TEXAS REGISTER

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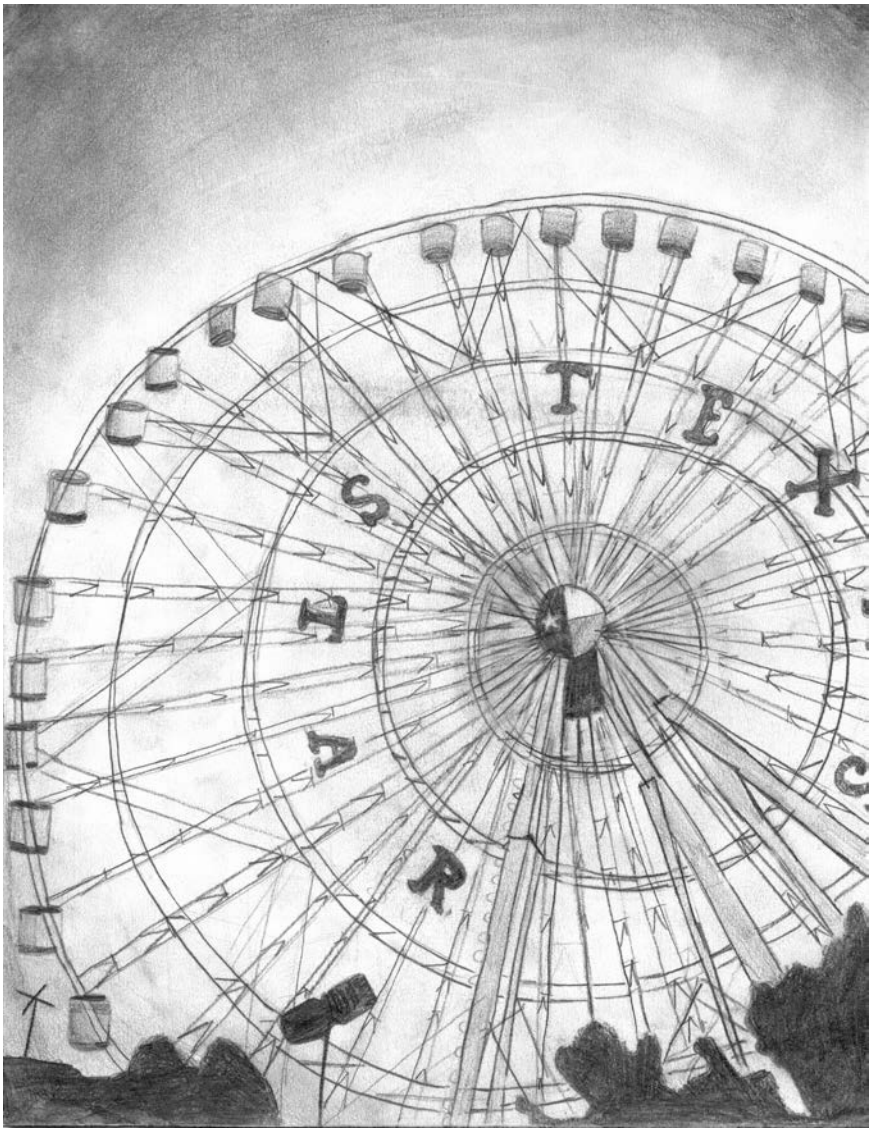

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but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

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

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IN THIS ISSUE

Open Meetings

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

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

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

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

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

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

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

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

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

THE GOVERNOR

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

Appointments

Appointments for May 9, 2012

Appointed to the Texas Water Development Board, effective June 11, 2012, for a term to expire December 31, 2017, Lewis Hill McMahan of Dallas (Mr. McMahan is being reappointed).

Appointed to the Texas Water Development Board, effective June 11, 2012, for a term to expire December 31, 2017, Frederick "Rick" Rylander of Iraan (replacing T. Weir Labatt, III of San Antonio whose term expired).

Appointed to the Southern Regional Education Board, effective June 30, 2012, for a term to expire June 30, 2016, Rob Eissler of The Woodlands (Representative Eissler is being reappointed).

Appointed to the Juvenile Justice Advisory Board for a term to expire at the pleasure of the Governor, Eric Garza of Brownsville.

Appointed to the Juvenile Justice Advisory Board for a term to expire at the pleasure of the Governor, Cheryln "Cherie" Townsend of Austin.

Appointed to the Continuing Advisory Committee for Special Education for a term to expire February 1, 2015, Vickie J. Mitchell of Montgomery (replacing Sherri Hammack of Austin whose term expired).

Appointed to the Continuing Advisory Committee for Special Education for a term to expire February 1, 2015, Debbie Unruh of Austin (replacing Marjorie Haynes of Huntsville whose term expired).

Appointed to the Continuing Advisory Committee for Special Education for a term to expire February 1, 2015, Erin Wilder of Pflugerville (replacing Teresa Hernandez of San Marcos whose term expired).

Appointed to the Interagency Council for Genetic Services for a term to expire September 1, 2013, T. Craig Benson of Austin (replacing Karen Littlejohn of Carrollton whose term expired).

Appointed to the Texas Institute of Health Care Quality and Efficiency Board of Directors, pursuant to SB 7, 82nd Legislature, 1st Called Session, for a term to expire January 31, 2015, Jacinto Juarez of Laredo.

Appointed to the Texas Early Learning Council for a term to expire at the pleasure of the Governor, Michele Adams of Georgetown (replacing Sasha Rasco of Austin).

Appointed to the Texas Early Learning Council for a term to expire at the pleasure of the Governor, Jonel Huggins of Kyle (replacing Dottie Goodman of Austin).

Appointed to the Governor's Committee on People with Disabilities for a term to expire February 1, 2014, Aaron W. Bangor of Austin (Dr. Bangor is being reappointed).

Appointed to the Governor's Committee on People with Disabilities for a term to expire February 1, 2014, Rodolfo Becerra, Jr. of Nacogdoches (Mr. Becerra is being reappointed).

Appointed to the Governor's Committee on People with Disabilities for a term to expire February 1, 2014, Mackenzie Kelly of Austin (replacing Maureen McClain of Kerrville whose term expired).

Appointed to the Governor's Committee on People with Disabilities for a term to expire February 1, 2014, Margaret M. Larsen of The Hills (Ms. Larsen is being reappointed).

Appointed to the Governor's Committee on People with Disabilities for a term to expire February 1, 2014, Patricia A. Watson of Flower Mound (Ms. Watson is being reappointed).

Appointed to the Statewide Health Coordinating Council for a term to expire August 1, 2017, Danny Ken McCoy of Corsicana (replacing Steven Nguyen of Irving who resigned).

