texas Association of Community Colleges (TACC) commented on an older version of the new section, which would have asked institutions of higher education to provide guidance to students on the steps to take to achieve Permanent Resident status. TACC requested that the Coordinating Board provide information on the steps in order to ensure consistent implementation statewide.

Response: No change was made based on this comment. TACC commented on a version of the section that had previously been considered. As proposed and adopted herein, institutions of higher education are asked to "refer students to the appropriate federal agency for instructions on how to achieve such status;" i.e., Permanent Resident status. Therefore, no change is needed based on this comment.

Comment: The University of North Texas (UNT) System Office commented that the permanent retention of the affidavit and the additional notices to students would cause the institution to incur additional costs. It also noted that the requirement to maintain a permanent record of the affidavit did not indicate whether or not an electronic copy would suffice, and that the immediate implementation of the provision would not provide the institution enough time to carefully implement the change and avoid unnecessary complications and problems.

Response: The Board agreed that the rules should clarify that retaining the affidavits either in paper or electronic format is acceptable and amended §21.30(a) by adding the words "in a paper or electronic format." The Board recognizes that the implementation of these provisions will generate additional costs for institutions, but believes current technology can provide options that would keep costs to a minimum, especially with the relatively small number of students affected per institution (306 reported at UNT and UNT-Dallas in fall 2010). As long as students enrolled for the spring 2012 term and later are reminded of their obligations as laid out in the affidavit by the end of the academic year in which they are enrolled, an institution will be considered to have met the new requirements.

Comment: The Mexican American Legal Defense and Educational Fund (MALDEF) recommended alternate wording for subsection (b)(2) to more clearly reflect the circumstances under which a student could/should apply for Permanent Resident (PR) status. It would expand subsection (b)(1) to indicate students are to act "in the event of federal legislation or policy changes in the near future providing additional paths to apply for PR status" and subsection (b)(2) to include a recommendation that students are to be advised to seek consultation with appropriate legal counsel before contacting federal agencies for instructions on how to apply for PR status.

Response: The Board did not recommend a change based on this comment. Although changed individual circumstances may enable certain individuals to apply for permanent resident status, subsection (b)(1) as proposed assures that all such students are advised to take action if/when federal restrictions for establishing such status are changed (for instance, through the passage of federal legislation or policy changes providing additional paths to Permanent Resident status, i.e., some legislation similar to the "Dream Act," as has been proposed over the past few years). The wording of subsection (b)(2) is not expected to cause institutions to urge ineligible students to contact the United States Citizenship and Immigration Services Office.

Comment: The University of Texas System indicated that the burden of maintaining a paper document in perpetuity is signif-

icant and asked if an electronic version is acceptable. It also indicated that their system does not track a student's intended graduation date, as it is too variable, and asked that this requirement be eliminated.

Response: The Board agreed that the rules should be amended to clarify that retaining the affidavits either in paper or electronic format is acceptable and amended §21.30(a) by adding the words "in a paper or electronic format." However, since institutions are in contact with students when they graduate (for instance, when the student notifies the school of his/her intent to graduate and/or when the student is contacted at the time he or she is to receive a diploma), staff believes one of these contacts would offer an opportunity to remind affidavit students of their commitment to apply for Permanent Resident status when they become eligible to do so.

The new section is adopted under the Texas Education Code, §54.075, which provides the Coordinating Board with the authority to adopt rules to carry out the purposes of Texas Education Code, §§54.0501 - 54.075.

§21.30. Special Procedures for Documenting Compliance.

(a) Signed affidavits, acquired by public or independent institutions of higher education in keeping with §21.25(a)(1)(B) of this chapter (relating to Information Required to Initially Establish Resident Status), must be retained in a paper or electronic format permanently by the institution or until the students (current and former) provide proof that they have applied for Permanent Resident status.

(b) A public or independent institution of higher education that classifies a person who is not a Citizen or Permanent Resident of the United States as a resident under §21.24(a)(1) of this chapter (relating to Determination of Resident Status) shall:

(1) instruct such students upon admission, annually while the students are enrolled, and upon graduation of their obligation to apply for Permanent Resident status as soon as eligible to do so; and

(2) refer students to the appropriate federal agency for instructions on how to achieve such status.

(c) The provisions of this section apply to all persons who are not Citizens or Permanent Residents of the United States and who are enrolled and classified as residents under §21.24(a)(1) of this chapter by a public or independent institution of higher education during any part of the 2011-2012 academic year or later.

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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Bill Franz
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Texas Higher Education Coordinating Board
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SUBCHAPTER C. HINSON-HAZLEWOOD COLLEGE STUDENT LOAN PROGRAM

19 TAC §21.53

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §21.53, concerning the Definitions for Hinson-Hazlewood College Student Loan Program, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7230).

Specifically, the amendments update a reference to the title of Chapter 21, Subchapter B, of Board rules.

No comments were received regarding the amendments.

The amendments are adopted under Texas Education Code, §§52.31 - 52.41, which provide the Coordinating Board with the authority to establish procedures to administer the Hinson-Hazlewood College Student Loan Program and Texas Education Code, §52.31, which provides the Coordinating Board with the authority to adopt rules to effectuate the provisions of Texas Education Code, Chapter 52.

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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Bill Franz
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SUBCHAPTER K. THE GOOD NEIGHBOR SCHOLARSHIP PROGRAM

19 TAC §21.281

The Texas Higher Education Coordinating Board (Coordinating Board) adopts an amendment to §21.281, concerning Authority and Purpose, with changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7231).

Specifically, Senate Bill 32, 82nd Texas Legislature, redesignated Texas Education Code, Chapter 54, Subchapter D, §54.207 as §54.331. The amendment to this section updates this citation.

No comments were received regarding the amendments.

The amendment is adopted under Texas Education Code, §54.331 (formerly §54.207) which authorizes the Texas Higher Education Coordinating Board to formulate and prescribe a plan governing the admission and distribution of all applicants desiring to qualify under this program.

§21.281. Authority and Purpose.

(a) Authority. Authority for this subchapter is provided in the Texas Education Code, Subchapter B, Tuition Rates. These rules establish procedures to administer the program authorized in Texas Education Code, §54.331 (previously §54.207), Students from Other Nations of the American Hemisphere, more commonly known as the Good Neighbor Scholarship Program.

(b) Purpose. The purpose of the Good Neighbor Scholarship Program is to encourage academically talented students from the countries of the Western (American) hemisphere to pursue higher education in the State of Texas, thus establishing a beneficial link between the State of Texas and the home countries of the students.

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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Bill Franz
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Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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SUBCHAPTER M. TEXAS COLLEGE WORK-STUDY PROGRAM

19 TAC §21.402

The Texas Higher Education Coordinating Board (Coordinating Boar) adopts amendments to §21.402, concerning Definitions for the Texas College Work-Study Program, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7231).

Specifically, the amendments update a reference to the title of Chapter 21, Subchapter B, of Board rules.

No comments were received regarding the amendments.

The amendments are adopted under Texas Education Code, §56.077, which provides the Coordinating Board with the authority to adopt rules to administer the Texas College Work-Study Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER X. WAIVER PROGRAMS FOR CERTAIN NONRESIDENT PERSONS

19 TAC §§21.730 - 21.752

The Texas Higher Education Coordinating Board (Coordinating Board) adopts the repeal of §§21.730 - 21.752, concerning Waiver Programs for Certain Nonresident Persons, without changes to the proposal as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7461).

Specifically, Senate Bill 32, 82nd Texas Legislature, transferred the waiver programs located in Texas Education Code, Chapter 54, Subchapter B to Texas Education Code, Chapter 54, Subchapter D. This transfer moved the programs out of the purview of the Coordinating Board's general rulemaking authority for programs in Subchapter B, as stated in Texas Education Code, §54.075. New sections are simultaneously being adopted along with this repeal for the two programs for which the Coordinating Board is assigned specific rulemaking authority by statute.

No comments were received regarding the repeal.

The repeal is adopted because Texas Education Code, §54.075, which provides the Coordinating Board with the authority to adopt rules to carry out the purposes of Texas Education Code, Chapter 54, Subchapter B is no longer applicable to these sections.

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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Bill Franz
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SUBCHAPTER AA. RECIPROCAL EDUCATIONAL EXCHANGE PROGRAM

19 TAC §21.901

The Texas Higher Education Coordinating Board (Coordinating Board) adopts an amendment to §21.901, concerning the Reciprocal Educational Exchange Program, with changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7232). Specifically, Senate Bill 32, 82nd Texas Legislature, transferred §54.060 from Texas Education Code, Chapter 54, Subchapter B to Texas Education Code, Chapter 54, Subchapter D and redesignated it as §54.231. The amendment in §21.901 updates this citation. However, due to an error in the proposal, the existing rule language "§54.060(c) and (d)" was shown to be bracketed and struck out, when that phrase was not intended to be deleted. The amendment should have been shown as ". . . §54.231(c) and (d) (previously §54.060(c) and (d)). . ." The adoption corrects this error and the rule text is republished.

No comments were received regarding the amendments.

The amendment is adopted under Texas Education Code, §54.231 (formerly §54.060) which authorizes the Texas Higher Education Coordinating Board to adopt rules to administer Texas Education Code, §54.060(c) and (d).

§21.901. Authority and Purpose.

(a) Authority. Authority for this subchapter is provided in the Texas Education Code, Chapter 54, Subchapter B, Tuition Rates. These rules establish procedures to administer the subchapter as prescribed in the Texas Education Code, §54.231(c) and (d) (previously §54.060(c) and (d)), Resident of Bordering State or Nation or Participant in Student Exchange Program: Tuition.

(b) The purpose of the reciprocal educational exchange program is to enable Texas students of participating institutions to afford to participate in exchange programs with foreign institutions in order to help them better understand the culture, language, needs, and expectations of other nations of the world.

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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Bill Franz
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SUBCHAPTER BB. PROGRAMS FOR ENROLLING STUDENTS FROM MEXICO

19 TAC §21.931

The Texas Higher Education Coordinating Board (Coordinating Board) adopts an amendment to §21.931, concerning Programs for Enrolling Students from Mexico, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7232). Specifically, Senate Bill 32, 82nd Texas Legislature, transferred §54.060 from Texas Education Code, Chapter 54, Subchapter B to Texas Education Code, Chapter 54, Subchapter D and redesignated it as §54.231. The amendment in §21.931 updates this citation.

No comments were received regarding the amendments.

The amendment is adopted under Texas Education Code, §54.231 (formerly §54.060), which authorizes the Texas Higher Education Coordinating Board to adopt rules to administer Texas Education Code, §54.060(b) and (d).

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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Bill Franz
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SUBCHAPTER CC. EARLY HIGH SCHOOL GRADUATION SCHOLARSHIP PROGRAM FOR STUDENTS GRADUATING HIGH SCHOOL ON OR BEFORE JUNE 20, 2011

19 TAC §21.951

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §21.951, concerning Definitions, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7233).

Specifically, the amendments update a reference to the title of Chapter 21, Subchapter B, of Board rules.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §56.209, which provides the Coordinating Board with the authority to adopt rules to administer the program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER II. EDUCATIONAL AIDE EXEMPTION PROGRAM

19 TAC §21.1080, §21.1081

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §21.1080 and §21.1081, concerning Authority and Purpose and Definitions, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7233). Specifically, Senate Bill 32, 82nd Texas Legislature, redesignated Texas Education Code, Chapter 54, Subchapter D, §54.214 as §54.363. The amendment in §21.1080 updates this citation. The amendment to §21.1081 updates a reference to the title of Chapter 21, Subchapter B, of Board rules.

No comments were received regarding the amendments.

The amendments are adopted under Texas Education Code, §54.363, (formerly Texas Education Code, §54.214(e)) which authorizes the Texas Higher Education Coordinating Board to adopt rules to administer the Educational Aide Exemption Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER NN. EXEMPTION PROGRAM FOR VETERANS AND THEIR DEPENDENTS (THE HAZLEWOOD ACT)

19 TAC §§21.2099, 21.2100, 21.2102, 21.2107, 21.2108

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §§21.2099, 21.2100, 21.2102, 21.2107, and 21.2108, concerning the Exemption Program for Veterans and their Dependents (The Hazlewood Act) without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7234).

Specifically, Senate Bill 32, 82nd Texas Legislature, redesignated Texas Education Code, Subchapter D, §54.203 as §54.341. The amendment in §21.2099 updates this citation. The amendments to §21.2100 update a reference to the title of Chapter 21, Subchapter B, of Board rules, and make the definition of "Resident of Texas" consistent with other Board rules. Amendments to §21.2102 and §21.2107(a)(2) clarify that eligible veterans who reside out of state solely due to their own (or their spouses') military orders are excluded from the provision which requires veterans to reside in Texas during the semester or term for which the exemption is claimed and clarify that these requirements are for veterans who claim the benefit for the first time beginning fall 2011. New §21.2108(b) indicates that an eligible veteran who wishes to assign his or her unused hours to a child through the Hazlewood Legacy Program must reside in Texas or must prove that he or she is eligible for the exception due to military orders (§21.2102, as amended), and provide documentation to prove his or her domicile in Texas.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §54.341(i) and (k) (formerly §54.203(i) and (k)), which provide the Coordinating Board with the authority to adopt rules to administer Texas Education Code, §54.341 (formerly §54.203), including the Hazlewood Legacy Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
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SUBCHAPTER RR. TEXAS ARMED SERVICES SCHOLARSHIP PROGRAM

19 TAC §21.2244

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §21.2244, concerning Initial Award Eligibility and Agreement Requirements, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7235).

Specifically, the amendments align the section with current practices at institutions that award Reserve Officers' Training Corps (ROTC) credit to students based on their prior military service. Some students receive four years of ROTC credit without actually completing four years of ROTC training because of prior military service. These students will be allowed to qualify for awards through the Texas Armed Services Scholarship Program.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §61.9774, which provides the Coordinating Board with the authority to adopt rules for the administration of the Texas Armed Services Scholarship Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bill Franz
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SUBCHAPTER SS. WAIVER PROGRAMS FOR CERTAIN NONRESIDENT PERSONS

19 TAC §§21.2260 - 21.2264

The Texas Higher Education Coordinating Board adopts new §§21.2260 - 21.2264, concerning Waiver Programs for Certain Nonresident Persons, without changes to the proposed text as published in the November 4, 2011, issue of the *Texas Register* (36 TexReg 7462).

Specifically, Senate Bill 32, 82nd Texas Legislature, transferred the waiver programs located in Texas Education Code (TEC), Chapter 54, Subchapter B, to Chapter 54, Subchapter D. This transfer moved the programs out of the purview of the Coor-

dinating Board's general rulemaking authority for programs in Subchapter B, as stated in TEC, §54.075. The new sections reflect definitions for waivers, authorized in Texas Education Code §54.0015, and rules for two programs for which the Coordinating Board is assigned specific rulemaking authority by statute. These include the competitive scholarship waiver committee authorized by TEC, §54.064(a), and the waiver program for general academic teaching institutions located within 100 miles of the Texas border with another state, authorized by TEC, §54.0601.

No comments were received regarding the new sections.

The new sections are adopted under the Texas Education Code, §54.0015, which provides the Coordinating Board with the authority to adopt definitions for exemptions and waivers authorized in Texas Education Code, Chapter 54, §54.064(a), which provides the Coordinating Board with the authority to develop criteria for the committees used to select scholarship recipients, and Chapter 54, §54.0601, which provides the Coordinating Board with the authority to set a lowered tuition rate for certain nonresident students under conditions set in that statute.

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 February 8, 2012.

TRD-201200675
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 28, 2012
Proposal publication date: November 4, 2011
For further information, please call: (512) 427-6114

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CHAPTER 22. GRANT AND SCHOLARSHIP PROGRAMS

SUBCHAPTER B. PROVISIONS FOR THE TUITION EQUALIZATION GRANT PROGRAM

19 TAC §§22.22, 22.24, 22.25

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §§22.22, 22.24, and 22.25, concerning Provisions for the Tuition Equalization Grant Program, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7236).

Specifically, new §22.22(25) adds a definition for "Residency Core Questions," to clarify that persons receiving Tuition Equalization Grant (TEG) awards must complete the state's core residency questions in order to provide their institutions sufficient information for them to accurately determine the students' residency status. Subsequent definitions are renumbered accordingly. The amendment to §22.22(26) updates a reference to the name of Chapter 21, Subchapter B, of Board rules: "Determination of Resident Status." The amendments to §22.24(a)(4) and to §22.25(a)(4) clarify the need to base residency decisions on data from the Residency Core Questions and to provide consistent wording regarding the TEG residency requirement, whether the person is receiving an award through the 2006 Revised TEG Program (covered in §22.24) or the Original TEG Program (covered in §22.25).

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §61.229, which provides the Coordinating Board with the authority to adopt rules to implement the program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 8, 2012.

TRD-201200676
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 28, 2012
Proposal publication date: October 28, 2011
For further information, please call: (512) 427-6114

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SUBCHAPTER E. TEXAS NEW HORIZONS SCHOLARSHIP PROGRAM

19 TAC §§22.81 - 22.86

The Texas Higher Education Coordinating Board (Coordinating Board) adopts the repeal of §§22.81 - 22.86, concerning the Texas New Horizons Scholarship Program, without changes to the proposal as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7237).

Specifically, House Bill 713, 76th Texas Legislature, repealed Texas Education Code, §54.216, beginning with the 1999 fall semester. Section 54.216 authorized the Texas New Horizons Scholarship Program. The program was phased out and awards for the few remaining continuation students were funded from TEXAS Grant appropriations. Since this is no longer a functioning program, it is appropriate to repeal the rules from those under the purview of the Texas Higher Education Coordinating Board.

No comments were received regarding the repeal.

Sections 22.81 - 22.86 were originally adopted under Texas Education Code, §54.216, and Senate Bill 576, 75th Texas Legislature. As §54.216 has since been repealed, there is no longer any statutory basis for the rules concerning the Texas New Horizons Scholarship Program, and these rules should be properly repealed.

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 February 8, 2012.

TRD-201200677

Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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SUBCHAPTER F. PROVISIONS FOR THE SCHOLARSHIP PROGRAMS FOR VOCATIONAL NURSING STUDENTS

19 TAC §22.102

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §22.102, concerning Definitions of the Provisions for the Scholarship Programs for Vocational Nursing Students, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7237).

Specifically, the amendments update a reference to the title of Chapter 21, Subchapter B, of Board rules.

No comments were received regarding the amendments.

The amendments are adopted under Texas Education Code, §61.652, which authorizes the Texas Higher Education Coordinating Board to adopt rules to establish and administer a scholarship program for vocational nursing students.

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 February 8, 2012.

TRD-201200678
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 28, 2012
Proposal publication date: October 28, 2011
For further information, please call: (512) 427-6114

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SUBCHAPTER G. PROVISIONS FOR THE SCHOLARSHIP PROGRAMS FOR PROFESSIONAL NURSING STUDENTS

19 TAC §22.122

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §22.122, concerning Definitions for the Provisions for the Scholarship Programs for Professional Nursing Students, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7238).

Specifically, the amendments update a reference to the title of Chapter 21, Subchapter B, of Board rules.

No comments were received regarding the amendments.

The amendments are adopted under Texas Education Code, §61.652, which authorizes the Texas Higher Education Coordinating Board to adopt rules to establish and administer a scholarship program for professional nursing students.

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 February 8, 2012.

TRD-201200679
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 28, 2012
Proposal publication date: October 28, 2011
For further information, please call: (512) 427-6114

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SUBCHAPTER I. PROVISIONS FOR THE FIFTH-YEAR ACCOUNTING STUDENT SCHOLARSHIP PROGRAM

19 TAC §§22.161 - 22.171

The Texas Higher Education Coordinating Board (Coordinating Board) adopts the repeal of §§22.161 - 22.171, concerning Provisions for the Fifth-Year Accounting Student Scholarship Program, without changes to the proposal as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7238)

Specifically, House Bill 2440, 81st Texas Legislature, transferred Texas Education Code, Chapter 61, Subchapter N to Occupations Code, Chapter 901, thereby transferring responsibility for the program to the Texas State Board of Public Accountancy. Therefore, it is appropriate to delete the rules from those under the purview of the Texas Higher Education Coordinating Board.

No comments were received regarding the repeal.

These rules were originally proposed under Texas Education Code, §61.755, which provided the Coordinating Board with the authority to adopt rules concerning the Fifth-Year Accounting Student Scholarship Program. As the statutes for this program have been moved to the Occupations Code under the purview of the Texas State Board of Public Accountancy, the statutory basis for these rules no longer exists and these rules should be properly repealed.

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 February 8, 2012.

TRD-201200680
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 28, 2012
Proposal publication date: October 28, 2011
For further information, please call: (512) 427-6114

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SUBCHAPTER J. TEXAS CAREER OPPORTUNITY GRANT PROGRAM

19 TAC §22.182

The Texas Higher Education Coordinating Board (Coordinating Board) adopts an amendment to §22.182, concerning Definitions for the Texas Career Opportunity Grant Program, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7239).

Specifically, the amendment updates a reference to the title of Chapter 21, Subchapter B, of Board rules.

No comments were received regarding the amendment.

The amendment is adopted under Labor Code, §305.003, which allows the Coordinating Board to administer the Texas Career Opportunity Grant Program through a memorandum of understanding with the Texas Workforce Commission.

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 February 8, 2012.

TRD-201200681
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 28, 2012
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For further information, please call: (512) 427-6114

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SUBCHAPTER K. PROVISIONS FOR SCHOLARSHIPS FOR STUDENTS GRADUATING IN THE TOP 10 PERCENT OF THEIR HIGH SCHOOL CLASS

19 TAC §22.197

The Texas Higher Education Coordinating Board (Coordinating Board) adopts an amendment to §22.197, concerning Definitions for the Provisions for Scholarships for Students Graduating in the Top 10 Percent of Their High School Class, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7239).

Specifically, the amendment updates a reference to the title of Chapter 21, Subchapter B, of Board rules and changes the wording of the definition to make it consistent with other Board rules.

No comments were received regarding the amendment.

The amendment is adopted under Article III, General Appropriations Act, 80th Texas Legislature.

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 February 8, 2012.

TRD-201200682
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 28, 2012
Proposal publication date: October 28, 2011
For further information, please call: (512) 427-6114

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SUBCHAPTER L. TOWARD EXCELLENCE, ACCESS, AND SUCCESS (TEXAS) GRANT PROGRAM

19 TAC §22.226

The Texas Higher Education Coordinating Board (Coordinating Board) adopts an amendment to §22.226, concerning Definitions for the Toward EXcellence, Access and Success (TEXAS) Grant Program, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7240).

Specifically, the amendment updates a reference to the title of Chapter 21, Subchapter B, of Board rules.

No comments were received regarding the amendment.

The amendment is adopted under Texas Education Code, §56.303, which provides the Coordinating Board with the authority to adopt rules to implement the TEXAS Grant Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 8, 2012.

TRD-201200683
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 28, 2012
Proposal publication date: October 28, 2011
For further information, please call: (512) 427-6114

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SUBCHAPTER M. TEXAS EDUCATIONAL OPPORTUNITY GRANT PROGRAM

19 TAC §22.254

The Texas Higher Education Coordinating Board (Coordinating Board) adopts an amendment to §22.254, concerning Definitions for the Texas Educational Opportunity Grant (TEOG) Program, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7240).

Specifically, the amendment updates a reference to the title of Chapter 21, Subchapter B, of Board rules.

No comments were received regarding the amendment.

The amendment is adopted under Texas Education Code, §56.403, which provides the Coordinating Board with the authority to adopt rules to implement the TEOG Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 8, 2012.

TRD-201200684
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 28, 2012
Proposal publication date: October 28, 2011
For further information, please call: (512) 427-6114

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SUBCHAPTER O. EXEMPTION PROGRAM FOR CHILDREN OF PROFESSIONAL NURSING PROGRAM FACULTY AND STAFF

19 TAC §22.292, §22.293

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §22.292, concerning Authority and Purpose, and §22.293, concerning Definitions for the Exemption Program for Children of Professional Nursing Program Faculty and Staff, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7241)

Specifically, Senate Bill 32, 82nd Texas Legislature, redesignated Texas Education Code, Chapter 54, Subchapter D, §54.221 as §54.355. The amendment in §22.292 updates this citation. The amendment to §22.293 updates a reference to the title of Chapter 21, Subchapter B, of Board rules.

No comments were received regarding the amendments.

The amendments are adopted under Texas Education Code, §54.355 (formerly Texas Education Code, §54.221) which authorizes the Texas Higher Education Coordinating Board to adopt rules governing the granting or denial of an exemption under this section, including rules relating to the determination of eligibility for an exemption.

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 February 8, 2012.

TRD-201200685
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 28, 2012
Proposal publication date: October 28, 2011
For further information, please call: (512) 427-6114

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SUBCHAPTER P. EXEMPTION PROGRAM FOR CLINICAL PRECEPTORS AND THEIR CHILDREN

19 TAC §22.302, §22.303

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §22.302, concerning Authority and Purpose, and §22.303, concerning Definitions for the Exemption Program for Clinical Preceptors and Their Children, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7242).

Specifically, Senate Bill 32, 82nd Texas Legislature, redesignated Texas Education Code, Chapter 54, Subchapter D, §54.222, as §54.356. The amendment to §22.302 updates this citation. The amendment to §22.303 updates a reference to the title of Chapter 21, Subchapter B, of Board rules.

No comments were received regarding the amendments.

The amendments are adopted under Texas Education Code, §54.356 (formerly Texas Education Code, §54.222), which authorizes the Texas Higher Education Coordinating Board to adopt rules governing the granting or denial of an exemption under this section, including rules relating to the determination of eligibility for an exemption.

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 February 8, 2012.

TRD-201200686
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 28, 2012
Proposal publication date: October 28, 2011
For further information, please call: (512) 427-6114

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SUBCHAPTER T. EXEMPTION FOR FIREFIGHTERS ENROLLED IN FIRE SCIENCE COURSES

19 TAC §22.523

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §22.523, concerning the Exemption for Firefighters Enrolled in Fire Science Courses, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7242).

Specifically, the amendment to this section clarifies that general education courses may be included in the exemption if they fall within a designated fire science curriculum as defined by the institution.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §54.208, which provides the Coordinating Board with the authority to adopt rules governing the granting or denial of an exemp-

tion under this section, including rules relating to the determination of a student's eligibility for an exemption.

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 February 8, 2012.

TRD-201200687
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 28, 2012
Proposal publication date: October 28, 2011
For further information, please call: (512) 427-6114

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SUBCHAPTER V. TEXAS SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS CHALLENGE SCHOLARSHIP PROGRAM

19 TAC §§22.570 - 22.577

The Texas Higher Education Coordinating Board (Coordinating Board) adopts new §§22.570 - 22.577, concerning the Texas Science, Technology, Engineering, and Mathematics Challenge Scholarship Program, without changes to the proposed text as published in the October 28, 2011, issue of the *Texas Register* (36 TexReg 7243).

The intent of these new sections is to specify the Board's criteria and process for awarding grants under the program to eligible public junior and technical colleges that offer degree programs leading to careers in science, technology, engineering, mathematics, and related fields. Grants will provide funds to support scholarships to qualifying, high-achieving students. Participating institutions must develop partnerships with business and industry that will result in part-time employment for students enrolled in a STEM field.

No comments were received concerning the new sections.

The new sections are adopted under Texas Education Code, Chapter 61, Subchapter GG, §61.9791, which provides the Coordinating Board with the authority to establish rules for the administration of the Texas Science, Technology, Engineering, and Mathematics Challenge Scholarship Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 8, 2012.

TRD-201200688
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Effective date: February 28, 2012
Proposal publication date: October 28, 2011
For further information, please call: (512) 427-6114

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PART 8. WINDHAM SCHOOL DISTRICT

CHAPTER 300. GENERAL PROVISIONS

19 TAC §300.3

The Windham School District (WSD) Board of Trustees adopts the repeal of 19 TAC §300.3, Employment Referral Services for Offenders--Memorandum of Understanding, without changes to the proposal as published in the December 23, 2011, issue of the *Texas Register* (36 TexReg 8721).

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 WSD was removed as the responsible managing entity and there was no funding appropriated for Project Reintegration of Offenders by the 82nd Legislature.

No comments were received regarding the repeal.

The repeal is adopted under the General Appropriations Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on February 13, 2012.

TRD-201200796
Michael Mondville
General Counsel
Windham School District
Effective date: March 4, 2012
Proposal publication date: December 23, 2011
For further information, please call: (512) 463-9693

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER A. EXAMINATION AND FINANCIAL ANALYSIS

28 TAC §7.68

The Commissioner of Insurance (Commissioner) adopts the repeal of §7.68, concerning the requirements for filing the 2005 quarterly and annual statements, other reporting forms, and electronic data filings with the Texas Department of Insurance (Department) and the National Association of Insurance Commissioners (NAIC). The repeal is adopted without changes to the proposal published in the January 6, 2012, issue of the *Texas Register* (37 TexReg 46).

The repeal of the obsolete section is necessary to permit the simultaneous adoption of new §7.68, concerning filing require-

ments for the annual statements, the quarterly statements, other reporting forms, and electronic data filings with the Department and the NAIC.

The 2005 reporting forms and other forms required to be filed under the repealed section have been filed and the due dates for filing the 2005 annual statements, 2005 quarterly statements, and other reports have passed. Therefore, the repealed section is no longer necessary. In conjunction with the adopted repeal, the adoption of new §7.68 is also published in this issue of the *Texas Register.*

The adoption of the repeal will result in the removal of an obsolete provision from the Texas Administrative Code and permit the adoption of new §7.68. Adopted new §7.68 specifies the requirements for filing the annual statements, the quarterly statements, other reporting forms, and electronic data filings with the Department and the NAIC.

The new section will be applicable to annual filings with the Department and the NAIC, beginning with the year ending December 31, 2011, and each year thereafter; and to the quarterly filings with the Department and the NAIC, beginning with the quarter ending on March 31, 2012, and each quarter thereafter.

The Department did not receive any comments on the proposed repeal.

The repeal of the section is adopted under the Insurance Code §§802.001 - 802.003, 802.051 - 802.056, and 36.001. Sections 802.001 - 802.003 and 802.051 - 802.056 authorize the Commissioner to make changes in the forms of the annual statements required of insurance companies of any kind, as shall seem best adapted to elicit a true exhibit of their condition and methods of transacting business, and require certain insurers to make filings with the National Association of Insurance Commissioners. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

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 February 9, 2012.

TRD-201200691
Sara Waitt
General Counsel
Texas Department of Insurance
Effective date: February 29, 2012
Proposal publication date: January 6, 2012
For further information, please call: (512) 463-6327

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28 TAC §7.68

The Commissioner of Insurance (Commissioner) adopts new §7.68, concerning requirements for the filing of the annual statements, the quarterly statements, other reporting forms, and electronic data filings with the Texas Department of Insurance (Department) and the National Association of Insurance Commissioners (NAIC). The new section is adopted with changes to the proposed text published in the January 6, 2012, issue of the *Texas Register* (37 TexReg 46).

The new section is necessary to specify the filing requirements for insurers and other regulated entities for the annual statements, the quarterly statements, other reporting forms, and electronic data filings filed with the Department and the NAIC. The requirements are applicable to insurance companies, including limited purpose subsidiary life insurance companies established under the Insurance Code Chapter 841, Subchapter I; health maintenance organizations (HMOs); nonprofit legal service corporations; the Texas Health Insurance Pool; the Texas FAIR Plan Association; and the Texas Windstorm Insurance Association (TWIA). These insurance companies, HMOs, and other regulated entities are referred to collectively as "carriers" in this adoption.

The carriers will file the annual and quarterly statements and other reporting forms with the Department and the NAIC as directed in the adopted requirements. The new section adopts by reference the annual statement blanks, the quarterly statement blanks, the annual and quarterly supplemental reporting forms, and the related instruction manuals as adopted and published by the NAIC each year, as well as the Texas-specific reporting forms specified in this section.

The carriers will use these forms to report their calendar year financial condition and business operations and activities each year. The information provided by the completion of the forms is necessary to allow the Department to monitor the solvency, business activities, and statutory compliance of the carriers. The new section will be applicable to annual filings with the Department and the NAIC, beginning with the year ending December 31, 2011, and each year thereafter; and to the quarterly filings with the Department and the NAIC, beginning with the quarter ending on March 31, 2012, and each quarter thereafter. The forms and instructions are available for inspection in the office of the Texas Department of Insurance, Financial Regulation Division, Financial Analysis, in the William P. Hobby Jr. State Office Building at 333 Guadalupe, Tower Number III, Third Floor, Austin, Texas. The NAIC forms and instructions may also be reviewed at www.naic.org.

Additionally, the new section is necessary to outline a process for annual notice by the Department of the annual filing requirements and the opportunity to petition the Department for adoption of a rule amendment to this section.

The new section is also necessary to implement HB 3161, 82nd Regular Session, effective June 17, 2011, by specifying the financial, accounting, and certain actuarial filing requirements for limited purpose subsidiary life insurance companies established under the Insurance Code Chapter 841, Subchapter I. Specifically, §7.68(i)(5) implements the Insurance Code §§841.410(b) and (c), 841.414(c), and 841.420. Also, §7.68(i)(6) restates the actuarial requirement in the Insurance Code §841.419. Section 841.419 requires that, not later than March 1 of each year that a limited purpose subsidiary life insurance company is in operation and is ceded new business from a ceding insurer, a senior actuarial officer of each ceding insurer shall file with the Commissioner a certification that the ceding insurer's transactions with the limited purpose subsidiary life insurance company are not being used to gain an unfair advantage in the pricing of the ceding insurer's products.

The following paragraphs provide a brief summary as well as an analysis of the reasons for the adopted section.

Section 7.68(a) is necessary to explain the purpose of the section.

Section 7.68(b) is necessary to provide the scope and applicability of the section.

Section 7.68(c) is necessary to define the term "Texas Edition." The term "Texas Edition" is used in the section to denote the blanks and forms promulgated by the Commissioner.

Section 7.68(d) is necessary to adopt by reference the NAIC and Texas-specific forms and instruction manuals described in the section.

Section 7.68(e) is necessary to specify the hierarchy of laws in the event of a conflict between the Insurance Code, §7.68, and other Department regulations and the NAIC instructions specified in the section.

Section 7.68(f) is necessary to specify the annual and quarterly statement filing requirements applicable to every domestic carrier described in §7.68(i) - (m).

Section 7.68(g) is necessary to require each foreign HMO and foreign insurer permitted or allowed to do the business of HMOs in Texas to make the annual and quarterly statement filings specified in §7.68(f)(1) - (4) electronically with the NAIC and in paper copy with the Department, and to make the filings specified in §7.68(m) electronically and in paper copy with the Department.

Section 7.68(h) is necessary to enumerate the annual and quarterly filing requirements applicable to every foreign carrier described in §7.68(i) - (l).

Section 7.68(i) is necessary to require each domestic life; life and accident; life and health; accident; accident and health; mutual life; or life, accident, and health insurance company and each domestic stipulated premium company, domestic limited purpose subsidiary life insurance company, domestic group hospital service corporation, and the Texas Health Insurance Pool complete and file the blanks, forms, and electronic annual and quarterly statement filings with the NAIC and the Department, as directed in §7.68(f), with the exceptions or additional filings provided in §7.68(i). Section 7.68(i) is also necessary to require each foreign life; life and accident; life and health; accident; accident and health; mutual life; or life, accident, and health insurance company and each foreign stipulated premium company and foreign group hospital service corporation to complete and file the blanks, forms, and electronic annual and quarterly statement filings with the NAIC and the Department, as directed in §7.68(h), with the exceptions or additional filings provided in §7.68(i).

Section 7.68(j) is necessary to require each domestic fire, fire and marine, general casualty, fire and casualty, or U.S. branch of an alien insurer, a domestic county mutual insurance company, a domestic mutual insurance company other than life, a domestic Lloyd's plan, a domestic reciprocal or inter insurance exchange, a domestic risk retention group, a domestic life insurance company that is licensed to write workers' compensation, any domestic farm mutual insurance company that filed a property and casualty annual statement for the previous calendar year or had gross written premiums in excess of $6 million for the current calendar year, a domestic joint underwriting association, the Texas Mutual Insurance Company, the Texas Windstorm Insurance Association, and the Texas FAIR Plan Association to complete and file the blanks, forms, and electronic filings with the NAIC and the Department, as directed in §7.68(f) and §7.68(j). Specifically, §7.68(j)(4) and (5) is necessary to enumerate the annual and quarterly statement filing requirements for TWIA and the FAIR Plan Association, respectively. Section 7.68(j) also is necessary to require each foreign fire, fire and marine, general casualty, fire and casualty, or U.S. branch of an alien insurer, a foreign county mutual insurance company, a foreign mutual insurance company other than life, a foreign Lloyd's plan, a foreign reciprocal or inter insurance exchange, and a foreign life insurance company that is licensed to write workers' compensation, any foreign farm mutual insurance company that filed a property and casualty annual statement for the previous calendar year or had gross written premiums in excess of $6 million for the current calendar year to complete and file the blanks, forms, and electronic annual and quarterly statement filings with the NAIC and the Department, as directed in §7.68(h), with the exceptions or additional filings provided in §7.68(i).

Section 7.68(j) is also necessary to require each foreign fire, fire and marine, general casualty, fire and casualty, or U.S. branch of an alien insurer, a foreign county mutual insurance company, a foreign mutual insurance company other than life, a domestic Lloyd's plan, a foreign reciprocal or inter insurance exchange, any foreign farm mutual insurance company that filed a property and casualty annual statement for the previous calendar year or had gross written premiums in excess of $6 million for the current calendar year to complete and file the blanks, forms, and electronic filings with the NAIC and the Department, as directed in §7.68(h) and §7.68(j).

Section 7.68(k) is necessary to require domestic fraternal benefit societies to complete and file the annual and quarterly statement blanks, forms, and electronic filings described in §7.68(f), with the exceptions or additional filings provided in §7.68(k). Section 7.68(k) is also necessary to require foreign fraternal benefit societies to complete and file the annual and quarterly statement blanks, forms, and electronic filings described in §7.68(h), with the exceptions or additional filings provided in §7.68(k).

Section 7.68(l) is necessary to require each domestic title insurance company to complete and file the annual and quarterly statement blanks, forms, and electronic filings described in §7.68(f). Section 7.68(l) is also necessary to require each foreign title insurance company to complete and file the annual and quarterly statement blanks, forms, and electronic filings described in §7.68(h).

Section 7.68(m) is necessary to require each domestic health maintenance organization licensed pursuant to the Insurance Code Chapter 843 and each domestic insurer that is subject to life insurance statutes and is permitted or allowed to do the business of health maintenance organizations to complete and file the annual and quarterly statement blanks, forms, and electronic filings described in §7.68(f) and the additional filings specified in §7.68(m). Section 7.68(m) is also necessary to require each foreign health maintenance organization licensed pursuant to the Insurance Code Chapter 843 and each domestic insurer that is subject to life insurance statutes and is permitted or allowed to do the business of health maintenance organizations to complete and file the annual and quarterly statement blanks, forms, and electronic filings described in §7.68(h) and the additional filings specified in §7.68(m).

Section 7.68(n) is necessary to enumerate the Texas-specific annual statement filing requirements for farm mutual insurance companies not subject to §7.68(j).

Section 7.68(o) is necessary to enumerate the Texas-specific annual statement filing requirements for statewide mutual assessment associations, local mutual aid associations, mutual burial associations, and exempt associations.

Section 7.68(p) is necessary to state the Texas-specific annual statement filing requirements for nonprofit legal service corporations.

Section 7.68(q) is necessary to specify the Texas-specific annual statement filing requirements for Mexican casualty insurance companies.

Section 7.68(r) is necessary to clarify that nothing in §7.68 prohibits the Department from requiring any insurer or other regulated entity from filing other financial reports with the Department or the NAIC.

Section 7.68(s) is necessary to outline a process for annual notice of the annual, quarterly, and supplemental filing checklists that reference the latest editions of the annual statement, quarterly statement, forms and instructions adopted by the NAIC and the Texas-specific filing forms and instructions. Section 7.68(s) is also necessary to address a process for any interested person to petition the Department for the adoption of a rule amendment to §7.68 under 28 TAC §1.60 (relating to Petition for Adoption of Rules), or its successor, for exceptions to the latest editions of the blanks, supplemental reporting forms, and instructions adopted by the NAIC or the Department.

Simultaneously with the adoption of this new section, the Department is adopting the repeal of existing §7.68, which is also published in this issue of the *Texas Register.*

On November 29, 2011, the Department posted a draft rule for informal comment, concerning requirements for the filing of the annual statements, the quarterly statements, other reporting forms, and electronic data filings with the Department and the NAIC. The Department also disseminated the draft informal rule to various stakeholders for the opportunity to comment.

In response to a written comment on the published proposal, the Department has changed some of the proposed language in the text of the rule as adopted. The Department has also changed some of the proposed language to make minor editorial changes for purposes of clarification and consistency, to conform to agency style, and to correct several typographical errors. None of these changes materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice. The following changes are made to the proposed text.

The Department has changed the catchline of §7.68(g) to "General filing requirements for foreign health maintenance organizations and foreign insurers doing health maintenance organization business." The new catchline better reflects the content of the subsection. The Department has made similar changes to the catchlines of §7.68(b), (d) - (f), and (h) - (s).

The Department has added a comma to follow the word "accident" in the catchline for redesignated §7.68(i). Additionally, the Department has broken down the list in the first sentence of §7.68(i) by inserting the words "and each" following the list item addressing different variations of life, accident, and health insurance companies. Additional punctuation changes are made in the rest of the sentence for consistency with the change.

The Department has changed proposed §7.68(i) and (m) in response to a comment that under proposed §7.68(i) and (m), it is unclear if foreign accident and health insurers or foreign insurers doing HMO business are required to file the supplemental compensation exhibit under proposed §7.68(f)(6). Section 7.68(i) and (m) as adopted clarify that foreign accident and health insurers and foreign insurers doing HMO business are not required to submit the supplemental compensation agreement. The Department has made similar clarifications to §7.68(j) - (l) as adopted to more clearly state that foreign property and casualty insurers, foreign fraternal benefit societies, and foreign title insurers, respectively, are not required to submit the supplemental compensation agreement.

The Department has redesignated §7.68(i)(5)(C) as §7.68(i)(6), and has changed §7.68(i)(5)(A) and (B) to make grammatical corrections. Additionally, the Department has changed redesignated §7.68(i)(6) to clarify that the insurer ceding business to a limited purpose subsidiary life insurance company, not the limited purpose subsidiary life insurance company itself, is required to annually file with the Department the actuarial certification specified under the Insurance Code §841.419. These changes make the provisions consistent with the statutory actuarial certification filing requirements in §841.419.

The Department has inserted necessary indefinite articles and revised punctuation in §7.68(j).

The Department has added the phrase "of this section" in the first sentence of §7.68(k) and in the first sentence of §7.68(l) to conform to agency style.

The Department has changed the catchline of §7.68(n) by replacing two references to subsection (f) with references to subsection (j). These changes are necessary to more accurately reflect filings requirements that may apply to a farm mutual insurance company that filed a property and casualty annual statement for the previous calendar year or had gross written premiums in excess of $6 million for the current calendar year.

The Department has inserted a comma in the first sentence of §7.68(s) and removed two commas to correct punctuation.

Section 7.68(a) explains the purpose of the section.

Section 7.68(b) explains the scope and applicability of the section.

Section 7.68(c) defines the term "Texas Edition" as the blanks and forms promulgated by the Commissioner.

Section 7.68(d) adopts by reference the NAIC and Texas-specific forms and instruction manuals listed in the section.

Section 7.68(e) specifies the hierarchy of laws in the event of a conflict between the Insurance Code, §7.68, and other Department regulations and the NAIC instructions specified in the section.

Section 7.68(f) specifies the annual and quarterly filing requirements applicable to every domestic carrier described in §7.68(i) - (m).

Section 7.68(g) requires each foreign HMO and foreign insurer permitted or allowed to do the business of HMOs in Texas to make the filings specified in §7.68(f)(1) - (4) electronically with the NAIC and in paper copy with the Department. Section 7.68(g) further requires each foreign HMO and foreign insurer permitted or allowed to do the business of HMOs in Texas to make the filings specified in §7.68(m) electronically and in paper copy with the Department.

Section 7.68(h) enumerates the annual and quarterly filing requirements applicable to every foreign carrier described in §7.68(i) - (l).

Section 7.68(i) requires each domestic life; life and accident; life and health; accident; accident and health; mutual life; or

life, accident, and health insurance company and each domestic stipulated premium company, limited purpose subsidiary life insurance company, domestic group hospital service corporation, and the Texas Health Insurance Pool to complete and file the blanks, forms, and electronic filings with the NAIC and the Department, as directed in §7.68(f), with the exceptions or additional filings provided in §7.68(i). Section 7.68(i) also requires each foreign life; life and accident; life and health; accident; accident and health; mutual life; or life, accident and health insurance company and each foreign stipulated premium company and foreign group hospital service corporation to complete and file the blanks, forms, and electronic filings with the NAIC and the Department, as directed in §7.68(h), with the exceptions or additional filings provided in §7.68(i).

Section 7.68(j) requires each domestic fire, fire and marine, general casualty, fire and casualty, or U.S. branch of an alien insurer, a domestic county mutual insurance company, a domestic mutual insurance company other than life, a domestic Lloyd's plan, a domestic reciprocal or inter insurance exchange, a domestic risk retention group, a domestic life insurance company that is licensed to write workers' compensation, any domestic farm mutual insurance company that filed a property and casualty annual statement for the previous calendar year or had gross written premiums in excess of $6 million for the current calendar year, a domestic joint underwriting association, the Texas Mutual Insurance Company, the Texas Windstorm Insurance Association, and the Texas FAIR Plan Association to complete and file the blanks, forms, and electronic filings with the NAIC and the Department, as directed in §7.68(f) and this subsection. Section 7.68(j) also requires each foreign fire, fire and marine, general casualty, fire and casualty, or U.S. branch of an alien insurer, a foreign county mutual insurance company, a foreign mutual insurance company other than life, a foreign Lloyd's plan, a foreign reciprocal or inter insurance exchange, a foreign life insurance company that is licensed to write workers' compensation, and any foreign farm mutual insurance company that filed a property and casualty annual statement for the previous calendar year or had gross written premiums in excess of $6 million for the current calendar year to complete and file the blanks, forms, and electronic filings with the NAIC and the Department, as directed in §7.68(h) and this subsection.

Section 7.68(k) requires domestic fraternal benefit societies to complete and file the blanks, forms, and electronic filings described in §7.68(f), with the exceptions or additional filings provided in §7.68(k). Section 7.68(k) also requires foreign fraternal benefit societies to complete and file the blanks, forms, and electronic filings described in §7.68(h), with the exceptions or additional filings provided in §7.68(k).

Section 7.68(l) requires each domestic title insurance company to complete and file the blanks, forms, and electronic filings described in §7.68(f). Section 7.68(l) also requires each foreign title insurance company to complete and file the blanks, forms, and electronic filings described in §7.68(h).

Section 7.68(m) requires each domestic health maintenance organization licensed pursuant to the Insurance Code Chapter 843 and each domestic insurer that is subject to life insurance statutes and is permitted or allowed to do the business of health maintenance organizations to complete and file the blanks, forms, and electronic filings described in §7.68(f) and the additional filings specified in §7.68(m). Section 7.68(m) also requires each foreign health maintenance organization licensed pursuant to the Insurance Code Chapter 843 and each foreign insurer that is subject to life insurance statutes and is permitted or allowed to do the business of health maintenance organizations to complete and file the blanks, forms, and electronic filings described in §7.68(g) and the additional filings specified in §7.68(m).

Section 7.68(n) enumerates the Texas-specific filing requirements for farm mutual insurance companies not subject to §7.68(j).

Section 7.68(o) enumerates the Texas-specific filing requirements for statewide mutual assessment associations, local mutual aid associations, mutual burial associations, and exempt associations.

Section 7.68(p) states the Texas-specific filing requirements for nonprofit legal service corporations.

Section 7.68(q) specifies the Texas-specific filing requirements for Mexican casualty insurance companies.

Section 7.68(r) provides that nothing in §7.68 prohibits the Department from requiring any insurer or other regulated entity from filing other financial reports with the Department or the NAIC.

Section 7.68(s) outlines a process for annual notice of the annual, quarterly, and supplemental filing checklists that reference the latest editions of the annual statement, quarterly statement, forms and instructions adopted by the NAIC and the Texas-specific filing forms and instructions. Section 7.68(s) further addresses a process for any interested person to petition the Department for the adoption of a rule amendment to this section under 28 TAC §1.60 (relating to Petition for Adoption of Rules), or its successor, for exceptions to the latest editions of the blanks, supplemental reporting forms, and instructions adopted by the NAIC or the Department.

§7.68(i) and (m).

Comment: One commenter states that based upon the proposed text in §7.68(i) and (m), it is unclear whether foreign accident and health insurers or foreign insurers doing HMO business are required to file the supplemental compensation exhibit under §7.68(f)(6). The commenter recommends that the Department revise the language to more clearly reflect what is intended. The commenter further states that requiring foreign insurers to file the supplemental compensation exhibit would change current Texas requirements, and the commenter expresses concern that the Department is not able to maintain the confidentiality of this filing.

Agency Response: The Department agrees that the language in §7.68(i) and (m) as proposed is unclear and has changed §7.68(i) and (m) to more clearly state that foreign accident and health insurers and foreign insurers doing HMO business are not required to submit the supplemental compensation agreement. The Department has made similar clarifications to §7.68(j) - (l) as adopted to more clearly state that foreign property and casualty insurers, foreign fraternal benefit societies, and foreign title insurers, respectively, are not required to submit the supplemental compensation agreement.

Neither for nor against, with suggested changes: Texas Association of Life and Health Insurers.

The new section is adopted under the following provisions of the Insurance Code. Sections 802.001 - 802.003 and 802.051 - 802.056 authorize the Commissioner to make changes in the forms of the annual statements required of insurance companies of any kind, as shall seem best adapted to elicit a true

exhibit of their condition and methods of transacting business, and require certain insurers to make filings with the NAIC. Chapters 2201, 2210, and 2211 and §§841.255, 841.410(b) and (c), 841.414, 841.420, 842.003, 842.201, 842.202, 843.151, 843.155, 861.254, 861.255, 862.001, 862.003, 882.001, 882.003, 883.002, 883.204, 884.256, 885.401, 885.403 - 885.406, 886.107, 887.009, 887.060, 887.401 - 887.407, 911.001, 911.304, 912.002, 912.201 - 912.203, 912.301, 941.252, 942.201, 961.002, 961.003, 961.052, 961.202, 982.004, 982.101, 982.103, 982.251 - 982.254, 984.101 - 984.103, 984.153, 984.201, 984.202, 1301.009, 1506.057, 1506.058, 2210.008, 2210.101, 2210.102, 2210.152, 2211.058, 2551.001, and 2551.152 require the filing of financial reports and other information by insurers and other regulated entities and provide specific rulemaking or regulatory authority to the Commissioner relating to those insurers and other regulated entities.

Sections 982.001, 982.002, 982.004, 982.052, 982.102 - 982.104, 982.106, 982.108, 982.110 - 982.112, 982.201 - 982.204, 982.251 - 982.255, and 982.302 - 982.306 provide the conditions under which foreign and alien insurers are permitted to do business in this state and require foreign and alien insurers to comply with the provisions of the Insurance Code. Sections 844.001 - 844.005, 844.051 - 844.054, and 844.101 specify statutory requirements relating to nonprofit health corporations and authorize the Commissioner to adopt rules to implement the regulation of nonprofit health corporations holding a certificate of authority under the Insurance Code, Title 2, Chapter 844.

Section 2210.008 authorizes the Commissioner to adopt rules in the manner prescribed in the Insurance Code, Chapter 36, Subchapter A, as reasonable and necessary to implement Chapter 2210. Section 2210.101 provides that the board of directors of the Texas Windstorm Insurance Association is responsible and accountable to the Commissioner. Section 2210.102 requires the Commissioner to appoint the board of directors of the Texas Windstorm Insurance Association. Section 2210.152 requires the plan of operation for the Texas Windstorm Insurance Association to provide for the efficient, economical, fair, and nondiscriminatory administration of the Association and to include provisions as considered necessary by the Department to implement the purposes of Chapter 2210.

Section 2211.057 charges the Commissioner with the authority to supervise the Texas FAIR Plan Association and the inspection bureau. Section 2211.057(1) grants the Commissioner the power to examine the operations of the Texas FAIR Plan Association and the inspection bureau through free access to all books, records, files, papers, and documents related to the operation of the Texas FAIR Plan Association and the inspection bureau. Section 2210.057(4) grants the Commissioner the power to require reports from the Texas FAIR Plan Association concerning the risks the Texas FAIR Plan Association insurers under Chapter 2211 as the Commissioner considers necessary.

Section 421.001 requires insurers to establish adequate reserves and provides for the adoption of each current formula for establishing reserves applicable to each line of insurance. Section 32.041 requires the Department to furnish the statement blanks and other reporting forms necessary for companies to comply with the filing requirements. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§7.68. Requirements for Filing the Annual Statements, the Quarterly Statements, Other Reporting Forms, and Electronic Filings with the Texas Department of Insurance and the NAIC.

(a) Purpose. This section specifies the requirements for insurers and other regulated entities to file the annual statements, the quarterly statements, other reporting forms, and electronic data filings with the department and the National Association of Insurance Commissioners (NAIC) necessary to report information concerning the financial condition and business operations and activities of insurers.

(b) Scope and applicability. This section applies to all insurers and certain other regulated entities authorized to do the business of insurance in this state and includes, but is not limited to, life insurers; accident insurers; life and accident insurers; life and health insurers; accident and health insurers; life, accident and health insurers; mutual life insurers; stipulated premium insurers; limited purpose subsidiary life insurance companies under the Insurance Code Chapter 841, Subchapter I; group hospital service corporations; fire insurers; fire and marine insurers; U.S. branches of alien insurers; Mexican casualty insurers; general casualty insurers; fire and casualty insurers; mutual insurers other than life; statewide mutual assessment companies; local mutual aid associations; mutual burial associations; exempt associations; county mutual insurers; Lloyd's plans; reciprocal and inter-insurance exchanges; domestic risk retention groups; domestic joint underwriting associations; title insurers; fraternal benefit societies; farm mutual insurers; health maintenance organizations; nonprofit health corporations; nonprofit legal services corporations; the Texas Health Insurance Pool; the Texas Mutual Insurance Company; the Texas Windstorm Insurance Association; and the Texas FAIR Plan Association. Insurers and other regulated entities must properly report each calendar year to the department and the NAIC by completing, in accordance with applicable instructions, the appropriate paper copy annual and quarterly statement blanks, other reporting forms, and electronic filings specified in this section. This section shall be applicable to annual filings with the department and the NAIC, beginning with the year ending December 31, 2011, and each year thereafter; and to the quarterly filings with the department and the NAIC, beginning with the quarter ending on March 31, 2012, and each quarter thereafter.

(c) Definition. In this section, "Texas Edition" refers to the blanks and forms promulgated by the commissioner.

(d) NAIC and TDI specific forms and instructions. The commissioner adopts by reference the annual statement blanks, the quarterly statement blanks, the annual and quarterly supplemental reporting forms, and the related instruction manuals as adopted and published by the NAIC each year; and the Texas-specific reporting forms specified in this section. The Texas-specific forms are available from the Texas Department of Insurance, Financial Regulation Division, Financial Analysis, Mail Code 303-1A, P.O. Box 149104, Austin, Texas 78714-9104. Copies of the latest editions of the blanks, supplemental reporting forms, and related instruction manuals adopted and published by the NAIC may be obtained from the NAIC, and can be filed electronically using software available from vendors.

(e) Conflicts with other laws. In the event of a conflict between the Insurance Code, any currently existing department rule, form, instructions, or any specific requirement of this section and the NAIC instructions listed in this section, the Insurance Code, the department rule, form, instruction, or the specific requirements of this section shall take precedence and in all respects control.

(f) General filing requirements for domestic insurers and other domestic regulated entities. Every domestic insurer and other domestic regulated entity must complete and file the following reports and forms using the latest editions of the annual and quarterly statement blanks, forms, and related instruction manuals adopted by the NAIC that are

appropriate for the type of business written by the insurer or regulated entity:

(1) an annual statement, in paper copy with the department and electronically with the NAIC, due on or before March 1 for the preceding year ending December 31;

(2) quarterly statements, in paper copy with the department and electronically with the NAIC, due on or before May 15, August 15, and November 15;

(3) all the annual and quarterly supplements adopted by the NAIC including, but not limited to, the Management's Discussion and Analysis, in paper copies with the department and electronically with the NAIC, prepared and filed in accordance with and on or before dates specified in the latest editions of the forms, instructions, and guidelines adopted by the NAIC;

(4) a Statement of Actuarial Opinion, in paper copy with the department and electronically with the NAIC, due on or before March 1 for the preceding year ending December 31;

(5) a Schedule SIS, in paper copy only with the department, due on or before March 1 for the preceding year ending December 31;

(6) a Supplemental Compensation Exhibit, in paper copy only with the department, due on or before March 1 for the preceding year ending December 31;

(7) a Texas Overhead Assessment Exemption Form (Texas Edition), in paper copy only with the department, due on or before March 1 for the preceding year ending December 31. This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed;

(8) an Analysis of Surplus (Texas Edition), in paper copy only with the department, due on or before March 1 for the preceding year ending December 31; and

(9) an advertising certificate of compliance with its annual statement filing, in paper copy only with the department, prepared and filed in accordance with §21.116 of this title (relating to Special Enforcement Procedures for Rules Governing Advertising and Solicitation of Insurance).

(g) General filing requirements for foreign health maintenance organizations and foreign insurers doing health maintenance organization business. Every foreign health maintenance organization and foreign insurer permitted or allowed to do the business of health maintenance organizations must file the filings specified in subsection (f)(1) - (4) of this section electronically with the NAIC and in paper copy with the department; and the filings specified in subsection (m) of this section electronically and in paper copy with the department.

(h) General filing requirements for foreign insurers and other foreign regulated entities. Each foreign insurer or other foreign regulated entity described in subsections (i) - (l) of this section:

(1) must prepare and file electronically with the NAIC the filings specified in subsection (f)(1) - (4) of this section on or before the due dates required under those provisions;

(2) if filing only electronically with the NAIC and not filing a paper copy with the department, must file with the department, in paper copy, a signed annual statement jurat page, along with the advertising certificate of compliance required under §21.116 of this title, on or before March 1; and a signed jurat page for each quarter on or before May 15, August 15, and November 15, respectively, in lieu of filing the entire paper filings;

(3) the commissioner reserves the right to request paper copies of any paper or electronic filings made by foreign companies in their state of domicile or the NAIC; and

(4) a foreign insurer that is classified as a commercially domiciled insurer under the Insurance Code §823.004 annually must file an Analysis of Surplus (Texas Edition) in paper copy with the department, on or before March 1 for the prior year ending December 31.

(i) Filing requirements for life, accident and health insurers. Each domestic life; life and accident; life and health; accident; accident and health; mutual life; or life, accident, and health insurance company and each domestic stipulated premium company, limited purpose subsidiary life insurance company, group hospital service corporation, and the Texas Health Insurance Pool must complete and file the blanks, forms, and electronic filings as directed in subsection (f) of this section and this subsection. Each foreign life; life and accident; life and health; accident; accident and health; mutual life; or life, accident and health insurance company and each foreign stipulated premium company and foreign group hospital service corporation must complete and file the blanks, forms, and electronic filings as directed in subsection (h) of this section and this subsection. The electronic filings of these forms or reports with the NAIC must be completed and filed in accordance with the NAIC data specifications and instructions for electronic filing and must include PDF format filing. Insurers and other regulated entities specified in this subsection and engaged in business authorized under the Insurance Code Chapters 843 or 848 may have additional reporting requirements under subsections (g) and (m) of this section. Domestic insurers or other regulated entities described in this subsection, and foreign insurers or other regulated entities described in this subsection must prepare and file the reports and forms specified in subsections (f) and (h) of this section, respectively, with the following exceptions or additional filings:

(1) a separate accounts annual statement (required of companies maintaining separate accounts), in paper copy with the department and electronically with the NAIC, due on or before March 1 for the preceding year ending December 31.

(2) for stipulated premium companies not subject to the Insurance Code §884.406, all filings with due dates of March 1 under subsections (f) or (h) of this section, are due on or before April 1. Additionally, a stipulated premium company, unless specifically requested to do so by the department, is not required to file quarterly data filings with the department or with the NAIC, if it meets all three of the following conditions:

(A) it is authorized to write only life insurance on its certificate of authority;

(B) it collected premiums in the prior calendar year of less than $1 million; and

(C) it had a profit from operations in the prior two calendar years.

(3) The Statement of Actuarial Opinion required under subsections (f)(4) and (h)(1) of this section must be prepared and filed in accordance with the following:

(A) Companies filing the NAIC Life, Accident and Health Annual Statement and the Statement of Actuarial Opinion, attached to the NAIC Life, Accident and Health Annual Statement must follow the applicable provisions of Chapter 3, Subchapter Q, of this title (relating to Actuarial Opinion and Memorandum Regulation), except for companies exempted from the asset adequacy analysis pursuant to §3.1608 of this title (relating to Asset Adequacy Analysis Exemption). Notwithstanding §3.1608 of this title, limited purpose subsidiary life insurance companies annually must prepare and file the

asset adequacy analysis required under Chapter 3, Subchapter Q of this title. For those companies exempted from the asset adequacy analysis pursuant to §3.1608 of this title, the format provided by instructions 1 - 12 of the NAIC Annual Statement Instructions, Life, Accident and Health, must be followed.

(B) Companies filing the NAIC Health Annual Statement and the Statement of Actuarial Opinion attached to the NAIC Health Annual Statement must follow the NAIC Annual Statement Instructions, Health. In addition, for those companies not exempted from the asset adequacy analysis pursuant to §3.1608 of this title, the Statement of Actuarial Opinion must follow the applicable provisions of §§3.1601 - 3.1608 of this title that are not covered in the NAIC Annual Statement Instructions, Health, including those provisions relating to asset adequacy analysis.

(C) Any company required by §3.4505(b)(3)(G) of this title (relating to General Calculation Requirements for Basic Reserves and Premium Deficiency Reserves) to opine on the application of X factors, must attach this opinion to the NAIC Life, Accident and Health Annual Statement or the NAIC Health Annual Statement, as applicable.

(4) The Texas Health Insurance Pool must prepare and file the following, in paper copies only with the department:

(A) the NAIC Health Annual Statement with only pages 1 - 6, and Schedule E Part 1, Part 2, and Part 3 to be completed and filed on or before March 1 for the preceding year ending December 31; and

(B) the NAIC Health Quarterly Statements, with only pages 1 - 6, Schedule E, Part 1 - Cash, and Part 2 - Cash Equivalents to be completed and filed on or before May 15, August 15, and November 15;

(5) Each limited purpose subsidiary life insurance company must complete and file:

(A) the paper copy filings with the department and the electronic filings with the NAIC specified under subsection (f)(1) - (9) of this section; and

(B) an actuarial memorandum and a regulatory asset adequacy issues summary, in paper copy only with the department, in accordance with and on or before the due dates provided in Chapter 3, Subchapter Q, of this title; and

(6) An insurer ceding business to a limited purpose subsidiary life insurance company must file the actuarial certification required under the Insurance Code §841.419, in paper copy only with the department, due on or before March 1 for the preceding year ending December 31.

(j) Requirements for certain property and casualty insurers. Each domestic fire, fire and marine, general casualty, fire and casualty, or U.S. branch of an alien insurer, a domestic county mutual insurance company, a domestic mutual insurance company other than life, a domestic Lloyd's plan, a domestic reciprocal or inter insurance exchange, a domestic risk retention group, a domestic life insurance company that is licensed to write workers' compensation; any domestic farm mutual insurance company that filed a property and casualty annual statement for the previous calendar year or had gross written premiums in excess of $6 million for the current calendar year, a domestic joint underwriting association, the Texas Mutual Insurance Company, the Texas Windstorm Insurance Association, and the Texas FAIR Plan Association must complete and file the blanks, forms, and electronic filings as described in subsection (f) of this section and this subsection. Each foreign fire, fire and marine, general casualty, fire and casualty, or U.S. branch of an alien insurer, a foreign county mutual insurance company, a foreign mutual insurance company other than life, a foreign Lloyd's plan, a foreign reciprocal or inter insurance exchange, a foreign life insurance company that is licensed to write workers' compensation, and any foreign farm mutual insurance company that filed a property and casualty annual statement for the previous calendar year or had gross written premiums in excess of $6 million for the current calendar year must complete and file the blanks, forms, and electronic filings as described in subsection (h) of this section and this subsection. The electronic filings with the NAIC must be completed and filed in accordance with the NAIC data specifications and instructions and must include PDF format filing, as applicable. Domestic insurers or other regulated entities described in this subsection and foreign insurers or other regulated entities described in this subsection annually must prepare and file the reports and forms specified in subsections (f) and (h) of this section, respectively, with the following exceptions or additional filings:

(1) a combined property/casualty annual statement, if required, due on or before May 1, for the preceding year ending December 31, in paper copy with the department and electronically with the NAIC. The combined property/casualty annual statement is required only for those affiliated insurers that wrote more than $35 million in direct premiums as a group in the previous calendar year, as disclosed in Schedule T of the NAIC annual statement(s).

(2) an Actuarial Opinion Summary prepared and filed in accordance with §7.9 of this subchapter (relating to Examination of Actuarial Opinion for Property and Casualty Insurers).

(3) for Texas county mutual insurance companies, a Texas Supplement for County Mutuals (Texas Edition) and a Texas Supplemental "A" for County Mutuals (Texas Edition), in paper copy only with the department, due on or before March 1. Texas county mutual insurance companies are not required to file an Analysis of Surplus (Texas Edition) as described in subsection (f)(8) of this section.

(4) The Texas Windstorm Insurance Association must complete and file in paper copy with the department and electronically with the NAIC the filings specified under subsection (f) of this section and paragraph (2) of this subsection, on or before the due dates required under those provisions. Additionally, the Texas Windstorm Insurance Association must prepare and file in paper copy with the department only:

(A) annual financial statements for each year ending December 31, due on or before March 1, in accordance with the Insurance Code Chapter 2210, prepared in accordance with generally accepted accounting principles as prescribed or modified by the Governmental Accounting Standards Board or its successor, and in compliance with the Government Code §2101.011(d) and any related regulations, guidelines, procedures, or reporting requirements prescribed by the Comptroller of Public Accounts; and

(B) quarterly financial statements for the first three quarters of each calendar year, due on or before May 15, August 15, and November 15, prepared in accordance with generally accepted accounting principles as prescribed or modified by the Governmental Accounting Standards Board or its successor.

(5) Notwithstanding §5.9927 of this title (relating to Annual and Quarterly Financial Statements), the Texas FAIR Plan Association must complete and file in paper copy with the department and electronically with the NAIC the filings specified under subsection (f) of this section and paragraph (2) of this subsection, except that the annual statements, the Statement of Actuarial Opinions, and all annual supplements due on or before March 1 under the NAIC instructions are due on or before March 31; and the Actuarial Opinion Summary is due on or before April 15.

(6) An insurer that files an application with the department for approval of a policyholder dividend must file an Analysis of Surplus (Texas Edition) for property and casualty insurers with the application.

(k) Requirements for fraternal benefit societies. Each domestic fraternal benefit society must complete and file the blanks, forms, and electronic filings as described in subsection (f) of this section and this subsection. Each foreign fraternal benefit society must complete and file the blanks, forms, and electronic filings as described in subsection (h) of this section and this subsection. The electronic data filings with the NAIC must be completed and filed in accordance with the NAIC data specifications and instructions and must include PDF format filing. Domestic insurers or other regulated entities described in this subsection and foreign insurers or other regulated entities described in this subsection must prepare and file the reports and forms specified in subsections (f) and (h) of this section, respectively, with the following exceptions or additional filings:

(1) a separate accounts annual statement (required of companies maintaining separate accounts), in paper copy with the department and electronically with the NAIC, due on or before March 1 for the preceding year ending December 31.

(2) The Statement of Actuarial Opinion required under subsections (f)(4) and (h)(1) of this section must be prepared in accordance with the following:

(A) The Statement of Actuarial Opinion, attached to the Fraternal Annual Statement, must follow the applicable provisions of §§3.1601 - 3.1608 of this title, except for companies exempted from the asset adequacy analysis pursuant to §3.1608 of this title. For those companies exempted from the asset adequacy analysis pursuant to §3.1608 of this title, the format provided by instructions 1 - 12 of the NAIC Fraternal Annual Statement Instructions must be followed; and

(B) Any company required by §3.4505(b)(3)(G) of this title to opine on the application of X factors, shall attach this opinion to the NAIC Fraternal Annual Statement, as applicable.

(l) Requirements for title insurers. Each domestic title insurance company must complete and file the blanks, forms, and electronic filings as described in subsection (f) of this section and this subsection. Each foreign title insurance company must complete and file the blanks, forms, and electronic filings as described in subsection (h) of this section and this subsection. The electronic filings with the NAIC must be completed and filed in accordance with the NAIC data specifications and instructions and must include PDF format filing.

(m) Requirements for health maintenance organizations. Each domestic health maintenance organization licensed pursuant to the Insurance Code Chapter 843 and each insurer that is subject to life insurance statutes and is permitted or allowed to do the business of health maintenance organizations must complete and file the following blanks, forms, and electronic filings as described in subsection (f) of this section and this subsection. Each foreign health maintenance organization licensed pursuant to the Insurance Code Chapter 843 and each foreign insurer that is subject to life insurance statutes and is permitted or allowed to do the business of health maintenance organizations must complete and file the following blanks, forms, and electronic filings as described in subsection (g) of this section and this subsection. The electronic filings with the NAIC must be completed and filed in accordance with NAIC data specifications and instructions and must include PDF format filing. The Texas specific electronic filings regarding HMO data requested by the department must be completed and filed in accordance with the instructions provided by the department. Domestic health maintenance organizations and insurers described in this section and foreign health maintenance organizations and insurers described in this section must prepare and file the reports and forms specified in subsections (f) and (g) of this section, respectively, with the following additional filings:

(1) with each quarterly statement filing with the department and the NAIC, include an up-to-date and completed Schedule E, Part 3 - Special Deposits, utilizing the format from the Health Annual Statement;

(2) a Texas HMO Supplement Annual (Texas Edition), in paper copy and electronically only with the department, due on or before March 1, containing annual data for the preceding year ending December 31, to be completed according to the instructions provided by the department; and

(3) a Texas HMO Supplement Quarterly (Texas Edition), due on or before May 15, August 15, and November 15, in paper copy and electronically only with the department, containing quarterly statement data, to be completed according to the instructions provided by the department.

(n) Requirements for farm mutual insurers not subject to the provisions of subsection (j) of this section. Farm mutual insurance companies not subject to subsection (j) of this section annually must complete and file the following blanks and forms with the department only, on or before March 1 for the preceding year ending December 31:

(1) Annual Statement (Texas Edition);

(2) Texas Overhead Assessment Exemption Form (Texas Edition). This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed; and

(3) Statement of Actuarial Opinion, unless exempted under §7.31 of this subchapter (relating to Annual Statement Instructions for Farm Mutual Insurance Companies).

(o) Requirements for statewide mutual assessment associations, local mutual aid associations, mutual burial associations, and exempt associations. Each statewide mutual assessment association, local mutual aid association, mutual burial association, and exempt association must complete and file the following blanks and forms with the department only, on or before April 1 for the preceding year ending December 31:

(1) Annual Statement (Texas Edition) (exempt companies are required to complete all pages except lines 22, 23, 24, 25, and 26 on page 3, the special instructions at the bottom of page 3, and pages 4 - 7);

(2) Texas Overhead Assessment Exemption Form (Texas Edition). This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed;

(3) Release of Contributions Form (Texas Edition);

(4) 3-1/2 Percent Chamberlain Reserve Table (Reserve Valuation) (Texas Edition);

(5) Reserve Summary (1956 Chamberlain Table 3-1/2 Percent) (Texas Edition);

(6) Inventory of Insurance in Force by Age of Issue or Reserving Year (Texas Edition); and

(7) Summary of Inventory of Insurance in Force by Age and Calculation of Net Premiums (Texas Edition).

(p) Requirements for nonprofit legal service corporations. Each nonprofit legal service corporation doing business as authorized by a certificate of authority issued under the Insurance Code Chapter

961 annually must complete and file with the department only the following blanks and forms for the preceding year ending December 31. An actuarial opinion is not required. The following forms are to be filed on or before March 1:

(1) Annual Statement (Texas Edition); and

(2) Texas Overhead Assessment Exemption Form (Texas Edition). This form is to be filed only by domestic insurance companies that have qualified pension contracts under the Insurance Code §401.151; otherwise, this form should not be filed.

(q) Requirements for Mexican casualty insurance companies. Each Mexican casualty insurance company doing business as authorized by a certificate of authority issued under the Insurance Code Chapter 984, annually must complete and file the following blanks and forms with the department only for the preceding year ending December 31. All submissions must be printed or typed in English and all monetary values must be clearly designated in United States dollars. The form identified in paragraph (1) of this subsection must be completed to the extent specified in paragraph (1) of this subsection and in accordance with the latest edition of the property and casualty annual statement instructions adopted by the NAIC. An actuarial opinion is not required. It is the express intent of this subsection that it shall not repeal or otherwise modify or amend any department rule or the Insurance Code. The following blanks or forms are to be filed on or before March 1:

(1) an annual statement using the latest edition of the property and casualty annual statement blank adopted by the NAIC; provided, however, only pages 1 - 4, and 104 (Schedule T) are required to be completed;

(2) a copy of the balance sheet and the statement of profit and loss from the Mexican financial statement (printed or typed in English);

(3) a copy of the official documents issued by the Comisión Nacional de Seguros y Fianzas approving the annual statement for the preceding year ending December 31; and

(4) a copy of the current license to operate in the Republic of Mexico.

(r) Other financial reports. Nothing in this section prohibits the department from requiring any insurer or other regulated entity from filing other financial reports with the department or the NAIC.

(s) Annual notice and opportunity to petition for adoption of a rule amendment to this section. The department annually will publish notice of the annual, quarterly, and supplemental filing checklists that reference the latest editions of the annual statement, quarterly statement, forms and instructions adopted by the NAIC and the Texas-specific filing forms and instructions. On or before 30 days after the department publishes its notice, any interested person may petition the department for the adoption of a rule amendment to this section under §1.60 of this title (relating to Petition for Adoption of Rules), or its successor, for exceptions to the latest editions of the blanks, supplemental reporting forms, and instructions adopted by the NAIC or the department.

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 February 9, 2012.

TRD-201200692

Sara Waitt
General Counsel
Texas Department of Insurance
Effective date: February 29, 2012
Proposal publication date: January 6, 2012
For further information, please call: (512) 463-6327

SUBCHAPTER D. RISK-BASED CAPITAL AND SURPLUS AND OTHER REQUIREMENTS

28 TAC §7.402

The Commissioner of Insurance (Commissioner) adopts amendments to §7.402, concerning risk-based capital and surplus requirements for insurers and health maintenance organizations (HMOs). The amendments are adopted without changes to the proposed text published in the December 30, 2011, issue of the *Texas Register* (36 TexReg 9177).

The amendments to §7.402 are necessary to implement and update the year-end 2011 risk-based capital and surplus requirements for property and casualty insurers, including county mutual insurance companies that do not meet the express criteria contained in the Insurance Code §912.056(f); life insurance companies, including limited purpose subsidiary life insurance companies; HMOs and insurers filing the National Association of Insurance Commissioners (NAIC) Health blank; and fraternal benefit societies by (i) clarifying the scope of the §7.402 risk-based capital and surplus requirements; (ii) adopting by reference the 2011 NAIC risk-based capital formulas and instructions to be used for year-end 2011; and (iii) specifying the filing requirements for the 2011 risk-based capital reports and supplemental reports and forms.

In particular, the amendments to §7.402 are necessary to require each domestic or foreign fraternal benefit society to file, for the first time, an electronic version of the 2011 fraternal risk-based capital report and any supplemental forms and reports with the NAIC. The amendments to §7.402 are further necessary to subject each domestic and foreign fraternal benefit society to a trend test. Additionally, the amendments to §7.402 are necessary to implement changes enacted by the 82nd Legislature, Regular Session, in House Bill (HB) 3161, effective June 17, 2011, by adding limited purpose subsidiary life insurance companies to the list of defined "carriers" that must comply with the section. Insurers and HMOs subject to §7.402 are referred to collectively in this proposal as "carriers."

The following paragraphs provide a brief summary and analysis of the reasons for the adopted amendments.

The amendments to §7.402 are necessary to regulate risk-based capital and surplus requirements for insurers and HMOs. The risk-based capital requirement is a method of ensuring that an insurer or HMO has an appropriate level of policyholder surplus after taking into account the underwriting, financial, and investment risks of a carrier. The updated NAIC risk-based capital formulas provide the Department with a widely used regulatory tool to identify the minimum amount of capital or surplus appropriate for an insurer or HMO to support its overall business operations in consideration of its size and risk exposure.

The amendments to §7.402(b) and (e) are necessary to specify the 2011 risk-based capital reporting requirements for insurers subject to §7.402. Specifically, the amendments clarify that

fraternal benefit societies, stipulated premium companies, and county mutual insurance companies that do not meet the express criteria contained in the Insurance Code §912.056(f) are required to file electronic versions of the 2011 risk-based capital reports and any supplemental risk-based capital forms and reports with the NAIC in accordance with and by the due dates specified in the risk-based capital instructions promulgated by the NAIC.

Under the previous version of §7.402, stipulated premium companies doing business only in Texas and county mutual insurance companies were required, for the first time, to file electronic versions of the 2010 risk-based capital reports with the NAIC by March 1, 2011. Under the amendments to §7.402(b) and (e), fraternal benefit societies are required, for the first time, to file electronic versions of the 2011 risk-based capital reports with the NAIC in accordance with and by the due date specified in the risk-base capital instructions promulgated by the NAIC.

The amendments to §7.402(b), (d), (e), and (g) further expand the risk-based capital requirements for domestic and foreign fraternal benefit societies. Specifically, the amendments to §7.402 add new subsection (g)(8), which imposes new substantive trend test requirements for fraternal benefit societies for year-end 2011, and each calendar year thereafter. New subsection (g)(8) subjects a fraternal benefit society to a trend test if its total adjusted capital to authorized control level risk-based capital is between 200 percent and 250 percent. In that case, and if any fraternal benefit society trends below 190 percent of total adjusted capital to authorized control level risk-based capital, it will be subject to the company action level requirements and will need to file additional reporting with the Department as a result of the trend test. This new requirement is necessary because it will allow early identification of a fraternal benefit society that is likely to reach a company action level in the following year. By triggering a company action level sooner, a fraternal benefit society can better plan for its capital needs, and the Department will receive information necessary to regulate solvency and protect the public interests.

The amendments to §7.402(b), (d), and (e) also are necessary to implement HB 3161, by specifying risk-based capital requirements for limited purpose subsidiary life insurance companies. HB 3161 added a new Subchapter I to Chapter 841 of the Insurance Code to authorize the establishment of domestic limited purpose subsidiary life insurance companies to enable those companies to support excess reserves for certain life insurance policies. Under the amendments to §7.402(b), (d), and (e) as adopted, each limited purpose subsidiary life insurance company is subject to the section's risk-based capital requirements for life insurers and will be required to file an electronic version of the 2011 risk-based capital report and any supplemental forms and reports with the NAIC in accordance with and by the due date specified in the risk-based capital instructions promulgated by the NAIC.