Appointed to the Manufactured Housing Board for a term to expire January 31, 2013, Bobby Ray McCarn of Port Lavaca (replacing Paul Schneider who resigned).

Appointed to the Texas Board of Professional Geoscientists for a term to expire February 1, 2017, Christopher Mathewson of College Station (replacing Judy Reeves of Grapevine who resigned).

Appointed to the Texas State Library and Archives Commission for a term to expire September 28, 2017, Sharon T. Carr of Katy (Ms. Carr is being reappointed).

Appointed to the Texas State Library and Archives Commission for a term to expire September 28, 2017, Fenton Lynwood Givens of Plano (replacing Sally Reynolds of Rockport whose term expired).

Appointed to the State Soil and Water Conservation Board for a term to expire February 1, 2014, Larry D. Jacobs of Montgomery. Mr. Jacobs is being reappointed.

Appointed to the State Employee Charitable Campaign Policy Committee for a term to expire January 1, 2014, Gregory "Greg" Davidson of Lexington (reappointed).

Appointed to the State Employee Charitable Campaign Policy Committee for a term to expire January 1, 2014, Louri O'Leary of Austin (reappointed).

Rick Perry, Governor

TRD-201202389

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THE ATTORNEY GENERAL

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

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

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

Requests for Opinions

RQ-1058-GA

Requestor:

The Honorable Russell W. Malm

Midland County Attorney

500 N. Loraine, Suite 1101

Midland, Texas 79701

Re: Authority of a county bail bond board with regard to attorneys who execute bail bonds: Clarification of Attorney General Opinion No. GA-0197 (2004) (RQ-1058-GA)

Briefs requested by June 8, 2012

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

TRD-201202421
Katherine Cary
General Counsel
Office of the Attorney General
Filed: May 15, 2012

♦ ♦ ♦

Opinions

Opinion No. GA-0928

The Honorable Ben Woodward

Chair, Court Reporters Certification Board

205 West Fourteenth Street, Suite 101

Austin, Texas 78701

Re: Whether and to what extent depositions can be recorded solely by non-stenographic means (RQ-0993-GA)

S U M M A R Y

Construing Rule of Civil Procedure 199.1 in harmony with Government Code sections 52.021 and 52.033, a party to litigation, the attorney of the party, or a full-time employee of a party or a party's attorney may record a deposition solely by non-stenographic means without violating Government Code section 52.021(f).

Opinion No. GA-0929

The Honorable Gary D. Young

Lamar County and District Attorney

Lamar County Courthouse, 3rd Floor

119 North Main Street

Paris, Texas 75460

Re: Authority of a commissioners court to remove salary increases for county officials at the final budget hearing, and the effect of that removal on the grievance process (RQ-0999-GA)

S U M M A R Y

A commissioners court that removes county officers' proposed salary increases from the budget at the final budget hearing without giving additional notice to county officers under subsection 152.013(c), Local Government Code, and without giving the elected officials a chance to seek redress from the salary grievance committee under section 152.016 acts contrary to the requirements of chapter 152.

There is no legal authority on which to conclude that the county officers here are entitled to the proposed salary increases.

A district court's supervisory jurisdiction could be invoked to seek a judicial determination as to whether a commissioners court acted beyond its jurisdiction or clearly abused its discretion in adopting the county budget.

Opinion No. GA-0930

The Honorable Seth C. Slagle

Clay County Attorney

Post Office Drawer 449

Henrietta, Texas 76365-0449

Re: Authority of a commissioners court to adopt regulations under section 352.081, Local Government Code, which relates to local burn bans (RQ-1013-GA)

S U M M A R Y

Pursuant to Local Government Code subsection 352.081(c), the Legislature has generally authorized a commissioners court to adopt a burn ban, including restrictions, limitations, or exemptions on a burn ban issued under that section.

The Legislature has prohibited a commissioners court from regulating the outdoor burning activities described in Local Government Code subsection 352.081(f).

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

♦ ♦ ♦

TRD-201202417
Katherine Cary
General Counsel
Office of the Attorney General
Filed: May 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 1. ADMINISTRATION

PART 12. COMMISSION ON STATE EMERGENCY COMMUNICATIONS

CHAPTER 251. REGIONAL PLANS--STANDARDS

1 TAC §251.9

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Commission on State Emergency Communications or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Commission on State Emergency Communications (CSEC) proposes the repeal of §251.9, concerning Guidelines for Database Maintenance Funds.

BACKGROUND AND PURPOSE

Regional Planning Commissions (RPCs) are responsible for ensuring the accuracy of the information contained in the 9-1-1 Database. Section 251.9 was adopted by the Commission in 1998 to provide the RPCs with guidelines for using allocated funds to maintain the 9-1-1 Database; and was last amended in 2008. Specifically, §251.9 authorizes RPCs to distribute allocated funds to counties for database maintenance consistent with the RPC's strategic plan and the allowable cost components established in the rule.

Current practice regarding use of allocated funds for database maintenance is for the RPC to self-provision or contract with counties and/or vendors for database maintenance deliverables, as opposed to the cost components approach in current §251.9(e). Additionally, the requirements in §251.9(a) - (d) are incorporated into the Commission's rules and Program Policy Statements (PPS), including Rule §251.1, Regional Strategic Plans for 9-1-1 Service; Rule §251.12, Contracts for 9-1-1 Service; PPS 033, Regional Planning Commission Strategic Planning; PPS 027, Contracts for 9-1-1 Service; and PPS 017, Certification of Interlocal Agreements.

Repealing §251.9 allows the RPCs to enter into deliverables-based contracts for 9-1-1 Database maintenance with counties and/or vendors consistent with their approved strategic plans.

FISCAL NOTE

Kelli Merriweather, CSEC's executive director, has determined that for each year of the first five fiscal years that §251.9 is repealed there will be no cost implications to the state or local governments as a result of enforcing or administering the repeal of §251.9.

PUBLIC BENEFIT

Ms. Merriweather has determined that for each year of the first five years the repeal is in effect, the public benefits anticipated as a result of the repeal will be to provide the RPCs with additional latitude by allowing for a deliverables-based, as opposed to cost-based, approach in maintaining the 9-1-1 Database. Ms. Merriweather estimates no additional economic costs to persons required to comply with the repeal.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

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

LOCAL EMPLOYMENT IMPACT STATEMENT

CSEC has determined that this proposal does not directly affect a local economy and therefore has not drafted a local employment impact statement as would otherwise be required under Administrative Procedure Act §2001.022.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

In accordance with Government Code §2006.002(c), Ms. Merriweather has determined that there will be no adverse economic effect on small businesses or micro-businesses. Accordingly, CSEC has not prepared the economic impact statement or regulatory flexibility analysis that would otherwise be required.

PUBLIC COMMENT

Comments on the proposal may be submitted in writing to Patrick Tyler, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942 or by email to patrick.tyler@csec.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

STATEMENT OF AUTHORITY

The repeal is proposed pursuant to the Health and Safety Code §§771.051, 771.055, 771.056, 771.057, 771.061, 771.075, 771.0751, 771.078, and 771.079.

No other statute, article, or code is affected by the proposal.

§251.9. Guidelines for Database Maintenance Funds.

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

Filed with the Office of the Secretary of State on May 8, 2012.

TRD-201202329

Patrick Tyler
General Counsel
Commission on State Emergency Communications
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 305-6930

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CHAPTER 252. ADMINISTRATION

1 TAC §252.6

The Commission on State Emergency Communications (CSEC) proposes amendments to §252.6, concerning the calculation and distribution of wireless service fees.

BACKGROUND AND PURPOSE

Section 252.6 provides the procedures by which CSEC determines the proportionate amount of wireless emergency services fees remitted under Health and Safety Code §771.0711 and attributable to each Regional Planning Commission (RPC) and Emergency Communication District (ECD); and distributes the proportionate amount to each ECD not participating in the state system.

CSEC proposes amending §252.6 to include prepaid wireless emergency services remitted under Health and Safety Code §771.0712, to clarify CSEC's obligation to distribute funds to non-participating ECDs, and to distribute to each non-participating ECD the proportionate interest earned and credited by the Comptroller of Public Accounts on remitted wireless emergency service fees.

SECTION-BY-SECTION EXPLANATION

Subsections (a) - (e) are amended to include remitted prepaid wireless emergency service fees, further clarify CSEC's use of the state demographer's annual population estimates, and CSEC's adoption of proportionate distribution percentages for use in distributing wireless emergency service fees to non-participating ECDs.

Subsection (f) is being proposed to memorialize CSEC's practice in distributing the proportionate earned interest on remitted wireless emergency service fees to non-participating ECDs.

FISCAL NOTE

Kelli Merriweather, CSEC's executive director, has determined that for each year of the first five fiscal years that the proposed amended section is in effect there are no foreseeable implications relating to costs or revenues to the state or local governments as a result of enforcing or administering the amended section.

PUBLIC BENEFIT

Ms. Merriweather has determined that for each year of the first five years the amended section is in effect, the public benefits will be to clarify the procedures for calculating the distribution percentages with respect to wireless service fees. Ms. Merriweather estimates no additional economic costs to persons required to comply with the amended section.

REGULATORY ANALYSIS

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

LOCAL EMPLOYMENT IMPACT STATEMENT

CSEC has determined that this proposal should not affect a local economy.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Merriweather has determined that there will be no effect on small businesses or micro-businesses, as those terms are defined in Government Code §2003.001, required to comply with this proposal.

PUBLIC COMMENT

Comments on the proposal may be submitted in writing to Patrick Tyler, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942 or by email to patrick.tyler@csec.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

STATEMENT OF AUTHORITY

The amendments are proposed pursuant to the Health and Safety Code §§771.051, 771.074, 771.0711(c), 771.0712(a), and 771.078(b)(2).

No other statute, article, or code is affected by the proposal.

§252.6. Wireless Service Fee Proportional Distribution.

(a) The Commission shall use the most recent annual estimate from the Texas State Data Center to determine the proportionate amount of [~~proportionately distribute~~] wireless and prepaid wireless emergency service fees remitted per Health and Safety Code §771.0711(c) and §771.0712(a) attributable to each regional planning commission (RPC) and emergency communication district (ECD) [~~§771.078(b)(2)~~].

(b) Within 90 days of the publication of the state [~~State~~] demographer's population estimates, [~~the~~] Commission staff shall provide the RPCs and ECDs [~~regional planning commissions (RPCs) and those emergency communication districts (ECDs) not participating in a regional plan~~] with the proposed proportionate distribution percentages. RPCs and ECDs may provide comments to the proposed [~~distribution~~] percentages within the timeframe set by [~~the~~] Commission staff.

(c) The Commission shall adopt proportionate [~~the~~] distribution percentages in an open meeting. Notice of the adopted [~~The approved distribution~~] percentages shall be provided by Commission staff to the RPCs and ECDs within thirty (30) days of adoption [~~by the Commission~~].

(d) Upon request by an RPC or ECD, the Commission shall review and modify the adopted distribution percentages in order to account for 9-1-1 service boundaries not reflected in the state demographer's population estimates.

(e) In accordance with Health and Safety Code §771.0711(c), [~~The~~] Commission staff shall use the adopted percentages to distribute to each ECD not participating in the state system its pro-rata share of remitted wireless and prepaid wireless emergency service fees, and notify each ECD when a distribution is made. [~~The Commission shall distribute interest earned on wireless emergency service fees and credited by the Comptroller of Public Accounts no less than once each fiscal year.~~]

(f) Commission staff shall use the adopted percentages to distribute to each ECD not participating in the state system the interest earned on remitted wireless and prepaid wireless emergency service fees and credited by the Comptroller of Public Accounts. Distributions of interest shall be made no less than once each fiscal year.

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

Filed with the Office of the Secretary of State on May 8, 2012.

TRD-201202334
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 305-6930

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1 TAC §252.7

The Commission on State Emergency Communications (CSEC) proposes amendments to §252.7, concerning the definition of "9-1-1 Database."

BACKGROUND AND PURPOSE

As part of its statutory review of its Chapter 252 rules, CSEC is proposing to amend §252.7. Section 252.7 defines terms commonly used in the provisioning of 9-1-1 service. Section 252.7 also addresses possible conflicts between terms used in CSEC rules and/or program policy statements (PPS) and the National Emergency Number Association's (NENA) Master Glossary of 9-1-1 Terms.

CSEC proposes amending §252.7(b)(2) to expand the definition of "9-1-1 Database" to address impending changes to the database as part of the Commission's efforts to implement Next Generation 9-1-1 service. Proposed amended §252.7(b)(2) also includes text making clear that the 9-1-1 Database is an "address database used in providing computerized 9-1-1 service," and therefore the information contained therein is confidential and not available for public inspection under Health and Safety Code §771.060.

FISCAL NOTE

Kelli Merriweather, CSEC's executive director, has determined that for each year of the first five fiscal years that the proposed amended section is in effect there are no foreseeable implications relating to costs or revenues to the state or local governments as a result of enforcing or administering the amended section.