Under the amendments to §7.402(b), (d), and (e), a limited purpose subsidiary life insurance company is also subject to a trend test under §7.402(g)(5) if its total adjusted capital to authorized control level risk-based capital is between 200 percent and 250 percent. In that case, and if a limited purpose subsidiary life insurance company trends below 190 percent of total adjusted capital to authorized control level risk-based capital, it will be subject to the company action level requirements and will need to file additional reporting with the Department as a result of the trend test. This new requirement is necessary because it will allow for early identification of a limited purpose subsidiary life insurance company that is likely to reach a company action level in the following year. By triggering a company action level sooner, a limited purpose subsidiary life insurance company can plan better for its capital needs, and the Department will receive information necessary to regulate solvency and protect the public interests.

The amendments to §7.402(d) are also necessary to adopt by reference the 2011 NAIC risk-based capital formulas to be used for year-end 2011. These adopted formulas include the 2011 NAIC Life Risk-Based Capital Report Including Overview and Instructions for Companies, the 2011 NAIC Fraternal Risk-Based Capital Report Including Overview and Instructions for Companies, the 2011 NAIC Property and Casualty Risk-Based Capital Report Including Overview and Instructions for Companies, and the 2011 NAIC Health Risk-Based Capital Report including Overview and Instructions for Companies.

Copies of the documents 2011 NAIC risk-based capital formulas adopted by reference in §7.402(d) are available for inspection in Financial Analysis, Financial Regulation Division, Texas Department of Insurance, William P. Hobby Jr. State Office Building, Tower Number III, Third Floor, Mail Code 303-1A, 333 Guadalupe, Austin, Texas 78701. The 2011 NAIC formulas and instructions adopted and published by the NAIC may be obtained from the NAIC, and the 2011 NAIC RBC reports can be filed electronically using software available from vendors.

The amendments to §7.402(b) expand the scope of the risk-based capital requirements for domestic and foreign fraternal benefit societies and add limited purpose subsidiary life insurance companies to the list of defined carriers that must comply with the section.

The amendments to §7.402(d) adopt by reference the 2011 NAIC risk-based capital formulas, replacing the year-end 2009 formulas and year-end 2010 formulas. The amendments to §7.402(e) update the risk-based capital filing requirements for the various types of carriers. Specifically, under the amendments to §7.402(e), fraternal benefit societies are required, for the first time, to file electronic versions of the 2011 risk-based capital reports with the NAIC in accordance with and by the due date specified in the risk-base capital instructions promulgated by the NAIC.

The amendment to §7.402(g) updates the remedial actions that the Commissioner of Insurance may take against fraternal benefit societies depending on the results computed by the risk-based capital formula. New subsection (g)(8) subjects a fraternal benefit society to a trend test if its total adjusted capital to authorized control level risk-based capital is between 200 percent and 250 percent. In that case, and if any fraternal benefit society trends below 190 percent of total adjusted capital to authorized control level risk-based capital, it will be subject to the company action level requirements and will need to file additional reporting with the Department as a result of the trend test.

The Department did not receive any comments on the published proposal.

The amendments are adopted under the Insurance Code Chapters 404 and 441 and the Insurance Code §§822.210, 822.211, 841.205, 841.410(b) and (c), 841.414(c), 841.420, 843.404, 884.054, 884.206, 885.401, 982.105, 982.106, and 36.001. Chapter 404 addresses the duties of the Department when an insurer's solvency is impaired. Section 404.004 provides that the Commissioner's authority to increase any capital and

surplus requirements prevails over the general provisions of the Insurance Code relating to specific companies, and §404.005 authorizes the Commissioner to set standards for evaluating the financial condition of an insurer. Chapter 441 addresses the prevention of insurer delinquencies and insolvencies. Under §441.005, the Commissioner may adopt reasonable rules as necessary to implement and supplement the purposes of Chapter 441. Section 441.051 specifies "the circumstances in which an insurer is considered insolvent, delinquent, or threatened with delinquency" and includes certain statutorily specified conditions, including if an insurer's required surplus, capital, or capital stock is impaired to an extent prohibited by law.

Section 822.210 authorizes the Commissioner to adopt rules or guidelines to require an insurer to maintain capital and surplus levels in excess of statutory minimum levels to assure financial solvency of insurers for the protection of policyholders. Section 822.211 specifies the actions the Commissioner may take if an insurance company does not comply with the capital and surplus requirements of Chapter 822.

Section 841.205 authorizes the Commissioner to adopt rules or guidelines to require an insurer that writes life or annuity contracts or assumes liability on or indemnifies one person for any risk under an accident and health insurance policy, or a combination of these policies, in an amount that exceeds $10,000 to maintain capital and surplus levels in excess of statutory minimum levels to assure financial solvency of insurers for the protection of policyholders.

Section 841.410(b) and (c) require a limited purpose subsidiary life insurance company to comply with the risk-based capital requirements adopted by the Commissioner by rule, and maintain risk-based capital in an amount that is at least equal to 300 percent of the authorized control level of risk-based capital adopted by the Commissioner. Section 841.414(c) requires a limited purpose subsidiary life insurance company annually to file with the Commissioner a report of the limited purpose subsidiary life insurance company's risk-based capital level as of the end of the preceding calendar year containing the information required by the risk-based capital instructions adopted by the Commissioner. Section 841.420 requires the Commissioner to prescribe accounting and financial reporting requirements with regard to the limited purpose subsidiary life insurance company and any insurer as defined by §841.402 that organizes a limited purpose subsidiary life insurance company.

Section 843.404 authorizes the Commissioner to adopt rules to require a health maintenance organization to maintain a specific net worth based on factors listed in the statute to ensure financial solvency of health maintenance organizations for the protection of enrollees.

Section 884.054 specifies the capital stock and surplus requirements for stipulated premium insurance companies. Section 884.206 authorizes the Commissioner to adopt rules to require an insurer that writes or assumes life insurance, annuity contracts or accident and health insurance for a risk to one person in an amount that exceeds $10,000 to maintain capital and surplus levels in excess of statutory minimum levels to assure financial solvency of insurers for the protection of policyholders and insurers.

Section 885.401 requires each fraternal benefit society to file an annual report on the society's financial condition, including any information the Commissioner considers necessary to demonstrate the society's business and method of operation, and authorizes the Department to use the annual report in determining a society's financial solvency.

Section 982.105 specifies the capital, stock, and surplus requirements for foreign or alien life, health, or accident insurance companies. Section 982.106 specifies the capital, stock, and surplus requirements for foreign or alien insurance companies other than life, health, or accident insurance companies.

Section 36.001 authorizes the Commissioner to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

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 February 9, 2012.

TRD-201200693
Sara Waitt
General Counsel
Texas Department of Insurance
Effective date: February 29, 2012
Proposal publication date: December 30, 2011
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 1. PERMIT APPLICATION

30 TAC §116.128

The Texas Commission on Environmental Quality (TCEQ or commission) adopts new §116.128 *with changes* to the proposed text as published in the October 21, 2011, issue of the *Texas Register* (36 TexReg 7128).

Section 116.128(a), (b), (c)(1)(A)(i)(I) - (IX) and (XII) - (XIII), (c)(1)(B) - (F), (c)(2) - (4), (f), and (h) will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the State Implementation Plan (SIP). Section 116.128(c)(1)(A)(i)(X) - (XI), (d), (e), and (g) will not be submitted to the EPA.

Background and Summary of the Factual Basis for the Adopted Rule

House Bill (HB) 2694, 82nd Legislature, 2011, created new Texas Health and Safety Code (THSC), §382.059, Hearing and Decision on Permit Amendment Application of Certain Electric Generating Facilities, which establishes public notice and contested case hearing (CCH) requirements specifically

for permit amendment applications necessary to comply with a maximum achievable control technology (MACT) standard promulgated under Federal Clean Air Act (FCAA), §112. This new rule establishes public notice, comment, and CCH deadlines and procedures for permit amendment applications for electric generating facilities (EGFs) to comply with a MACT standard established by EPA under FCAA, §112. This rule action will implement HB 2694, §4.27 and §4.30. It provides an option for permit amendment application processing with statutorily established deadlines for preparation of a draft permit and a decision on the application by the commission, which is not a feature of the commission's existing public participation process established by HB 801, 77th Legislature, 2001. THSC, §382.059 provides specific time periods for TCEQ to draft a permit amendment, for persons to request a CCH on the draft amendment, and for the commission to act on the permit application. The scope of any hearing granted under THSC, §382.059 is limited to whether the control technology in the executive director's draft permit is the MACT to meet a standard promulgated under FCAA, §112.

On May 3, 2011, the EPA proposed, in 85 *Federal Register* 24976, a new MACT standard. The final rule was signed on December 21, 2011 for submittal to the *Federal Register* and applies to petroleum coke, fuel oil, and coal fired electric generating units (the EPA Utility MACT). The new Utility MACT will be effective 60 days after publication in the *Federal Register.* In Texas, the EPA Utility MACT is expected to affect a very small group of existing EGFs within the power generation sector, since there currently are a maximum of 20 permitted and operating petroleum coke, fuel oil, and coal fired electric generating sites, with approximately 41 combustion units, statewide that could potentially be affected by new §116.128. Natural gas-fired EGFs are not affected by either EPA's Utility MACT standard or this rule. In addition, EPA could adopt other MACT standards under FCAA, §112 that could require permit amendment applications that are subject to this new section.

Section 116.128 applies only to permit amendment applications submitted solely to allow an EGF to reduce emissions and comply with a requirement imposed by FCAA, §112 (42 United States Code (USC), §7412) to use applicable MACT. The applications shall be limited to changes in method of control for an existing electric utility steam generating unit, as defined in 40 Code of Federal Regulations (CFR) §63.42, for the purpose of achieving a MACT standard promulgated by EPA under FCAA, §112. The applications may request authorization for collateral increases in emissions that result from installation of this control technology. Amendment applications are subject to the requirements of Chapter 116, Subchapter B, Divisions 1, 4, 5, and 6, Permit Application, Permit Fees, Nonattainment Review Permits, and Prevention of Significant Deterioration Review, respectively, except that the public notice, public participation, and CCH requirements of this new rule will apply rather than the requirements in 30 TAC Chapters 39, 50, and 55, Public Notice, Action on Applications and Other Authorizations, and Requests for Reconsideration and Contested Case Hearings; Public Comment, respectively, except as otherwise specified. Although the adopted rule contains text that is similar to the commission's rules for public participation in those chapters, this rule is designed to include all required notice and CCH requirements to comply with the new statute.

Before certain changes are made to the EGF, including changes in control technology, a permit amendment is required, and the application is subject to review for best available control technology, and protection of the public's health and physical property (See THSC, §382.0518(a) and (b), and 30 TAC §116.116(b)). The requirement to obtain a permit amendment is included in the approved Texas SIP.

Any other changes in the method of control of emissions, the character of the emissions, or an increase in the emission rate of any air contaminant, including any concurrent projects undertaken by the owner or operator of EGFs not related to reducing emissions to comply with the requirements of MACT, must be submitted in a separate amendment application and that application will not be processed under §116.128.

The new statute requires the commission to provide an opportunity for a public hearing and the submission of public comment on the application in the manner provided by THSC, §382.0561. This section of the Texas Clean Air Act specifies the public notice and participation requirements for federal operating (Title V) permits by cross-references to the public notice section for new source review (NSR) permits found in THSC, §382.056. Therefore, applications filed under this new section are subject to specific requirements regarding newspaper publication, sign posting, and alternate language notice. This is implemented in subsection (c)(1). These requirements are consistent with the notice requirements in Chapter 39 that the commission has adopted as a proposed revision to the SIP for other amendment applications. The new statute also provides that the commission send notice of a decision on an application for a permit amendment under this section in the manner provided by THSC, §382.0562, which is the section in the Texas Clean Air Act regarding notice of decisions on federal operating permits. This statutory requirement is implemented in subsection (f).

A request for a CCH must be submitted within 30 days after the issuance of the draft permit. This period begins upon the publication of the notice of the draft permit. The commission must then evaluate any hearing requests, potentially hold a CCH, and ultimately issue a final order on the issuance of the permit no later than 120 days after the draft permit is issued. The deadline in this statute for issuance of the order is the only one for any air quality permit applications that are subject to CCH. The 120-day limit is shorter than the typical length of CCHs, including post-hearing procedures, under the current rules for all other applications subject to CCH. Therefore, this rulemaking requires modification of some agency procedures to implement these statutory requirements.

The adopted rule provides that the commission may hold a hearing or refer the matter to the State Office of Administrative Hearings (SOAH). The sole issue for any hearing is whether the choice of technology approved in the draft permit is the MACT required under FCAA, §112 (42 USC, §7412).

The new rule, except subsections (c)(1)(A)(i)(X) - (XI), (d), (e), and (g) will be submitted to the EPA as a revision to the Texas SIP, which already includes certain requirements for amendment applications. The amendment application that is subject to this rule is one that could result in changes to a minor or a major NSR permit. Therefore, the commission will submit the identified portions of the rule as a revision to the SIP to ensure that any permit changes would meet the requirements of the current SIP as well as the public notice and participation rules that the commission adopted and submitted to EPA as part of the SIP in 2010. While the amendment application is specific in scope and the public participation portions of the rule implement the strict deadlines in the statute, the commission's position is that this rule does not

allow for any backsliding from the approved Texas SIP and is therefore compliant with FCAA, §110(l).

Section Discussion

Subsection (a) establishes the applicability of the new section to permit amendment applications to allow existing EGFs to reduce emissions and comply with a requirement imposed by FCAA, §112. The applications shall be limited to changes in method of control for an existing electric utility steam generating unit, as defined in 40 CFR §63.42, for the purpose of achieving a MACT standard promulgated by EPA under FCAA, §112. The applications may include a request for authorization for collateral increases in emissions that result from installation of this control technology. Amendment applications are subject to the requirements of Chapter 116, Subchapter B, Divisions 1, 4, 5, and 6. Applications that are subject to the requirements of Divisions 5 or 6 are subject to additional public notice requirements, as discussed later as part of the explanation of subsection (c)(1)(F).

Applications for permit amendments will be submitted under §116.111, General Application. If the collateral increases, calculated in accordance with existing commission rules, exceed federal major source thresholds, the application will be subject to the requirements of Chapter 116, Subchapter B, Divisions 5 or 6.

Subsection (b) places a requirement on the executive director to produce a draft permit no later than 45 days after the receipt of an application for an amendment under subsection (a). The rule has been changed from proposal to state that this 45-day period will begin once a permit application has been determined to be administratively and technically complete. The commission received comments that this action is not consistent with past commission practice of initiating schedules on draft permit production once an application is judged to be only administratively complete. The commission has determined that some aspects of its current practices for permit application processes must be changed to ensure that the intent of the legislature is implemented concerning compressed schedules. The commission has further determined that ensuring this intent requires that the rule be changed to state that an application should be both administratively and technically complete before it can be considered received. Specifically, as a matter of practical implementation and to allow as much time as possible for contested case procedures, including procedures required by SOAH, the commission has determined that the time for issuance of a draft permit must be less than 45 days. The commission will retain the 45-day requirement in the rule to be consistent with the statute but will implement practices for permit review that require that a draft permit be issued within a shorter than typical time period. To meet this schedule, permit applications should be administratively and technically complete when submitted to the commission.

As provided in subsection (d), the publication of a notice of the issuance of a draft permit for public review and comment will begin a 30-day period for parties to request a CCH. The issuance and publication of the draft permit also begins a 120-day period for the commission to issue a final order issuing or denying the permit. This gives the commission a total of 165 days from receipt of a complete application to a decision on permit issuance following any CCH.

Therefore, applicants should be prepared to submit public notification to the appropriate publications and to comply with other notification requirements when they submit their amendment application. The commission encourages applicants to contact the executive director prior to submitting an application to ensure that they are prepared to move promptly to public notification.

Subsection (c) establishes public participation requirements and specifies that the requirements of Chapters 39 and 55 will not apply to applications processed under this section, except as specifically provided in this subsection.

Paragraph (1) specifies requirements for applicants. They will be required to publish notice of a draft permit and preliminary decision in a newspaper of general circulation in the municipality in which the existing EGF is located.

The notice text requirements are listed in subsection (c)(1)(A)(i)(I) - (XIII) and will include: the permit application number; the applicant's name, address, and telephone number and a description of the manner in which a person may contact the applicant or permit holder for further information; a description of the location or the proposed location of the EGF; and a description of the choice of technology in the draft permit. The notice will also include the location and availability of the complete permit application, the draft permit, and all other relevant supporting materials in the public files of the agency.

The notice must further describe the public comment procedures, including the duration of the public notice comment period, procedures to request a CCH, and a statement, printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice, that a person who may be affected by the emission of air pollutants from the EGF is entitled to request a CCH. The notice will include the time and location of any scheduled public meeting and the time and location of any scheduled CCH that will be held if any requests for a CCH are received.

The notice must include a statement that a person who may be affected by emissions from the EGF associated with changes in control technology that is the subject of an application under this section is entitled to request a CCH. The notice must also include a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application or draft permit, and the name, address, and phone number of the commission office to be contacted for further information. In addition to these notice requirements, subsection (c)(1)(A)(ii) requires applicants to publish additional notice that meets the requirements of §39.603(c)(2), Newspaper Notice, commonly referred to as a "display notice." For both of these publications, subsection (c)(1)(B) requires applicants to comply with the requirements of §39.405(h)(1) - (6) and (8) - (11), General Notice Provisions, regarding alternative language newspaper notice. Subsection (c)(1)(D) requires applicants to comply with the sign-posting requirements of §39.604, Sign Posting, as modified by this rule, which includes alternative language sign posting whenever alternative language newspaper notice is required by §39.405(h).

Subsection (c)(1)(C) and (D) also includes specific requirements for filing copies of the published notice with the commission as required by §39.605(1), Notice to Affected Agencies, and providing verifications of the sign posting requirements. In addition, subsection (c)(1)(E) requires applicants to provide a copy of the application available for review and copying at a public place in the county in which the facility is located beginning on the first day of newspaper publication of the notice. If a CCH is requested, the application and a copy of the draft permit must

remain available until the commission has taken action on the application or the commission refers issues to SOAH.

Subsection (c)(1)(F) establishes additional public notice requirements if collateral emission increases are subject to Chapter 116, Subchapter B, Divisions 5 or 6. The newspaper notice shall contain the following additional information: the degree of increment consumption expected from the source or modification; a statement that the state's air quality analysis is available for comment; the deadline to request a public meeting and that the executive director will hold a meeting at the request of any interested person; a statement that the draft permit and preliminary decision, preliminary determination summary, and air quality analysis are available electronically; locations where the permit can be accessed; a statement that the executive director will respond to all comments; and a brief description of how the public can participate in the final permit decision. The additional requirements for the applicant also include providing notifications to certain persons, and placement of the application in a location with internet access. Additional requirements for the executive director include holding a meeting if requested by an interested person and placing certain documents on the commission's Web page.

Subsection (c)(2) requires the executive director to make available a copy of the complete permit application and draft permit at the commission's central office and at the commission's regional office for the region in which the EGF is located.

Subsection (c)(3) requires that, for applications subject to Prevention of Significant Deterioration (PSD) review or nonattainment new source review (NNSR) permitting requirements, the executive director must file certain documents with the TCEQ Office of the Chief Clerk (OCC).

Subsection (c)(4) establishes the public comment procedures. Subsection (c)(4)(A) sets out the applicable requirements for public meetings, including specific requirements in clause (iii) for any applications that trigger PSD or nonattainment permitting requirements. Subsection (c)(4)(B) establishes a public comment period of 30 days following the last newspaper publication of the notice. Any objections to a condition of the draft permit must raise all arguments during this period. The executive director will respond to comments as required by §55.156(b), Public Comment Processing. The commission has changed rule language to remove references to the Office of Public Assistance and change the reference to the OCC to reflect the current organization of the TCEQ.

Subsection (d) establishes procedures for CCHs under this section. The requirements of Chapters 50 and 55 will not apply except as specifically required by this section. Consistent with the requirements of the THSC, §382.059, paragraph (1) limits the subject of any CCH to only legitimate issues of material fact regarding whether the choice of technology approved in the draft permit is MACT, and would limit the period for requesting a CCH to 30 days from the issuance of a draft permit, which is calculated from the date of first publication of the notice. This 30-day period differs from the general comment period found in subsection (c)(4). Accordingly, the period for raising legitimate issues of material fact and requesting a CCH may end before the comment period ends.

Paragraph (2) allows the applicant or the executive director to request that the application be sent directly to SOAH.

Paragraph (3) establishes specific procedures for processing hearing requests. Because of the accelerated schedule of CCH requests and final decision on a draft permit, it will be necessary for OCC to coordinate with SOAH to obtain a date and location for a CCH. The commission adopts rule language allowing TCEQ to retain jurisdiction over a draft permit following coordination between OCC and SOAH to set a preliminary CCH date. If any hearing requests are received, the OCC of the commission shall schedule the hearing request for a commission meeting and notify the applicant, all timely commenters and requestors, the executive director, and the commission's Public Interest Counsel. The paragraph authorizes the Office of General Counsel to establish a briefing schedule and requires that briefs and replies be filed with the OCC and served to the executive director, the Public Interest Counsel, the applicant, and any hearing requestors. The commission has changed rule language to remove references to the Office of Public Assistance and change the reference to the OCC to reflect the current organization of the TCEQ.

Paragraph (4)(A) states that commission consideration of public comment, the executive director's response, or a request for a CCH does not constitute a CCH.

Paragraphs (4)(B) and (C) provide that after evaluation of a request for a CCH, the commission may determine that the request does not meet the requirements of this section and act on the application. If the request meets the requirements of this section the commission may hold a hearing or refer the matter to SOAH on the issue of whether the choice of technology approved in the draft permit is the MACT required under FCAA, §112. The commission may also refer one or more hearing requests to SOAH for a determination of whether the requestor is an affected person entitled to a CCH. If the request raises only disputed issues of law or policy, the commission may make a decision on the issues and act on the application.

Paragraph (4)(D) requires the commission or Administrative Law Judge (ALJ) to consider the factors in §55.203 and §55.205, Determination of Affected Person, and Request by Group or Association, respectively.

Paragraph (4)(E) states that requests for a CCH will be granted if the request is made by the executive director, the applicant, or an affected person if the request raises legitimate issues of material fact as stated in the rule, is timely filed with the OCC, and is pursuant to a right to hearing authorized by law, and complies with §55.201(d)(1) - (3) and (5), Requests for Reconsideration and Contested Case Hearing.

Paragraph (4)(F) states that a decision on a request for a CCH is not binding on the issue of designation of parties. Paragraph (4)(F) allows a person whose request for a CCH is denied to seek to be admitted as a party should a CCH be granted based on other requests.

Paragraph (4)(G) allows the filing of motions for rehearing if all requests for a CCH are denied. Paragraph (4)(G) also states that the commission's decision to deny is final and appealable.

Paragraph (4)(H) provides that if all parties requesting hearing on an issue withdraw their request for a CCH in writing, the scope of the hearing no longer includes the issue except as authorized under THSC, §382.059.

Paragraph (5) authorizes the ALJ to establish a procedural schedule for discovery, hearing date, and pre- and post-hearing briefings. In addition, subparagraph (B) requires the ALJ to issue a proposal for decision within 80 days after the executive director issues the draft permit, or as specified by the commis-

sion, to meet the requirements of THSC, §382.059 and this new rule.

Subsection (e) states that the pleading requirements of §80.257, Pleadings Following Proposal for Decision, will not apply for applications under this section. The section establishes expedited deadlines for filing exceptions and replies in order to meet the timelines prescribed in THSC, §382.059. This subsection allows the general counsel to change filing deadlines for pleadings on his own motion or at the request of a party.

Subsection (f) requires the commission to send notice of a decision on the amendment application no later than 120 days after the issuance of a draft permit. The notice shall go to the applicant and all persons who commented during the comment period and will include responses to comments received during the comment period.

Subsection (g) allows a person affected by a decision of the commission to issue or deny a permit amendment to file a motion for rehearing under 30 TAC §80.272, Motion for Rehearing. The subsection also states that the commission's decision to deny is final and appealable.

Subsection (h) states that this section will expire on the sixth anniversary of the date that the EPA adopts the standard for EGFs pursuant to FCAA, §112, unless a stay of the rule is granted.

Final Regulatory Impact Analysis Determination

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a major environmental rule as defined in that statute, and in addition, if it did meet the definition, would not be subject to the requirement to prepare a regulatory impact analysis.

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 specific intent of the rule is to implement HB 2694, §4.27 and §4.30 which adds new THSC, §382.059. This rule would apply only to permit amendment applications submitted solely to allow an EGF to comply with a requirement imposed by FCAA, §112 (42 USC, §7412) to use applicable MACT. The applications shall be limited to changes in method of control for an existing EGF but may request authorization for collateral increases in emissions that result from installation of this control technology. The rule would compress the amount of time for affected parties to request a CCH on the permit amendment to no later than 30 days after the executive director issues a draft permit. The period in which the commission must issue or deny the permit amendment would be no later than 120 days from the issuance of a draft permit.

The rule is not anticipated to add any significant additional costs to affected individuals or businesses beyond what is expected to be required for compliance with the Utility MACT 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. The rule implements the statutorily prescribed schedule for requesting a CCH and for a decision to be rendered on information presented at any CCH relating to issuance of an amended permit. The rule does not add an opportunity for a CCH that did not already exist under THSC, §382.056.

Additionally, the rulemaking 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. The rule implements requirements of HB 2694, 82nd Legislature, 2011.

The rule was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble.

Therefore, this rulemaking action is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), taking means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or a governmental action that affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and is the producing cause of a reduction of at least 25% in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect.

The commission completed a takings impact analysis for the adopted rulemaking under Texas Government Code, §2007.043. The primary purpose of this rulemaking is to implement HB 2694, §4.27 and §4.30. This rule applies only to applications for a permit amendment allowing existing EGFs to reduce emissions and comply with a requirement under FCAA, §112. The rule will not create any additional burden on private real property. The rule will not affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The rule also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission determined that this rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.),* and commission rules in 30 TAC Chapter 281, Subchapter B, Consistency with the Texas Coastal Management Program. As required by §281.45(a)(3), Actions Subject to Con-

sistency with the Goals and Policies of the Texas Coastal Management Program (CMP), and 31 TAC §505.11(b)(2), Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this 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), Goals). This rule will implement legislation related to emission reductions at EGFs. The CMP policy applicable to this rulemaking action 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, Policies for Emission of Air Pollutants). Therefore, in accordance with 31 TAC §505.22(e), Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program, the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Effect on Sites Subject to the Federal Operating Permits Program

Chapter 116 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, include any changes made using the amended Chapter 116 requirements into their operating permit.

Public Comment

The commission held a public hearing on this proposal in Austin on November 17, 2011, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The following persons submitted comments during the public comment period which closed on November 21, 2011: Luminant Power (Luminant); Association of Electric Companies of Texas on behalf of AEP, Entergy Services, Inc., Luminant, NRG Energy, and Xcel Energy (AECT); Jackson Walker L.L.P. on behalf of the Gulf Coast Lignite Association (GCLC); NRG Energy, Inc. (NRG); EPA; Lowerre, Frederick, Perales, Allmon & Rockwell on behalf of the Lone Star Chapter of the Sierra Club; Public Citizen, Sustainable Energy and Economic Development Coalition (Environmental Groups); Lone Star Chapter of the Sierra Club (Sierra); Public Citizen, Sustainable Energy and Economic Development Coalition (SEED); and the Office of Public Interest Counsel of the Texas Commission on Environmental Quality (OPIC).

Response to Comments

Luminant commented that all of the state's coal fired power plants will be subject to federal MACT requirements. Because these plants supply a significant amount of the state's energy, the installation of pollution controls to meet MACT should not be delayed. Conserving time in the TCEQ permitting process allows installation during facility shutdowns when seasonal demand for power is low. Luminant notes that the current CCH process can take more than a year to complete and easily consume half of the time to comply with federal MACT requirements. Luminant states that it intends to use all available authorization methods to meet MACT deadlines including permits by rule and standard permits, but in cases where collateral emissions result from control installation, a permit amendment may be the only alternative. GCLC supports these comments and added that the proposed rule increases environmental protection by allowing installation of MACT at quicker pace and that it exceeds federal requirements for public participation.

Luminant, GCLC, and NRG state that the proposed rule is a practical solution to a challenging implementation schedule, preserves the public's right to participate, and support the rule as proposed.

AECT recognizes the limited time to implement federal MACT supports the streamlined deadlines in the proposed rule and the protection of the public's ability to participate in the process. AECT states the proposed rule is consistent with the new statute created by the 82nd Legislature, 2011, in THSC, §382.059.

The commission appreciates the comments from the regulated community regarding the need for appropriate authorization and control of emissions, and timely compliance with the Utility MACT and other requirements.

AECT states that §116.128(b) reflects the language of THSC, §382.059 by requiring the issuance of a draft permit "no later than the 45th day after the date the application is received." The proposal preamble instead refers to "45 days after a permit application has been determined to be administratively and technically complete," which could add unintended delay. AECT requests the preamble language be made consistent with §116.128(b). GCLC added that the preamble language indicates that the application will be considered "received" only after it is judged administratively and technically complete. This is in conflict with TCEQ's longstanding practice of considering an application "received" after it is judged administratively complete. This will ensure that the timely decision-making process sought by the legislature is faithfully implemented.

The commission has changed the rule in response to this comment. The commission must act quickly on any application received under this section in order to conform to the significantly compressed schedule for the issuance of a draft permit, public comment, possible CCH and decision on an application. The statement in the preamble indicates the need for an applicant to coordinate with the commission's permitting staff prior to the formal submittal of an amendment application to ensure that all actions on that application may occur immediately. If the review of a deficient application must be delayed while the clock for the issuance of a draft permit is running, then the schedule required under this section could become unworkable. In short, the commission has determined that some aspects of its current practices for permit application processes must be changed to ensure that the intent of the legislature is implemented. The commission has further determined that ensuring this intent requires that the rule be changed to require that an application be both administratively and technically complete. The commission notes that this change in practice is limited to applications processed under §116.128.

AECT and GCLC request that the word "increased" be added to §116.128(c)(1)(A)(i)(VII) so that it reads, "A statement that a person who may be affected by the increased emissions of air pollutants from the EGF ...".

The commission has changed the rule in response to this comment. The proposed wording can apply not only to emission increases in previously emitted contaminants but also to the collateral emission of new contaminants associated with the installation of control technology. Further, the proposed language is

intended primarily to establish the eligibility of persons to request a CCH based primarily on proximity to the facility, and on an increase of any particular air contaminant.

AECT and GCLC state that proposed §116.128(c)(1)(D) refers to the sign posting requirements of §39.604(b), which refers to "Notice of Receipt of Application and Intent to Obtain Permit," but there will be no such notice under the proposed rule. Instead the notice will be for a "Notice of Draft Permit and Preliminary Decision," and §116.128(c)(1)(D) should be revised.

The commission has changed the rule in response to this comment to require language for signs consistent with this new section. Amendments sought under this section are subject only to a single public notice because of the accelerated schedule, and use of the term "Notice of Draft Permit and Preliminary Decision" is more consistent with the modified procedures of new §116.128. The use of the term is also consistent with language in §116.128(c)(1)(A)(i).

AECT states that proposed §116.128(d)(1) refers to "first" publication of notice. Since there will be only one notice under the proposed rule, the word "first" should be deleted. GCLC added that a similar reference to "last newspaper publication" in §116.128(c)(4)(B)(i) indicates that there will be a second notice and should be deleted.

AECT is correct that only a single notice will be provided for amendments under this section. The commission is not changing §116.128(d)(1) to delete the reference to "first." When alternate language publication is required, then use of the word "first" is relevant. In addition, the statute provides that comments be submitted within 30 days of the issuance of the draft permit. The commission is also not changing the rule in §116.128(c)(4)(B)(i). The use of the term "last newspaper publication" refers to the schedule individual newspapers follow in publication of the applicant-supplied notice and not to a second notice.

AECT and GCLC state that to be consistent with the reference in proposed §116.128(d)(1) to §55.201(d)(1) - (3) and (5), they believe that proposed §116.128(d)(4)(E)(ii)(IV) should be revised to contain the same reference rather than §55.201(d), which indicates that §55.201(d)(4) also applies.

The commenters are correct; §55.201(d)(4) refers to "all relevant and material disputed issues of fact" and "number and scope of issues to be referred to hearing." These conditions do not apply to hearings considered under this new section where the issues of fact are limited to MACT equivalency. The reference to §55.201(d) in §116.128(d)(4)(E)(ii)(IV) should be clear that §55.201(d)(4) does not apply, and the commission has changed the rule accordingly.

EPA states that the intent of the rulemaking is unclear and asks that the commission clarify in the rule and preamble whether the §116.128 permit amendment will include all increases and decreases associated with the installation of control equipment or whether it includes only the collateral emission increases associated with the installation.

The intent of this rule is to expedite the installation of controls required by the Utility MACT. Any permit amendment sought under this new section will contain all increases and decreases in any contaminant resulting from the control technology, and may include collateral increases in other contaminants.

EPA states that if the permit will include all increases and decreases, the commission will need to include a justification of how the proposed section satisfies the Utility MACT and Title V permitting and public notice, since Title V is the traditional vehicle for MACT compliance. Further, EPA requests justification as to why the commission is seeking Title I SIP approval for a Title V program.

The commission understands that EPA does not approve rules which are designed to implement MACT requirements as part of the SIP. As EPA is aware, the commission has included requirements for the control of hazardous air pollutants in its rules for its NSR permitting program. This is because the Texas Clean Air Act requires authorization for new facilities, a change in the method of control of or in the character of emissions from facilities, which is also required by the EPA's NSR program. Therefore, any collateral emissions resulting from the installation of controls to meet the Utility MACT are subject to the SIP which requires that the emissions be reviewed for compliance with best available control technology and impacts to public health and welfare before authorization by a permit amendment. Section 116.128(c)(1)(F) contains public notice requirements for collateral emission increases that meet or exceed PSD or NNSR thresholds including the opportunity for a public meeting. EPA retains the option of approving or disapproving the portions of §116.128 submitted as a SIP revision.

Regardless of whether an EGF has collateral emissions or needs a permit amendment to comply with the Utility MACT, the basic requirement to comply with the MACT will apply to all EGFs. Because Title V is a separate permitting program, this portion of the comment is beyond the scope of this rulemaking. That said, the Utility MACT will be an applicable requirement for Title V permitting and thus be subject to the appropriate Title V notice requirements and permit processing procedures.

EPA states that permits by rule and standard permits are not available for collateral emission increases that are subject to PSD or NNSR. EPA also notes that it has not approved the use of the pollution control project standard permits and its use would not be federally enforceable. EPA further states that if the commission intends to provide an opportunity for source owners to demonstrate compliance with the Utility MACT through a permit by rule or standard permit, they encourage development a source category specific to the MACT.

The commission acknowledges the limitations on the use of permits by rule and standard permits and has included specific provisions in §116.128(c)(1)(F) that specify actions required of the applicant when collateral emissions are subject to PSD review or NNSR that do not include the use of a standard permit. The commission disagrees that the current non-rule pollution control standard permit is not federally enforceable because this permit was adopted by the commission under a SIP-approved standard permit program. The commission's pollution control project standard permit was written to cover a wide range of applications, and the commission has determined that a category-specific authorization for pollution control projects is not needed within its NSR program. Finally, EPA has failed to offer any legal citation for its basis that a standard permit must be limited to a source category and thus its argument that such limitation in permitting is without a basis to require the commission to adopt such a limited scope standard permit.

EPA states that proposed §116.128 includes provisions for CCHs that are not required under the FCCA and should not be submitted for SIP inclusion. Including these provisions is in contrast to the position taken with the July 2010 submissions of Chapters 39 and 55. EPA requests that the commission not submit CCH requirements that go beyond the scope of the July 2010

submission. As an alternative, provide an explanation why CCH provisions are necessary for SIP inclusion for the proposed new §116.128.

The commission agrees that certain parts of the contested case process, including some parts of this rule, are not required by the FCAA nor the Texas SIP. The commission recognizes that not all of the rule would likely be adopted as a revision, but did not exclude any parts of the rule from public comment on that subject to ensure that the structure and text of the adopted rule would clearly identify the portions that the commission understands should be submitted, or not, to EPA as a revision to the Texas SIP. To maintain consistency with the SIP submission in July 2010, the commission will not include §116.128(c)(1)(A)(i)(X) - (XI), (d), (e), and (g) in its SIP submission for this new section.

EPA commented that it reserves the right to address CCHs under the Title V program at a later date, and that it cannot provide comments at this time as to whether the proposed contested case provisions adequately address judicial review requirements under Title V.

The commission notes the comment, and also that EPA specifically commented that §116.128(g), regarding appeal of a commission decision on a permit application under this new section, should not be submitted as a revision to the SIP.

EPA states that permit amendment applications that include collateral emission increases which are subject to PSD or NNSR are not subject to the public participation requirements of Chapters 39 and 55. EPA notes that the commission provided an analysis of how these chapters met federal public notice requirements in the July 2010 SIP submission which is absent from the current proposal. The commission must provide information to demonstrate how the new permit amendment and public notice provisions of this proposal is not a non-approvable relaxation of the SIP or pending SIP submittal of Chapters 39 and 55. EPA also notes that any future changes to Chapter 39 and 55 public notice provisions must also be made to the Utility MACT provisions and submitted as revisions to the Texas SIP to maintain consistency. Luminant, GCLC, and AECT state that the rule provides for full notice and comment consistent with federal air permitting procedures, with Luminant citing to 40 CFR §52.21(q) and 40 CFR Part 124.

The new permit amendment provisions are not a relaxation of the SIP because the rule requires compliance with Chapter 116, Subchapter B, Divisions 1, and 4 - 6, which contain the substantive requirements for permit issuance.

There is no relaxation of either the approved SIP or the rules in Chapters 39 and 55 submitted as revisions to the SIP in 2010. First, the approved SIP provides that the executive director determines which amendment applications go to notice. The public participation requirements of §116.128, when compared to the approved SIP, clearly are more stringent and precise with regard to notice for the permit amendment applications and thus strengthen the SIP.

Second, the commission's adoption in 2010 of new, amended and repealed rules for public participation for air quality permit applications resulted in changes that strengthen the SIP. Permit amendment applications are now subject to clearly articulated criteria that determine which applications are subject to public participation requirements (See the adoption published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198, 5256, and 5331) for further discussion about those changes).

The commission agrees that the notice provisions applicable to applications which include collateral increases are not identical to the public participation rules in Chapters 39 and 55 which were submitted to EPA as revisions to the SIP in July 2010. However, when comparing new §116.128 and the public participation rules in Chapters 39 and 55, they each have common notice requirements for permit amendment applicants, which are as follows: newspaper publication of notice of draft permit, with similar notice text requirements; alternate language notice requirements, for both newspaper publication and sign posting, if certain conditions are present; placement of the application and draft permit in a public location for inspection and copying; posting of signs at the plant site; and compliance with certain notice requirements for major NSR permit applications. In addition, the commission provides an opportunity for interested persons to submit comments and the commission's executive director prepares a response to comments. Finally, the commission provides an opportunity for interested persons to request a public meeting or CCH on the application.

There are three basic differences in public participation requirements for permit amendment applications filed under new §116.128 as compared to the rules in Chapters 39 and 55. However, none of those differences are required by federal rules. First, applicants under §116.128 are not required to publish notice of an administratively complete application, designated in §39.418 as Notice of Receipt of Application and Intent to Obtain Permit (NORI), also commonly referred to as first notice. This is because the NORI requirement derives from THSC, §382.056, which does not apply to applications filed under THSC, §382.059.

Second, any emission increases, including collateral emission increases, are subject to notice regardless of the amount of the increase. This is due to the fact that the insignificant thresholds for exclusion from notice in THSC, §39.402 do not apply. This is because THSC, §382.0518(h) does not apply to applications filed under THSC, §382.059.