PUBLIC BENEFIT

Ms. Merriweather has determined that for each year of the first five years the amended section is in effect, the public benefits will be to expand the definition of "9-1-1 Database" in preparation for CSEC's and the state's efforts to implement Next Generation 9-1-1 service. Ms. Merriweather estimates no additional economic costs to persons required to comply with the amended section.

REGULATORY ANALYSIS

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

LOCAL EMPLOYMENT IMPACT STATEMENT

CSEC has determined that this proposal should not affect a local economy.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Merriweather has determined that there will be no effect on small businesses or micro-businesses, as those terms are defined in Government Code §2003.001, required to comply with this proposal.

PUBLIC COMMENT

Comments on the proposal may be submitted in writing to Patrick Tyler, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942 or by email to patrick.tyler@csec.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

STATEMENT OF AUTHORITY

The amendments are proposed pursuant to Health and Safety Code §§771.051, 771.055, 771.056, 771.057, 771.061, 771.075, 771.0751, 771.078, and 771.079.

No other statute, article, or code is affected by the proposal.

§252.7. Definitions.

(a) (No change.)

(b) Definitions. Unless the context clearly indicates otherwise, the following terms mean:

(1) (No change.)

(2) 9-1-1 Database--An address database used in providing computerized 9-1-1 service consisting of an organized collection of information, which is [~~typically~~] stored in computer systems. The information may be [~~that are~~] comprised of fields containing emergency service zones (ESZs), address points, street center lines, public safety answering point (PSAP) boundaries, and response agency (law, fire, EMS) boundaries, as well as additional[~~,~~] records (data), [~~and~~] indexes, and digital maps. [~~In 9-1-1, such databases include master street address guides (MSAG), telephone numbers, emergency service numbers (ESNs), and telephone customer records.~~] This information is used for the delivery of 9-1-1 calls and automatic location information to a designated PSAP [~~public safety answering point (PSAP)~~]. A Regional Planning Commission, or other local government, is responsible for developing and maintaining the 9-1-1 Database. Use of the 9-1-1 database must be authorized by the Commission and RPC in accordance with Commission Rule §251.13, *The Use of the 9-1-1 Database for Emergency Notification Services*. [~~The database is developed and maintained by the local government agency and/or the RPC as described within the regional strategic plan in accordance with Commission Rule 251.9, Guidelines for Database Maintenance Funds.~~]

(3) - (31) (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 May 9, 2012.

TRD-201202338
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 305-6930

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CHAPTER 255. FINANCE

1 TAC §255.2

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

The Commission on State Emergency Communications (CSEC) proposes the repeal of §255.2, concerning Definition of Intrastate Long-Distance Service.

BACKGROUND AND PURPOSE

The 82nd Texas Legislature (2011) amended Health and Safety Code Chapter 771 to convert the state equalization surcharge (surcharge) from a percentage of charges for "intrastate long-distance service" to a fixed monthly fee imposed on each local exchange access line or equivalent local exchange access line and each wireless telecommunications connection other than a connection that constitutes prepaid wireless telecommunications service. Prior to being amended, Health and Safety Code Chapter 771 obligated CSEC to define intrastate long-distance service for purposes of applying the surcharge.

CSEC's definition of intrastate long-distance service is found in §255.2. As revised, Health and Safety Code Chapter 771 no longer requires or authorizes CSEC to define intrastate long-distance service. CSEC proposes to repeal §255.2.

FISCAL NOTE

Kelli Merriweather, CSEC's executive director, has determined that for each year of the first five fiscal years that §255.2 is repealed there will be no cost implications to the state or local governments as a result of enforcing or administering the repeal of §255.2.

PUBLIC BENEFIT

Ms. Merriweather has determined that for each year of the first five years the repeal is in effect, the public benefits anticipated as a result of enforcing the repeal will be to align CSEC regulations with legislative requirements. Ms. Merriweather estimates no additional economic costs to persons required to comply with the repeal.

REGULATORY ANALYSIS OF MAJOR ENVIRONMENTAL RULES

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

LOCAL EMPLOYMENT IMPACT STATEMENT

CSEC has determined that this proposal does not directly affect a local economy and therefore has not drafted a local employment impact statement as would otherwise be required under Administrative Procedure Act §2001.022.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

In accordance with Government Code §2006.002(c), Ms. Merriweather has determined that there will be no adverse economic effect on small businesses or micro-businesses. Accordingly, CSEC has not prepared the economic impact statement or regulatory flexibility analysis that would otherwise be required.

PUBLIC COMMENT

Comments on the proposal may be submitted in writing to Patrick Tyler, Commission on State Emergency Communications, 333 Guadalupe Street, Suite 2-212, Austin, Texas 78701-3942 or by email to patrick.tyler@csec.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

STATEMENT OF AUTHORITY

The repeal is proposed pursuant to the Health and Safety Code §§771.001(4), 771.051, and 771.072.

No other statute, article, or code is affected by the proposal.

§255.2. Definition of Intrastate Long-Distance Service.

This 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 May 8, 2012.

TRD-201202332
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 305-6930

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TITLE 16. ECONOMIC REGULATION

PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 45. MARKETING PRACTICES
SUBCHAPTER C. STANDARDS OF IDENTITY FOR MALT BEVERAGES

16 TAC §45.92

The Texas Alcoholic Beverage Commission (commission) proposes new §45.92, relating to Contracts for Services or Use of Facilities for Brewing and Manufacturing Malt Beverages. The section interprets and implements Alcoholic Beverage Code §§12.06, 13.04, 62.14 and 63.05.

Texas Alcoholic Beverage Code §§12.06, 13.04, 62.14 and 63.05 authorize entities (or their successors) that had a permit or license to brew or manufacture beer or ale/malt liquor on May 1, 2005, or who had a brand that was legally sold in the state on that date, to contract with someone that currently holds an appropriate permit or license to: provide brewing or manufacturing services; and/or to use brewing or manufacturing facilities.

This new section clarifies that, *unless the requirements of these code sections are met,* the holder of a permit to brew or a license to manufacture may not enter into a contract to provide brewing/manufacturing services or to allow the use of its facilities. The proposed new section also clarifies that permittees or licensees with alternating proprietorship arrangements approved by the federal regulatory authority are allowing the use of their facilities and therefore must be authorized to do so under the relevant code provisions and this section.

Because we recognize that passage of this section to enforce the requirements of the code could adversely affect the ability of some producers to continue to operate, the provisions of this section would not apply to existing operators until September 1, 2013. This would give them time to come into compliance or to seek legislative change to the current code provisions. In the

meantime, all new operators would need to comply with the code and this section.

Subsection (a) specifies the purpose of the section.

Subsection (b) specifies the applicability of the section.

Subsection (c) defines "contract" for the purposes of this section.

Subsection (d) defines "facilities" for the purposes of this section.

Subsections (e) and (f) state that contracts that do not meet the applicable code requirements are not allowed.

Subsection (g) clarifies that an alternating proprietorship arrangement that has been approved by the federal regulatory authority is a contract that must satisfy the code requirements and the requirements of this section.

Subsection (h) specifies the effective date of the section and essentially grandfathers existing contracts until September 1, 2013.

Steve Greinert, Director of Tax and Marketing Practices, has determined that for each year of the first five years that the section will be in effect, there will be no impact on state or local government.

Because the section simply clarifies the requirements already imposed by the Alcoholic Beverage Code, the section itself will have no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission beyond the impacts required by the code. There is no additional anticipated negative impact on local employment.

Mr. Greinert has determined that for each year of the first five years that the section will be in effect, the public will benefit because the policy of the state, as expressed by the legislature in the language of the code, will be enforced.

Comments on the proposed new section may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127 or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register.*

The commission specifically invites comment on the fiscal, regulatory and employment impact of enforcing Texas Alcoholic Beverage Code §§12.06, 13.04, 62.14 and 63.05 in relation to existing contract arrangements and in relation to potential new contract arrangements.

The staff of the commission will hold a public hearing to receive oral comments on June 6, 2012 in the Commission Meeting Room on the first floor of the commission's headquarters at 5806 Mesa Drive in Austin, Texas. The public hearing will begin at 1:30 p.m. The commission designates this public hearing as the opportunity to make oral comments if you wish to assure that the commission will respond to them formally under Government Code §2001.033. The commission's response to comments received at the public hearing will be in the preamble to the adopted rule, if the commission chooses to adopt a rule. Staff will not respond to comments at the public hearing. Persons with disabilities who plan to attend this hearing and who may need auxiliary aids or services (such as interpreters for persons who are deaf, hearing impaired readers, large print, or Braille) are requested to contact Gloria Darden Reed at (512) 206-3221 (voice), (512) 206-3259 (fax), or (512) 206-3270 (TDD), at least three days prior to the meeting so that appropriate arrangements can be made.

The proposed new section is authorized by Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

The proposed new section affects Alcoholic Beverage Code §§5.31, 12.06, 13.04, 62.14 and 63.05.

§45.92. Contracts for Services or Use of Facilities for Brewing and Manufacturing Malt Beverages.

(a) This section interprets and implements Alcoholic Beverage Code §§12.06, 13.04, 62.14 and 63.05.

(b) This section applies to holders of brewer's permits, nonresident brewer's permits, manufacturer's licenses and nonresident manufacturer's licenses.

(c) In this section, "contract" means any agreement whereby one party becomes bound to a second party to pay a sum of money, perform some act, or omit to perform some act, in return for which the second party either:

(1) provides a brewing or manufacturing service to the first party; or

(2) allows the first party to use its brewing or manufacturing facilities.

(d) In this section, "facilities" includes any fixtures, equipment or other tangible property used in the production of a malt beverage at the physical location of a brewer, nonresident brewer, manufacturer or nonresident manufacturer.

(e) An entity or successor to an entity that on May 1, 2005 did not hold a brewer's or nonresident brewer's permit, or whose brand was not legally sold in this state, may not contract with the holder of a brewer's or nonresident brewer's permit to provide brewing services or to use the permit holder's brewing facilities.

(f) An entity or successor to an entity that on May 1, 2005 did not hold a manufacturer's license or a nonresident manufacturer's license, or whose brand was not legally sold in this state, may not contract with the holder of a manufacturer's or nonresident manufacturer's license to provide manufacturing services or to use the permit holder's manufacturing facilities.

(g) For purposes of this section, and of Alcoholic Beverage Code §§12.06, 13.04, 62.14 and 63.05, an alternating proprietorship arrangement approved by the Alcohol and Tobacco Tax and Trade Bureau of the United States Department of the Treasury, or a successor federal regulatory agency, is a contract under Texas law, and the parties to such an arrangement for the production of malt beverages are subject to the limitations and restrictions in Alcoholic Beverage Code §§12.06, 13.04, 62.14 and 63.05 and in this section.

(h) Effective Date. This section is effective upon passage. For purposes of this section, "upon passage" means 20 days after the date it is filed in the Office of the Secretary of State pursuant to Government Code §2001.036(a).

(1) Contracts, including but not limited to alternating proprietorship arrangements, entered into by the parties on or after the effective date of this section must meet the requirements of and be in compliance with subsections (a) - (g) of this section.

(2) Contracts, including but not limited to alternating proprietorship arrangements, entered into by the parties before the effective date of this section must meet the requirements of and be in compliance with subsections (a) - (g) of this section as of September 1, 2013

or they will be considered in violation of this section and of Alcoholic Beverage Code §§12.06, 13.04, 62.14 and 63.05, as applicable.

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

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

TRD-201202352
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 206-3443

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SUBCHAPTER D. ADVERTISING AND PROMOTION--ALL BEVERAGES

16 TAC §45.113

The Texas Alcoholic Beverage Commission (commission) proposes an amendment to §45.113, Gifts, Services and Sales, relating to prearrangement and preannouncement of purchases of beer by manufacturers and distributors.

In *Authentic Beverages Company, Inc vs. Texas Alcoholic Beverage Commission,* A-10-CA-710-SS, 2011 WL 6396530 (W.D. Tex. Dec. 19, 2011), certain provisions of the Alcoholic Beverage Code and the rules of the commission were found to be unconstitutional violations of the First Amendment. Although §45.113 was not specifically litigated and therefore was not specifically addressed in the court's Order, the Order and Judgment enjoin the commission from enforcing "any other provision of Texas law" that is inconsistent with the court's opinion. In light of that provision of the Order, this section is amended to conform to the court's decision.

Section 45.113(b)(3) currently allows manufacturers and distributors to purchase *beer* for consumers if it is consumed at a licensed retail premises in the presence of the purchaser. However, the rule currently provides that such purchases may not be excessive, prearranged or preannounced. This section implements §102.15 of the code, which generally prohibits a manufacturer or distributor from giving anything of value to a beer retailer. By preannouncing (i.e., advertising) a beer purchase promotion at a specific retail location, the upper tier member is clearly benefitting the retailer.