Third, while the SIP includes a requirement for CCHs, neither the approved SIP, nor the rules pending SIP review, include or require that the scope of a CCH include any specific issues. Further, neither the FCAA nor EPA's rules for major or minor permitting include a requirement for the opportunity to request a CCH. Although a CCH for any collateral emissions associated with applications filed under new §116.128 can be requested, any issues beyond compliance with the standard adopted under FCAA, §112 cannot be the subject of a hearing. This does not render the opportunity to request a hearing meaningless because a hearing can be held on the issue for which the statute was adopted, which is prompt approval of control equipment to comply with the Utility MACT standard. The full application is subject to comment and comments are responded to by the executive director.

The first and third of these differences provide some limits on public participation, while the second difference is expands public participation beyond that included in the rules pending SIP review. However, none of these differences constitute backsliding because there are no federal rule requirements for notice of application or for CCH on minor or major NSR permit applications. Therefore, this rule meets and still exceeds minimum federal rule requirements for notice. For minor NSR permits, the federal rules require newspaper notice of draft permit in the affected area, a 30-day comment period on the draft permit, and certain requirements for notification to other agencies. These re-

quirements are included in §116.128. For major NSR permit applications, there are additional federal notice requirements, and the commission has included those in this new rule, specifically in §116.128(c)(1)(F) and (4)(A)(iii).

As the EPA recognizes, states have broad discretion to determine the scope of their minor NSR programs as needed to attain and maintain the national ambient air quality standards, and for reasonable further progress and any other requirement of the FCAA. States have significant discretion to tailor minor NSR requirements that are consistent with the requirements of 40 CFR Part 51 (Requirements for Preparation, Adoption, and Submittal of Implementation Plans), and may also provide a rationale for why the rules are at least as stringent as the 40 CFR Part 51 requirements where the revisions are different from 40 CFR Part 51. Both the substantive and procedural elements of this rule are at least as stringent as the permit amendment notice, review and issuance requirements in the commission's SIP-approved minor NSR permitting program. Further, the rules are at least as stringent as federal rules for PSD and NNSR permitting with regard to both substantive and procedural requirements as discussed in this preamble. When conducting an analysis of whether rule amendments submitted as part of the SIP can be approved, the analysis under FCAA, §110(l), 42 USC, §7410 has been interpreted to be whether the revision will "make air quality worse" *(Kentucky Resources Council, Inc. v. EPA,* 467 F3d 986 (6th Cir. 2006), cited with approval in *Galveston-Houston Association for Smog Prevention (GHASP) v. U.S. EPA,* 289 Fed. Appx. 745, 2008 WL 3471872 (C.A. 5)). This would apply to the rules adopted by the commission for major and minor NSR public participation requirements, such as those included in new §116.128. Certainly, the difference in procedural requirements from the approved SIP and the commission's current rules cannot be found to make air quality worse, and as such §116.128 is approvable as part of the Texas SIP.

Finally, the commission understands that if changes to public participation rules are made for permit amendment applications that SIP consistency must be considered in that process.

EPA states that the commission acknowledges that EPA could adopt other MACT standards under FCAA, §112 that could require permit amendment applications under the proposed new section. EPA recommends that the scope of new §116.128 be limited to the Utility MACT.

The new statute, THSC, §382.059(g), limits the scope to permit amendments to achieve emission reductions at EGFs under FCAA, §112 and the commission has addressed this in §116.128(a). In addition, the legislature has expressed its intent as to the scope through the title selected for new THSC, §382.059, which is "Hearing and Decision on Permit Amendment Application of Certain Electric Generating Facilities." The commission notes that this permit amendment is an option for permit applicants who can also apply for permit amendments under existing permitting rules.

OPIC states that the compressed hearing schedule would not allow an adequate hearing if emissions trigger PSD or NNSR and recommends that any application with these emission increases be put in a separate application subject to a full public comment and CCH process. The bifurcated application would allow compliance with HB 2694 and account for emissions that are by definition significant. OPIC also expressed concern about the limitation of topics for a CCH stating that it is inappropriate to limit topics to MACT if collateral emissions trigger PSD or NNSR. OPIC states that, if legitimate issues of fact on emissions causing PSD or NNSR are raised, a hearing could still be denied if MACT is not addressed. OPIC also states that any collateral emissions which trigger PSD or NNSR are normally subject to the full HB 801 public comment and contested case process. OPIC finds that such emissions are not collateral and are not properly permitted under the proposed new section.

Environmental Groups stated that the statutory language in THSC, §382.059(d) does not limit the issues in a CCH to questions of MACT equivalency, and this limitation is at odds with EPA procedural requirements which require an opportunity for public comments on draft NSR permits and amendments.

Environmental Groups and SEED further state that the Utility MACT does not force a particular technology into a permit but proposes to set limits on emissions of hazardous air pollutants. Limiting comments to the topic of technology equivalency would thwart the purpose of public comment. Since the statute may be read to allow comments on a greater range of topics, it should be, in order not to render the statute trivial and the rule should reflect this absence of limitation.

The commission has not changed the rule in response to these comments. The commission disagrees with the commenters and interprets the restriction in THSC, §382.059(d) as a limitation on the subject of a CCH to whether a control technology meets the MACT. This interpretation is consistent with the intent of the legislation which was to expedite the installation of control technology. This interpretation does not render the statute trivial, rather it serves the purpose of the statute by reducing the amount of time required for installation of control technology. Similarly, the bifurcation of an application under this section would defeat the intent of the legislation by delaying installation of Utility MACT controls until the separate application concerning collateral emissions has been through any CCH process.

OPIC's characterization that emissions which trigger PSD or NNSR are not collateral raises two distinct issues. The choice of control equipment selected by the applicant for MACT compliance may, but not always, result in collateral emissions. The quantity of those emissions may or may not be in an amount that triggers PSD or NNSR permitting. If the amount is significant, i.e., in a quantity that does require major NSR permitting, then the appropriate review under Chapter 116, Subchapter B, Divisions 5 and 6 will be conducted. This review includes health effects, appropriate control technology and effect of the increased emissions on national ambient air quality standards. The commission is aware that collateral emissions of this magnitude are indeed significant and expects applicants to have evaluated these emissions thoroughly and represented the results in their amendment application. The commission will not consider an application technically complete if an evaluation is deficient and will not accept it, and will not consider time restrictions on draft permit issuance, CCH requests, and final decision on the application to have begun. While issues related to emissions requiring PSD review or NNSR cannot be considered in a CCH under this section, the emissions are subject to separate public notice requirements which meet the minimum federal notice requirements as well as state law. These notice requirements include newspaper publication of the opportunity for a public meeting, the executive director's preliminary decision, and a statement that the executive director will respond to all comments related to the emissions and a statement of the electronic availability of the air quality analysis of the emissions and draft permit.

Under this new section, the technical evaluation of an application is separate from the subject of CCH requests, which by statute, are limited to the issue of whether the control technology meets MACT. Consistent with the authorizing statute, the new section limits the subject of CCHs to MACT equivalency, but does not limit the commission's final decision on a draft permit, which will be made in accordance with applicable law. The commission remains receptive to any comment that will ensure that accurate and protective permits are issued.

The commission agrees that MACT does not force a particular technology into a permit, but any technology chosen by an applicant must produce reductions such that a MACT standard is met.

The commission agrees with OPIC that a CCH can be denied based solely on legitimate issues of fact related to PSD or NNSR.

Public Citizen states that limiting the topic of the hearing to a question of MACT equivalency will not allow a full examination of the entire suite of emission controls and their effect on mercury reduction. SEED adds that any collateral emissions must also be a topic of CCHs. Environmental Groups stated that the proposed limitation on the issues that may be tried in a hearing is an interpretation of the statute that is unnecessarily narrow.

The commission agrees that the entire collection of control technologies can have an effect on the technology specifically designed for the control of mercury. A hearing can include the issues of whether the representations by the applicant properly describe how the control technology will be installed and operated, and its predicted effectiveness. However, if the overall result of the application of the selected technology is that the standard for mercury and other hazardous air pollutants is met, then the MACT is satisfied. The commission interprets that statute to clearly limit the scope of the hearing to whether the selected control technology will satisfy the MACT.

Sierra states that the rule explicitly directs the SOAH ALJ to establish a procedural schedule for CCHs and that §116.128(d)(4)(C) infers that the SOAH proceeding is subject to the Texas Administrative Procedure Act (APA). Sierra notes that neither of these requirements is stated in the proposed rule for hearings the commission may conduct, creating the inference that the commission may follow an unspecified standard. This inference should be removed from the rule and any standards for a commission hearing, other than those of the APA, should be specified in the rule.

The commission has not changed the rule in response to these comments. Any CCHs conducted by the commission directly rather than by a SOAH ALJ will be held under the authority provided to the commission in Texas Water Code, Chapter 5, THSC, Chapter 382, and the relevant portions of the APA, found in Texas Government Code, Chapter 2001.

SEED and Public Citizen state that the rule should allow sufficient time for discovery on pre-filed testimony from the applicant. In order for this discovery to be meaningful, the public must be able to determine the issues that relate directly to those questions to which the CCH is restricted. The rule does not allow sufficient time to develop more specific and targeted discovery. The rule needs to allow full discovery.

The commission has not changed the rule in response to these comments. The commission acknowledges that the time for discovery will be very short and therefore must be conducted in a targeted, precise manner with cooperation by all parties for the discovery to be meaningful. Persons who think they may want to request to be named a party in a CCH will need to thoroughly review the application and draft permit as quickly as possible, and be informed on the subject matter to develop meaningful discovery requests. This is necessary due to the compressed schedule and so that any CCH will serve to develop a thorough administrative record for the commission's consideration in determining whether to issue the permit and what conditions should be included in the permit.

SEED states that it is not acceptable to have increases in other pollutants as a result of decreasing mercury.

The commission has not changed the rule in response to this comment. Collateral increases in air contaminants are a common result from the control of another contaminant. The respective increases and decreases are subject to an air quality analysis to determine the overall benefit to air quality, and to ensure that no adverse impacts are expected from the collateral emissions. Reduction of any hazardous air pollutant is likely to result in an overall benefit despite increases in other non-toxic air contaminants.

SEED states their support for the earliest possible installation of mercury controls on the 42 coal-fired power plants in Texas. SEED stated the serious health risks from mercury and stated that the electric utility industry has lobbied against public health rules for decades. SEED stated that mercury causes permanent brain damage and damage to the circulatory system, liver, and kidneys. SEED, Public Citizen, and Sierra all submitted comments emphasizing the toxicity of mercury. They cited studies linking mercury to rates of brain damage, autism, and the tendency of mercury to become concentrated in portions of the food chain. Sierra noted that the largest emitter of mercury is the Big Brown plant in northeast Texas.

The commission acknowledges the commenters' concerns about level of mercury in the environment, but has not changed the rule in response to these comments. The commission has determined that the requirements of this rule will expedite the installation of control technology and protect overall air quality.

Statutory Authority

The new rule 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; §5.103, concerning Rules, and §5.105, concerning General Policy, which authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under THSC, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act. The new rule is also adopted under THSC, §382.002, concerning Policy and Purpose, which establishes the commission purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; §382.003, concerning Definitions; §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.016, concerning Monitoring Requirements; Examination of Records, which authorizes the commission to prescribe requirements for measuring and monitoring the emission of air contaminants and for maintaining records; §382.029, concerning Hearing Powers, which authorizes the commission to call and hold

hearings; §382.0291, concerning Public Hearing Procedures, which prescribes procedures for the commission's hearings; §382.030, concerning Delegation of Hearing Powers, which authorizes the commission to delegate the authority to hold hearings; §382.031, concerning Notice of Hearings, which prescribes the requirements for notice of commission hearings; §382.032, concerning Appeal of Commission Action, which authorizes affected persons to appeal a ruling, order or decision of the commission; §382.040, concerning Document; Public Property, which provides that information, documents, and data collected by the commission are state property; §382.041, concerning Confidential Information, which provides procedures for information submitted as confidential; §382.0512, concerning Modification of Existing Facility, which prescribes the commission's consideration of whether a proposed change at a facility is a modification; §382.051, concerning Permitting Authority of Commission; Rules, which authorizes the commission to issue a permit by rule for types of facilities that will not significantly contribute air contaminants to the atmosphere; §382.0513, concerning Permit Conditions, which authorizes the commission to establish and enforce permit conditions; and §382.0514, concerning Sampling, Monitoring, and Certification. The new rule is also adopted under THSC, §382.0515, concerning Application for Permit, which prescribes requirements for permit applications; §382.0518, concerning Preconstruction Permit, which requires a permit from the commission prior to construction or modification of a facility; §382.056, concerning Notice of Intent to Obtain Permit or Permit Review: Hearing, which requires applicants for a permit or modification to publish public notice; §382.0561, concerning Federal Operating Permit; Hearing, which establishes public hearing procedures on federal operating permits; §382.0562, concerning Notice of Decision, which requires that the commission send notice send notice of final action on a federal operating permit to an applicant and commenters; §382.061, concerning delegation of Powers and Duties, which allows the commission to delegate powers and duties to the executive director concerning permits except for the adoption of rule; §382.062, concerning Application, Permit, and Inspection Fees, which authorizes the commission to collect fees for permit applications; and §382.059, concerning Hearing and Decision on Permit Amendment Application of Certain Electric Generating Facilities, which regulates the request for contested case hearings on permit amendments for electric generating facilities under Federal Clean Air Act, §112.

The new rule is also adopted under TWC, §5.013, concerning Commission and Staff Responsibility Policy, which requires the commission to separate the responsibilities of the commission and its staff; §5.115, concerning Persons Affected in Commission Hearings; Notice of Application, which defines an affected person for purposes of administrative hearings; §5.116, concerning Hearings; Recess, which authorizes the commission to recess any hearing from time to time and place to place; §5.118, concerning Power to Administer Oaths, which authorizes the commission, chief clerk, or hearing examiner to administer oaths; §5.122, concerning delegation of Uncontested matters to Executive Director, which authorizes the commission to delegate authority to act on permits to the executive director; §5.1733, concerning Electronic Posting of Information, which requires the commission to post public information on its website; §5.311, concerning Delegation of Responsibility, which authorizes the commission to delegate the responsibility to conduct hearings to the State Office of Administrative Hearings (SOAH); and §5.557, concerning Direct Referral to Contested Case Hearing, which allows the commission to refer contested case hearing directly to SOAH. In addition, the new rule is adopted under 42 United States Code, §7401, *et seq.*

The new rule implements all of these statutes except TWC, §§5.102, 5.103, and 5.105, and THSC, §382.017. The new rule also implements House Bill 2694, §4.27 and §4.30, 82nd Legislature, 2011.

§116.128. Amendment Application, Public Notice and Contested Case Hearing Procedures for Certain Electric Generating Facilities.

(a) Applicability. This section applies to permit amendment applications submitted solely to allow an owner or operator of an electric generating facility (EGF) to reduce emissions and comply with a requirement imposed by the Federal Clean Air Act, §112 (42 United States Code (USC), §7412) to use applicable maximum achievable control technology (MACT). The applications shall be limited to changes in method of control for an existing electric utility steam generating unit, as defined in 40 Code of Federal Regulations (CFR) §63.42, for the purpose of achieving a MACT standard promulgated by the United States Environmental Protection Agency (EPA) under Federal Clean Air Act, §112. The application may request authorization for collateral increases in emissions that result from installation of this control technology. Amendment applications submitted under this section are subject to the requirements of Divisions 1, 4, 5, and 6 of this subchapter (relating to Permit Application, Permit Fees, Nonattainment Review Permits, and Prevention of Significant Deterioration Review, respectively).

(b) Issuance of Draft Permit. Not later than the 45th day after the date the application is received and the executive director determines it is both administratively and technically complete, the executive director shall issue a draft permit.

(c) Notice and Public Participation. The public participation requirements of Chapters 39 and 55 of this title (relating to Public Notice, and Requests for Reconsideration and Contested Case Hearings; Public Comment, respectively) shall not apply, except as specifically required by this section.

(1) The applicant shall comply with the following notice requirements:

(A) The applicant shall publish notice as follows:

(i) The executive director shall direct the applicant to publish a notice of draft permit and preliminary decision, at the applicant's expense, in the public notice section of one issue of a newspaper of general circulation in the municipality in which the EGF is located, or in the municipality nearest to the location of the EGF. Applicants shall use notice text provided and approved by the agency. The executive director may approve changes to notice text prior to notice being given. The notice shall contain the following information:

(I) the permit application number;

(II) the applicant's name, address, and telephone number and a description of the manner in which a person may contact the applicant or permit holder for further information;

(III) a brief description of the location or the proposed location of the EGF and the nature of the proposed activity;

(IV) a description of the choice of technology in the draft permit;

(V) the location, at a public place in the county in which the EGF is located, at which the following are available for review and copying:

(-a-) the complete permit application;

(-b-) the draft permit; and

(-c-) all other relevant supporting materials in the public files of the agency;

(VI) a description of the comment procedures, including the duration of the public notice comment period and procedures to request a contested case hearing printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice;

(VII) a statement that a person who may be affected by the increased emission of air pollutants from the EGF associated with the changes in control technology that are the subject to the permit application or a member of the legislature in the general area is entitled to request a contested case hearing printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice;

(VIII) a description of the procedure by which a person may be placed on a mailing list in order to receive additional information about the application or draft permit;

(IX) the date, time, and location of any scheduled public meeting, and a brief description of the nature and purpose of the meeting;

(X) if applicable, a statement that any contested case hearing will be based on legitimate issues of material fact regarding whether the choice of control technology in the draft permit is the MACT required under the Federal Clean Air Act, §112 (42 USC, §7412);

(XI) the date, time, and location of any scheduled contested case hearing that will be held if any requests for contested case hearing are received;

(XII) the name, address, and phone number of the commission office to be contacted for further information; and

(XIII) any additional information required by the executive director or needed to satisfy federal public notice requirements.

(ii) Another notice that meets the requirements of §39.603(c)(2) of this title (relating to Newspaper Notice).

(B) The applicant is required to comply with the requirements of §39.405(h)(1) - (6) and (8) - (11) of this title (relating to General Notice Provisions) regarding alternative language newspaper notice.

(C) The applicant must file a copy of each published notice and a publisher's affidavit with the chief clerk certifying facts that constitute compliance with the requirement. The deadline to file a copy of each published notice which shows the date of publication and the name of the newspaper is ten business days after the last date of publication. The deadline to file the affidavit is ten calendar days after the last date of publication for each notice. Filing an affidavit certifying facts that constitute compliance with notice requirements creates a rebuttable presumption of compliance with the requirement to publish notice. The applicant shall furnish a copy of the notices and affidavits required by this section in the same manner as §39.605(1) of this title (relating to Notice to Affected Agencies).

(D) At the applicant's expense, the applicant shall comply with the sign posting requirements of §39.604 of this title (relating to Sign-Posting), except that the text of the sign shall refer to "Notice of Draft Permit and Preliminary Decision." The applicant shall furnish a copy of sign posting verification, within ten business days after the end of the comment period to the chief clerk and the executive director.

(E) The applicant shall make a copy of the technically complete application and the executive director's draft permit available for review and copying at a public place in the county in which the EGF is located beginning on the first day of newspaper publication of the notice required to be published by subparagraphs (A) and (B) of this paragraph and remain available for the comment period. If the application is submitted with confidential information marked as confidential by the applicant, the applicant shall indicate in the public file that there is additional information in a confidential file. If a contested case hearing is requested, the application shall remain available until the commission has taken action on the application or the commission refers issues to the State Office of Administrative Hearings (SOAH).

(F) If the collateral increases in emissions are also subject to the requirements of Divisions 5 or 6 of this subchapter, the applicant shall comply with the additional public notice requirements:

(i) the notice required by subparagraph (A)(i) of this paragraph shall include the following text:

(I) as applicable, the degree of increment consumption that is expected from the source or modification;

(II) a statement that the state's air quality analysis is available for comment;

(III) the deadline to request a public meeting;

(IV) a statement that the executive director will hold a public meeting at the request of any interested person;

(V) a statement that the executive director's draft permit and preliminary decision, preliminary determination summary, and air quality analysis are available electronically on the commission's Web site at the time of publication of the notice of draft permit;

(VI) a summary of the executive director's preliminary decision and whether the executive director has prepared a draft permit;

(VII) the location, at a public place in the county with internet access in which the EGF facility is located, at which a copy of the complete application and the executive director's draft permit and preliminary decision are available for review and copying;

(VIII) a statement that the executive director will respond to all comments regarding applications that are subject to the requirements of Divisions 5 or 6 of this subchapter; and

(IX) a brief description of procedures by which the public may participate in the final permit decision and, if applicable, how to request a public meeting or a contested case hearing, printed in a font style or size that clearly provides emphasis and distinguishes it from the remainder of the notice. Where applicable, the notice should include a statement that a public meeting will be held by the executive director if requested by a member of the legislature who represents the general area where the facility is to be located or if there is substantial public interest in the proposed activity when requested by any interested person;

(ii) a copy of the notices and affidavit shall be furnished to the chief executives of the city and county where the EGF is located, and any State or Federal Land Manager, or Indian Governing Body whose lands may be affected by emissions from the source or modification; and

(iii) a copy of the complete application and the executive director's draft permit and preliminary decision shall be available for review and copying at a public place in the county with internet access in which the EGF is located.

(2) The executive director shall make available for public inspection the draft permit and the complete application throughout the comment period during business hours at the commission's central office and at the commission's regional office for the region in which the EGF is located.

(3) After technical review is complete for applications subject to the requirements of Divisions 5 or 6 of this subchapter, the executive director shall file the executive director's draft permit and preliminary decision, the preliminary determination summary and air quality analysis, with the chief clerk. The chief clerk shall make available by electronic means on the commission's Web site the executive director's draft permit and preliminary decision, the executive director's response to public comments, and as applicable, preliminary determination summary and air quality analysis.

(4) The public comment procedures are as follows.

(A) Public Meetings. The following shall apply to any public meeting held regarding the applications subject to the requirements of this section:

(i) A public meeting is intended for the taking of public comment and is not a contested case under the Texas Administrative Procedure Act.

(ii) At any time, the executive director or Office of the Chief Clerk may hold public meetings. The executive director or Office of the Chief Clerk shall hold a public meeting if a member of the legislature who represents the general area in which the facility is located or proposed to be located requests that a public meeting be held.

(iii) For applications subject to the requirements of Prevention of Significant Deterioration or Nonattainment Permits subject to this subchapter, if an interested person requests a public meeting regarding the executive director's draft permit or air quality analysis, a public meeting in response to a request under this paragraph will be held after notice of application and the executive director's preliminary decision is published. The commission may hold a public meeting and accept oral or written public comment concerning the application.

(iv) The applicant shall attend any public meeting held by the executive director or Office of the Chief Clerk.

(v) A tape recording or written transcript of the public meeting shall be made available to the public.

(B) Public Comment. The public comment submittal and processing procedures are as follows:

(i) Comments regarding the application must be filed with the chief clerk within the time period specified in the notice. The public comment period will be for 30 days following the last newspaper publication of notice of draft permit and extended to the close of any public meeting.

(ii) The executive director will respond to comments as required by §55.156(b) of this title (relating to Public Comment Processing).

(iii) After the executive director files the response to comments, the chief clerk shall mail (or otherwise transmit) the executive director's response to public comments to the applicant, any person who submitted comments during the public comment period, any person who requested to be on the mailing list for the permit action, any person who timely filed a request for a contested case hearing, the Office of Public Interest Counsel, and the Office of the Chief Clerk.

(iv) Any person, including the applicant, who believes that any condition of the draft permit is inappropriate or that the preliminary decision of the executive director to issue or deny a permit is inappropriate must raise all reasonably ascertainable arguments supporting that position by the end of the public comment period.

(v) The commission shall consider all comments received during the public comment period and at the public meeting in determining whether to issue the permit and what conditions should be included if a permit is issued.

(d) Hearing on Control Technology. The requirements of Chapters 50 and 55 of this title shall not apply, except as specifically required by this section.

(1) Not later than the 30th day after the first publication of notice of issuance of the draft permit under subsection (b) of this section, persons may submit to the commission any legitimate issues of material fact regarding whether the choice of technology approved in the draft permit is the MACT required under Federal Clean Air Act, §112 (42 USC, §7412) and may request a contested case hearing before the commission. A request for a contested case hearing by an affected person must be in writing and must be filed with the chief clerk. The hearing request must comply with the requirements of §55.201(d)(1) - (3) and (5) of this title (relating to Requests for Reconsideration or Contested Case Hearing).

(2) After the executive director issues the draft permit, the applicant or the executive director may file a request with the chief clerk that the application be sent directly to SOAH for a hearing on the application. The chief clerk shall refer the application directly to SOAH for a contested case hearing that is limited to the issue of whether the choice of technology approved in the draft permit is the MACT required under Federal Clean Air Act, §112. Notwithstanding the provisions of §80.126 of this title (relating to Public Comment in Direct Referrals) regarding responses to and presenting evidence on each issue raised in public comment, the scope of any hearing held under this rule shall be limited to the choice of technology approved in the draft permit and shall not include any other issues that were raised in public comment.

(3) Hearing request processing:

(A) If a hearing request is received, the chief clerk shall promptly coordinate with SOAH to establish a contested case hearing date and location in preparation for applications that may be referred to SOAH. Notwithstanding any other section of this title, the commission shall retain jurisdiction over the application until referral to SOAH pursuant to Chapter 55 of this title or Chapter 80 of this title (relating Contested Case Hearings).

(B) If one or more hearing requests are received, the chief clerk shall schedule the hearing request for a commission meeting consistent with the requirements of this section after the final deadline to submit requests for contested case hearing expires.

(C) Immediately after scheduling the hearing request for a commission meeting, the chief clerk shall mail notice to the applicant, executive director, the Office of Public Interest Counsel, and all timely commenters and requestors. The notice shall explain how to participate in the commission decision, describe alternative dispute resolution under commission rules, and explain the relevant requirements of this section.

(D) The Office of General Counsel may establish a briefing schedule for the issues raised in a hearing request. Any briefs and replies shall be filed with the Office of the Chief Clerk, and served on the same day to the executive director, the Office of Public Interest Counsel, the applicant, and any requestors.

(E) Responses to hearing requests must specifically address:

(i) whether the requestor is an affected person;

(ii) whether the disputed issues involve questions of fact or of law;

(iii) whether the issues were raised during the appropriate time period; and

(iv) whether the issues are legitimate issues of material fact regarding whether the choice of technology approved in the draft permit is the MACT required under Federal Clean Air Act, §112.

(4) Commission consideration of hearing requests is as follows:

(A) Commission consideration of the following items is not itself a contested case subject to the Texas Administrative Procedure Act:

(i) public comment;

(ii) executive director's response to comment; or

(iii) request for contested case hearing.

(B) The commission will evaluate requests for contested case hearing and may:

(i) determine that a hearing request does not meet the requirements of this section, and act on the application; or

(ii) determine that a hearing request meets the requirements of this section and:

(I) hold a hearing on the issue of whether the choice of technology approved in the draft permit is the MACT required under Federal Clean Air Act, §112;

(II) direct the chief clerk to refer application to the SOAH for a hearing on the issue of whether the choice of technology approved in the draft permit is the MACT required under Federal Clean Air Act, §112; or

(III) if the request raises only disputed issues of law or policy, make a decision on the issues and act on the application; or

(iii) refer one or more hearing requests to SOAH for a determination of whether the requestor is an affected person entitled to a contested case hearing.

(C) If the commission refers the hearing request to SOAH it shall be processed as a contested case under the Texas Administrative Procedure Act. If the commission or SOAH determines that a requestor is an affected person, SOAH may proceed with a contested case hearing on the issue of whether the choice of technology approved in the draft permit is the MACT required under Federal Clean Air Act, §112.

(D) In determining whether a person is an affected person, the commission or Administrative Law Judge shall consider the factors in §55.203 and §55.205 of this title (relating to Determination of Affected Person, and Request by Group or Association, respectively).

(E) A request for a contested case hearing shall be granted if the request is:

(i) made by the applicant or the executive director; or

(ii) made by an affected person if the request:

(I) identifies any legitimate issues of material fact regarding whether the choice of technology approved in the draft permit is the MACT required under Federal Clean Air Act, §112;

(II) is timely filed with the chief clerk;

(III) is pursuant to a right to hearing authorized by law; and

(IV) complies with the requirements of §55.201(d)(1) - (3) and (5) of this title.

(F) If a request for a contested case hearing is granted, a decision on a contested case hearing is an interlocutory decision on the validity of the request or issue and is not binding on the issue of designation of parties under §80.109 of this title (relating to Designation of Parties) or the issues referred to SOAH under this section. A person whose request for contested case hearing is denied may still seek to be admitted as a party under §80.109 of this title if any hearing request is granted on an application. Failure to seek party status shall be deemed a withdrawal of a person's request for contested case hearing.

(G) If all requests for contested case hearing are denied, §80.272 of this title (relating to Motion for Rehearing) applies. A motion for rehearing in such a case must be filed no more than 20 days after the date the person or attorney of record is notified of the commission's final decision or order. A person is presumed to have been notified on the third day after the date that the decision or order is mailed by first class mail. If the motion is denied under §80.272 and §80.273 of this title (relating to Motion for Rehearing, and Decision Final and Appealable, respectively) the commission's decision is final and appealable under Texas Health and Safety Code, §382.032, or under the Texas Administrative Procedure Act.

(H) If all hearing requestors whose requests for a contested case hearing were granted with regard to an issue, withdraw in writing their hearing requests with regard to the issue before issuance of the notice of the contested case hearing, the scope of the hearing no longer includes that issue except as authorized under Texas Health and Safety Code, §382.059.

(5) Procedural schedules:

(A) Upon convening a hearing pursuant to the procedural rules in Chapter 80 of this title and of SOAH, 1 TAC Chapter 155 (relating to Rules of Procedure), the Administrative Law Judge shall establish a procedural schedule, which shall provide for, as appropriate, discovery, hearing date, and pre- and post-hearing briefings, to comply with the provisions of Texas Health and Safety Code, §382.059 and this section.

(B) The Administrative Law Judge shall issue a proposal for decision within 80 days after the executive director issues the draft permit, or as specified by the commission, to meet the requirements of Texas Health and Safety Code, §382.059 and this section.

(e) Pleadings Following Proposal for Decision. The pleading requirements of §80.257 of this title (relating to Pleadings Following Proposal for Decision) shall not apply to applications filed under this section.

(1) Pleading schedule. Unless right of review has been waived, any party may file exceptions within five business days after the date of issuance of the proposal for decision. Any replies to exceptions shall be filed within eight business days after the date of issuance of the proposal for decision.

(2) Change of filing deadlines. On his own motion or at the request of a party, the general counsel may change the deadlines to file pleadings following the proposal for decision. A party requesting a change must file a written request with the chief clerk, and must serve a copy on the general counsel, the judge, and the other parties. The request must explain that the party requesting the change has contacted the other parties, and whether the request is opposed by any party.

The request must include proposed dates and must indicate whether the judge and the parties agree on the proposed dates.

(f) Notice of Decision. No later than 120 days from the date of issuance of a draft permit the commission shall make a final decision on a permit amendment application under this section. The commission shall send notice of a decision on an application for a permit amendment by first-class mail to the applicant and all persons who commented during the public comment period or at the public meeting. The notice shall include a response to any comment submitted during the public comment period and shall identify any change in the conditions of the draft permit and the reasons for the change. The notice shall include the following text:

(1) state that any person affected by the decision of the commission may appeal the decision;

(2) state the date by which the appeal must be filed; and

(3) explain the appeal process.

(g) A person affected by a decision of the commission to issue or deny a permit amendment may file a motion for rehearing under §80.272 of this title. If the motion is denied under §80.272 and §80.273 of this title, the commission's decision is final and appealable under Texas Health and Safety Code, §382.032, or under the Texas Administrative Procedure Act.

(h) Expiration. This section expires on the sixth anniversary of the date the EPA administrator adopts standards for existing EGFs under the Federal Clean Air Act, §112, unless a stay of the rule is granted.

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 February 10, 2012.

TRD-201200716
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Effective date: March 1, 2012
Proposal publication date: October 21, 2011
For further information, please call: (512) 239-2548

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER DD. OIL FIELD CLEANUP REGULATORY FEE

34 TAC §3.732

The Comptroller of Public Accounts adopts an amendment to §3.732, concerning reporting requirements for the gas fee, without changes to the proposed text as published in the December 30, 2011, issue of the *Texas Register* (36 TexReg 9200). This section is being amended pursuant to Senate Bill 1, 82nd Legislature, First Special Session, 2011. Senate Bill 1 added language to create the Oil and Gas Regulation and Cleanup Fund as an account in the General Revenue Fund of the state treasury.

No comments were received regarding adoption of the amendment.

This amendment is adopted under the Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of the Tax Code, Title 2.

The amendment implements Natural Resources Code, §81.117.

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 February 10, 2012.

TRD-201200738
Ashley Harden
General Counsel
Comptroller of Public Accounts
Effective date: March 1, 2012
Proposal publication date: December 30, 2011
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 5. TEXAS BOARD OF PARDONS AND PAROLES

CHAPTER 143. EXECUTIVE CLEMENCY
SUBCHAPTER A. FULL PARDON AND RESTORATION OF RIGHTS OF CITIZENSHIP

37 TAC §§143.1, 143.2, 143.5 - 143.7, 143.12

The Texas Board of Pardons and Paroles adopts amendments to 37 TAC §§143.1, 143.2, 143.5 - 143.7, and 143.12, concerning authority to grant pardons, pardons for innocence, discharged prisoner, inmate in Texas Department of Criminal Justice-Institutional Division, prior out-of-state or federal convictions, and restoration of firearm rights. The amendments are adopted without changes to the proposed text as published in the November 25, 2011, issue of the *Texas Register* (36 TexReg 7969). The text of the rules will not be republished.

The amended rules are adopted to clean up the language and include Article 4, §11 of the Texas Constitution language.

No public comments were received regarding adoption of these amendments.

The amended rules are adopted under the Texas Constitution, Article 4, §11, and the Code of Criminal Procedure, Article 48.01 and Article 48.03. Article 4, §11, Texas Constitution authorizes the board to make clemency recommendations to the Governor. Articles 48.01 and 48.03, Code of Criminal Procedure, authorize the board make clemency recommendations to the Governor.

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 February 10, 2012.

TRD-201200713
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Effective date: March 1, 2012
Proposal publication date: November 25, 2011
For further information, please call: (512) 406-5388

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37 TAC §143.13

The Texas Board of Pardons and Paroles adopts new 37 TAC §143.13, concerning posthumous pardon. The new rule is adopted without changes to the proposed text as published in the November 25, 2011, issue of the *Texas Register* (36 TexReg 7970). The text of the rule will not be republished.

The new §143.13 allows the board to consider a recommendation for a full pardon on behalf of a deceased individual.

No public comments were received regarding adoption of the new rule.

The new rule is adopted under §508.035, Government Code and Attorney General Opinion GA-0754. Section 508.035 requires the presiding officer to establish policies and procedures to further the efficient administration of the business of the board. The Attorney General Opinion GA-0754 provides the board with the authority to recommend a posthumous pardon to the Governor.

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 February 10, 2012.

TRD-201200715
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Effective date: March 1, 2012
Proposal publication date: November 25, 2011
For further information, please call: (512) 406-5388

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SUBCHAPTER B. CONDITIONAL PARDON

37 TAC §143.20

The Texas Board of Pardons and Paroles adopts the repeal of 37 TAC §143.20, concerning posthumous pardon. The repeal is adopted without changes to the proposal as published in the November 25, 2011, issue of the *Texas Register* (36 TexReg 7970).

This section is repealed to move the identical language under Subchapter A (Full Pardon and Restoration of Rights of Citizenship).

No public comments were received regarding adoption of the repeal.

The repeal is adopted under Government Code, Chapter 2001.

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 February 10, 2012.

TRD-201200714
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Effective date: March 1, 2012
Proposal publication date: November 25, 2011
For further information, please call: (512) 406-5388

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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 adopts 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, without changes to the proposed text as published in the December 23, 2011, issue of the *Texas Register* (36 TexReg 8747).

The amendments are adopted to redesignate state jail regions pursuant to changes made by the 82nd Texas Legislature.

No comments were received regarding the amendments.

The amendments are adopted under Texas Government Code §§499.071, 499.153, 507.003, 507.004, 507.024.

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 February 13, 2012.

TRD-201200791
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: March 4, 2012
Proposal publication date: December 23, 2011
For further information, please call: (512) 463-9693

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SUBCHAPTER B. CORRECTIONAL CAPACITY

37 TAC §152.29

The Texas Board of Criminal Justice adopts the repeal of §152.29, concerning Standards for Functional Areas, without changes to the proposal as published in the December 23, 2011, issue of the *Texas Register* (36 TexReg 8750).

The repeal is adopted to eliminate a rule that is merely a restatement of Texas Government Code §499.102.

No comments were received regarding the repeal.

The repeal is adopted under Texas Government Code §499.102.

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 February 13, 2012.

TRD-201200794
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: March 4, 2012
Proposal publication date: December 23, 2011
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 adopts amendments to §159.13, concerning Educational Services to Released Offenders/Memorandum of Understanding, without changes to the proposed text as published in the December 23, 2011, issue of the *Texas Register* (36 TexReg 8751).

The amendments are adopted to delete an unnecessary legal reference and authorize a new memorandum of understanding.

No comments were received regarding the amendments.

The amendments are adopted under Texas Government Code §508.318.

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 February 13, 2012.

TRD-201200790
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: March 4, 2012
Proposal publication date: December 23, 2011
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 adopts amendments to §195.81, concerning Temporary Housing Assistance Program, without changes to the proposed text as published in the December 23, 2011, issue of the *Texas Register* (36 TexReg 8751).

The amendments are adopted to clarify the criteria for seeking temporary housing assistance.

No comments were received regarding the amendments.

The amendments are adopted under Texas Government Code §508.157.

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 February 13, 2012.

TRD-201200789
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Effective date: March 4, 2012
Proposal publication date: December 23, 2011
For further information, please call: (512) 463-9693

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Agency Rule Review Plans

General Land Office

Title 31, Part 1

TRD-201200792
Filed: February 13, 2012

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Texas Board of Professional Engineers

Title 22, Part 6

TRD-201200877
Filed: February 14, 2012

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School Land Board

Title 31, Part 4

TRD-201200793
Filed: February 13, 2012

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Proposed Rule Reviews

Department of Assistive and Rehabilitative Services

Title 40, Part 2

The Department of Assistive and Rehabilitative Services proposes to review Chapter 106, Division for Blind Services, pursuant to the Texas Government Code, §2001.039.

Elsewhere in this issue of the *Texas Register,* DARS contemporaneously proposes amendments to the existing rules.

Comments on the proposed review may be submitted to: Nancy Mikulencak, Rules Coordinator, Texas Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 150-A-2, Austin, Texas 78756 or electronically to DARS.Rules@dars.state.tx.us.

TRD-201200896

Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: February 15, 2012

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Texas Department of Criminal Justice

Title 37, Part 6

The Texas Board of Criminal Justice files this notice of intent to review §151.3, concerning the Texas Board of Criminal Justice Operating Procedures.

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; e-mail: Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this notice.

TRD-201200856
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: February 13, 2012

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The Texas Board of Criminal Justice files this notice of intent to review §151.4, concerning Public Presentations and Comments to the Texas Board of Criminal Justice.

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; e-mail: Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this notice.

TRD-201200857
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: February 13, 2012

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The Texas Board of Criminal Justice files this notice of intent to review §155.31, concerning Establishing Procedures for Resolving Contract Claims and Disputes with the Texas Department of Criminal Justice.

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; e-mail: Melinda.Bozarth@tdcj.state.tx.us.

Written comments from the general public should be received within 30 days of the publication of this notice.

TRD-201200858
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Filed: February 13, 2012

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Commission on State Emergency Communications

Title 1, Part 12

In accordance with Government Code §2001.039, the Commission on State Emergency Communications (CSEC) files this notice of intent to review Chapter 252, consisting of the following nine rules:

§252.1. Definition of State Agency for Billing Purpose of the 9-1-1 Service Fees and Surcharges.