However, §102.07(g) of the code allows a brewer, distiller, rectifier, wholesaler, class B wholesaler, winery or wine bottler to prearrange and preannounce promotional activities, and §45.117(b)(3) specifically allows all of them to purchase *distilled spirits* or *wine* for consumers if they are consumed at a licensed retail premises in the presence of the purchaser. Indeed, brewers may also prearrange and preannounce purchases of *ale/malt liquor.* Section 45.117(b)(3) provides only that such purchases may not be excessive. By preannouncing a distilled spirits, wine or ale purchase promotion at a specific retail location, the upper tier member is clearly benefitting the retailer. Were it not for the specific grant of authority in §102.07(g) of the code, providing this thing of value to the retailer would clearly violate the general prohibition from doing so that is found in §102.07(a)(2) of the code.

Regardless of whether the promotional activity itself is providing a thing of value to the retailer, §108.04 of the code allows the commission to relax that restriction in certain circumstances and the commission did so by adopting §45.113 and §45.117 to allow "bar spending" (i.e., the purchase of alcoholic beverages at the retail level by a member of the manufacturing or wholesale level). Since the underlying promotional activity itself is legal, the question becomes whether advertising it is lawful.

As the Court noted in *Authentic Beverages,* starting with the proposition that advertising is generally allowable as a protected form of commercial speech, in order to justify restricting that speech the state must: articulate a substantial government interest; demonstrate the regulations directly advance that interest; and show the regulations are not more extensive than necessary to advance the interest. Although the advertisement itself may indeed provide something of value to the retailer and thus be in violation of state law, that state law, albeit supported by the 21st Amendment to the U.S. Constitution, must yield to the dictates of the 1st Amendment to the U.S. Constitution. Indeed, the Court in *Authentic Beverages* held that despite the fact that an advertisement by a brewer stating where its product is being sold undoubtedly provides something of value to the retailer whose location is being advertised, the brewer is allowed to engage in such advertising.

In this case, the §45.113(b)(3) restriction on preannouncement and prearrangement of *beer* purchases by manufacturers is difficult to constitutionally justify in light of the ability of brewers (who often also hold manufacturer licenses) to preannounce and prearrange their *ale/malt liquor* purchases. Furthermore, it is difficult to constitutionally justify why a *distributor's* advertising of such a promotion is "providing a thing of value" in violation of the Code if a *brewer's or manufacturer's* advertising of a similar promotion is not. The commission does not have evidence that the promotional activities regarding distilled spirits, wine and ale/malt liquor that are currently allowed under §102.07(g) of the code and §45.117(b)(3) have resulted in any harm to the public health and safety or have led to any disturbances in the marketplace.

For these reasons, the commission proposes to amend §45.113(b)(3) to remove the restriction on prearranging and preannouncing beer purchase promotions by manufacturers and distributors. The resulting language would be essentially identical to the language that currently applies to liquor purchase promotions in §45.117(b)(3). In neither case is anyone at any level required to engage in such promotions or to prearrange or preannounce them.

Steve Greinert, Director of Tax and Marketing Practices, has determined that for each year of the first five years that the proposed amendment will be in effect, there will be no impact on state or local government.

Because the proposed amendment merely removes a prohibition but does not impose any new affirmative obligation, the proposed amendment will have no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission. There is no anticipated negative impact on local employment.

Mr. Greinert has determined that for each year of the first five years that the proposed amendment will be in effect, the public will benefit because the section will allow advertising by manufacturers and distributors of promotions benefitting consumers.

Comments on the proposed amendment may be submitted in writing to Martin Wilson, Assistant General Counsel, Texas Alco-

holic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by facsimile transmission to (512) 206-3280. They may also be submitted electronically through the commission's public website at http://www.tabc.state.tx.us/laws/proposed_rules.asp. Comments will be accepted for 30 days following publication in the *Texas Register.*

The commission specifically invites comment on whether there is a substantial government interest supporting the current restrictions in §45.113(b)(3). If there is such an interest, what is it? Beyond that, how does the current language of §45.113(b)(3) directly advance that interest? Is there a less restrictive means than the language of §45.113(b)(3) to advance that interest?

The staff of the commission will hold a public hearing to receive oral comments on June 6, 2012 in the Commission Meeting Room on the first floor of the commission's headquarters at 5806 Mesa Drive in Austin, Texas. The public hearing will begin at 1:30 p.m. The commission designates this public hearing as the opportunity to make oral comments if you wish to assure that the commission will respond to them formally under Government Code §2001.033. The commission's response to comments received at the public hearing will be in the preamble to the adopted rule, if the commission chooses to adopt the rule. Staff will not respond to comments at the public hearing. Persons with disabilities who plan to attend this hearing and who may need auxiliary aids or services (such as interpreters for persons who are deaf, hearing impaired readers, large print, or Braille) are requested to contact Gloria Darden Reed at (512) 206-3221 (voice), (512) 206-3259 (fax), or (512) 206-3270 (TDD), at least three days prior to the meeting so that appropriate arrangements can be made.

The proposed amendment is authorized by Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code.

The proposed amendment affects Alcoholic Beverage Code §§5.31, 102.15 and 108.04.

§45.113. Gifts, Services and Sales.

(a) General.

(1) This rule is promulgated pursuant to §108.04 of the Alcoholic Beverage Code to relax certain restrictions and prohibitions set forth in §§102.14, 102.15 and 108.06 of the code.

(2) This rule applies to buyers, sellers and consumers of beer.

(b) Gifts to Consumers. Manufacturers and distributors may furnish novelty items and beer to consumers.

(1) Novelty items are things designed to advertise or promote a specific product or brand. Such items may have a utilitarian function in addition to product promotion.

(2) Such items may not exceed a value of $1.00 per unit wholesale cost.

(3) Beer may be purchased for consumers provided that such beverages are consumed at retail licensed premises in the presence of the purchaser. Such purchases shall not be excessive[~~, prearranged or preannounced~~]. All members of the manufacturing and distribution tier participating in promotions authorized by this paragraph must hold an agent's beer license.

(4) The administrator may grant specific approval for sampling tests designed to determine consumer taste preferences. The administrator may impose such conditions as he/she deems necessary.

(5) Manufacturers and distributors may, as a social courtesy, give beer and other things of value to unlicensed persons who are not employed or affiliated with the holder of a retail license or permit.

(c) Promotional items sold to retailers. Distributors and members of the manufacturing tier authorized to sell to retailers may sell promotional items to retailers.

(1) Promotional items are things designed to promote a specific product or brand and are further designed for use by the consumer, either on or off the retailer's premises.

(2) Promotional items sold must bear a manufacturer's logo, brand or product name.

(3) Promotional items may not be sold for less than the item manufacturer's regularly published wholesale price. Payment must be in cash, paid on or before delivery.

(d) Signs provided to retailers.

(1) Distributors and members of the manufacturing tier authorized to sell to retailers may furnish, give or sell interior signs to retailers.

(2) A sign is a thing whose primary purpose is the advertisement of a brand or product or the price thereof.

(3) A sign furnished by a distributor or authorized member of the manufacturing tier may not bear the name, logo or trademark of a specific retailer.

(4) No manufacturer or distributor may paint, improve or remodel a retailer's buildings or parts of buildings, inside or out, or finance any improvements thereto.

(e) Services provided to retailers. Distributors and members of the manufacturing tier may:

(1) service and repair promotional items and signs furnished or sold under the provisions of this rule;

(2) furnish meeting rooms to retailers on the manufacturer's or distributor's licensed premises. In no event shall anything be furnished to retailers except samples of the manufacturer's or distributor's product or food provided as a courtesy in accompaniment to such samples; and

(3) furnish and install shanks, washers, hose and hose connections, tap rods, tap markers, coil cleaning service necessary for the proper delivery and dispensing of draft malt beverages.

(f) Gifts to unlicensed organizations. Manufacturers and distributors may donate money, beer or other things of value to unlicensed civic, religious or charitable organizations.

(1) Beer may only be given for consumption in a wet area.

(2) Advertising of events sponsored by organizations receiving donations shall include promotion of the organization sponsor or cause in a manner at least equal to or greater than the advertising of the industry donor.

(3) Distributors and manufacturers authorized to sell to retailers may furnish draft beer dispensing equipment for use at temporary events, provided that such equipment may not be given in exchange for an exclusive sales privilege.

(4) Manufacturers, distributors and their employees and agents may not serve or dispense malt beverages at temporary events.

(5) "Unlicensed" means not having a permit or license authorizing the sale or service of alcoholic beverages.

This 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 May 14, 2012.

TRD-201202391
Alan Steen
Administrator
Texas Alcoholic Beverage Commission
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 206-3443

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 1. GENERAL ADMINISTRATION SUBCHAPTER E. NOTICE OF TOLL-FREE TELEPHONE NUMBERS AND PROCEDURES FOR OBTAINING INFORMATION AND FILING COMPLAINTS

28 TAC §1.603

The Texas Department of Insurance (TDI) proposes new 28 TAC §1.603, concerning complaint information available through TDI's toll-free telephone number. This new section is necessary to: (i) notify the public that, pursuant to the Insurance Code §521.052, complaint information available through TDI's toll-free telephone number includes information collected or maintained by TDI relating to the number and disposition of complaints received against an insurer that are justified, verified as accurate, and documented as valid; (ii) equate the term "confirmed," for the Consumer Protection Section's use in its complaint handling process, with the statutory term "justified"; and (iii) describe the criteria TDI uses to classify a complaint as "confirmed."

Proposed new §1.603 addresses complaint information available through TDI's toll-free telephone number. Proposed new §1.603(a) says that TDI will provide to the public through its toll-free telephone number the information specified by the Insurance Code §521.052, including information TDI collects or maintains relating to the number and disposition of complaints received against an insurer that are justified, verified as accurate, and documented as valid. Proposed new §1.603(b) states that TDI considers a complaint justified if the complaint is a confirmed complaint. Proposed new §1.603(c) provides the definition of what constitutes a confirmed complaint.

FISCAL NOTE. Melissa Hield, Associate Commissioner, Consumer Protection Section, has determined that, for each year of the first five years the proposed section will be in effect, there will be no fiscal impact to state and local governments as a result of the enforcement or administration of the proposal. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Hield also has determined that, for each year of the first five years the proposed section is in effect, the public benefit anticipated as a result of the proposal is public awareness of complaint information available through TDI's toll-free telephone number, notification to the public of how the term "confirmed" is equated with the statutory term "justified," and what criteria TDI uses to classify a complaint as confirmed. Ms. Hield anticipates no costs for persons required to comply with the proposal; therefore, the costs for compliance will not vary between the smallest and largest businesses.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. As required by the Government Code §2006.002(c), TDI has determined that the proposal will not have an adverse economic effect on small or micro businesses because the proposed rule does not apply to any small or micro businesses. Instead, it only relates to complaint information available through TDI's toll-free telephone number. Therefore, in accordance with the Government Code §2006.002(c), TDI has determined that a regulatory flexibility analysis is not required.

TAKINGS IMPACT ASSESSMENT. TDI has determined that this proposal does not affect any private real property interests 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. Therefore, this proposal does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. If you want TDI to consider written comments on the proposal, you must submit them no later than 5:00 p.m. on June 25, 2012 to Sara Waitt, General Counsel, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You must simultaneously submit an additional copy of the comment to Melissa Hield, Associate Commissioner, Consumer Protection Section, Mail Code 111-1A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. You should separately submit any request for a public hearing to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, before the close of the public comment period. If TDI holds a hearing, TDI will consider written and oral comments presented at the hearing.

STATUTORY AUTHORITY. TDI proposes the new section pursuant to the Insurance Code §§521.051, 521.052, and 36.001. Section 521.051 requires TDI to maintain a toll-free telephone number to provide the information described by the Insurance Code §521.052 and receive and aid in resolving complaints against insurers. Section 521.052 requires TDI to provide to the public through its toll-free telephone number information specified by the section, including information TDI collects or maintains relating to the number and disposition of complaints received against an insurer that are justified, verified as accurate, and documented as valid. Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of TDI under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The proposal affects the following statutes: Insurance Code §521.052

§1.603. Complaint Information Available through the Texas Department of Insurance's Toll-Free Telephone Number.

(a) The Texas Department of Insurance (department) will provide to the public through its toll-free telephone number the information specified by the Insurance Code §521.052, including information collected or maintained by the department relating to the number and disposition of complaints received against an insurer that are justified, verified as accurate, and documented as valid.

(b) The department considers a complaint justified if the complaint is a confirmed complaint.

(c) A "confirmed complaint" is a complaint for which the department receives information indicating that:

(1) an insurer committed any violation of:

(A) an applicable state insurance law or regulation;

(B) a federal requirement the department has authority to enforce; or

(C) the term or condition of an insurance policy or certificate; or

(2) the complaint and insurer's response, considered together, suggest that the insurer was in error or that the complainant had a valid reason for the complaint.

This 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 May 7, 2012.

TRD-201202313
Sara Waitt
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 463-6327

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER J. PETROLEUM PRODUCTS DELIVERY FEE

34 TAC §3.151

The Comptroller of Public Accounts proposes an amendment to §3.151, concerning imposition, collection, and bonds or other security of the fee. The amendment is necessary to reflect the passage of House Bill 2694, 82nd Legislature, 2011, that amended Water Code, Chapter 26, to reference that the petroleum products delivery fee imposed on the withdrawal of petroleum products imported into Texas or withdrawn from Texas bulk facilities and delivered into cargo tanks or barges is set by the Texas Commission on Environmental Quality.