§252.2. Purchase of Goods and Services.

§252.3. Sick Leave Pool.

§252.4. Charges for Open Records Requests.

§252.5. Employee Training and Education.

§252.6. Wireless Service Fee Proportional Distribution.

§252.7. Definitions.

§252.8. Emergency Communications Advisory Committee.

§252.9. Liability Protection of NG9-1-1 Service Providers.

CSEC's preliminary review of Chapter 252 indicates that the reasons for initially adopting the rules continue to exist. CSEC anticipates readopting and/or readopting with amendments each of the rules in Chapter 252.

Comments or questions regarding this rule review should be submitted in writing within 30 days following publication of this notice to Patrick Tyler, General Counsel, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942 and include a reference to "Chapter 252 Rule Review." The current text of the rules in Chapter 252 can be found in the Rules section of CSEC's website http://www.csec.texas.gov/.

TRD-201200900
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Filed: February 15, 2012

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Department of Information Resources

Title 1, Part 10

The Texas Department of Information Resources (DIR) files this notice of intention to review and consider for re-adoption, revision, or repeal Texas Administration Code, Title 1, Chapter 207, §§207.1 - 207.8, "Telecommunications Services Division." The review and consideration of the rules are conducted in accordance with Texas Government Code, §2001.039. The review will include, at a minimum, an assessment by DIR of whether the reasons the rules were initially adopted continue to exist and whether the rules should be re-adopted.

Any questions or written comments pertaining to this rule review may be submitted to Martin Zelinsky, General Counsel, via mail at P.O. Box 13564, Austin, Texas 78711, via facsimile transmission at (512) 475-4759 or via electronic mail to martin.zelinsky@dir.texas.gov. The deadline for comments is thirty (30) days after publication of this notice in the *Texas Register*. Any proposed changes to the rules as a result of the rule review will be published in the Proposed Rules section of the *Texas Register*. The proposed rule changes will be open for public comment prior to final adoption or repeal of the rule by DIR in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

TRD-201200911
Martin Zelinsky
General Counsel
Department of Information Resources
Filed: February 15, 2012

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Executive Council of Physical Therapy and Occupational Therapy Examiners

Title 22, Part 28

In accordance with §2001.039, Agency Review of Existing Rules, the Executive Council of Physical Therapy and Occupational Therapy Examiners submits the following plan for review of their rules. The board voted to review all rules at its January 27, 2012 meeting. The Review Plan will be posted again on the agenda for the next board meeting, May 30, 2012. The Board will consider all comments received at the meeting and re-adopt (or not) the reviewed rules. The public may comment in writing at any point in the process until the rules are re-adopted by the Board.

The Board will review the following chapter:

Chapter 651. Fees

§651.1. Occupational Therapy Board Fees.

§651.2. Physical Therapy Board Fees.

§651.3. Administrative Services Fees.

All comments and/or questions should be directed to Jennifer J. Jones, Executive Assistant, Executive Council of Physical Therapy and Occupational Therapy Examiners, 333 Guadalupe Street, Suite 2-510, Austin, Texas 78701; jennifer@ptot.texas.gov.

TRD-201200882
John Maline
Executive Director
Executive Council of Physical Therapy and Occupational Therapy Examiners
Filed: February 14, 2012

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Texas Board of Physical Therapy Examiners

Title 22, Part 16

Pursuant to the Texas Government Code, §2001.039, the Texas Board of Physical Therapy Examiners proposes to review the rules in the following chapters at its May 4, 2012 meeting.

Chapter 321. Definitions.

Chapter 322. Practice.

Chapter 323. Powers and Duties of the Board.

Chapter 325. Organization of the Board.

Chapter 327. Compensation.

Chapter 329. Licensing Procedure.

Chapter 335. Professional Title.

Chapter 337. Display of License.

Chapter 339. Fees.

Chapter 341. License Renewal.

Chapter 342. Open Records.

Chapter 343. Contested Case Procedure.

Chapter 344. Administrative Fines and Penalties.

Chapter 345. Accessible Services.

Chapter 346. Practice Settings for Physical Therapy.

Chapter 347. Registration of Physical Therapy Facilities.

As a result of its review, the Texas Board of Physical Therapy Examiners will re-adopt, re-adopt with amendments, or repeal rules following its assessment of whether the reasons for initially adopting the rules continue to exist.

Comments on the rules may be submitted to Nina Hurter, PT Coordinator, at nina.hurter@ptot.texas.gov or by mail at 333 Guadalupe, Suite 2-510, Austin TX 78701. The comment period begins with the publication of this notice. All comments must be received by April 4th, 2011.

TRD-201200876
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Filed: February 14, 2012

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Texas Board of Professional Engineers

Title 22, Part 6

The Texas Board of Professional Engineers will review and consider for readoption, revision, or repeal Texas Administrative Code, Title 22, Part 6, Chapter 131, Organization and Administration.

This review is conducted pursuant to §2001.039 of the Government Code.

In conducting its review, the Board will determine whether the reasons for each rule continue to exist. The rule review will also determine whether each rule is obsolete, reflects current legal and policy considerations, and reflects current procedures of the Board.

Any comments pertaining to this notice may be submitted within the next 30 days to Dewey Helmcamp, Staff Attorney, Texas Board of Professional Engineers, 1917 IH-35 South, Austin, Texas 78741 or faxed to his attention at (512) 440-0417. Any proposed changes to the rules as a result of this review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional comment period prior to final adoption or repeal by the Board.

TRD-201200871
Lance Kinney
Executive Director
Texas Board of Professional Engineers
Filed: February 14, 2012

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The Texas Board of Professional Engineers will review and consider for readoption, revision, or repeal Texas Administrative Code, Title 22, Part 6, Chapter 133, Licensing.

This review is conducted pursuant to §2001.039 of the Government Code.

In conducting its review, the Board will determine whether the reasons for each rule continue to exist. The rule review will also determine whether each rule is obsolete, reflects current legal and policy considerations, and reflects current procedures of the Board.

Any comments pertaining to this notice may be submitted within the next 30 days to Dewey Helmcamp, Staff Attorney, Texas Board of Professional Engineers, 1917 IH-35 South, Austin, Texas 78741 or faxed to his attention at (512) 440-0417. Any proposed changes to the rules as a result of this review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional comment period prior to final adoption or repeal by the Board.

TRD-201200872
Lance Kinney
Executive Director
Texas Board of Professional Engineers
Filed: February 14, 2012

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The Texas Board of Professional Engineers will review and consider for readoption, revision, or repeal Texas Administrative Code, Title 22, Part 6, Chapter 135, Firm Registration.

This review is conducted pursuant to §2001.039 of the Government Code.

In conducting its review, the Board will determine whether the reasons for each rule continue to exist. The rule review will also determine whether each rule is obsolete, reflects current legal and policy considerations, and reflects current procedures of the Board.

Any comments pertaining to this notice may be submitted within the next 30 days to Dewey Helmcamp, Staff Attorney, Texas Board of Professional Engineers, 1917 IH-35 South, Austin, Texas 78741 or faxed to his attention at (512) 440-0417. Any proposed changes to the rules as a result of this review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional comment period prior to final adoption or repeal by the Board.

TRD-201200873
Lance Kinney
Executive Director
Texas Board of Professional Engineers
Filed: February 14, 2012

♦ ♦ ♦

The Texas Board of Professional Engineers will review and consider for readoption, revision, or repeal Texas Administrative Code, Title 22, Part 6, Chapter 137, Compliance and Professionalism.

This review is conducted pursuant to §2001.039 of the Government Code.

In conducting its review, the Board will determine whether the reasons for each rule continue to exist. The rule review will also determine whether each rule is obsolete, reflects current legal and policy considerations, and reflects current procedures of the Board.

Any comments pertaining to this notice may be submitted within the next 30 days to Dewey Helmcamp, Staff Attorney, Texas Board of Professional Engineers, 1917 IH-35 South, Austin, Texas 78741 or faxed

to his attention at (512) 440-0417. Any proposed changes to the rules as a result of this review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional comment period prior to final adoption or repeal by the Board.

TRD-201200874
Lance Kinney
Executive Director
Texas Board of Professional Engineers
Filed: February 14, 2012

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The Texas Board of Professional Engineers will review and consider for readoption, revision, or repeal Texas Administrative Code, Title 22, Part 6, Chapter 139, Enforcement.

This review is conducted pursuant to §2001.039 of the Government Code.

In conducting its review, the Board will determine whether the reasons for each rule continue to exist. The rule review will also determine whether each rule is obsolete, reflects current legal and policy considerations, and reflects current procedures of the Board.

Any comments pertaining to this notice may be submitted within the next 30 days to Dewey Helmcamp, Staff Attorney, Texas Board of Professional Engineers, 1917 IH-35 South, Austin, Texas 78741 or faxed to his attention at (512) 440-0417. Any proposed changes to the rules as a result of this review will be published in the Proposed Rule Section of the *Texas Register* and will be open for an additional comment period prior to final adoption or repeal by the Board.

TRD-201200875
Lance Kinney
Executive Director
Texas Board of Professional Engineers
Filed: February 14, 2012

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Windham School District

Title 19, Part 8

The Windham School District files this notice of intent to review §300.1, concerning Public Presentations and Comments to the Windham School District Board of Trustees.

This review is being conducted pursuant to Texas Government Code §2001.039, which requires rule review every four years.

Comments should be directed to Michael Mondville, General Counsel, Windham School District, P.O. Box 40, Huntsville, Texas 77342; e-mail: michael.mondville@wsdtx.org. Written comments from the general public should be received within 30 days of the publication of this notice.

TRD-201200855
Michael Mondville
General Counsel
Windham School District
Filed: February 13, 2012

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The Windham School District files this notice of intent to review §300.2, concerning Windham School District Board of Trustees Operating Procedures.

This review is being conducted pursuant to Texas Government Code §2001.039, which requires rule review every four years.

Comments should be directed to Michael Mondville, General Counsel, Windham School District, P.O. Box 40, Huntsville, Texas 77342; e-mail: michael.mondville@wsdtx.org. Written comments from the general public should be received within 30 days of the publication of this notice.

TRD-201200854
Michael Mondville
General Counsel
Windham School District
Filed: February 13, 2012

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Adopted Rule Reviews

State Board for Educator Certification

Title 19, Part 7

The State Board for Educator Certification (SBEC) adopts the review of Title 19, Texas Administrative Code (TAC), Chapter 231, Assignment of Public School Personnel, pursuant to the Texas Government Code, §2001.039. The SBEC proposed the review of 19 TAC Chapter 231 in the November 11, 2011, issue of the *Texas Register* (36 TexReg 7683).

Relating to the review of 19 TAC Chapter 231, the SBEC finds that the reasons for adoption continue to exist and readopts the rule. Revisions are anticipated to the SBEC rule in 19 TAC Chapter 231 to incorporate any changes that may result from the rule review. Texas Education Agency staff anticipates presenting for discussion proposed revisions at the June 2012 SBEC meeting following a stakeholder meeting.

Following is a summary of the public comment received and corresponding response.

Comment: A representative of the Science Teachers Association of Texas (STAT) commented that the STAT is not against adopting the review of 19 TAC Chapter 231.

Board Response: The SBEC agreed and adopted the review of 19 TAC Chapter 231.

This concludes the review of 19 TAC Chapter 231.

TRD-201200899
Cristina De La Fuente-Valadez
Director, Rulemaking, Texas Education Agency
State Board for Educator Certification
Filed: February 15, 2012

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Texas Higher Education Coordinating Board

Title 19, Part 1

The Texas Higher Education Coordinating Board adopts the review of Chapter 1, concerning Agency Administration. The proposed notice of review was published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6971).

No comments were received regarding the review of this chapter. During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Texas Government Code, §2001.039.

This concludes the Board's review of Chapter 1 as required by the Texas Government Code, §2001.039.

TRD-201200697
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 9, 2012

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the review of Chapter 4, concerning Rules Applying to All Public Institutions of Higher Education in Texas. The proposed notice of review was published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6971).

No comments were received regarding the review of this chapter. During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Texas Government Code, §2001.039.

This concludes the Board's review of Chapter 4 as required by the Texas Government Code, §2001.039.

TRD-201200698
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 9, 2012

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the review of Chapter 5, concerning Rules Applying to Public Universities, Health-Related Institutions, and/or Selected Public Colleges of Higher Education in Texas. The proposed notice of review was published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6971).

No comments were received regarding the review of this chapter however, it was noticed that the title of Chapter 5 was listed incorrectly in the proposed rule review. This has been corrected accordingly. During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Texas Government Code, §2001.039.

This concludes the Board's review of Chapter 5 as required by the Texas Government Code, §2001.039.

TRD-201200699
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 9, 2012

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the review of Chapter 6, concerning Health Education, Training, and Research Funds. The proposed notice of review was published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6971).

No comments were received regarding the review of this chapter. During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Texas Government Code, §2001.039.

This concludes the Board's review of Chapter 6 as required by the Texas Government Code, §2001.039.

TRD-201200700
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 9, 2012

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the review of Chapter 7, concerning Degree Granting Colleges and Universities Other Than Texas Public Institutions. The proposed notice of review was published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6971).

No comments were received regarding the review of this chapter. During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Texas Government Code, §2001.039.

This concludes the Board's review of Chapter 7 as required by the Texas Government Code, §2001.039.

TRD-201200701
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 9, 2012

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the review of Chapter 8, concerning Creation, Expansion, Dissolution, or Conservatorship of Public Community College Districts. The proposed notice of review was published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6972).

No comments were received regarding the review of this chapter. During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Texas Government Code, §2001.039.

This concludes the Board's review of Chapter 8 as required by the Texas Government Code, §2001.039.

TRD-201200702
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 9, 2012

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the review of Chapter 9, concerning Program Development in Public Two-Year Colleges. The proposed notice of review was published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6972).

No comments were received regarding the review of this chapter. During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Texas Government Code, §2001.039.

This concludes the Board's review of Chapter 9 as required by the Texas Government Code, §2001.039.

TRD-201200703

Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 9, 2012

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the review of Chapter 11, concerning Texas State Technical College System. The proposed notice of review was published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6972).

No comments were received regarding the review of this chapter. During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Texas Government Code, §2001.039.

This concludes the Board's review of Chapter 11 as required by the Texas Government Code, §2001.039.

TRD-201200704
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 9, 2012

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the review of Chapter 13, concerning Financial Planning. The proposed notice of review was published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6972).

No comments were received regarding the review of this chapter. During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Texas Government Code, §2001.039.

This concludes the Board's review of Chapter 13 as required by the Texas Government Code, §2001.039.

TRD-201200705
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 9, 2012

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the review of Chapter 14, concerning Research Funding Programs. The proposed notice of review was published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6972).

No comments were received regarding the review of this chapter. During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Texas Government Code, §2001.039.

This concludes the Board's review of Chapter 14 as required by the Texas Government Code, §2001.039.

TRD-201200706
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 9, 2012

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the review of Chapter 15, concerning National Research Universities. The proposed notice of review was published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6972).

No comments were received regarding the review of this chapter. During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Texas Government Code, §2001.039.

This concludes the Board's review of Chapter 15 as required by the Texas Government Code, §2001.039.

TRD-201200707
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 9, 2012

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the review of Chapter 17, concerning Resource Planning. The proposed notice of review was published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6972).

No comments were received regarding the review of this chapter. During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Texas Government Code, §2001.039.

This concludes the Board's review of Chapter 17 as required by the Texas Government Code, §2001.039.

TRD-201200708
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 9, 2012

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the review of Chapter 21, concerning Student Services. The proposed notice of review was published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6973).

No comments were received regarding the review of this chapter. During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Texas Government Code, §2001.039.

This concludes the Board's review of Chapter 21 as required by the Texas Government Code, §2001.039.

TRD-201200709
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 9, 2012

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the review of Chapter 22, concerning Grant and Scholarship Programs. The pro-

posed notice of review was published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6973).

No comments were received regarding the review of this chapter. During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Texas Government Code, §2001.039.

This concludes the Board's review of Chapter 22 as required by the Texas Government Code, §2001.039.

TRD-201200710
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 9, 2012

♦ ♦ ♦

The Texas Higher Education Coordinating Board adopts the review of Chapter 25, concerning Optional Retirement Program. The proposed notice of review was published in the October 14, 2011, issue of the *Texas Register* (36 TexReg 6973).

No comments were received regarding the review of this chapter. During its review, the Board determined that the initial reasons for adopting these sections continue to exist. The rules are therefore readopted in accordance with the requirements of the Texas Government Code, §2001.039.

This concludes the Board's review of Chapter 25 as required by the Texas Government Code, §2001.039.

TRD-201200711
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: February 9, 2012

♦ ♦ ♦

Texas Board of Pardons and Paroles

Title 37, Part 5

The Texas Board of Pardons and Paroles files this notice of readoption of 37 TAC Chapter 143, Executive Clemency, Subchapter A, Full Pardon and Restoration of Rights of Citizenship, and all the sections contained within the subchapter.

The Board amended §§143.1, 143.2, 143.5 - 143.7, and 143.12 to clean up the language of the rules. The readoption of Chapter 143, Subchapter A is filed in accordance with the Board of Pardons and Paroles' Notice of Intent to Review published in the November 25, 2011, issue of the *Texas Register* (36 TexReg 8073). No public comments were received.

The assessment of Chapter 143, Subchapter A indicates that the original justifications for these rules continues to exist, and the Board is readopting the rules in accordance with Texas Government Code, §2001.039. This concludes the review of 37 TAC Chapter 143, Subchapter A.

TRD-201200712
Bettie Wells
General Counsel
Texas Board of Pardons and Paroles
Filed: February 10, 2012

♦ ♦ ♦

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: 28 TAC §110.101(e)(1)

"NOTICE TO EMPLOYEES CONCERNING WORKERS' COMPENSATION IN TEXAS"

COVERAGE: [Name of employer] has workers' compensation insurance coverage from [name of commercial insurance company] ~~to protect you~~ in the event of work-related injury or occupational disease [~~illness~~]. This coverage is effective from [effective date of workers' compensation insurance policy]. Any injuries or occupational diseases [~~illnesses~~] which occur on or after that date will be handled by [name of commercial insurance company]. An employee or a person acting on the employee's behalf, must notify the employer of an injury or occupational disease [~~illness~~] not later than the 30th day after the date on which the injury occurs or the date the employee knew or should have known of an occupational disease [~~illness~~], unless the Texas Department of Insurance, Division of Workers' Compensation (Division) [~~Commission~~] determines that good cause existed for failure to provide timely notice. Your employer is required to provide you with coverage information, in writing, when you are hired or whenever the employer becomes, or ceases to be, covered by workers' compensation insurance.

EMPLOYEE ASSISTANCE: The Division [~~Commission~~] provides free information about how to file a workers' compensation claim. Division [~~Commission~~] staff will answer any questions you may have about workers' compensation and process any requests for dispute resolution of a claim. You can obtain this assistance by contacting your local Division field office or by calling 1-800-252-7031. The Office of Injured Employee Counsel (OIEC) also provides free assistance to injured employees and will explain your rights and responsibilities under the Workers' Compensation Act, [~~and assist in resolving disputes about a claim.~~] You can obtain OIEC's [~~this~~] assistance by contacting your local Division [~~Commission~~] field office or by calling 1-866-EZE-OIEC (1-866-393-6432) [~~1-800-252-7031~~].

SAFETY VIOLATIONS HOTLINE: The Division [~~Commission~~] has [~~established~~] a 24 hour toll-free telephone number for reporting unsafe conditions in the workplace that may violate occupational health and safety laws. Employers are prohibited by law from suspending, terminating, or discriminating against any employee because he or she in good faith reports an alleged occupational health or safety violation. Contact the Division [~~of Workers' Health & Safety~~] at 1-800-452-9595."

Figure: 28 TAC §110.101(e)(2)

"NOTICE TO EMPLOYEES CONCERNING WORKERS' COMPENSATION IN TEXAS"

COVERAGE: Effective on [effective date of certificate] [name of employer] has been certified by the Texas Department of Insurance, Division of Workers' Compensation (Division) [~~Texas Workers' Compensation Commission~~] as a self-insured employer providing workers' compensation insurance [~~to protect you~~] in the event of work-related injury or occupational disease [~~illness~~]. Claims for injuries or occupational diseases [~~illnesses~~] which occur on or after that date will be handled by [name of third party administrator]. An employee or a person acting on the employee's behalf, must notify the employer of an injury or occupational disease [~~illness~~] not later than the 30th day after the date on which the injury occurs or the date the employee knew or should have known of an occupational disease [~~illness~~], unless the Division [~~Commission~~] determines that good cause existed for failure to provide timely notice. Your employer is required to provide you with coverage information, in writing, when you are hired or whenever the employer becomes, or ceases to be, covered by workers' compensation insurance.

EMPLOYEE ASSISTANCE: The Division [~~Commission~~] provides free information about how to file a workers' compensation claim. Division [~~Commission~~] staff will answer any questions you may have about workers' compensation and process any requests for dispute resolution of a claim. You can obtain this assistance by contacting your local Division field office or by calling 1-800-252-7031. The Office of Injured Employee Counsel (OIEC) also provides free assistance to injured employees and will explain your rights and responsibilities under the Workers' Compensation Act. [~~and assist in resolving disputes about a claim.~~] You can obtain OIEC's [~~this~~] assistance by contacting your local Division [~~Commission~~] field office or by calling 1-866-EZE-OIEC (1-866-393-6432) [~~1-800-252-7031~~].

SAFETY VIOLATIONS HOTLINE: The Division [~~Commission~~] has [~~established~~] a 24 hour toll-free telephone number for reporting unsafe conditions in the workplace that may violate occupational health and safety laws. Employers are prohibited by law from suspending, terminating, or discriminating against any employee because he or she in good faith reports an alleged occupational health or safety violation. Contact the Division [~~of Workers' Health & Safety~~] at 1-800-452-9595."

Figure: 28 TAC §110.101(e)(3)

"NOTICE TO EMPLOYEES CONCERNING WORKERS' COMPENSATION IN TEXAS"

COVERAGE: Effective on [effective date of certificate] [name of employer] provides workers' compensation insurance coverage as a member of a self-insurance group under Labor Code Chapter 407A in the event of work-related injury or occupational disease. Claims for injuries or occupational diseases which occur on or after that date will be handled by [name of third party administrator]. An employee or a person acting on the employee's behalf, must notify the employer of an injury or occupational disease not later than the 30th day after the date on which the injury occurs or the date the employee knew or should have known of an occupational disease, unless the Texas Department of Insurance, Division of Workers' Compensation (Division) determines that good cause existed for failure to provide timely notice. Your employer is required to provide you with coverage information, in writing, when you are hired or whenever the employer becomes, or ceases to be, covered by workers' compensation insurance.

EMPLOYEE ASSISTANCE: The Division provides free information about how to file a workers' compensation claim. Division staff will answer any questions you may have about workers' compensation and process any requests for dispute resolution of a claim. You can obtain this assistance by contacting your local Division field office or by calling 1-800-252-7031. The Office of Injured Employee Counsel (OIEC) also provides free assistance to injured employees and will explain your rights and responsibilities under the Workers' Compensation Act. You can obtain OIEC's assistance by contacting your local Division field office or by calling 1-866-EZE-OIEC (1-866-393-6432).

SAFETY VIOLATIONS HOTLINE: The Division has a 24 hour toll-free telephone number for reporting unsafe conditions in the workplace that may violate occupational health and safety laws. Employers are prohibited by law from suspending, terminating, or discriminating against any employee because he or she in good faith reports an alleged occupational health or safety violation. Contact the Division at 1-800-452-9595."

Figure: 28 TAC §110.101(e)(4)

"NOTICE TO EMPLOYEES CONCERNING WORKERS' COMPENSATION IN TEXAS"

COVERAGE: (Name of employer) does not have [~~has elected not to obtain~~] workers' compensation insurance coverage. As an employee of a non-covered employer, you are not eligible to receive workers' compensation benefits under the Texas Workers' Compensation Act. However, a non-covered (non-subscribing) employer can and may provide other benefits to injured employees. You should contact your employer regarding the availability of other benefits [~~or compensation~~] for a work-related injury or occupational disease [~~illness~~]. In addition, you may have rights under the common law of Texas should you have [~~suffer~~] an on the job injury or occupational disease [~~illness~~]. Your employer is required to provide you with coverage information, in writing, when you are hired or whenever the employer becomes, or ceases to be, covered by workers' compensation insurance.

SAFETY VIOLATIONS HOTLINE: The Division [~~Commission~~] has a 24 hour toll-free telephone number for reporting unsafe conditions in the workplace that may violate occupational health and safety laws. Employers are prohibited by law from suspending, terminating, or discriminating against any employee because he or she in good faith reports an alleged occupational health or safety violation. Contact the Division [~~of Workers' Health & Safety~~] at 1-800-452-9595."

Figure: 30 TAC §331.42(b)

$r = (2.25\ KHt / S10^{x})^{1/2}$

Where:

$x = 4\ \pi\ KH\ (h_w - h_{bo} \times S_pG_b) / 2.3\ Q$

r = radius of endangering influence from injection well (length)
K = hydraulic conductivity of the injection zone (length/time)
H = thickness of the injection zone (length)
t = time of injection (time)
S = storage coefficient (dimensionless)
Q = injection rate (volume/time)
h_{bo} = observed original hydrostatic head of injection zone (length) measured from the base of the lowermost underground source of drinking water
h_w = hydrostatic head of underground source of drinking water (length) measured from the base of the lowest underground source of drinking water
S_pG_b = specific gravity of fluid in the injection zone (dimensionless)
π = 3.142 (dimensionless)

The above equation is based on the following assumptions:
(1) the injection zone is homogenous and isotropic;
(2) the injection zone has infinite area extent;
(3) the injection well penetrates the entire thickness of the injection zone;
(4) the well diameter is infinitesimal compared to "r" when injection time is longer than a few minutes; and
(5) the emplacement of fluid into the injection zone creates instantaneous increase in pressure.

Figure: 40 TAC §108.1413(c)

Monthly Fees for DARS ECI Family Cost Share by % Federal Poverty Guideline

Family Income by % Federal Poverty Guideline	Monthly Fee
≤ 100%	$0
>100% to 150%	$3
>150% to 200%	$5
> 200% to 250%	$10
> 250% to 350%	$20
> 350% to 450%	$55
> 450% to 550%	$85
> 550% to 650%	$115
> 650% to 750%	$145
> 750%	$175

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.

Texas Department of Agriculture

Request for Proposals: 2012-2013 Child Care Wellness Grant Program Competitive Grant Application

Background.

Farm-Direct. Farm-direct programs, such as Farm to School and Farm to Work, provide area farmers with additional sales opportunities and promote the production of locally grown fresh fruits and vegetables. Farm-direct programs also make a wonderful variety of healthy fruits and vegetables more readily available to buy and eat at sites and locations other than the traditional grocery store and supermarket. Increasing the number of farm-direct programs in a given community can strengthen local economies and remove some of the barriers families may face when trying to eat healthy foods.

Breastfeeding Supportive Child Care Practices. A hundred years ago, babies were nourished solely on their mothers' milk. Although the choice to breastfeed or formula feed a child is an individual decision, community-based programs that support a mothers' ability to safely and conveniently choose to breastfeed are gaining attention due to the health benefits to the child and mother. Economically speaking, the choice to breastfeed can save a family up to $1,500 annually.

Although TDA acknowledges that changing environments to be more supportive of both farm-direct and breastfeeding-friendly practices require the active involvement of many public and private partners, it also recognizes that child care centers play a critical role as a key environment in which change can take place and improve the nutritional health of our most vulnerable population.

Statement of Purpose.

The Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2010 (P.L. 111-80) authorized the United States Department of Agriculture Food and Nutrition Service (FNS) to award $8 million in grants to State Agencies administering the Child and Adult Care Food Program (CACFP) for projects aimed at improving the health and nutrition of children in child care settings.

The purpose of the CACFP Child Care Wellness Grants (CWG) is to expand and complement established efforts to improve early child care nutrition environments and meals served to infants and children by following the most recent Dietary Guidelines for Americans and current scientific knowledge. TDA seeks to do this through the establishment of Farm to Child Care and Breastfeeding Supportive Child Care Practices Grant Programs in child care centers and day care homes across the state.

Request for Proposal.

TDA seeks eligible child care centers and day home sponsors to apply for one of two Child Care Wellness Grant programs:

1. Farm to Child Care (FTC) - is based on the premise that when children participate in the local food system and know where their food comes from, they are more likely to select and consume fresh fruits and vegetables. By establishing a system to directly purchase and incorporate locally grown produce (fruits and vegetables) into meal, snack and educational offerings, child care centers and day care homes can improve the nutritional intake of the children under their care while emphasizing the direct connection between local food choices and the quality and health of their community and daily lives.

2. Breastfeeding Supportive Child Care Practices Child Care (BSC) - will assist child care centers and day homes in providing increased support for breastfeeding mothers through the implementation of optimal policies and procedures, and increased education/informational outreach to staff, parents/guardians and the community-at-large regarding the benefits of breastfeeding supportive practices.

Applicants may select to apply for Farm to Child Care or Breastfeeding Supportive Child Care Practices; however, all respondents are automatically required to participate in the Healthy Child Care Network (HCN), a TDA initiative to improve providers' access to trainings, outreach and related communications. All grant awardees are automatically participants in the network, participation in the network involves attending two required training activities related to Farm to Child Care and/or the Breastfeeding Supportive Practices Grants.

The Farm to Child Care grant program (FTC) will assist a child care center, sponsor of multiple child care centers/organizations or day home sponsor to establish a farm-direct program. Key steps in creation of such a program include 1) identifying a source and vendor of locally grown produce; and 2) accomplishing an achievable range of activities that will create both a purchasing and educational relationship between the child care center/daycare home and that source (vendor) of locally grown produce. A successful program established under this program will provide children with an environment where choosing healthy foods is easy and preferable, and where they learn about local food in a way that will enhance their dietary knowledge and choices beyond the child care setting.

The Breastfeeding Supportive Child Care Practices (BSC) will assist child care centers and day homes in providing increased support for breastfeeding mothers. Key steps in establishing this support include: 1) performing a review of existing practices and current compliance with the requirements for the Breastfeeding Supportive Child Care Practices designation; and 2) accomplishing an achievable number of steps that will enable the child care center employees and owners to provide consistent lactation support to breastfeeding families whose babies are in their care. A successful program established under this program will provide mothers and families with an environment where breastfeeding is normal, respected and convenient; and where infant health is protected through ready access to their mother's milk.

In addition to participating in either FTC or BSC, all grant recipients will be required to participate in the Healthy Child Care Network (HCN). HCN will allow for the purchase or upgrade of software, hardware, and other technological services deemed appropriate and necessary to improve child care provider's access to this network's training and outreach, however technology expenses will be limited to the percentage of time spent on CACFP functions. As the Program develops, all CACFP providers will be encouraged to participate in this Network.

Eligible Projects.

Total TDA funding for FTC and BCS for the 2012 funding cycle is approximately $650,000. Individual child care centers may seek up to $10,000 for expenses related to the implementation, supplementation, improvement or expansion of Farm to Child Care or Breastfeeding Supportive Child Care Practices program, as well as participation in the mandatory Healthy Child Care Network initiatives. A sponsoring organization of either child care centers or day homes may request up to $25,000 for centers or day homes in their network, with a maximum of $10,000 that can be awarded to a single center/home within that network.

Eligibility.

Individual child care centers and day homes in Texas that currently participate in the CACFP may respond to this request for proposals. Sponsoring organizations of child care centers or day homes in Texas that currently participate in the CACFP may respond to this request for proposals.

Funding Parameters.

TDA reserves the right to fund projects partially or fully. TDA reserves the right to negotiate individual elements of any proposal and to reject any and all proposals. Where more than one proposal is acceptable for funding, TDA may request cooperation between grantees or revision/adjustment to a proposal in order to avoid duplication and to realize the maximum benefit to the state. Selected projects will receive funding on a cost-reimbursement basis.

All costs directly or indirectly related to preparation of a response to this Request for Proposals (RFP) or any oral presentation required to supplement and/or clarify the RFP which may be required by TDA shall be the sole responsibility of, and shall be borne by the applicant.

Evaluation of Information.

Preference will be given to projects that are unique in nature and that meet the criteria set out by TDA. TDA may consider some or all of these criteria in its review of each application:

Relevance and Effectiveness: Do the goal, objectives and activities match the intent of the RFP and the expressed goals of the program?

Feasibility and Efficiency: Is the proposal, including activities, budget, and timeframe, realistic and achievable?

Impact: If the proposed project is successful as proposed, how will it make a difference in the recipient organization, the children under its care, its community and its impacted families?

Sustainability: Does the proposal include procedures to sustain the activities proposed beyond any initial grant funding period?

Supporting and Leveraged Funds: Have potential funds from other sources been identified? How will the project continue after any initial grant funding period?

Geographic location in the state;

Type of provider (center, day home) and type(s) of program(s) to be implemented;

Number(s) expected to be reached and impacted in both general and special population(s) by estimated individual; family and/or community counts; and

Degree of significant health and/or economic disparity based on current demographic and/or population/special population information.

TDA will appoint a panel to evaluate applications. The panel will consist of experts in the fields of health, nutrition, and child development and/or education, and will recommend applications for funding. TDA will make the final funding decisions.

Application Requirements.

Both FTC and BSC applications must be submitted on Form FND-134 in order to be considered. Responses, including Form FND-134, may not exceed six pages. The required form is available on the TDA web site at www.TexasAgriculture.gov.

1. Cover Page - Form FND-134

a. Personnel/Contact Information. Cover sheet with names, titles, addresses, telephone and email addresses of the project manager and official representative legally authorized to enter into binding agreements for the organization.

b. Check box for type of facility (e.g., Center or Day Home Sponsor)

c. Certification that the applicant organization is a CACFP participating entity that provides care for children of pre-school/early age.

d. Selection of Farm to Child Care and/or Breastfeeding Supportive Child Care Practices

2. Project Components - May not exceed six (6) pages

a. **Project Title:** Title must be brief, descriptive and capture the primary focus (FTC or BSC) of the project.

b. **Project Summary - May not exceed 200 words:** Include a project summary of 200 words or less. The project summary must contain a brief description of the proposed project suitable for sharing with the public.

c.**Impact of Project:** Provide number of children this project is expected to reach. If applicant is a sponsor, please indicate the number of centers, homes and eligible children enrolled in the facilities that will be participating, if funded.

i. Number(s) expected to be reached and impacted in both general and special population(s) by estimated individual; family and/or community counts; and

ii. Degree of significant health and/or economic disparity based on current demographic and/or population/special population information.

d. **Project Purpose:** A clear statement of the purpose of each project. Applicants may choose to focus on Farm to Child Care OR Breastfeeding Supportive Child Care Practices. Please note that all respondents will be required to participate in the Healthy Child Care Network.

e. **Narrative Proposal:** A detailed account or description of how the provider organization plans to implement their program. The narrative proposal must:

i. State the overall goal;

ii. List the objectives to fulfill the goal along with appropriate timeframes; and

iii. Explain how the required proposal activities provided below will be performed to accomplish the objectives based on type of application (FTC or BSC).

f. **Farm to Child Care Proposal Activities:**

i. Identify and select a source of locally grown fruits and vegetables. Examples of appropriate sources include a small, medium or large size family farm or family farm cooperative; urban farm, or urban/community garden that is located within 100 miles of the center;

ii. Identify and select a vendor from which to purchase the local produce. In many cases, the vendor and the source are the same (see (i.) above), but vendors can also include regional or local food/farmers markets; and community supported agriculture (CSA) projects. Regardless of the vendor selected, the farmer/grower must be the main

seller of the fruits and vegetables grown on their farm and the main individual or entity that profits from what is sold.

iii. Incorporate locally grown fruits and vegetables in regular meal/snack offerings. Include the frequency or how often fresh local produce will be directly purchased and featured (included) in your centers/day homes' regular meal and/or snack offering(s) for children under your care to consume. Grant funds cannot be used to purchase fruits or vegetables for meals and snacks as part of the reimbursable meal. Grant funds may be used to develop menus, devote staff time, etc.

iv. Incorporate regular appropriate education/awareness and hands-on activities to enhance and sustain the FTC program and impact. Include a description of how often fresh local produce will be the topic of conducted education, awareness and hands-on activities and how education will be used to reinforce and sustain both the FTC program and individual dietary changes. When applicable, explain how an activity demonstrates the connection(s) between individual/community health and food/nutrition, food sources and systems. Suggested topics and types of activities include, but are not limited to the following:

Classroom instruction on making healthy food choices, basic nutrition;

Presentation on the local food system, benefits of fruits and vegetables;

Hands-on activities, e.g., taste tests, food preparation and cooking demonstrations using locally grown fruits and vegetables;

Field trip/visit to the local farm;

Field trip/visit to a farmers market, community or urban garden;

Gardening, growing food;

Team Nutrition's *Grow It, Try It, Like It! Preschool Fun with Fruits and Vegetables;*

Utilize Team Nutrition's *Nibbles for Health and/or Two Bite Club.*

v. Promote and communicate your new FTC program to staff, children, parents/families and the community. Applicants are required to develop a name/identity of their FTC program and develop complimentary promotion materials, fliers, etc. Describe how you will promote and communicate your program and include copies of any draft items as available in the application.

vi. Commit to participate in a minimum of 2 training events per year and review all educational materials regarding FTC start-up, benefits and sustainability that TDA or its partners and stakeholders will make available. Registration records and completion of evaluations for these trainings and educational materials will serve as documentation of participation and review.

g. **Breastfeeding Supportive Child Care Practices Proposal Activities**

Note: If applying for Breastfeeding Supportive Child Care Practices Child Care, **you must first conduct a Self-Appraisal Questionnaire to assess key areas where improvements are needed and include a copy of the results of your appraisal with your application along with a description of how current policies or procedures may pose actual or perceived barriers to breastfeeding/breastfeeding mothers. The Self-Appraisal Questionnaire is located at Attachment A of this RFP.**

i. Based on the results of the Self-Appraisal Questionnaire appraisal, select 4 or more of the following 10 Steps to become a Breastfeeding Supportive child care center and describe how you will accomplish them in your narrative proposal:

Step 1. Designate an individual or group who is responsible for development and implementation of the 10 steps.

Step 2. Establish a supportive breastfeeding policy and require all staff be aware of and follow the policy.

Step 3. Establish a supportive worksite policy for staff members who are breastfeeding.

Step 4. Train all staff so that they are able to carry out breastfeeding promotion and support activities.

Step 5. Create a culturally appropriate breastfeeding environment.

Step 6. Inform expectant and new families and visitors about your center's Breastfeeding Supportive Child Care Practices policies.

Step 7 Stimulate participatory learning experiences with the children, related to breastfeeding.

Step 8. Provide a comfortable place for mothers to breastfeed or pump their milk in privacy, if desired. Educate families and staff of a mother's legal rights to breastfeed.

Step 9. Establish and maintain connections with local breastfeeding coalition or community breastfeeding resources.

Step 10. Maintain an updated resource file of community breastfeeding services and resources kept in an accessible area for families.

ii. Promote/conduct outreach regarding your BSC program to staff, parents/families and the community. Applicants may use existing or develop new complimentary promotion materials, informational fliers, etc. Describe how you will promote and communicate your program and include copies of any draft items as available in the application.

iii. Promote/conduct outreach and training using appropriate educational materials and resources explaining that breast milk is a creditable food item for a reimbursable infant meal.

iv. Commit to participate in a minimum of 2 training events per year AND review all educational materials regarding BSC start-up, benefits and sustainability that TDA or its partners and stakeholders will make available. Registration records and completion of evaluations for these trainings and educational materials will serve as documentation of participation and review.

v. When preparing your BSC proposal, refer to 10 Steps to Breastfeeding Supportive Child Care Practices Child Care Centers Resource Kit for a complete explanation of each step and activities involved available online at www.dhs.wisconsin.gov/health/physicalactivity/pdf_files/BreastfeedingFriendlyChildCareCenters.pdf

h. **Healthy Child Care Network (required)**

Narrative proposal of how the provider organization will utilize grant monies to purchase or upgrade software, hardware and other technological services deemed appropriate and necessary to improve child care provider's access to training, outreach and communication with State office. Technology expenses will be limited to the percentage of time spent on CACFP functions, which must be stated in the narrative. The budget must give line item cost that include % of time used for CACFP program functions.

i. **Budget Snapshot and Narrative:** Provide sufficient detail about budget categories in narrative format. Proposed costs include those directly associated with the Farm to Child Care and Breastfeeding Supportive Child Care Practices grant program, as well as any technological needs including, but not limited to, hardware, software, or service needs that would allow the childcare provider to fully participate in Healthy Child Care Network (total budget limited to a maximum award

of $10,000 per single center or $25,000 per childcare sponsors). See **"Description of the Budget"** in Budget information below.

i. Detailed description of technology costs, demonstrating that proposed expenses will be limited to the percentage of time used for CACFP functions (e.g., a laptop computer will be used 20% of the time on CACFP activities, therefore 20% of the hardware, software and internet connectivity cost may be reimbursed with sub-grant funds). The percentage of time dedicated to CACFP functions must be clearly justified with supporting documentation, such as timesheets.

j. **Acknowledgements:**

i. Requirement to participate in the Healthy Child Care Network.

ii. That grant funds may not be used to pay 100% of the technology cost for sub-grantees.

iii. Requirement to participate in the pre- and post-study surveys.

k. **Participating Sites. (If applicable)**

If applicant is a sponsor, please list all organization sites that will be participating, if funded.

Reporting Requirements. Applications selected for award are required to submit the following reports:

1. Payment Requests. The Child Care Wellness Grant is administered on a cost reimbursement basis. Funds will be disbursed once a proper payment request, including back-up documentation, has been received by TDA. Payment Requests may be submitted with no greater frequency than monthly.

2. Quarterly Performance Reports. To complete these reports, a hyperlink to an online reporting form will be electronically mailed to you each quarter. The form will cover accomplishments of project objectives for the time periods specified in the award document. Report due dates are December 30, 2012 for Quarter 1 (Sep.-Nov. 2012); March 30, 2013 for Quarter 2 (Dec. 2012-Feb. 2013); June 30, 2013 for Quarter 3 (Mar. 2013-May 2013); Sep. 30, 2013 for Quarter 4 (Jun. 2013-Aug. 2013). Funded projects will be asked to submit their reports electronically. The Quarterly Performance report should include:

a. Activities performed;

b. Problems and delays; and

c. Future project plans.

3. Final Performance Report is due thirty (30) days after the expiration or termination of the Grant Agreement, whichever occurs first. The final report shall be submitted in an electronic format utilizing Word. The final report shall contain:

a. Project summary: Description of how grant award was used to establish either an FTC or BSC program and how it met its objectives. Include an overview of results; and how they will impact implementation during the future year(s) of the project;

b. Description of the successes, challenges, and any limitations on the Child Care Wellness Grant program/activity associated with the grant award;

c. Description of future plans, including how the Child Care Wellness Grant program/activity will continue after the grant is expended; and

d. Photographs (if applicable) - to show program execution and/or document results.

4. Project Budget Reports. Budget reports detailing the amount of the grant award spent to date are due on a quarterly basis for the time periods specified in No. 2 Quarterly Performance Reports - see above.

5. Final Budget Report. This report is due thirty (30) days after the completion of the project or the termination of the agreement.

Budget Information.

1. **Eligible Expenses.** Expenses that are necessary and reasonable for proper and efficient performance and administration of a project are eligible; however, these expenses must be properly documented with sufficient backup detail, including copies of paid invoices in accordance with grant agreement. Examples of eligible expenditures are:

a. Personnel costs - both salary and benefits;

b. Travel - domestic travel for employees only; out-of-state and international travel is prohibited;

c. Supplies and direct operating expenses - equipment that costs less than $5,000, such as office and other supplies, postage, telecommunications, printing, etc.;

d. Contracts - agreements made with other entities to perform a portion of the project; and

e. Indirect costs - no more than 10% of direct costs.

2. **Ineligible Expenses.** Expenses that are prohibited by state or federal law or USDA guidelines are ineligible. Refer to the Uniform Grant Management Standards for more detailed information. http://www.governor.state.tx.us/divisions/stategrants/guidelines/files/UGMS062004.doc

The following are some examples of these ineligible expenses:

a. Alcoholic beverages;

b. Entertainment;

c. Food used for a reimbursable meal (food **can be purchased** for educational purposes, demonstrations and taste tests);

d. Contributions - charitable or political;

e. Expenses falling outside of the project grant agreement period;

f. Expenditures not specifically listed in the project budget; and

g. Expenses that are not adequately documented.

3. **Description of the Budget.** Present an overall project budget and include the following items in the budget description:

a. Personnel: Grant funds may be used for directly supporting salaries and wages of child care personnel. Support personnel can receive salaries and social/fringe benefits in proportion to the time devoted to the WGP project.

b. Fringe Benefits: Provide the rate of fringe benefits for each project participant's salary described in the personnel section.

c. Travel: Travel costs are allowable for expenses for transportation, lodging, subsistence, and related items incurred by grantee while traveling within Texas on official business. Reimbursement for travel is limited to the federal Domestic Per Diem Rates, which can be found on the U.S. General Services Administration (GSA) Web site (www.gsa.gov under Most Requested Links). For Texas locations not listed on the GSA site, the rate will be limited to $85 for lodging and $36 for meals.

d. Supplies: Expenses that are directly related to the grantee's day-to-day operation of the grant project that are not included in any of the Grantee's other standard budget categories and has an acquisition cost of less than $5,000 per unit and includes equipment such as breast pumps, storage containers, tools, utensils, etc. and other related supplies. Grantees must allocate costs on a prorated basis for shared usage, including office supplies, postage, telecommunications and printing.

e. Technology: While grantees will be permitted to purchase limited software, computer items, and related technology, the per unit acquisition cost will be less than $5000 and does not qualify as equipment as defined by TDA when reporting equipment as assets in its financial statements.

f. Other: Provide a detailed description of all other direct costs.

General Compliance Information.

1. All grant awards are subject to the availability of appropriations and authorizations by the Food and Nutrition Service.

2. Any delegation by the Grantee to a subcontractor regarding any duties and responsibilities imposed by the grant award shall be approved in advance by TDA and shall not relieve the Grantee of its responsibilities to TDA for their performance.

3. Any information or documentation submitted to TDA is subject to disclosure under the Texas Public Information Act.

4. Awarded grant projects must remain in full compliance or be subject to termination at the discretion of TDA.

5. Grant recipients must keep a separate bookkeeping account with a complete record of all expenditures relating to the research project. Records shall be maintained for three (3) years after the completion of the research project or as otherwise agreed upon with TDA. TDA, U.S. Department of Agriculture (USDA) and the Texas State Auditor's Office reserve the right to examine all books, documents, records, and accounts relating to the research project at any time throughout the duration of the agreement and for three (3) years immediately following completion of the project. If there has been any litigation, claim, negotiation, audit or other action started prior to the expiration of the three-year period involving the records, then the records must be retained until the completion of the action and resolution of all issues which arise from it, or until the end of the regular three-year period, whichever is later. TDA, USDA and the Texas State Auditor's Office reserve the right to inspect the research locations and to obtain from the research team full information regarding all project activities.

6. If the Grantee has a financial audit performed in any year during which Grantee receives funds from TDA, and if TDA requests information about the audit, the Grantee shall provide such information to TDA or provide information as to where the audit report can be publicly viewed, including the audit transmittal letter, management letter, and any schedules in which the Grantee's funds are included.

7. Grant awards to Texas institutions shall comply in all respects with the Uniform Grant Management Standards (UGMS). A copy may be downloaded from the following website: www.governor.state.tx.us/divisions/stategrants/guidelines/files/U GMS012001.doc

Deadline for Submission of Responses.

Forms required for submitting an application are available by accessing TDA's website at: www.TexasAgriculture.gov. One original and five (5) copies of the application must be submitted to one of the following addresses. **Submissions must be postmarked no later than March 31, 2012.** Applications will be accepted by overnight delivery and express services; these applications must also be posted no later than March 31, 2012. Hand-delivered applications will be accepted; these applications are due at TDA Headquarters no later than 5 p.m. on March 31, 2012.

Physical Address (For hand-delivery and overnight mail carriers): Texas Department of Agriculture, Child Care Wellness Grant Program, Attn: Food and Nutrition Division, 1700 N. Congress Ave., 10th Floor, Austin, TX 78701.

Mailing Address (For US Postal Service mailings): Texas Department of Agriculture, Child Care Wellness Grant Program, Attn: Food and Nutrition Division, P.O. Box 12847, Austin, TX 78711.

TDA will send an acknowledgement receipt by email indicating the response was received.

For questions regarding submission of the proposal and TDA documentation requirements, please email CACFPWellness@Texasagriculture.gov.

Award Information and Notification.

Selected projects may be asked to provide more detailed information regarding the scope of work, measurable outcomes, implementation, or anticipated expenditures.

TDA reserves the right to accept or reject any or all proposals submitted. TDA is under no legal or other obligation to execute a grant on the basis of a response submitted to this RFP. TDA shall not pay for any costs incurred by any entity in responding to this RFP.

The public announcements and written notifications will be made to all applicants and their affiliated agencies, organizations, or institutions. Favorable decisions will indicate the amount of award, duration of the grant, and any special conditions associated with the project.

Texas Public Information Act.

All proposals shall be deemed, once submitted, to be the property of the TDA and are subject to the Texas Public Information Act, Texas Government Code, Chapter 552.

ATTACHMENT A
Self-Appraisal Questionnaire

For an online copy of this appraisal and the entire resource kit for child care centers developed by the Wisconsin Department of Health Services' Nutrition, Physical Activity and Obesity Prevention Program visit their website at: http://dhs.wisconsin.gov/health/physicalactivity

The Self-Appraisal Questionnaire is designed to help child care centers review their existing practices and current compliance with the requirements for the Breastfeeding Supportive Child Care Practices designation. The questionnaire is designed as a tool to assess key areas for improvement to support breastfeeding mothers and babies. Once the Self-Appraisal Questionnaire is complete, it can be used to prioritize areas where improvements are needed.

Staff
Name of Child Care Center or Sponsor _____
_____
Name and title of person completing this form_____
Date form completed_____
Name and title(s) of person responsible for initiating and assessing progress in completing the steps to become "Breastfeeding Supportive Child Care Practices"_____

10 Steps to Successful Breastfeeding for Child Care Centers

	Yes	No
Step 1. Designate an individual or group who is responsible for development and implementation of the 10 Steps.		
• Does the Child Care Center have a designated individual or group responsible for initiating and assessing progress in completing the steps to become "Breastfeeding Supportive Child Care Practices?"	___	___
• Does the Child Care Center have a designated individual or group responsible for reviewing policies, procedures and protocols for practice?	___	___
• Does the Child Care Center have a designated individual or group responsible for ensuring staff receive orientation and continuing education?	___	___

	Yes	No
Step 2. Establish a supportive breastfeeding policy and assure that all staff are aware of and follow the policy.		
• Does the Child Care Center have a written breastfeeding policy?	___	___
• Does the policy cover all 10 Steps?	___	___
• Are all staff trained on the policy and monitored for compliance?	___	___
• Is the policy available for review by women and their families if requested?	___	___
Step 3. Establish a supportive worksite policy for staff members who are breastfeeding.		
• Are breastfeeding employees provided a flexible schedule for breastfeeding or pumping to provide breast milk for their children?	___	___
• Are breastfeeding employees provided a private and clean place to breastfeed their babies or express milk?	___	___
• Does this area have an electrical outlet, comfortable chair, and nearby access to running water?	___	___
Step 4. Train all staff so that they are able to carry out breastfeeding promotion and support activities.		
• Are new staff oriented to the breastfeeding policy and appropriately trained within six months?	___	___
• Are all staff with responsibility for care of infants and children able to provide breastfeeding information and support to help mothers continue breastfeeding when working or going to school?	___	___
• Do staff members work with family members to develop babies' individual breastfeeding support plans and regularly update the plans?	___	___
• Do staff members promote exclusive breastfeeding until babies are about six months old with continued breastfeeding to one year and beyond?	___	___

	Yes	No
Step 5. Create a culturally appropriate breastfeeding friendly environment.		
• Does the child care center display culturally appropriate pictures and posters of breastfeeding and exclude those supplied by formula manufacturers?	___	___
• Are brochures, pamphlets and other resources about breastfeeding displayed for easy access?	___	___
• Does the child care center offer information on the benefits of breastfeeding to all families enrolled at the child care center?	___	___
• Are fathers included in discussions about breastfeeding?	___	___
Step 6. Inform expectant and new families and visitors about your Center's Breastfeeding Supportive Child Care Practices policies.		
• Are all staff able to explain the benefits of exclusive breastfeeding for six months and do mothers receive this information?	___	___
• Do staff members willingly tell visitors about your breastfeeding policies?	___	___
• Are breastfeeding policy and practice materials included in the Center's information package?	___	___
• Are current and prospective parents encouraged to drop in and view the Breastfeeding Supportive Child Care Practices environment?	___	___
Step 7. Stimulate participatory learning experiences with the children related to breastfeeding.		
• Do learning activities incorporate the concept that animals have baby animals of the same kind, and have special ways they are prepared to care for them, including how they are fed?	___	___
• Does the Center offer children's books that contain pictures of breastfeeding, play dolls that are nursing and other learning experiences that normalize breastfeeding?	___	___

	Yes	No
Step 8. Provide a comfortable place for mothers to breastfeed or pump their milk in privacy, if desired. Educate families and staff that a mother may breastfeed her child wherever they have a legal right to be.		
• Is a private, clean, quiet space available for mothers to breastfeed and/or express milk?	___	___
• Does this area have a comfortable chair, electrical outlet and nearby access to running water?	___	___
• Does the Center provide refrigerator space for breastfeeding mothers to store their expressed breast milk?	___	___
• Does the Center educate staff and families that a mother may breastfeed her child wherever they have a legal right to be?	___	___
Step 9. Establish and maintain connections with your local breastfeeding coalition or other community resources.		
• Does the child care center coordinate and exchange information with the local breastfeeding coalition, e.g., WIC Project, Head Start, UW-Extension, schools, and health care providers?	___	___
Step 10. Maintain an updated resource file of community breastfeeding services and resources kept in an accessible area for families.		
• Are all breastfeeding mothers given contact details of community based breastfeeding support groups, breastfeeding peer counselors, and lactation specialists?	___	___
• Are mothers with breastfeeding concerns referred to above community resources?	___	___
• Are current printed or electronic lactation resources available to breastfeeding clients and employees?		

TRD-201200904
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: February 15, 2012

♦ ♦ ♦

Department of Assistive and Rehabilitative Services

Notice of Public Hearing for DARS Maximum Affordable Payment Schedule

The Department of Assistive and Rehabilitative Services (DARS) will hold a public hearing from 2:00 p.m. to 4:00 p.m. on Thursday, March

8, 2012, in Conference Room 3601 of the Brown-Heatly Building at 4900 North Lamar Boulevard in Austin, Texas 78751, to receive public comments on the proposed FY 2011-2012 Maximum Affordable Payment Schedule (MAPS) rates used for the purchase of medical and medical-related services. The proposed implementation date for the new MAPS rates is April 1, 2012.

The schedule of proposed rates may be viewed or copies may be obtained by calling Stuart McPhail with DARS at (512) 424-4144 or visiting DARS at the Brown Heatly Building at 4900 North Lamar, Austin, Texas 78751.

Written comments on the proposed rates may be submitted to Stuart McPhail, Department of Assistive and Rehabilitative Services, 4900 North Lamar Boulevard, Austin, Texas 78751.

TRD-201200783
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: February 10, 2012

♦ ♦ ♦

Revised Notice of Public Hearings and Opportunity for Public Comment on Revisions to 40 TAC Chapter 108 Division for Early Childhood Intervention Services

This notice was originally published in the February 17, 2012, issue of the *Texas Register* (37 TexReg 959) and has been revised.

The Texas Department of Assistive and Rehabilitative Services (DARS) is providing an opportunity for public comment and a notice of public hearings on the proposed revisions to 40 TAC Chapter 108, Division for Early Childhood Intervention Services. The proposed revisions are based on recent federal regulation changes, programmatic clarification of existing requirements, and new programmatic requirements.

The public hearings listed below will be held to collect public testimony from 4:00 p.m. until 7:00 p.m.

March 19, 2012

Education Service Center, Region 20

1314 Hines Avenue

San Antonio, Texas 78208

March 21, 2012

United Way of Greater Houston

50 Waugh Drive

Houston, Texas 77007

March 23, 2012

American Foundation for the Blind

11030 Ables Lane

Dallas, Texas 75229

Copies of the proposed rules may be obtained from the DARS website at http://www.dars.state.tx.us/ or by contacting the DARS Division for Early Childhood Intervention Services at (512) 424-6754.

Written comments on the proposed rule revisions may be submitted electronically to DARSrules@dars.state.tx.us or sent by postal mail to:

Texas Department of Assistive and Rehabilitative Services

Center for Policy and External Relations, Mail Code 1411

4800 North Lamar Blvd.

Austin, TX 78751-2399

All comments must be received by 5:00 p.m. on April 23, 2012.

Persons who have special communication or other accommodation needs who are planning to attend a public hearing should contact the DARS Inquiry Line at 1-800-628-5115. Requests for accommodations should be made five business days before the hearing date.

TRD-201200919
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Filed: February 15, 2012

♦ ♦ ♦

Office of the Attorney General

Access & Visitation Grant (Shared Parenting Program) Request for Applications

The federal Office of Child Support Enforcement Strategic Plan Vision Statement and Guiding Principles emphasizes the importance of parents providing both financial **and emotional** support to their children. The Office of the Attorney General's (OAG's) Child Support Division (CSD) echoes this philosophical approach and highlights our support for the emotional connection between parents and their children through the OAG Shared Parenting Program. The CSD of the OAG will solicit applications for projects under the Access & Visitation Grant for the Shared Parenting Program beginning February 28, 2012.

Under 42 U.S.C. §669b, the federal government provides to states grants for Access and Visitation (A&V) programs. The grants may be used to establish and administer programs to support and facilitate noncustodial parents' access to and visitation with their children. Eligible activities include:

* Mediation;

* Counseling;

* Education

* Parenting plan development; and

* Visitation Enforcement.

Projects funded under this program do not have to be statewide (exception: Hotline projects must be statewide). Entities eligible for funding include: courts, local government or other public entities, and nonprofit organizations with a minimum of two years operating history. Matching funds (cash or in-kind) of at least 10% are required. Throughout the entity's public education materials, web and social media sites, and any media or public comments, the entity must demonstrate a consistent message of cooperative parenting without any bias toward either parent or set of parents. State funds or other funding may be used to expand the federal A&V Program.

Local Shared Parenting Program (SPP) Priorities

Preference will be given to those proposals emphasizing Texas' priorities for the SPP grant: early intervention, co-parenting education; alternative dispute resolution services, and visitation enforcement programs offering parents with cases in the IV-D child support program legal, educational, and case management assistance in achieving compliance with parenting time (possession) orders. These priorities include a target population of forming families within the IV-D child support

program. A forming family, also called a fragile family, consists of low-income, unmarried parents who share a child and are at high risk of family dissolution. Applicants are encouraged to discuss in detail the particular issues of never-married couples. Approximately 67% of the OAG caseload includes parents who were not married at the birth of their child. The SPP emphasizes mediation, co-parenting education, and resources to support cooperative parenting for never-married noncustodial parents and former partners with child support cases in the IV-D agency (OAG). Applicants should define how their proposals would reach underserved populations. Proposals must include methodology that will be used to report outcomes of proposed services on noncustodial parenting time. Grantees are required to submit monthly demographic information on customers served.

Statewide Toll-Free Telephone Hotline Project

In addition to local projects, the OAG is inviting proposals for one project to provide a statewide, toll-free, telephone hotline providing legal information on access and visitation, custody, paternity establishment, and child support as well as legal resources for parents, and a website with shared parenting information and legal resources. Hotline project applicants will need to demonstrate the ability to provide brief legal services to a minimum of 2,500 callers per month. Services must include:

* paper and electronic copies of legal resources to callers, host an internet website that provides parents with comprehensive access, visitation, custody, paternity and child support information;

* accurate and appropriate referrals to local providers of access and visitation, mediation, and legal services; and adequately track customer satisfaction with hotline and web-based services;

* explanation of Texas' IV-D child support system and processes; and

* explanation and/or interpretation of child support and parenting time court order language in parent-friendly language to callers.

Funding Terms

Contract awards will be by State Fiscal Year. The State Fiscal Year is from September 1 through August 31 of each year. The initial contract term will be from September 1, 2012 through August 31, 2013. After the initial contract term, Contractors successfully performing program services may be eligible for up to three additional one-year contract extensions, based on performance and availability of funds. Contract extensions are at the sole discretion of the OAG, which reserves the right to add new federal or state mandates.

The OAG anticipates awarding approximately 10 grants ranging from $14,000 to $80,000 for projects other than the Statewide Toll-Free Telephone Hotline Project. Funding levels for the Statewide Toll-Free Telephone Hotline Project will be at the OAG's discretion.

Application Deadline

Applications must be submitted no later than 5:00 p.m. CST April 16, 2012. Applications and/or attachments received after the deadline will not be considered. Applications may be submitted 1 of 2 ways. Do NOT use the U.S. Postal Service. **This location CANNOT accept U.S. Postal Service deliveries.**

1. By Federal Express or by United Parcel Service (UPS):

Office of the Attorney General

Family Initiatives, Child Support Division

5500 East Oltorf Street, Mail Code 039

Austin, Texas 78741

2. By email to:

OFI.Grants@cs.oag.state.tx.us; cc: anita.stuckey@cs.oag.state.tx.us

A. Email your application as:

a. Read only files (with electronic signature); **OR**

b. Single PDF file.

Include all attachments (FY13 and FY14 budgets and performance indicators, support letters, and letter of cooperation with the local child support office (except Hotline applications)). **Contact** the *office manager at your local child support office* (Regional Manager if you serve many counties) for the letter of cooperation. Do not send your version to the office manager.

B. Print your sent email and retain for your files as proof of timely submission.

You must submit a Letter of Intent at http://www.oag.state.tx.us/cs/ofi/index.shtml prior to the application deadline. Once submitted, you may download the complete application packet.

Email questions about the application process by April 6, 2012 to: Anita Stuckey at anita.stuckey@cs.oag.state.tx.us and check the Frequently Asked Questions on http://www.oag.state.tx.us/cs/ofi/index.shtml for answers (posted within 3 business days).

For information regarding this publication, contact Zindia Thomas, Agency Liaison, at (512) 936-9901.

TRD-201200658
Jay Dyer
Deputy Attorney General
Office of the Attorney General
Filed: February 8, 2012

♦ ♦ ♦

Cancer Prevention and Research Institute of Texas

Request for Applications

C-12-COMP-3 Company Commercialization Award

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks applications from Texas-based companies for innovative products addressing critically important needs related to diagnosis, prevention, and/or treatment of cancer and the product development infrastructure needed to support these efforts.

The goal of the Company Commercialization Award is to finance the development of innovative products, services, and infrastructure with significant potential impact on patient care. These investments will provide companies or limited partnerships located and headquartered in Texas, or those that are willing to relocate to Texas, with the opportunity to further the development of new products for the diagnosis, treatment, or prevention of cancer; to establish infrastructure that is critical to the development of a robust industry; or to fill a treatment or research gap. This award is intended to support companies that will be staffed with a majority of Texas-based employees, including C-level executives. The long-term objective of this award is to support commercially oriented therapeutic and medical technology products, diagnostic- or treatment-oriented information technology products, diagnostics, tools, services, and infrastructure projects. Eligible products or services include--but are not limited to--therapeutics (e.g., small molecules and biologics), diagnostics, devices, and potential breakthrough technologies, including software and research discovery techniques. Eligible stages of development include translational research, proof-of-concept studies, preclinical studies, and Phase I or Phase II clinical trials. By exception, Phase III clinical trials and later stage

commercialization projects will be considered where circumstances warrant CPRIT investment.

To be eligible for the three (3) year funding award, company applicants must have already received at least one round of professional institutional investment and must have or must commit to headquartering and registration in Texas; the majority of staff residing in or relocated to Texas; and use of Texas-based subcontractors and suppliers, unless adequate justification is provided for the use of out-of-state entities. No maximum is set on the amount of funding that can be requested. Funding will be tranched and will be tied to the achievement of contract-specified milestones. Funds may be used for salary and fringe benefits, research supplies, equipment, clinical trial expenses, intellectual property protection, external consultants and service providers, and other appropriate development costs, subject to certain limitations set forth by Texas state law.

A detailed Request for Applications (RFA) is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on February 16, 2012 through 3:00 p.m. Central Time on March 15, 2012, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). CPRIT will not accept applications that are not submitted via the CPRIT Application Receipt System.

TRD-201200880
William "Bill" Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Filed: February 14, 2012

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Request for Applications

C-12-FORM-3 Company Formation Award

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks applications from Texas-based companies for innovative products addressing critically important needs related to diagnosis, prevention, and/or treatment of cancer and the product development infrastructure needed to support these efforts.

The goal of the Company Formation Award is to support the formation and establishment of new start-up companies in Texas that will develop products to significantly impact cancer care. These companies must be Texas-based or be willing to relocate to and remain in Texas for a specified period upon funding. Eligible products or services include, but are not limited to, therapeutics (e.g., small molecules and biologics), diagnostics, devices, and potential breakthrough technologies, including software and research discovery techniques. Eligible stages of development include translational research, proof-of-concept studies, preclinical studies, and Phase I or Phase II clinical trials. By exception, Phase III clinical trials and later stage commercialization projects will be considered where circumstances warrant CPRIT investment.

To be eligible for the award, company applicants must be early-stage start-up companies with no previous rounds of professional institutional investment (i.e., those that have not yet received Series A financing). Successful applicants must commit to headquarters or substantial business functions of the company in Texas and registration in Texas; personnel sufficient to operate the Texas-based research and/or development activities of the company, along with appropriate management, relocated to or hired from within Texas. This is a three-year funding program with an opportunity for renewal after the term expires. No maximum is set on the amount of funding that can be requested. Funding will be tranched and will be tied to the achievement of contract-specified milestones. Funds may be used for salary and fringe benefits, research supplies, equipment, clinical trial expenses, intellectual property protection, external consultants and service providers, and other appropriate development costs, subject to certain limitations set forth by Texas state law.

A detailed Request for Applications (RFA) is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on February 16, 2012 through 3:00 p.m. Central Time on March 15, 2012, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). CPRIT will not accept applications that are not submitted via the CPRIT Application Receipt System.

TRD-201200881
William "Bill" Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Filed: February 14, 2012

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Request for Applications

C-12-RELO-3 Company Relocation Award

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks applications from existing oncology-focused companies or limited partnerships that are willing to relocate to Texas for innovative products addressing critically important needs related to diagnosis, prevention, and/or treatment of cancer and the product development infrastructure needed to support these efforts.

The goal of the Company Relocation Award is to attract industry partners in the field of cancer care to advance economic development and cancer care efforts in the state by recruiting to Texas companies with proven management teams who are focused on exceptional product opportunities to improve cancer care. CPRIT expects outcomes of supported activities to directly and indirectly benefit subsequent cancer research efforts, cancer public health policy, or the continuum of cancer care--from prevention to treatment and cure. To fulfill this vision, applications may address any product development topic or issue related to cancer biology, causation, prevention, detection or screening, treatment, or cure. The overall goal of this award program is to improve outcomes of patients with cancer by increasing the availability of Food and Drug Administration (FDA)-approved therapeutic interventions with a primary focus on Texas-centric programs. Eligible products or services include--but are not limited to--therapeutics (e.g., small molecules and biologics), diagnostics, devices, and potential breakthrough technologies, including software and research discovery techniques. Eligible stages of development include translational research, proof-of-concept studies, preclinical studies, and Phase I or Phase II clinical trials. By exception, Phase III clinical trials and later stage commercialization projects will be considered where circumstances warrant CPRIT investment.

To be eligible for the award, company applicants must presently be based outside Texas and must have already received at least one round of professional institutional investment (i.e., Series A financing). In addition, award recipients must commit to headquarters or substantial business functions of the company in Texas; personnel sufficient to operate the Texas-based research and/or development activities of the company, along with appropriate management, relocated to or hired from within Texas; and use of Texas-based subcontractors and suppliers unless adequate justification is provided for the use of out-of-state entities. This is a three-year funding program with an opportunity for renewal after the term expires. Financial support will be awarded based upon the breadth and nature of the development program proposed. While requested funds must be well justified, no maximum is

set on the amount that may be requested. Funding will be tied to the achievement of contract-specified milestones. Funds may be used for salary and fringe benefits, research supplies, equipment, clinical trial expenses, intellectual property protection, external consultants and service providers, and other appropriate development costs, subject to certain limitations set forth by Texas state law.

A detailed Request for Applications (RFA) is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on February 16, 2012 through 3:00 p.m. Central Time on March 15, 2012, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). CPRIT will not accept applications that are not submitted via the CPRIT Application Receipt System.

TRD-201200879
William "Bill" Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Filed: February 14, 2012

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Comptroller of Public Accounts

Certification of the Average Taxable Price of Gas and Oil - December 2011

The Comptroller of Public Accounts, administering agency for the collection of the Crude Oil Production Tax, has determined that the average taxable price of crude oil for reporting period December 2011, as required by Tax Code, §202.058, is $69.63 per barrel for the three-month period beginning on September 1, 2011, and ending November 30, 2011. Therefore, pursuant to Tax Code, §202.058, crude oil produced during the month of December 2011, from a qualified Low-Producing Oil Lease, is not eligible for exemption from the crude oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined that the average taxable price of gas for reporting period December 2011, as required by Tax Code, §201.059, is $2.93 per mcf for the three-month period beginning on September 1, 2011, and ending November 30, 2011. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of December 2011, from a qualified low-producing well, is eligible for 50% credit on the natural gas production tax imposed by Tax Code, Chapter 201.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of West Texas Intermediate crude oil for the month of December 2011, is $98.58 per barrel. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall not exclude total revenue received from oil produced during the month of December 2011, from a qualified low-producing oil well.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of gas for the month of December 2011, is $3.25 per MMBtu. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall exclude total revenue received from gas produced during the month of December 2011, from a qualified low-producing gas well.

Inquiries should be directed to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

TRD-201200784
Ashley Harden
General Counsel
Comptroller of Public Accounts
Filed: February 13, 2012

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Notice of Availability and Request for Applications

Pursuant to Chapter 403, §403.352 and §403.358, Texas Government Code; Chapter 134, §134.002 and §134.008, Texas Education Code, the Comptroller of Public Accounts (Comptroller), announces this Notice of Availability and Request for Applications (RFA #E-JG6-2012) and invites applications from qualified and interested public junior colleges and public technical institutes for Jobs and Education for Texans' (JET) grants to defray the start-up costs associated with the development of new career and technical education programs that meet the requirements consistent with the terms of the Request for Applications and this notice. The Comptroller reserves the right to award more than one grant under the terms of the RFA. If a grant award is made under the terms of this RFA, the recipient should anticipate an effective date no earlier than May 1, 2012, or as soon thereafter as practical.

Contact: Parties interested in submitting an application should contact Robert Wood, Director, Local Government Assistance Division, at: 111 E. 17th St., 11th Floor, Austin, Texas 78774, (512) 463-3973. The Application and instructions will be available at http://www.everychanceeverytexan.org/funds after 10:00 a.m. Central Time (CT) on February 24, 2012, and during normal business hours thereafter.

Questions: All written inquiries and questions must be received in the Issuing Office, at: LBJ State Office Building, Room 201, 111 East 17th Street, Austin, Texas 78774 (Issuing Office) no later than 2:00 p.m. (CT) on Friday, March 2, 2012. Prospective applicants are encouraged to fax Questions to (512) 463-3669 or email Questions to contracts@cpa.state.tx.us to ensure timely receipt. On or about March 9, 2012, or as soon thereafter as practical, the Comptroller expects to post responses to questions at http://esbd.cpa.state.tx.us. Late questions will not be considered under any circumstances. Applicants shall be solely responsible for verifying timely receipt of questions in the Issuing Office.

Closing Date: Applications must be delivered in the Issuing Office to the attention of William Clay Harris, Assistant General Counsel, Contracts, no later than 2:00 p.m. CT, on Wednesday, March 21, 2012. Late applications will not be considered under any circumstances. Respondents shall be solely responsible for verifying the timely receipt of applications in the Issuing Office.

Evaluation Criteria: Applications will be evaluated under the evaluation criteria outlined in the application instructions. The Comptroller will make the final decision. The Comptroller reserves the right to accept or reject any or all applications submitted. The Comptroller is not obligated to make a grant award or to execute a contract on the basis of this notice or RFA. The Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or RFA.

The anticipated schedule of events pertaining to this grant is as follows: Issuance of RFA - February 24, 2012, after 10:00 a.m. CT; Questions Due - March 2, 2012, 2:00 p.m. CT; Official Responses to Questions posted - March 9, 2012, or as soon thereafter as practical; Applications Due - March 21, 2012, 2:00 p.m. CT; Grant Award/Contract Execution - April 24, 2012, or as soon thereafter as practical; Commencement of Grant Funding - as soon thereafter as practical.

TRD-201200903

William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: February 15, 2012

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Notice of Request for Applications

Pursuant to Chapters 403, 447 and 2305, Texas Government Code; and the State Energy Plan (SEP) and related legal authority and regulations, the Comptroller of Public Accounts (Comptroller), State Energy Conservation Office (SECO), announces this Request for Applications (RFA #ISD-G1-2012) and Notice of Funding Availability for approximately $2.5 million in grant funding and invites applications from eligible interested Independent School Districts (ISDs) for grant funds for the ISD Grants Program of the State Energy Conservation Office (SECO). Applications are not required to include any match. The Comptroller reserves the right to award more than one grant under the terms of this RFA. If a grant award is made under the terms of the RFA, Grantee will be expected to begin performance of the grant agreement on or about April 30, 2012, or as soon thereafter as practical.

Contact: For general questions about these instructions or the application form, please submit your question in writing to William Clay Harris, Assistant General Counsel, Contracts, via facsimile to: (512) 463-3669. The RFA will be published after 10:00 a.m. Central Time (CT) on Friday, February 24, 2012, and posted on the Electronic State Business Daily (ESBD) at: http://esbd.cpa.state.tx.us after 10:00 a.m. CT on Friday, February 24, 2012. The application and sample grant agreement will be posted on the following website shortly thereafter at: http://www.seco.cpa.state.tx.us/funding/.

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and Non-mandatory Letters of Intent must be received at the above-referenced address (Issuing Office), not later than 2:00 p.m. (CT) on Monday, March 5, 2012. Prospective applicants are encouraged to fax Non-mandatory Letters of Intent and Questions to (512) 463-3669 to ensure timely receipt. Non-mandatory Letters of Intent must be addressed to the attention of Mr. Harris and must be signed by an official of the entity. On or about Friday, March 9, 2012, or as soon thereafter as practical, the Comptroller expects to post responses to questions on the ESBD. Late Non-mandatory Letters of Intent and Questions will not be considered under any circumstances. Applicants shall be solely responsible for verifying timely receipt of Non-mandatory Letters of Intent and Questions in the Issuing Office.

Closing Date: Applications must be delivered to the Issuing Office to the attention of the Assistant General Counsel, Contracts, no later than 2:00 p.m. (CT), on Friday, March 30, 2012. Late Applications will not be accepted under any circumstances; Applicants shall be solely responsible for verifying timely receipt of applications in the Issuing Office.

Evaluation Criteria: Applications will be evaluated under the criteria outlined in the grant application and instructions for this RFA. The Comptroller reserves the right to accept or reject any or all applications submitted. The Comptroller is not obligated to execute a grant agreement on the basis of this notice or the distribution of any RFA. The Comptroller shall not pay for any costs incurred by any entity in responding to this Notice or to the RFA.

The anticipated schedule of events pertaining to this RFA is as follows: Issuance of RFA - February 24, 2012, after 10:00 a.m. CT; Non-mandatory Letters of Intent and Questions Due - March 5, 2012, 2:00 p.m. CT; Official Responses to Questions posted - March 9, 2012, or as soon thereafter as practical; Applications Due - March 30, 2012, 2:00 p.m. CT; Grant Agreement Execution - April 30, 2012, or as soon thereafter as practical; Commencement of Project - April 30, 2012, or as soon thereafter as practical.

TRD-201200902
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: February 15, 2012

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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 02/20/12 - 02/26/12 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 02/20/12 - 02/26/12 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-201200870
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: February 14, 2012

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Credit Union Department

Application to Amend Articles of Incorporation

Notice is given that the following application has been filed with the Credit Union Department (Department) and is under consideration:

An application was received from Brazos Valley Schools Credit Union, Katy, Texas to amend its Articles of Incorporation relating to primary place of business.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-201200897
Harold E. Feeney
Commissioner
Credit Union Department
Filed: February 15, 2012

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Applications to Expand Field of Membership

Notice is given that the following applications have been filed with the Credit Union Department (Department) and are under consideration:

An application was received from Space City Credit Union, Houston, Texas, to expand its field of membership. The proposal would permit

employees of Nexus Health Systems located in Texas and California, companies who are wholly owned by Nexus Health Systems bearing different names located within Texas and California, and family members of the Nexus Health Systems employees named, to be eligible for membership in the credit union.

An application was received from First Service Credit Union, Houston, Texas, to expand its field of membership. The proposal would permit employees of G&A Partners who are paid and/or supervised from 4801 Woodway, Suite 210, Houston, TX 77056, to be eligible for membership in the credit union.

An application was received from Resource One Credit Union (#1), Dallas, Texas, to expand its field of membership. The proposal would permit individuals who work or reside in Harris County, Texas, to be eligible for membership in the credit union.

An application was received from Resource One Credit Union (#2), Dallas, Texas, to expand its field of membership. The proposal would permit persons who live, worship, attend school or work in Collin or Denton Counties, Texas, to be eligible for membership in the credit union.

An application was received from Texas Bay Area Credit Union, Houston, Texas, to expand its field of membership. The proposal would permit persons who live, work, attend school, or worship in and businesses located within 10 miles of the office of Texas Bay Area Credit Union located at 2955 South Gulf Freeway, Dickinson, TX 77539, to be eligible for membership in the credit union.

Comments or a request for a meeting by any interested party relating to an application must be submitted in writing within 30 days from the date of this publication. Credit unions that wish to comment on any application must also complete a Notice of Protest form. The form may be obtained by contacting the Department at (512) 837-9236 or downloading the form at http://www.cud.texas.gov/page/bylaw-charter_1. Any written comments must provide all information that the interested party wishes the Department to consider in evaluating the application. All information received will be weighed during consideration of the merits of an application. Comments or a request for a meeting should be addressed to the Credit Union Department, 914 East Anderson Lane, Austin, Texas 78752-1699.

TRD-201200895
Harold E. Feeney
Commissioner
Credit Union Department
Filed: February 15, 2012

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Notice of Final Action Taken

In accordance with the provisions of 7 TAC §91.103, the Credit Union Department provides notice of the final action taken on the following applications.

Application to Expand Field of Membership - Approved

YOUR Community Credit Union (#2), Irving, Texas (Amended) - Persons who live, worship, attend school, or work in the portion of Dallas County, Texas that is west of Interstate Highway 45 and U.S. Highway 75.

YOUR Community Credit Union (#3), Irving, Texas (Amended) - Persons who live, worship, attend school, or work within an area bounded by Interstate Highway 45 on the East, Interstate Highway 10 on the South, and the Harris County Line on the West and North.

Application to Amend Articles of Incorporation - Approved

Waco Postal Credit Union, Waco, Texas - See *Texas Register* issue, dated December 30, 2011.

Articles of Incorporation - 50 Years to Perpetuity - Approved

Texas Bay Area Credit Union, Houston, Texas

TRD-201200898
Harold E. Feeney
Commissioner
Credit Union Department
Filed: February 15, 2012

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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 March 26, 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 March 26, 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: BP Amoco Chemical Company; DOCKET NUMBER: 2011-1983-AIR-E; IDENTIFIER: RN102536307; LOCATION: Texas City, Galveston County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §§101.20(3), 116.715(a), and 122.143(4), Flexible Permit Numbers 1176 and PSD-TX-782, Special Conditions Number 1, Federal Operating Permit Number O1513, General Terms and Conditions and Special Terms and Conditions Number 14, and Texas Health and Safety Code, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $11,450; Supplemental Environmental Project offset amount of $4,580 applied to Houston-Galveston Area Emission Reduction Credit Organization's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 403-4006; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: CENTRAL TRANSPORT LLC; DOCKET NUMBER: 2011-1723-PST-E; IDENTIFIER: RN101444602; LOCATION: Irving, Dallas County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to timely renew a previously issued underground storage tank (UST) delivery certificate by submitting a properly completed 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(b), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the UST; and 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(b) and (c)(1), by failing to monitor the UST for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring) and by failing to provide proper release detection for the suction piping associated with the UST; PENALTY: $5,201; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: City of Runaway Bay; DOCKET NUMBER: 2011-1982-MWD-E; IDENTIFIER: RN102181385; LOCATION: Runaway Bay, Wise County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010862001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; and 30 TAC §305.125(1) and (17), and §319.7(d) and TPDES Permit Number WQ0010862001, Monitoring and Reporting Requirements Number 1, by failing to timely submit effluent monitoring results at the intervals specified in the permit; PENALTY: $7,130; ENFORCEMENT COORDINATOR: Jill Russell, (512) 239-4564; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: ConocoPhillips Company; DOCKET NUMBER: 2011-1680-IHW-E; IDENTIFIER: RN102495884; LOCATION: Borger, Hutchinson County; TYPE OF FACILITY: crude oil refinery and chemical manufacturing plant; RULE VIOLATED: 30 TAC §335.2(b), 40 Code of Federal Regulations §270.1, and Industrial and Hazardous Waste Permit Number 50078, Provision Number IV.B.1, by failing to prevent the disposal of an unauthorized hazardous waste into a permitted waste management unit; PENALTY: $37,500; Supplemental Environmental Project offset amount of $15,000 applied to Texas Association of Resource Conservation and Development Areas, Incorporated - Clean School Buses; ENFORCEMENT COORDINATOR: Thomas Greimel, (512) 239-5690; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(5) COMPANY: Cowtown Gas Processing Partners L.P.; DOCKET NUMBER: 2011-1730-AIR-E; IDENTIFIER: RN104600754; LOCATION: Cleburne, Hood County; TYPE OF FACILITY: gas compression and treatment plant; RULE VIOLATED: 30 TAC §116.615(2) and §122.143(4), Texas Health and Safety Code (THSC), §382.085(b), Standard Permit Number 82961, Maximum Allowable Emissions Rates Table (MAERT), and Federal Operating Permit (FOP) Number O2847/General Operating Permit (GOP) Number 514, Site-wide Requirements (b)(2) and (7)(B), by failing to comply with the annual allowable emissions rate; 30 TAC §116.615(8) and §122.143(4), THSC, §382.085(b), Standard Permit Number 82961, MAERT, and FOP Number O2847/GOP Number 514, Site-wide Requirements (b)(2) and (7)(B), by failing to maintain sufficient data to demonstrate compliance with allowable emissions rates; 30 TAC §122.143(4), THSC, §382.085(b), and FOP Number O2847/GOP Number 514, Site-wide Requirements (b)(2) and (9)(B)(iv)(a), by failing to conduct quarterly visible emissions observations of stationary vents from emissions units; and 30 TAC §122.143(4) and §122.145(2)(A), THSC, §382.085(b), and FOP Number O2847/GOP Number 514, Site-wide Requirements (b)(2), by failing to report all instances of deviations; PENALTY: $19,170; Supplemental Environmental Project (SEP) offset amount of $15,336 applied to the University of Texas Arlington - Texas Air Monitoring Network SEP; ENFORCEMENT COORDINATOR: John Muennink, (713) 422-8970; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: DAUNA's, LLC dba Daunas Main; DOCKET NUMBER: 2011-2001-PST-E; IDENTIFIER: RN101813830; LOCATION: Harper, Gillespie County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide proper release detection for the pressurized piping associated with the underground storage tanks; PENALTY: $2,005; ENFORCEMENT COORDINATOR: Aaron Benmark, (512) 239-2569; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(7) COMPANY: EAGLE ELECTRONICS RESOURCES, INCORPORATED; DOCKET NUMBER: 2011-1709-MSW-E; IDENTIFIER: RN102146321; LOCATION: Houston, Harris County; TYPE OF FACILITY: computer recycling; RULE VIOLATED: 30 TAC §328.133(e)(1) and §328.5(b), by failing to provide notification within 90 days prior to collecting and processsing used computer equipment for recycling; 30 TAC §328.5(c), by failing to provide a written cost estimate showing the cost of hiring a third party to close the facility by disposition of all processed and unprocessed materials; and 30 TAC §37.921 and §328.5(d), by failing to demonstrate financial assurance for closure, post closure, and corrective action for the facility; PENALTY: $7,053; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY: Eagle Kim Incorporated dba Eagle Food Store; DOCKET NUMBER: 2011-1938-PST-E; IDENTIFIER: RN101552255; LOCATION: Rowlett, Rockwall County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide proper release detection for the pressurized piping associated with the underground storage tanks; PENALTY: $2,005; ENFORCEMENT COORDINATOR: Aaron Benmark, (512) 239-2569; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: Eastland County Water Supply District; DOCKET NUMBER: 2011-1612-MWD-E; IDENTIFIER: RN102185295; LOCATION: Eastland, Eastland County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0013726001, Effluent Limitations and Monitoring Requirements Number 1, 30 TAC §305.125(1), TWC, §26.121(a), and TCEQ AO Docket Number 2010-1101-MWD-E, Ordering Provision Number 2, by failing to comply with permitted effluent limits; TPDES Permit Number WQ0013726001, Monitoring and Reporting Requirements Number 1 and 30 TAC §305.125(1) and §319.4, by failing to submit complete monitoring results at the intervals specified in the permit; TPDES Permit Number WQ0013726001, Monitoring and Reporting Requirements Number 1 and 30 TAC §305.125(1) and §319.7(d), by failing to timely submit the monthly discharge monitoring reports by the 20th day of the following month; TPDES Permit Number WQ0013726001, Sludge Provisions and 30 TAC §305.125(17), by failing to timely submit monitoring results at the intervals specified in the permit; and TPDES Permit Number WQ0013726001, Monitoring and Reporting Requirements Number 3.b. and 30 TAC §305.125(1) and §319.7(c), by failing to maintain records for a minimum of at least three years and making them readily available for review upon request by a TCEQ

representative; PENALTY: $8,990; ENFORCEMENT COORDINATOR: Jorge Ibarra, P.E., (817) 588-5890; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(10) COMPANY: Equistar Chemicals, LP; DOCKET NUMBER: 2011-1829-AIR-E; IDENTIFIER: RN102926920; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: chemical plant; RULE VIOLATED: 30 TAC §§115.722(c)(1), 116.115(c), and 122.143(4), Texas Health and Safety Code, §382.085(b), Permit Number 6257E, Special Conditions Number 1, and Federal Operating Permit Number O1373, Special Terms and Conditions Number 18, by failing to prevent unauthorized emissions; PENALTY: $10,000; Supplemental Environmental Project offset amount of $5,000 applied to Houston Regional Monitoring Corporation (HRMC) - HRMC Houston Area Air Monitoring; ENFORCEMENT COORDINATOR: John Muennink, (713) 422-8970; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(11) COMPANY: Equistar Chemicals, LP; DOCKET NUMBER: 2011-1596-AIR-E; IDENTIFIER: RN100210319; LOCATION: La Porte, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §§101.20(3), 116.115(c), and 122.143(4), 40 Code of Federal Regulations §60.18(c)(2), Permit Numbers 18978 and PSD-TX-752M3, Special Conditions (SC) Number 1; Federal Operating Permit (FOP) Number O2223, Special Terms and Conditions (STC) Numbers 1.A. and 14 and General Terms and Conditions (GTC); and Texas Health and Safety Code (THSC), §382.085(b), by failing to prevent unauthorized emissions (Incident Number 153240); and 30 TAC §116.115(c) and §122.143(4); Permit Number 4477, SC Number 1; FOP Number O1606, STC Number 15 and GTC; and THSC, §382.085(b), by failing to prevent unauthorized emissions (Incident Number 153820); PENALTY: $20,000; Supplemental Environmental Project offset amount of $8,000 applied to Houston Regional Monitoring Corporation (HRMC) - HRMC Houston Area Air Monitoring; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 422-8938; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(12) COMPANY: Jamie Burns dba JJS Fast Stop; DOCKET NUMBER: 2011-1972-PST-E; IDENTIFIER: RN103148607; LOCATION: Wolfforth, Lubbock County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank system; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 796-7092.

(13) COMPANY: JIMMIE HAHN PARTNERSHIP, LTD.; DOCKET NUMBER: 2011-2051-PST-E; IDENTIFIER: RN100690874; LOCATION: Brenham, Washington County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $1,875; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(14) COMPANY: Mohammed Naseem Patel dba P and P Mart; DOCKET NUMBER: 2011-1812-PST-E; IDENTIFIER: RN102004447; LOCATION: Kennedale, Tarrant 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: $1,625; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(15) COMPANY: Neutze Properties, Ltd. dba Peter Rabbits Fast Foods 102; DOCKET NUMBER: 2011-2084-PST-E; IDENTIFIER: RN101857670; LOCATION: Uvalde, Uvalde County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank system; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Raymond Marlow, (409) 899-8785; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(16) COMPANY: Pavanputra Hanuman, Incorporated dba Lucky Stop 2; DOCKET NUMBER: 2011-1804-PST-E; IDENTIFIER: RN101735124; LOCATION: Nacogdoches, Nacogdoches County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); and 30 TAC §334.10(b), by failing to maintain UST records and make them immediately available for inspection upon request by agency personnel; PENALTY: $3,500; ENFORCEMENT COORDINATOR: Charlie Lockwood, (512) 239-1653; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(17) COMPANY: PHAL AND MUY, INCORPORATED dba Kwik Stop; DOCKET NUMBER: 2011-1922-PST-E; IDENTIFIER: RN102043239; LOCATION: Dallas, Dallas 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 by failing to provide release detection for the pressurized piping associated with the USTs; 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the UST system; and 30 TAC §334.10(b)(1)(B), by failing to maintain copies of all required records pertaining to the UST system and to make them immediately available for inspection upon request by agency personnel; PENALTY: $5,649; ENFORCEMENT COORDINATOR: David Carney, (512) 239-2583; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(18) COMPANY: R and R Suleiman LLC dba Chevron Express; DOCKET NUMBER: 2011-1952-PST-E; IDENTIFIER: RN101546026; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.244(1) and (3) and Texas Health and Safety Code (THSC), §382.085(b), by failing to conduct daily and monthly inspections of the Stage II vapor recovery system; 30 TAC §115.245(2) and THSC, §382.085(b), by failing to verify proper operation of the Stage II equipment at least once every 12 months; 30 TAC §115.246(3) and THSC, §382.085(b), by failing to maintain Stage II records at the station and making them immediately available for review upon request by agency personnel; and 30 TAC §115.248(1) and THSC, §382.085(b), by failing to ensure that at least one station representative received training in the operation and maintenance of the Stage II vapor recovery system, and each current employee receives in-house Stage II vapor recovery training regarding the purpose and correct operation of the Stage II equipment; PENALTY: $5,695; ENFORCEMENT COORDINATOR: Andrea Park, (512) 239-4575; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(19) COMPANY: Ranch Utilities, L.P.; DOCKET NUMBER: 2011-1609-MWD-E; IDENTIFIER: RN101522464; LOCATION: Weatherford, Parker County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0014163001, Interim I Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; 30 TAC §305.125(1) and (17) and §319.1, and TPDES Permit Number WQ0014163001, Monitoring and Reporting Requirements Number 1, by failing to submit monitoring results at the intervals specified in the permit; and 30 TAC §305.125(1) and §319.5(b), and TPDES Permit Number WQ0014163001, Monitoring and Reporting Requirements Number 1, by failing to collect and analyze samples for daily average and single grab concentrations for *escherichia coli* for the monitoring period ending April 30, 2011; PENALTY: $6,390; ENFORCEMENT COORDINATOR: JR Cao, (512) 239-2543; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(20) COMPANY: RECON SERVICES, INCORPORATED dba Recon Recycles; DOCKET NUMBER: 2011-2098-MSW-E; IDENTIFIER: RN103006607; LOCATION: Del Valle, Travis County; TYPE OF FACILITY: construction and demolition material recycling; RULE VIOLATED: 30 TAC §330.15(c), by failing to prevent the unauthorized disposal of solid waste; PENALTY: $1,000; ENFORCEMENT COORDINATOR: Keith Frank, (512) 239-1203; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(21) COMPANY: S AND L SERVICES, INCORPORATED dba Sam's Chevron; DOCKET NUMBER: 2011-1998-PST-E; IDENTIFIER: RN101444685; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $4,600; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5825; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(22) COMPANY: SENTINEL PLATING, INCORPORATED dba Sentinel Plating; DOCKET NUMBER: 2010-1759-IHW-E; IDENTIFIER: RN100548569; LOCATION: Garland, Dallas County; TYPE OF FACILITY: metal plating; RULE VIOLATED: 30 TAC §335.6(b), by failing to update the Notice of Registration with all waste streams and waste management units; 30 TAC §335.69(a)(2) and (3) and 40 Code of Federal Regulations (CFR) §262.34(a)(2) and (3), by failing to clearly label all hazardous waste containers with the words Hazardous Waste and mark each container with the date on which the accumulation period began; 30 TAC §335.112(a) and §335.69(a)(1)(A) and 40 CFR §262.34(a)(1)(i) and §265.173(a), by failing to keep containers of hazardous waste closed except when adding or removing waste; and 30 TAC §335.69(a)(1)(B) and 40 CFR §265.193(a), by failing to provide adequate secondary containment for a hazardous waste tank; PENALTY: $60,500; ENFORCEMENT COORDINATOR: Mike Pace, (817) 588-5933; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(23) COMPANY: Southwest Convenience Stores, LLC dba 7 Eleven 57202 and 7 Eleven 57205; DOCKET NUMBER: 2011-2012-PST-E; IDENTIFIER: RN102383510 and RN102383728; LOCATION: Wichita Falls, Wichita County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the underground storage tank (UST) system; and 30 TAC §334.10(b), by failing to maintain the UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $11,000; ENFORCEMENT COORDINATOR: Kimberly Walker, (512) 577-7596; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(24) COMPANY: TERRILL PETROLEUM COMPANY, INCORPORATED dba DJs Trading Post; DOCKET NUMBER: 2011-2181-PST-E; IDENTIFIER: RN101727592; LOCATION: Bronson, Sabine 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(b) and (c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring) and by failing to provide proper release detection for the suction piping associated with the USTs; PENALTY: $2,641; ENFORCEMENT COORDINATOR: Elvia Maske, (512) 239-0789; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(25) COMPANY: Texas State University - San Marcos; DOCKET NUMBER: 2011-1728-AIR-E; IDENTIFIER: RN100221480; LOCATION: San Marcos, Hays County; TYPE OF FACILITY: cogeneration plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.145(2)(A), Texas Health and Safety Code (THSC), §382.085(b) and Federal Operating Permit Number O1568, General Terms and Conditions, by failing to report all instances of deviations; 30 TAC §116.115(c) and THSC, §382.085(b), Standard Permit Registration Number 88323, Condition Number 5(B)(v), by failing to conduct initial compliance testing; 30 TAC §116.615(5)(A) and THSC, §382.085(b), by failing to notify the TCEQ prior to the commencement of operations; and 30 TAC §116.115(c) and THSC, §382.085(b), Standard Permit Registration Number 88383, Condition Number 4(B)(vii), by failing to determine compliance with the opacity standard; PENALTY: $17,150; ENFORCEMENT COORDINATOR: Raymond Marlow, P.G., (409) 899-8785; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(26) COMPANY: Texas Steel Conversion, Incorporated; DOCKET NUMBER: 2011-2175-AIR-E; IDENTIFIER: RN101376564; LOCATION: Houston, Harris County; TYPE OF FACILITY: steel pipe shaping, coating, and hydrotesting plant; RULE VIOLATED: 30 TAC §116.110(a) and Texas Health and Safety Code, §382.0518(a) and §382.085(b), by failing to obtain authorization prior to conducting surface coating operations; PENALTY: $1,125; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 422-8938; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(27) COMPANY: The Lubrizol Corporation; DOCKET NUMBER: 2011-1637-AIR-E; IDENTIFIER: RN101058410; LOCATION: Pasadena, Harris County; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(1), Texas Health and Safety Code, §382.085(b), and Federal Operating Permit Number O1582, General Terms and Conditions, by failing to submit the Permit Compliance Certification within 30 days from the end of the certification period; PENALTY: $3,425; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 403-4006; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(28) COMPANY: United Site Services of Texas, Incorporated; DOCKET NUMBER: 2011-2182-PST-E; IDENTIFIER: RN100556349; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued underground storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; 30 TAC §334.8(c)(5)(A)(i)

and TWC, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the UST system; and 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the UST 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 proper release detection for the product piping associated with the UST system; PENALTY: $4,129; ENFORCEMENT COORDINATOR: David Carney, (512) 239-2583; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(29) COMPANY: Young Soo Kang dba Andy's Food Mart; DOCKET NUMBER: 2011-1937-PST-E; IDENTIFIER: RN100928241; 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: $2,250; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(30) COMPANY: ZRZ Corporation dba Wagon Wheel; DOCKET NUMBER: 2011-2018-PST-E; IDENTIFIER: RN102266160; LOCATION: College Station, Brazos County; TYPE OF FACILITY: convenience store with retail sales of gasoline products; 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: $1,875; ENFORCEMENT COORDINATOR: Jorge Ibarra, P.E., (817) 588-5890; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

TRD-201200885
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: February 14, 2012

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Enforcement Orders

An agreed order was entered regarding New Waverly Sound Investments, LLC, Docket No. 2010-2066-WQ-E on January 25, 2012 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mohammad Shafiq dba Spin-N-Market 6, Docket No. 2010-2087-PST-E on January 25, 2012 assessing $3,668 in administrative penalties with $733 deferred.

Information concerning any aspect of this order may be obtained by contacting Theresa Hagood, Enforcement Coordinator at (512) 239-2540, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Texas Concrete Enterprise, L.L.C., Docket No. 2011-0207-IWD-E on January 25, 2012 assessing $2,940 in administrative penalties with $588 deferred.

Information concerning any aspect of this order may be obtained by contacting Harvey Wilson, Enforcement Coordinator at (512) 239-0321, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Edwin T. Morgenthaler dba Frontier Water Co., Docket No. 2011-0415-PWS-E on January 25, 2012 assessing $2,297 in administrative penalties with $459 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Linson-Mgbeoduru, Enforcement Coordinator at (512) 239-1482, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kingsland Estates Water Supply Corporation, Docket No. 2011-0479-UTL-E on January 25, 2012 assessing $472 in administrative penalties with $94 deferred.

Information concerning any aspect of this order may be obtained by contacting Katy Schumann, Enforcement Coordinator at (512) 239-2602, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Brandon Zorn dba Zorn Recycling, Docket No. 2011-0483-MSW-E on January 25, 2012 assessing $1,040 in administrative penalties with $208 deferred.

Information concerning any aspect of this order may be obtained by contacting Brianna Carlson, Enforcement Coordinator at (956) 430-6021, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Walterscheid Meat Co. dba Kountry Korner, Docket No. 2011-0485-PST-E on January 25, 2012 assessing $2,136 in administrative penalties with $427 deferred.

Information concerning any aspect of this order may be obtained by contacting Theresa Hagood, Enforcement Coordinator at (512) 239-2540, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Milagro Interests, Inc., Docket No. 2011-0517-UTL-E on January 25, 2012 assessing $315 in administrative penalties with $63 deferred.

Information concerning any aspect of this order may be obtained by contacting Gena Hawkins, Enforcement Coordinator at (512) 239-2583, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding PRIDA CONSTRUCTION, INC., Docket No. 2011-0617-WQ-E on January 25, 2012 assessing $2,924 in administrative penalties with $584 deferred.

Information concerning any aspect of this order may be obtained by contacting Lanae Foard, Enforcement Coordinator at (512) 239-2554, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Moore Water Supply Corporation, Docket No. 2011-0643-MWD-E on January 25, 2012 assessing $1,790 in administrative penalties with $358 deferred.

Information concerning any aspect of this order may be obtained by contacting Jeremy Escobar, Enforcement Coordinator at (361) 825-3422, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Dorsett Brothers Concrete Supply, Inc., Docket No. 2011-0644-IWD-E on January 25, 2012 assessing $1,400 in administrative penalties with $280 deferred.

Information concerning any aspect of this order may be obtained by contacting Jeremy Escobar, Enforcement Coordinator at (361) 825-

3422, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mirando City Water Supply Corporation, Docket No. 2011-0666-MWD-E on January 25, 2012 assessing $1,155 in administrative penalties with $231 deferred.

Information concerning any aspect of this order may be obtained by contacting Jennifer Graves, Enforcement Coordinator at (956) 430-6023, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding UHS of Texoma, Inc. dba Behavioral Health Center, Docket No. 2011-0676-PST-E on January 25, 2012 assessing $3,000 in administrative penalties with $600 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Park, Enforcement Coordinator at (512) 239-4575, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding CROSS STREET SERVICE, INC., Docket No. 2011-0733-PST-E on January 25, 2012 assessing $3,150 in administrative penalties with $630 deferred.

Information concerning any aspect of this order may be obtained by contacting Clinton Sims, Enforcement Coordinator at (512) 239-6933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HRH Investments, LP dba John T White Shell, Docket No. 2011-0821-PST-E on January 25, 2012 assessing $4,800 in administrative penalties with $960 deferred.

Information concerning any aspect of this order may be obtained by contacting Keith Frank, Enforcement Coordinator at (512) 239-1203, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Victron Stores, L.P., Docket No. 2011-0859-PST-E on January 25, 2012 assessing $2,600 in administrative penalties with $520 deferred.

Information concerning any aspect of this order may be obtained by contacting Philip Aldridge, Enforcement Coordinator at (512) 239-0855, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding HABIBCO, INC. dba Whistle Stop Grocery, Docket No. 2011-0879-PST-E on January 25, 2012 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at (512) 239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Chandler, Docket No. 2011-0887-MWD-E on January 25, 2012 assessing $1,550 in administrative penalties with $310 deferred.

Information concerning any aspect of this order may be obtained by contacting JR Cao, Enforcement Coordinator at (512) 239-2543, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Brownsville Navigation District, Docket No. 2011-0889-MWD-E on January 25, 2012 assessing $1,512 in administrative penalties with $302 deferred.

Information concerning any aspect of this order may be obtained by contacting Jennifer Graves, Enforcement Coordinator at (956) 430-6023, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding KING FUELS, INC. dba Hannas Food Store, Docket No. 2011-0922-PST-E on January 25, 2012 assessing $3,850 in administrative penalties with $770 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Caldwell, Docket No. 2011-0929-MWD-E on January 25, 2012 assessing $1,092 in administrative penalties with $218 deferred.

Information concerning any aspect of this order may be obtained by contacting Jeremy Escobar, Enforcement Coordinator at (361) 825-3422, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding STUDY BUTTE WATER SUPPLY CORPORATION, Docket No. 2011-0965-IWD-E on January 25, 2012 assessing $7,140 in administrative penalties with $1,428 deferred.

Information concerning any aspect of this order may be obtained by contacting Marty Hott, Enforcement Coordinator at (512) 239-2587, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bayou Pines, LLC, Docket No. 2011-0973-MWD-E on January 25, 2012 assessing $4,480 in administrative penalties with $896 deferred.

Information concerning any aspect of this order may be obtained by contacting Steve Villatoro, Enforcement Coordinator at (512) 239-4930, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding DCP Midstream, LP, Docket No. 2011-1062-AIR-E on January 25, 2012 assessing $3,950 in administrative penalties with $790 deferred.

Information concerning any aspect of this order may be obtained by contacting Allison Fischer, Enforcement Coordinator at (512) 239-2574, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Bogga Enterprises LLC dba A M Food Mart, Docket No. 2011-1109-PST-E on January 25, 2012 assessing $2,675 in administrative penalties with $535 deferred.

Information concerning any aspect of this order may be obtained by contacting Dora Smith, Enforcement Coordinator at (512) 239-2583, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding NPL Construction Co., Docket No. 2011-1122-AIR-E on January 25, 2012 assessing $4,800 in administrative penalties with $960 deferred.

Information concerning any aspect of this order may be obtained by contacting Kimberly Morales, Enforcement Coordinator at (713) 422-8938, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Hit Mi Entertainment, Inc. dba Country Food Mart, Docket No. 2011-1182-PST-E on January 25, 2012 assessing $2,429 in administrative penalties with $485 deferred.

Information concerning any aspect of this order may be obtained by contacting Theresa Hagood, Enforcement Coordinator at (512) 239-

2540, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Union Tank Car Company, Docket No. 2011-1196-PWS-E on January 25, 2012 assessing $870 in administrative penalties with $174 deferred.

Information concerning any aspect of this order may be obtained by contacting Michaelle Sherlock, Enforcement Coordinator at (210) 403-4076, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding INTERNATIONAL BUSINESS CONNECTION, INC. dba Quick Shop Food Mart, Docket No. 2011-1290-PST-E on January 25, 2012 assessing $2,250 in administrative penalties with $450 deferred.

Information concerning any aspect of this order may be obtained by contacting Rajesh Acharya, Enforcement Coordinator at (512) 239-0577, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lutheran Outdoors Ministry of Texas, Inc., Docket No. 2011-1408-MWD-E on January 25, 2012 assessing $6,080 in administrative penalties with $1,216 deferred.

Information concerning any aspect of this order may be obtained by contacting Merrilee Hupp, Enforcement Coordinator at (512) 239-4490, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Johnson, Don Jr, Docket No. 2011-1518-WOC-E on January 25, 2012 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Edna Lumber Co Inc, Docket No. 2011-1567-WQ-E on January 25, 2012 assessing $700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Prater Equipment Co Inc, Docket No. 2011-1568-WQ-E on January 25, 2012 assessing $700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Atlantic Aviation Corporation, Docket No. 2011-1569-WQ-E on January 25, 2012 assessing $700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Buc-ees Ltd, Docket No. 2011-1570-WQ-E on January 25, 2012 assessing $700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Minaldi, Beverly, Docket No. 2011-1576-WOC-E on January 25, 2012 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding 165 Howe LP, Docket No. 2011-1587-WQ-E on January 25, 2012 assessing $700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Owen, Ivar V, Docket No. 2011-1600-WOC-E on January 25, 2012 assessing $210 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding G & G Enterprises Inc, Docket No. 2011-1666-WQ-E on January 25, 2012 assessing $700 in administrative penalties.

Information concerning any aspect of this citation may be obtained by contacting Melissa Keller, Citation Coordinator at (512) 239-1769, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Seville Processing, Inc., Docket No. 2011-0774-IHW-E on January 25, 2012 assessing $5,250 in administrative penalties with $1,050 deferred.

Information concerning any aspect of this order may be obtained by contacting Philip Aldridge, Enforcement Coordinator at (512) 239-0855, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201200906
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 15, 2012

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Enforcement Orders

A default order was entered regarding Lonnie Bearden, Sr., dba The Tireman, Docket No. 2010-1935-MLM-E on January 30, 2012 assessing $13,440 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jeffrey Huhn, Staff Attorney at (210) 403-4023, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Andrew Pena dba A-One Aircraft Paint, Docket No. 2011-0215-IHW-E on January 30, 2012 assessing $18,340 in administrative penalties with $14,502 deferred.

Information concerning any aspect of this order may be obtained by contacting Mike Pace, Enforcement Coordinator at (817) 588-5933, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Bhaskar R. Patel, Docket No. 2011-0382-PST-E on January 30, 2012 assessing $3,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Phillip M. Goodwin, P.G., Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Teresa Reid dba Laursens Car Care & Keene Auto, Docket No. 2011-0397-PST-E on January 30, 2012 assessing $2,629 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Killeen and Central Texas - Killeen Memorial Park, Inc., Docket No. 2011-0420-WQ-E on January 30, 2012 assessing $15,000 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Samuel Short, Enforcement Coordinator at (512) 239-5363, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Enterprise Products Operating LLC, Docket No. 2011-0429-AIR-E on January 30, 2012 assessing $66,925 in administrative penalties with $13,385 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Charlsie Ann Evans Wilkins, Docket No. 2011-0513-PST-E on January 30, 2012 assessing $5,075 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Phillip M. Goodwin, P.G., Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Terry F. Lee, Docket No. 2011-0533-MSW-E on January 30, 2012 assessing $3,866 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Michael Parma, Docket No. 2011-0534-MSW-E on January 30, 2012 assessing $3,866 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default and shutdown order was entered regarding M & K Pantry, LLC (fka M & K Pantry, L.C.) dba M & K Pantry 4, Docket No. 2011-0638-PST-E on January 30, 2012 assessing $28,125 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Robert Black dba Alta Vista Mobile Home Park and Melissa Black dba Alta Vista Mobile Home Park, Docket No. 2011-0641-PWS-E on January 30, 2012 assessing $2,243 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jim Sallans, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Hall and Sons Transport Inc, Docket No. 2011-0698-WQ-E on January 30, 2012 assessing $3,150 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rudy Calderon, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ballard Exploration Company, Inc., Docket No. 2011-0711-AIR-E on January 30, 2012 assessing $52,500 in administrative penalties with $10,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ballard Exploration Company, Inc., Docket No. 2011-0712-AIR-E on January 30, 2012 assessing $62,500 in administrative penalties with $12,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Ballard Exploration Company, Inc., Docket No. 2011-0713-AIR-E on January 30, 2012 assessing $62,500 in administrative penalties with $12,500 deferred.

Information concerning any aspect of this order may be obtained by contacting Miriam Hall, Enforcement Coordinator at (512) 239-1044, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Prudencia Andrade dba Paredes Line Grocery, Docket No. 2011-0759-PST-E on January 30, 2012 assessing $3,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Xavier Guerra, Staff Attorney at (210) 403-4016, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Pegasus Polymers Benelux Inc., Docket No. 2011-0775-IWD-E on January 30, 2012 assessing $14,985 in administrative penalties with $2,997 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, P.E., Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Arrowhead Pipeline, L.P. and Hilcorp Energy Company, Docket No. 2011-0891-AIR-E on January

30, 2012 assessing $14,800 in administrative penalties with $2,960 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Princess, Inc., Docket No. 2011-1028-PWS-E on January 30, 2012 assessing $6,854 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Commerce, Docket No. 2011-1032-MWD-E on January 30, 2012 assessing $38,800 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Rochester, Docket No. 2011-1044-PWS-E on January 30, 2012 assessing $1,145 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Katy Schumann, Enforcement Coordinator at (512) 239-2602, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Margarito Flores and Lucia Flores dba Royal Oaks Apartments, Docket No. 2011-1084-PWS-E on January 30, 2012 assessing $3,165 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Andrea Byington, Enforcement Coordinator at (512) 239-2579, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was entered regarding Shauna Lynn McGee LLC dba Bert & Ernies General Store, Docket No. 2011-1102-PWS-E on January 30, 2012 assessing $2,788 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Stephanie J. Frazee, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Nacogdoches, Docket No. 2011-1116-MWD-E on January 30, 2012 assessing $8,300 in administrative penalties with $1,660 deferred.

Information concerning any aspect of this order may be obtained by contacting Jorge Ibarra, P.E., Enforcement Coordinator at (817) 588-5890, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Davis Gas Processing, Inc., Docket No. 2011-1119-AIR-E on January 30, 2012 assessing $11,310 in administrative penalties with $2,262 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Johnson, Enforcement Coordinator at (361) 825-3423, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Madisonville, Docket No. 2011-1131-MWD-E on January 30, 2012 assessing $7,860 in administrative penalties with $1,572 deferred.

Information concerning any aspect of this order may be obtained by contacting Lanae Foard, Enforcement Coordinator at (512) 239-2554, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Hubbard, Docket No. 2011-1162-MWD-E on January 30, 2012 assessing $20,400 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jennifer Graves, Enforcement Coordinator at (956) 430-6023, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Willow Park, Docket No. 2011-1238-MWD-E on January 30, 2012 assessing $8,850 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An order was entered regarding David Harden, Docket No. 2010-1775-PST-E on February 2, 2012 assessing $3,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Nolan, Enforcement Coordinator at (512) 239-6634, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201200907
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 15, 2012

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Enforcement Orders

An agreed order was entered regarding I 35 SANDPIT, INC. and Finis L. Shipman, Jr., Docket No. 2010-1027-MSW-E on February 3, 2012 assessing $6,480 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kari L. Gilbreth, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Robert E. Hunt, III dba Trey Hunt Cutting Horses, Docket No. 2010-1655-AGR-E on February 3, 2012 assessing $2,625 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting James Sallans, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding NAMINATH INVESTMENT, INC. dba Harborside Food Mart 1, Docket No. 2010-1723-PST-E on February 3, 2012 assessing $4,875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Kari L. Gilbreth, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding James Brook Sloan, Docket No. 2010-1934-PST-E on February 10, 2012 assessing $2,625 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sharesa Y. Alexander, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mohammad Saeed dba Park N Shop, Docket No. 2011-0343-PST-E on February 10, 2012 assessing $2,500 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sharesa Y. Alexander, Staff Attorney at (512) 239-3503, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Jesus Iglesias, Docket No. 2011-0458-PST-E on February 3, 2012 assessing $5,408 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sharesa Y. Alexander, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SUBURBAN UTILITY CO, Docket No. 2011-0499-UTL-E on February 10, 2012 assessing $5,348 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sharesa Y. Alexander, Staff Attorney at (512) 239-3503, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding COMMUNITY UTILITY COMPANY, Docket No. 2011-0500-UTL-E on February 10, 2012 assessing $1,080 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Sharesa Y. Alexander, Staff Attorney at (512) 239-3503, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Acme Readymix, Ltd., LLP, Docket No. 2011-0754-IWD-E on February 3, 2012 assessing $1,400 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Rudy Calderon, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding GEO Enterprises Inc. dba Handi Stop 50, Docket No. 2011-0959-PST-E on February 3, 2012 assessing $3,100 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Stephanie Frazee, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BIS C-STORE, INC. dba Super Stop 7, Docket No. 2011-1001-PST-E on February 10, 2012 assessing $4,600 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Phillip M. Goodwin, P.G., Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201200908
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 15, 2012

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 285

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 285, On-Site Sewage Facilities, §285.11 and §285.21; and new §285.38, under the requirements of Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would implement House Bill (HB) 2694, 82nd Legislature, 2011. HB 2694 abolished the Texas On-Site Research Council (Council). This proposed rulemaking would remove references to the Council from Chapter 285. The proposed rulemaking would also implement HB 240, 82nd Legislature. The proposed rulemaking would also require all On-Site Sewage Facilities (OSSF), including risers and covers, installed after September 1, 2012, to be designed to prevent access by anyone other than the system's owner and licensed OSSF installers or maintenance providers.

The commission will hold a public hearing on this proposal in Austin on March 21, 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 2011-040-285-CE. The comment period closes March 26, 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 Candy Garrett, Program Support Section, (512) 239-1451.

TRD-201200734
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 10, 2012

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 330

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 330, Municipal Solid Waste, §330.7, under

the requirements of Texas Health and Safety Code, §382.017 and Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would implement Senate Bill 1258, 82nd Legislature, 2011, which authorizes the commission to issue a permit by rule to a county or a municipality with a population of 10,000 or less in arid-exempt areas for disposal of demolition waste from abandoned or nuisance buildings.

The commission will hold a public hearing on this proposal in Austin on March 22, 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 2011-048-330-WS. The comment period closes March 26, 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 Steve Odil, MSW Permits Section, (512) 239-4568.

TRD-201200732
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 10, 2012

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 331

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 331, Underground Injection Control, under the requirements of Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would amend existing rules and add new rules pertaining to the use of a Class I well for disposal of nonhazardous drinking water treatment residuals (DWTR) into a salt cavern in horizontally bedded or non-domal salt. This includes disposal of nonhazardous DWTR that contain naturally occurring radioactive material (NORM). For commercial disposal of DWTR containing NORM, a Class I well permit would be accompanied by a radioactive materials license. The proposed rules would provide a disposal alternative within Texas for public water systems to dispose of their treatment residuals containing NORM in a manner that is protective of human health and safety and the environment. The proposed rules include the repeal of an obsolete rule and editorial clarifications and corrections.

The commission will hold a public hearing on this proposal in Austin on March 20, 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 Michael Parrish, 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 2011-023-331-WS. The comment period closes March 27, 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 Kathryn Flegal, Radioactive Materials Division, (512) 239-6890 or *kathryn.flegal@tceq.texas.gov.*

TRD-201200726
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 10, 2012

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapters 291, 293, and 297

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding the proposed repeal of §291.7 and amendment to §291.22 of 30 TAC Chapter 291, Utility Regulations; amendment to §293.94 of 30 TAC Chapter 293, Water Districts; and amendment to §297.1 of 30 TAC Chapter 297, Water Rights, Substantive, under the requirements of Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would implement House Bills 2694 and 3002, and Senate Bill 1361, 82nd Legislature, 2011, relating to water district audit report exemptions; the addition of the definition of aquaculture; utility application filing fees; and delivery of notice for certain utility applications. The proposed rulemaking would also correct the spelling of the word "willfully;" amend the rule to reflect that the "Water District Financial Management Guide" is the only manual currently in use for the accounting and auditing of water districts; and, make other non-substantive changes to comply with grammar, sequencing and formatting requirements.

The commission will hold a public hearing on this proposal in Austin on March 20, 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 2011-039-293-OW. The comment period closes March 26, 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 Justin Taack, Utilities and Districts Unit, (512) 239-1122.

TRD-201200727
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: February 10, 2012

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Notice of Water Quality Applications

The following notices were issued on February 3, 2012 through February 10, 2012.

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

SPRINGLAKE EARTH INDEPENDENT SCHOOL DISTRICT has applied for a new permit, Proposed Texas Commission on Environmental Quality (TCEQ) Permit No. WQ0004967000, to authorize the land application of sewage sludge for beneficial use on 14 acres. The anticipated date of the first application of sludge, subject to the issuance of the permit, is March 1, 2012. This permit will not authorize a discharge of pollutants into waters in the State. The sewage sludge land application site will be located 0.5 mile west of the intersection of Farm-to-Market Road 302 and Farm-to-Market Road 2901 in Lamb County, Texas 79031. The land application site will be located within the drainage basin of Double Mountain Fork Brazos River in Segment No. 1241 of the Brazos River Basin.

MONTEREY MUSHROOMS INC which operates Monterey Mushroom Facility, has applied for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0001896000, which authorizes the discharge of process wastewater, utility wastewater, and domestic wastewater from Monterey Mushrooms, Inc. and process wastewater and utility wastewater from Amycel, Inc., at a daily average flow not to exceed 121,000 gallons per day via Outfall 001; and the discharge of storm water on an intermittent and flow variable basis via Outfalls 002, 003, and 004. The facility is located at 5816 U.S. Highway 75 South, approximately 1.25 miles north of the intersection of U.S. Highway 75 and State Highway Spur 67, and 5.5 miles south of the City of Madisonville, Madison County, Texas 77864.

EQUISTAR CHEMICALS LP which operates Equistar Chemicals Matagorda Plant, has applied for a major amendment without renewal to TPDES Permit No. WQ0002481000 to relocate the bacteria (Enterococci) effluent limit monitoring location from Outfall 001 to immediately after the source, the sanitary wastewater treatment plant, at internal Outfall 101. The existing permit authorizes the discharge of treated process wastewater, utility wastewater, storm water runoff, and previously monitored effluents (treated sanitary wastewater via internal Outfall 101) at a daily average flow not to exceed 648,000 gallons per day via Outfall 001; and storm water runoff commingled with potable water, firewater, hydrostatic test water, construction water, cooling tower water, and water from spill cleanup on an intermittent and flow variable basis via Outfall 002. The facility is located at 17042 State Highway 60, on the west side of State Highway 60, approximately three miles south of the City of Wadsworth, Matagorda County, Texas 77414. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program (CMP) goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

EXIDE TECHNOLOGIES P.O. Box 250, Frisco, Texas 75034, which operates a secondary lead smelter operation, which removes lead and recycles lead bearing materials, primarily from spent lead-acid batteries, has applied for a renewal of TPDES Permit No. WQ0002964000, (SIC 3341) which authorizes the discharge of storm water not to exceed a daily average flow of 360,000 gallons per day (0.36 MGD). This application was submitted to the TCEQ on June 23, 2011. The facility is located at 7471 South 5th Street, in the City of Frisco, Collin County, Texas, 75034. The effluent is discharged via a pipe to Stewart Creek; thence to Lewisville Lake in Segment No. 0823 of the Trinity River Basin. There is no significant aquatic life use in the unclassified receiving waters. The designated uses for Segment No. 0823 are contact recreation, public water supply, and high aquatic life.

CITY OF ARLINGTON which operates the Municipal Separate Storm Sewer System (MS4) has applied for a renewal of TPDES Permit No. WQ0004635000 to authorize storm water point source discharges to surface water in the state from the City of Arlington MS4. The MS4 is located within the corporate boundaries of the City of Arlington, in Tarrant County, Texas 76004-3231.

CITY OF DENTON has applied for a renewal of TPDES Permit No. WQ0010027004, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,600,000 gallons per day. The draft permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 800,000 gallons per day. The facility is located at 5495 South Florence Road, approximately 14,800 feet southeast of the intersection of Farm-to-Market Road 2449 and Farm-to-Market Road 156 at Ponder and 14,600 feet northeast of the intersection of Farm-to-Market Road 1384 and Farm-to-Market Road 156 in Denton County, Texas 76210.

SUNBELT FRESH WATER SUPPLY DISTRICT has applied for a major amendment to TPDES Permit No. WQ0010236001 to authorize an increase in the discharge of treated domestic wastewater from an annual average flow not to exceed 450,000 gallons per day to an annual average flow not to exceed 2,100,000 gallons per day. The facility is located at 2821 Mooney, immediately north of Mooney Road and east of Halls Bayou in Harris County, Texas 77093.

AQUA UTILITIES, INC. has applied for a renewal of TPDES Permit No. WQ0011419001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 120,000 gallons per day. The facility is located at 14407 West Lee Shore Drive, approximately 200 feet south of Lake Conroe, approximately 5,500 feet west of Lewis Creek Reservoir, and approximately 7,000 feet north of the intersection of Longstreet Road and Farm-to-Market Road 1097 in Montgomery County, Texas 77318.

CITY OF BROADDUS has applied for a renewal of TPDES Permit No. WQ0011772001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 135,000 gallons per day. The facility is located at the end of Sheffield Street, approximately

0.7 mile southwest of the intersection of County Road 361 and Shippy Street, approximately 300 feet west of State Highway 147, adjacent to Caney Creek in San Augustine County, Texas 75929.

CASTLEWOOD MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0011883001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,000,000 gallons per day. The facility is located at 1350 Brushbird Lane, 500 feet north of Interstate Highway 10, 2,600 feet east of where Interstate Highway 10 crosses Mason Creek, and 6,300 feet west of Fry Road in Harris County, Texas 77449.

CANEY CREEK UTILITIES INC., has applied for a renewal of TPDES Permit No. WQ0012023001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. The facility is located on Hunters Court on the west bank of Lake Conroe approximately 3/4 mile north of Farm-to-Market Road 1097 in Montgomery County, Texas 77356.

R AND K WEIMAN MHP L.C. has applied for a renewal of TPDES Permit No. WQ0012310001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 30,000 gallons per day. The facility is located adjacent to and east of Horsepen Creek, approximately 1,500 feet south of the intersection of Farm-to-Market Road 529 and Jackrabbit Road in Harris County, Texas 77222.

NORTHWEST HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 29 has applied for a renewal of TPDES Permit No. WQ0012795001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 565,000 gallons per day. The facility is located at 12425 Kilkenny Glenn Drive, 600 feet west of Eldridge Road and 1,500 feet north of U.S. Highway 290 and approximately 4,400 feet southeast of Farm-to-Market Road 1960 in Harris County, Texas 77065.

ALDINE INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. WQ0013609001, 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 at 3031 Fallbrook Drive, approximately 700 feet southeast of the intersection of Frick Road and Ann Louise Road, approximately 1,200 feet southeast of Halls Bayou, and approximately 6,500 feet southwest of Beltway 8 and Veterans Memorial Drive in Harris County, Texas 77032.

ESTATE OF ROBERT EDWARD PINE AND CATHERINE DEBLIEUX (Administrator) have applied to the TCEQ for a major amendment to TPDES Permit No. WQ0013735001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 21,000 gallons per day to a daily average flow not to exceed 35,000 gallons per day. The proposed amendment also requests to change the treatment process from a constructed wetland system to an activated sludge system. The facility is located approximately 0.3 mile south of American Canal on County Road 48 and 2.8 miles north of the intersection of State Highway 6 and County Road 48 in Brazoria County, Texas 77583.

AQUA DEVELOPMENT INC. has applied for a renewal of TCEQ Permit No. WQ0014125001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 150,000 gallons per day via surface irrigation of 48 acres of a golf course. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located 0.1 mile southwest in the inlet of Indian Creek to Eagle Mountain Lake and 1.5 miles north-northwest of the intersection of County Road 1220 (Morris Dido Road) and Peden Road in Tarrant County, Texas 76179.

SLIDELL INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. WQ0014306001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. The facility is located approximately 1,700 feet north and 300 feet east of the intersection of Farm-to-Market Road 455 and County Road 2822 in Wise County, Texas 76267.

CITY OF CENTER has applied for a new permit, proposed TPDES Permit No. WQ0014352002, to authorize the discharge of treated filter backwash effluent from a water treatment plant at a daily average flow not to exceed 200,000 gallons per day. This facility was previously permitted under TPDES permit No. WQ0014352001 which expired August 1, 2011. The facility is located at 394 County Road 1211, approximately 1,500 feet north of the intersection of County Road 1211 and State Highway 7 in Center in Shelby County, Texas 75935.

MONTGOMERY COUNTY MUNICIPAL UTILITY DISTRICT NO 88 has applied for a renewal of TPDES Permit No. WQ0014523001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 600,000 gallons per day. The facility is located approximately at 4143 Riley Fuzzel Road, 7,200 feet northeast of the intersection of Rayford Road and Riley Fuzzel Road in Montgomery County, Texas 77386.

TEXAS DEPARTMENT OF TRANSPORTATION has applied for a renewal of TPDES Permit No. WQ0014767001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 10,000 gallons per day. The facility is located at 4080 Interstate Highway 37, on the northbound side of Interstate Highway 37, approximately 5.9 miles north of the intersection of Interstate Highway 37 and U.S. Highway 281, near the City of Three Rivers in Live Oak County, Texas 78071.

CITY OF BEDIAS has applied for a renewal of TPDES Permit No. WQ0014838001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 95,000 gallons per day. The facility is located within the northeast quadrant of the City of Bedias off of Farm-to-Market Road 1696 approximately 1,150 feet east of Highway 90 in Grimes County, Texas 77831. The treated effluent is discharged to Simes Creek; thence to Bedias Creek; thence to Lake Livingston in Segment No. 0803 of the Trinity River Basin.

NORTH TEXAS MUNICIPAL WATER DISTRICT has applied for a new permit, proposed TPDES Permit No. WQ0015018001, to authorize the discharge of raw river water overflow, treated water overflow and treated filter backwash and water treatment plant sludge lagoon decant water from a water treatment plant at a daily average flow not to exceed 1,250,000 gallons per day from Outfall 001, not to exceed 1,250,000 gallons per day from Outfall 002 and 600,000 gallons per day from Outfall 003. The facility will be located at 18015 County Road 329, northeast of the City of Terrell, 1.5 miles south of the intersection of State Highway 34 and County Road 331, at the intersection of County Roads 329 and 330 in Kaufman County, Texas 75161.

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-201200905
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 15, 2012

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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 February 7, 2012, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Joe Westmoreland d/b/a Athens Radiator & Tire; SOAH Docket No. 582-11-7891; TCEQ Docket No. 2011-0025-PST-E. The Commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Joe Westmoreland d/b/a Athens Radiator & Tire 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-201200909
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: February 15, 2012

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout TX" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
San Antonio	WellMed Networks, Inc. dba Specialists for Health NE Cardiology	L06448	San Antonio	00	01/18/12
San Antonio	Cancer Care Network of South Texas, P.A. dba Cancer Care Centers of South Texas	L06449	San Antonio	00	01/20/12
Throughout TX	American X-Ray and Inspection Services, Inc.	L06450	Midland	00	01/25/12

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Abilene	Hendrick Medical Center	L02433	Abilene	105	01/17/12
Abilene	Frontier Chemical, L.L.C.	L06427	Abilene	02	01/23/12
Arlington	Texas Oncology, P.A. dba Texas Cancer Center Arlington	L05116	Arlington	22	01/18/12
Bedford	Texas Health Physicians Group dba Cardiac and Vascular Center of North Texas.	L06373	Bedford	01	01/25/12
Brownwood	3M Company	L00918	Brownwood	43	01/17/12
Brownwood	3M Company	L00918	Brownwood	44	01/23/12
Dallas	Methodist Hospitals of Dallas Radiology Svcs.	L00659	Dallas	89	01/20/12
Dallas	Texas Health Presbyterian Hospital Dallas	L04288	Dallas	31	01/24/12
Dallas	GME Consulting Services, Inc.	L05128	Dallas	08	01/23/12
Dallas	Dallas Cardiology Associates, P.A. dba Heartplace-Charlton Methodist	L05541	Dallas	09	01/31/12
Deer Park	United States Environmental Services, L.L.C.	L05801	Deer Park	06	01/26/12
Denison	UHS of Texoma, Inc. dba Texoma Medical Center	L01624	Denison	68	01/26/12
El Paso	Texas Oncology, P.A. dba El Paso Cancer Treatment Center	L05774	El Paso	08	01/24/12
Fairfield	East Texas Medical Center Fairfield	L05195	Fairfield	09	01/20/12
Fairfield	J&J Solutions E&S, L.L.C.	L06442	Fairfield	02	01/23/12
Freeport	Braskem America, Inc.	L06443	Freeport	01	01/17/12
Houston	The Methodist Hospital	L00457	Houston	182	01/23/12
Houston	Texas Children's Hospital	L04612	Houston	54	01/19/12
Houston	Institute of Biosciences and Technology	L04681	Houston	34	01/17/12
Houston	One Step Diagnostic, Inc.	L05990	Houston	11	01/20/12
Houston	Methodist Health Centers dba Methodist West Houston Hospital	L06358	Houston	02	01/25/12
Houston	MH/USON Radiation Management Company, L.L.C.	L06408	Houston	02	01/02/12
Houston	Memorial Hermann Hospital System dba Memorial Hermann Texas Medical Center	L06439	Houston	01	01/30/12
Kerrville	Sid Peterson Memorial Hospital dba Peterson Regional Medical Center	L01722	Kerrville	39	01/18/12
Lubbock	Covenant Health System dba Covenant Medical Center - Lakeside	L01547	Lubbock	97	01/12/12
Lubbock	Cardinal Health Nuclear Pharmacy Services	L06290	Lubbock	06	01/25/12

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Lubbock	Manhattan Isotope Technology, L.L.C.	L06404	Lubbock	01	01/23/12
McAllen	McAllen Hospitals, L.P. dba McAllen Medical Heart Hospital	L04902	McAllen	23	01/19/12
Midland	Sunset Well Service, Inc.	L06426	Midland	02	01/23/12
Midland	Nova Training, Inc. dba Nova Safety and Environmental	L06428	Midland	01	01/23/12
Nassau Bay	Christus Health dba Christus St. John's Hospital	L03291	Nassau Bay	35	01/24/12
Paris	Essent PRMC, L.P. dba Paris Regional Medical Center	L03199	Paris	51	01/31/12
Pasadena	Equistar Chemicals, L.P.	L01854	Pasadena	41	01/17/12
Queen City	International Paper Company	L01686	Queen City	40	01/24/12
San Angelo	Shannon Medical Center	L02174	San Angelo	62	01/25/12
San Antonio	Trinity University	L01668	San Antonio	45	01/25/12
San Antonio	Cardiology of San Antonio, P.A.	L05408	San Antonio	04	01/25/12
Sherman	Sherman/Grayson Hospital, L.L.C. dba Texas Health Presbyterian Hospital - WNJ	L06354	Sherman	05	01/26/12
Temple	Scott and White Memorial Hospital and Scott Sherwood and Brindley Foundation dba Scott and White Memorial Hospital	L00331	Temple	90	01/18/12
The Woodlands	St. Luke's Community Health Services dba St. Luke's The Woodlands Hospital	L06370	The Woodlands	03	01/24/12
Throughout TX	Fox NDE, L.L.C.	L06411	Abilene	03	01/24/12
Throughout TX	AMEC Environment and Infrastructure, Inc.	L03622	El Paso	25	01/23/12
Throughout TX	Varco, L.P.	L00287	Houston	130	01/31/12
Throughout TX	HTS, Inc. Consultants	L02757	Houston	21	01/25/12
Throughout TX	Statewide Maintenance Company dba Diamond G Inspection, Inc.	L06229	Houston	05	01/30/12
Throughout TX	Hi-Tech Testing Service, Inc.	L05021	Longview	92	01/24/12
Throughout TX	Hi-Tech Testing Service, Inc.	L05021	Longview	93	01/26/12
Throughout TX	Weld Spec, Inc.	L05426	Lumberton	93	01/09/12
Throughout TX	Capitan Corporation	L05824	Midland	07	01/17/12
Throughout TX	Turner Specialty Services, L.L.C.	L05417	Nederland	41	01/31/12
Tomball	Mustafa Mandviwala, M.D., P.A.	L05296	Tomball	06	01/13/12

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Houston	Stewart & Stevenson Service Inc.	L05267	Houston	03	01/23/12
Throughout TX	Construction Services	L05625	San Angelo	12	01/23/12

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Abilene	Abilene Cardiology Consultants, P.A.	L04315	Abilene	035	01/17/12
Midland	Eddy Merket, Inc.	L04275	Midland	09	01/25/12
Pasadena	Quantum Technical Services, Inc.	L03731	Pasadena	36	01/17/12
San Antonio	Northeast Cardiovascular, L.L.C.	L06364	San Antonio	01	01/18/12

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of 25 Texas Administrative Code (TAC) Chapter 289, regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, Radiation Material Licensing - Mail Code 2835, P.O. Box 149347, Austin, Texas 78714-9347. For information call (512) 834-6688.

TRD-201200690
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: February 9, 2012

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Texas Lottery Commission

Instant Game Number 1410 "Triple Lucky Numbers"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1410 is "TRIPLE LUCKY NUMBERS". The play style is "key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1410 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1410.

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, STAR SYMBOL, $2.00, $4.00, $6.00, $10.00, $20.00, $50.00, $200, $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. 1410 - 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
STAR SYMBOL	TPL
$2.00	TWO$
$4.00	FOUR$
$6.00	SIX$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$200	TWO 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 $2.00, $4.00, $6.00, $8.00, $10.00, $12.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 or $200.

H. High-Tier Prize - A prize of $1,000, $3,000 or $30,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1410), 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: 1410-0000001-001.

K. Pack - A pack of "TRIPLE LUCKY NUMBERS" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One ticket will be folded over to expose a front and back of one ticket on each pack. Please note the books will be in an A, B, C and D configuration.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket or Instant Ticket - A Texas Lottery "TRIPLE LUCKY NUMBERS" Instant Game No. 1410 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 "TRIPLE LUCKY NUMBERS" Instant Game is determined once the latex on the ticket is scratched off to expose 18 (eighteen) play symbols. If a player matches ONE of YOUR NUMBERS play symbols to any of the LUCKY NUMBERS play symbols within a GAME, the player wins the PRIZE for that GAME. If a player matches TWO of YOUR NUMBERS play symbols to any of the LUCKY NUMBERS play symbols within a GAME, the player wins DOUBLE the PRIZE for that GAME! If a player reveals a "star" play symbol within a GAME, 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 18 (eighteen) 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 18 (eighteen) 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 18 (eighteen) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 18 (eighteen) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

C. No duplicate LUCKY NUMBERS play symbols on a ticket.

D. The "STAR" (tripler) play symbol will never appear more than once within a game.

E. The "STAR" (tripler) play symbol will only appear on intended winning tickets as dictated by the prize structure.

F. When the "STAR" (tripler) play symbol appears, there will be no occurrence of any of YOUR NUMBERS matching to any LUCKY NUMBERS play symbols within that game.

G. No duplicate non-winning prize symbols on a ticket.

H. There will be no identical YOUR NUMBERS play symbols within a game.

I. There will never be more than two YOUR NUMBERS in a game that match any of the LUCKY NUMBERS.

J. Non-winning prize symbols will never be the same as the winning prize symbol(s).

2.3 Procedure for Claiming Prizes.

A. To claim a "TRIPLE LUCKY NUMBERS" Instant Game prize of $2.00, $4.00, $6.00, $8.00, $10.00, $12.00, $20.00, $50.00 or $200 a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00 or $200 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 "TRIPLE LUCKY NUMBERS" Instant Game prize of $1,000, $3,000 or $30,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "TRIPLE LUCKY NUMBERS" 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 under $600 from the "TRIPLE LUCKY NUMBERS" 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 "TRIPLE LUCKY NUMBERS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names

submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 1410. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1410 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	588,000	10.20
$4	348,000	17.24
$6	96,000	62.50
$8	24,000	250.00
$10	60,000	100.00
$12	72,000	83.33
$20	36,000	166.67
$50	18,125	331.03
$200	4,600	1,304.35
$1,000	125	48,000.00
$3,000	50	120,000.00
$30,000	6	1,000,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.81. 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. 1410 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. 1410, 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-201200893
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 15, 2012

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Instant Game Number 1412 "Red Hot & Blue 7's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1412 is "RED HOT & BLUE 7'S". The play style is "key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1412 shall be $1.00 per ticket.

1.2 Definitions in Instant Game No. 1412.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: $1.00, $2.00, $5.00, $10.00, $20.00, $40.00, $100, $1,000, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19 or 20.

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. 1412 - 1.2D

PLAY SYMBOL	CAPTION
$1.00	ONE$
$2.00	TWO$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$40.00	FORTY
$100	ONE HUND
$1,000	ONE THOU
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
18	ETN
19	NTN
20	TWY

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $1.00, $2.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $40.00 or $100.

H. High-Tier Prize - A prize of $1,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1412), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 150 within each pack. The format will be: 1412-0000001-001.

K. Pack - A pack of "RED HOT & BLUE 7'S" Instant Game tickets contains 150 tickets, packed in plastic shrink-wrapping and fanfolded in pages of five (5). Tickets 001 to 005 will be on the top page; tickets 006 to 010 on the next page; etc.; and tickets 146 to 150 will be on the last page with backs exposed. Ticket 001 will be folded over so the front of ticket 001 and 010 will be exposed.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "RED HOT & BLUE 7'S" Instant Game No. 1412 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 "RED HOT & BLUE 7'S" Instant Game is determined once the latex on the ticket is scratched off to expose 11 (eleven) play symbols. If a player matches any of YOUR NUMBERS play symbols to the WINNING NUMBER play symbol, the player wins the PRIZE for that number. If a player reveals a "7" play symbol, the player instantly wins the prize for that symbol! No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 11 (eleven) 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 11 (eleven) 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 11 (eleven) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 11 (eleven) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Players can win up to five (5) times on a ticket in accordance with the approved prize structure.

B. Adjacent non-winning tickets within a pack will not have identical play or prize symbol patterns. Two (2) tickets have identical play or prize symbol patterns if they have the same play or prize symbols in the same positions.

C. The "7" play symbol will never appear in the "WINNING NUMBER" play symbol spot.

D. Non-winning tickets will contain five (5) different "YOUR NUMBERS" play symbols.

E. On winning tickets, non-winning "YOUR NUMBERS" play symbols will all be different.

F. No ticket will ever contain more than two (2) identical non-winning prize symbols.

G. Non-winning prize symbols will never be the same as the winning prize symbol(s).

H. The top prize ($1,000) will appear on every ticket unless otherwise restricted.

I. No prize amount in a non-winning spot will correspond with the "YOUR NUMBERS" play symbol (i.e., 5 and $5).

2.3 Procedure for Claiming Prizes.

A. To claim a "RED HOT & BLUE 7'S" Instant Game prize of $1.00, $2.00, $5.00, $10.00, $20.00, $40.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $40.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the

claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "RED HOT & BLUE 7'S" Instant Game prize of $1,000 the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "RED HOT & BLUE 7'S" 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 "RED HOT & BLUE 7'S" 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 "RED HOT & BLUE 7'S" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 10,080,000 tickets in the Instant Game No. 1412. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1412 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$1	1,344,000	7.50
$2	672,000	15.00
$5	134,400	75.00
$10	67,200	150.00
$20	33,600	300.00
$40	26,250	384.00
$100	2,100	4,800.00
$1,000	84	120,000.00

*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 4.42. 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. 1412 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. 1412, 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-201200894
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 15, 2012

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Instant Game Number 1417 "The Three Stooges®"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1417 is "THE THREE STOOGES®". The play style is "multiple games".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1417 shall be $2.00 per ticket.

1.2 Definitions in Instant Game No. 1417.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: $2.00, $4.00, $5.00, $10.00, $20.00, $50.00, $100, $1,000, $20,000, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and HAMMER PLAY SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1417 - 1.2D

PLAY SYMBOL	CAPTION
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$1,000	ONE THOU
$20,000	20 THOU
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
HAMMER PLAY SYMBOL	WIN2X

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $2.00, $4.00, $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00 or $100.

H. High-Tier Prize - A prize of $1,000 or $20,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1417), 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: 1417-0000001-001.

K. Pack - A pack of "THE THREE STOOGES®" Instant Game tickets contains 125 tickets, packed in plastic shrink-wrapping and fanfolded in pages of two (2). One ticket will be folded over to expose a front and back of one ticket on each pack. Please note the books will be in an A, B, C and D configuration.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery

pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket or Instant Ticket - A Texas Lottery "THE THREE STOOGES®" Instant Game No. 1417 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 "THE THREE STOOGES®" Instant Game is determined once the latex on the ticket is scratched off to expose 22 (twenty-two) play symbols. If a player matches any of YOUR NUMBERS play symbols to either of the WINNING NUMBERS play symbols, the player wins the prize for that number. If a player reveals a "HAMMER" play symbol, the player wins DOUBLE the prize for that symbol! No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 22 (twenty-two) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 22 (twenty-two) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 22 (twenty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 22 (twenty-two) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Players can win up to ten (10) times on a ticket in accordance with the approved prize structure.

B. Adjacent non-winning tickets within a pack will not have identical play and prize symbol patterns. Two (2) tickets have identical play and prize symbol patterns if they have the same play and prize symbols in the same positions.

C. Each ticket will contain two (2) different "WINNING NUMBERS" play symbols.

D. The "HAMMER" play symbol will never appear in the "WINNING NUMBERS" play symbol spots.

E. The "HAMMER" play symbol will only appear as dictated by the prize structure.

F. When the "HAMMER" play symbol appears, the associated winning prize will always be doubled as dictated by the prize structure.

G. Non-winning "YOUR NUMBERS" play symbols on a ticket will all be different.

H. No ticket will ever contain more than two (2) identical non-winning prize symbols.

I. Non-winning prize symbols will never be the same as the winning prize symbol(s).

J. The top prize symbol will appear on every ticket unless otherwise restricted.

K. No prize amount in a non-winning spot will correspond with the "YOUR NUMBERS" play symbol (i.e., 5 and $5).

2.3 Procedure for Claiming Prizes.

A. To claim a "THE THREE STOOGES®" Instant Game prize of $2.00, $4.00, $5.00, $10.00, $20.00, $50.00 or $100, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The

Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00 or $100 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and 2.3.C of these Game Procedures.

B. To claim a "THE THREE STOOGES®" Instant Game prize of $1,000 or $20,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "THE THREE STOOGES®" 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 under $600 from the "THE THREE STOOGES®" 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 "THE THREE STOOGES®" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 1417. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1417 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$2	576,000	10.42
$4	624,000	9.62
$5	96,000	62.50
$10	72,000	83.33
$20	48,000	125.00
$50	29,350	204.43
$100	2,500	2,400.00
$1,000	75	80,000.00
$20,000	10	600,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.14. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1417 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. 1417, 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-201200888
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: February 14, 2012

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Texas Parks and Wildlife Department

Notice of Proposed Real Estate Transactions

Proposed Land Sale - Randall and Armstrong Counties

In a meeting on March 29, 2012, the Texas Parks and Wildlife Commission (the Commission) will consider the sale of a 2,014-acre tract of land in Randall and Armstrong counties adjacent to Palo Duro Canyon State Park. The subject tract is part of a larger parcel acquired in 2008 to protect views from the canyon. A portion of this parcel not within view of the canyon is to be sold subject to a restrictive conservation easement. 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 or by email at ted.hollingsworth@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

Utility Easement Caprock Canyons Trailway - Hall County

In a meeting on March 29, 2012, the Texas Parks and Wildlife Commission (the Commission) will consider the granting of an easement to Southwestern Public Services (SPS) for a 345 kV transmission line to cross the Caprock Canyons Trailway in Hall County near its eastern terminus in Esteline. 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 or by email at ted.hollingsworth@tpwd.state.tx.us or through the TPWD web site at tpwd.state.tx.us.

TRD-201200869
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: February 14, 2012

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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 February 9, 2012, to amend a state-issued certificate of franchise authority, pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act.

Project Title and Number: Application of NTS Communications, Inc. to Amend its State-Issued Certificate of Franchise Authority, Project Number 40173.

The requested amendment is to expand the service area footprint to include the municipal boundaries of Abernathy, Anton, Brownfield, Hale Center, Idalou, Littlefield, O'Donnell, Olton, Meadow, New Deal, the unincorporated area of Reese Technology Center, Ropesville, Shallowater, Smyer, and Tahoka, 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 40173.

TRD-201200768
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 10, 2012

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Notice of Application for a Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on February 13, 2012, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Sonic Telecom, LLC for a Service Provider Certificate of Operating Authority, Docket Number 40178.

Applicant intends to provide data, facilities-based, and resale telecommunications services.

Applicant has not determined a geographic area for its SPCOA application.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll free at (888) 782-8477 no later than March 2, 2012. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at (800) 735-2989. All comments should reference Docket Number 40178.

TRD-201200886
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 14, 2012

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Notice of Application for Waiver of Denial of Numbering Resources

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on February 10, 2012, for waiver of denial by the Pooling Administrator (PA) of Time Warner Communications of Houston, L.P. d/b/a TW Telecom of Texas LLC's request for assignment of one thousands-block of numbers in the Conroe rate center.

Docket Title and Number: Petition of Time Warner Communications of Houston, L.P. d/b/a TW Telecom of Texas LLC for Waiver of Denial of Numbering Resources in the Conroe Rate Center, Docket Number 40177.

The Application: Applicant has exhausted its extended metro service (EMS) numbers in the Conroe rate center. Because of the need for EMS-specific numbers, number optimization strategies cannot resolve Applicant's need for additional numbering resources. Applicant submitted an application to the PA for the requested blocks in accordance with the current guidelines. The PA denied the request because Applicant did not meet the months-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll free at (888) 782-8477 no later than Monday, March 5, 2012. Hearing and speech impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at (800) 735-2989. All comments should reference Docket Number 40177.

TRD-201200883
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 14, 2012

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Notice of Application to Amend Certificated Service Area Boundaries

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on February 13, 2012, for an amendment to certificated service area boundaries within Cameron County, Texas.

Docket Style and Number: Application of the Brownsville Public Utilities Board (BPUB) to Amend a Certificate of Convenience and Necessity for Service Area Boundaries within Cameron County. Docket Number 40179.

The Application: The application encompasses an area of land which is singly certificated to American Electric Power Company (AEP), formerly known as Central Power & Light (CP&L), and is within the corporate limits of the City of Brownsville. BPUB received a letter request from Mr. Craig Stowell, P.E., General Manager of the Valley Municipal Utility District No. 2, requesting BPUB to provide electric utility service to a 0.526-acre tract of land. The estimated cost to BPUB to provide service to this proposed area is $709.77. If the application is granted the area would be dually certificated for electric service.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas no later than Monday, March 5, 2012, by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All comments should reference Docket Number 40179.

TRD-201200884

Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 14, 2012

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Notice of Award to Provide Technical Consulting Services

RFP Number 473-11-00313

1. To provide consulting services related to proceedings before the Federal Energy Regulatory Commission and the Public Utility Commission of Texas (PUCT) concerning the membership of Entergy Texas, Inc. in a regional transmission organization. The contractor will provide evaluation services and may, at the PUCT's election, provide contested case services.

2. London Economics International LLC

717 Atlantic Avenue

Unit 1A

Boston, MA 02111

3. $300,000

Term: January 24, 2012 through December 31, 2013

TRD-201200689
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 8, 2012

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Request for Proposals for Powertochoose.org Usability Study

RFP Number 473-12-00151

The Public Utility Commission of Texas (PUCT) is issuing a proposal for a consultant to assist the PUCT by performing a usability study for Powertochoose.org and then providing website redesign options.

Scope of Work:

The contractor shall develop an appropriate strategy for:

- completing a subjective and objective usability evaluation

- evaluating the site for ease of use, messaging, and overall design

- identifying potential barriers for site ease of use

The contractor shall host two workshops:

- to gather feedback about the current Powertochoose.org website

- to present the redesign options and receive feedback

The contractor shall provide a minimum of three redesign options based on the usability evaluation.

Request for Proposals (RFP) documentation may be obtained by contacting:

Purchaser

Public Utility Commission of Texas

P.O. Box 13326

Austin, Texas 78711-3326

(512) 936-7069

purchasing@puc.state.tx.us

RFP documentation is also located on the PUCT website at http://www.puc.state.tx.us/agency/about/procurement/Default.aspx.

Deadline for proposal submission is 3:00 p.m. CDT on Friday, March 23, 2012.

TRD-201200767
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 10, 2012

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Request for Proposals to Provide Education and Outreach to Low-Income and Elderly Texans

RFP Number 473-12-00149

The Public Utility Commission of Texas (PUCT) is issuing a proposal for a consultant to assist the PUCT to provide electric education outreach to low-income and elderly Texans on electric competition, the LITE-UP Texas program and energy efficiency in the Houston and Dallas-Fort Worth metropolitan areas.

Scope of Work:

The contractor will develop creative strategy and messaging for:

- educating low-income and elderly customers on electric competition in Texas

- educating low-income and elderly customers on the LITE-UP Texas program

- educating low-income and elderly customers about the benefits of energy efficiency

Request for Proposals (RFP) documentation may be obtained by contacting:

Purchaser

Public Utility Commission of Texas

P.O. Box 13326

Austin, Texas 78711-3326

(512) 936-7069

purchasing@puc.state.tx.us

RFP documentation is also located on the PUCT website at http://www.puc.state.tx.us/agency/about/procurement/Default.aspx.

Deadline for proposal submission is 3:00 p.m. CDT on Friday, March 23, 2012.

TRD-201200766
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: February 10, 2012

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Texas Water Development Board

Notice of Hearings in Groundwater Management Area 12

The Texas Water Development Board will hold a hearing on a petition submitted by the End Op, L.P. submitted under 31 TAC §356.44. The hearing on the petition will begin at 10:00 a.m. on Wednesday, February 29, 2012. The hearing will take place in the Milano Civic Center, 120 West Avenue East, Milano, Texas.

The Texas Water Development Board will hold a hearing on a petition submitted by Environmental Stewardship submitted under 31 TAC §356.44. The hearing on the petition will begin at 10:00 a.m. on Wednesday, March 7, 2012. The hearing will take place in the Milano Civic Center, 120 West Avenue East, Milano, Texas.

A petition on the reasonableness of the Desired Future Conditions adopted by Groundwater Management Area 12 was submitted by Ed Op, L.P. and Environmental Stewardship.

Interested persons are encouraged to attend the hearing, which is not a contested case hearing. Petitioners and Respondents will each have two hours in which to present their testimony. There will be no cross-examination of those making presentations and no objections to the testimony or exhibits. Testimony and evidence presented should address the claims asserted in the petitions.

Other interested persons will have 10 business days from the close of the hearing in which to submit written evidence. No time will be allotted for public comment during the hearing. Written evidence may be submitted during the 10-day period to the Board's General Counsel, Texas Water Development Board, 1700 N. Congress Ave., P.O. Box 13231, Austin, Texas 78711-3231.

TRD-201200865
Kenneth Petersen
General Counsel
Texas Water Development Board
Filed: February 13, 2012

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Request for Applications for Agricultural Water Conservation Grants - Fiscal Year 2012

The Texas Water Development Board (TWDB) solicits Request for Applications (RFAs) for the state fiscal year 2012. The total amount of the grants to be awarded by the TWDB shall not exceed $600,000 from the Agricultural Water Conservation Fund. The rules governing the Agricultural Water Conservation Fund (31 Texas Administrative Code Chapter 367) and application instructions are available upon request from the TWDB.

Summary of the RFA

Solicitation Date (Opening): Date published in the *Texas Register*

Due Date (Closing): 12:00 p.m., Wednesday, April 18, 2012

Anticipated Award Date: June 21, 2012

Estimated Total Funding: $600,000

Eligible applicants: Political Subdivisions

Contact: Comer Tuck, Jr., P.E., Director - Water Conservation Division, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231; telephone: (512) 936-2343; e-mail: comer.tuck@twdb.texas.gov

Agricultural Water Conservation Grant Categories:

1. Agricultural irrigation water use measurement

Grants to local political subdivisions may include the purchase and installation costs of agricultural irrigation measurement devices, automated gates, telemetry, and weather monitoring accessories. Applicants will be responsible for the costs of maintenance, data collection, and data reporting services for the duration of the contract. Water use data must be reported annually for each piece of equipment installed for a period of at least five years. Annual data reports are to include irrigated acreage, crop type, irrigation rate (inches per acre), total water use, and location by county (preferably including latitude/longitude coordinates). Additionally, annual rainfall totals must be provided (preferably as county totals). Annual water savings estimates (and an explanation of the water savings calculation methodology) resulting from use of the equipment must be reported as well.

2. Agricultural irrigation conservation education

Funding for this category is targeted towards educational efforts by local political subdivisions to assist in meeting the agricultural water conservation strategy of "irrigation conservation" as identified in the 2012 State Water Plan. This is not a category meant solely to develop new education tools and materials, but rather the technical aspects of the applications must include implementation and outreach to educate area landowners and irrigators (preferably for a period of at least three years) about materials, resources, and technologies that will assist in their ability to meet pumping limitations. Projects should include relevant tools developed through previous TWDB projects, the private sector, and/or other resources available to the public. Funded projects will be required to report actual water savings at the end of the project and an explanation of the methodology used to calculate water savings.

3. Agricultural irrigation system audits

Applications from local political subdivisions may include the cost to purchase portable flow meters and other related equipment used to measure irrigation pumpage and/or irrigated crop water use. If the application is for equipment only, TWDB will cover 100 percent of the eligible equipment costs. If the applicant wishes to provide complete in-field irrigation system audits, TWDB will cover 50 percent of the total project costs including equipment, travel expenses, and labor. An irrigation system audit is intended to assess the efficiency of the irrigation system and recommend improvements to the entire system or to specific components. The audits must be used to educate irrigators about their irrigation efficiency and for determining improvements in their irrigation management. Equipment only applicants are required to report estimated accumulative water savings for three irrigation seasons after funding date. Full in-field irrigation system audit applicants are required to report a summary of all audits performed, system improvement recommendations, along with the three accumulative water savings reports.

Grant Amount

Up to $600,000 has been initially authorized for fiscal year 2012 assistance for agricultural water conservation grants from the TWDB's Agricultural Water Conservation Fund (Fund). Funds will be awarded through a statewide competitive grants process. TWDB may fund single-and multi-year projects. Applicants may submit more than one application; however, individual applicants are only eligible to receive fiscal year 2012 agricultural water conservation grants not to exceed a total of $200,000. All proposals will be evaluated based upon the specific criteria set forth in this solicitation.

Description of Applicant Criteria

The applicable scope of work, schedule, and contract amount will be negotiated after the TWDB selects the most qualified applicants. Failure to arrive at mutually agreeable terms of a contract with the most qualified applicant shall constitute a rejection of the Board's offer and may result in subsequent negotiations with the next most qualified applicant. The TWDB reserves the right to reject any or all applications if staff determines that the application(s) does not adequately meet the required criteria or if the funding available is less than the requested funding.

Application instructions available upon request from Comer Tuck, comer.tuck@twdb.texas.gov, or online at twdb.texas.gov

Deadline for Submission of Applications

Six double-sided, double-spaced copies on recycled paper and one digital copy (CD) of a completed application must be filed with the TWDB on or before 12:00 p.m. on Wednesday, April 18, 2012. Applications can be directed either in person to David Carter, Texas Water Development Board, Stephen F. Austin Building, Room 610D, 1700 North Congress Avenue, Austin, Texas 78701; or by mail to David Carter, Texas Water Development Board, P.O. Box 13231 - Capitol Station, Austin, Texas 78711-3231.

TRD-201200696
Kenneth Petersen
General Counsel
Texas Water Development Board
Filed: February 9, 2012

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Workforce Solutions Brazos Valley Board

Notice of Request for Proposal for Child Care Provider Training

The Workforce Solutions Brazos Valley Board (WSBVB) is soliciting quotes for one or more trainers to provide Saturday training sessions from June through October 2012 in Bryan, Texas, to child care providers in the region.

The WSBVB is soliciting training services to support the Board's child care management program in the Brazos Valley region. The purpose of the training is to improve the skills and knowledge of the region's child care provider staff by providing information that will be helpful in working with children in daycare settings and count towards child care staff licensing requirements. Approximately 100 attendees are expected at each session.

The Board will release a Request for Quote (RFQ) on February 20, 2012. This RFQ provides information concerning this request and instructions for submitting a response. The due date for a response is no later than 4:00 p.m. March 21, 2012. Questions concerning this RFQ should be addressed to Trish Buck at pbuck@bvcog.org prior to March 7, 2012. The RFQ may be accessed at the Board's web site bvcog.org. Responses should be addressed to: Trish Buck, Workforce Solutions Brazos Valley Board, P.O. Drawer 4128, Bryan, TX 77805, Attn: Training Services RFQ Response.

Hand delivered responses should be delivered to: Trish Buck, Workforce Solutions Brazos Valley Board, 3991 East 29th Street, Bryan, Texas 77802, Attn: Training Services RFQ Response.

Workforce Solutions Brazos Valley is an equal opportunity employer and provides equal opportunity employment programs. Auxiliary aids are available upon request to disabled individuals. Texas Relay (800) 735-2989 TDD; (800) 735-2988 voice.

TRD-201200901
Tom Wilkinson
Executive Director
Workforce Solutions Brazos Valley
Filed: February 15, 2012

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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)*