Subsection (c) is being amended to remove the rates because beginning September 1, 2011, the Texas Commission on Environmental Quality is required to set the rates.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by clarifying the administration of the petroleum product delivery fee. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed under Tax Code, §111.002 and §111.0022, which provide the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2, and taxes, fees, or other charges which the comptroller administers under other law.

The amendment implements Water Code, §26.3574.

§3.151. Imposition, Collection, and Bonds or Other Security of the Fee.

(a) The Texas Petroleum Products Delivery Fee is imposed, collected, and paid to the state by operators of bulk facilities. The fee is assessed when petroleum products are withdrawn from the bulk facility and delivered into a cargo tank or barge or imported into this state in a cargo tank or barge for delivery to another location for distribution or sale. The fee is not assessed when the fuel is destined for delivery to another bulk facility, an electrical generating plant, a common carrier railroad for its exclusive use, or is to be exported from the state prior to being placed into intermediate storage tanks.

(b) For the purposes of this section, withdrawals from a bulk facility into a cargo tank or barge are not subject to the fee when the entire withdrawal is delivered into the fuel supply tanks of vessels or boats prior to being placed into intermediate storage tanks.

(c) The fee is collected by the operator of a bulk facility from the person ordering the withdrawal. The fee is set by the Texas Commission on Environmental Quality subject to Water Code, §26.3574(b-1). [~~computed as follows:~~]

[~~(1) $3.75 for each delivery made after August 31, 2007, and before September 1, 2011, into a cargo tank or barge having a capacity of less than 2,500 gallons;~~]

[~~(2) $7.50 for each delivery made after August 31, 2007, and before September 1, 2011, into a cargo tank or barge having a capacity of 2,500 gallons or more but less than 5,000 gallons;~~]

[~~(3) $11.75 for each delivery made after August 31, 2007, and before September 1, 2011, into a cargo tank or barge having a capacity of 5,000 gallons or more but less than 8,000 gallons;~~]

[~~(4) $15.00 for each delivery made after August 31, 2007, and before September 1, 2011, into a cargo tank or barge having a capacity of 8,000 gallons or more but less than 10,000 gallons;~~]

[~~(5) $7.50 for each increment of 5,000 gallons or any part thereof delivered after August 31, 2007, and before September 1, 2011, into a cargo tank or barge having a capacity of 10,000 gallons or more; and~~]

[~~(6) the fee is repealed effective September 1, 2011.~~]

(d) In determining the amount of fee due for motor gasoline, other alcohol blended fuels, and aviation gasoline, each net temperature corrected withdrawal of 7,000 gallons or more but less than 10,000 gallons shall be presumed to have been a delivery into a cargo tank having a capacity of 8,000 gallons or more but less than 10,000 gallons

[~~and the fee shall be collected as provided by subsection (c)(4) of this section~~].

(e) In determining the amount of fee due on all withdrawals not covered by subsection (d) of this section, it shall be presumed that the capacity of the cargo tank or barge is equal to the total net temperature corrected quantity of product withdrawn.

(f) For the purposes of this section, a bulk facility is a refinery terminal or any other terminal or facility which receives petroleum products by pipeline, rail, or barge, and delivers the products into a cargo tank or barge.

(g) For the purposes of this section, the operator of a bulk facility is the person who first invoices petroleum products withdrawn from the facility. An exchange statement is not considered an invoice.

(h) For the purposes of this section, an electrical generating facility is a plant operated for the primary purpose of generating electricity for sale to consumers.

(i) Persons exempt from the petroleum products delivery fee, including persons operating barges who make withdrawals from a permitted bulk facility for delivery into the fuel supply tanks of vessels or boats prior to intermediate storage, shall request in writing a letter of exemption from the comptroller. The letter of exemption issued by the comptroller, or a copy, must be furnished to the seller each time purchases exempt from the petroleum products delivery fee are made.

(j) If the person making the sale to the exempt purchaser does not hold a petroleum products delivery fee permit, the purchaser must also furnish to the seller a statement listing the date of purchase, number of gallons purchased per delivery, and destination of the product. For the seller to receive credit for exempt sales, this documentation must be presented to the permitted bulk facility from which the product was purchased.

(k) As an alternative to subsection (j) of this section, an exempt purchaser may elect to seek refund directly from the comptroller. When an exempt purchaser elects to use this option, the purchaser must use this option with the vendor for all petroleum products purchased during the refund claim period for which the fee has been paid. The exempt purchaser must furnish to the comptroller:

(1) a letter declaring that the exempt purchaser did not provide the seller with a comptroller issued petroleum products delivery fee exemption letter and will not seek a refund from the seller or bulk facility from which the petroleum products were withdrawn;

(2) a copy of the comptroller issued petroleum products delivery fee exemption letter;

(3) documentation showing that the petroleum products delivery fee was paid; and

(4) any other information the comptroller deems necessary to validate the refund.

(l) The amount of the petroleum products delivery fee must be listed as a separate item on the invoice or cargo manifest issued by the person holding a permit to collect the fee upon the withdrawal of product from a bulk facility.

(m) Only persons who hold a petroleum products delivery fee permit may charge and collect the fee on the basis of the bracket system established by the Texas Commission on Environmental Quality [~~in this section~~]. No other persons selling fuel may list the fee as a separate item on invoices or manifest except:

(1) when required to do so by another governmental agency; or

(2) when an amount is clearly identified as reimbursement. An amount collected as reimbursement may not exceed the amount of fee actually paid by the person issuing the manifest or invoice.

(n) The comptroller may require a bulk facility operator to post a bond or other security to protect the revenues of the state.

(o) When determining the security required of a bulk facility operator, the comptroller will take into consideration the amount of fee that has or is expected to become due from the person, any past history of the person as a distributor or supplier of fuel, and the necessity to protect the state against the failure to pay the fee as it becomes due.

(p) The comptroller may require a bond equal to two times the highest amount of fees that will accrue during a reporting period. The minimum bond is $30,000. The maximum bond is $600,000 unless the comptroller believes there is undue risk of loss of fee revenues, in which event he may require one or more bond or securities in a total amount exceeding $600,000.

(q) If the comptroller determines that a bulk facility operator has for four consecutive years continuously complied with the conditions of the bond or other security on file, the operator is entitled on request to have the comptroller return, refund, or release the bond or security. However, if the comptroller determines that the revenues of the state would be jeopardized by the return, refund, or release of the bond or security, the comptroller may elect not to return, refund, or release the bond or security. The comptroller may reimpose a requirement of a bond or other security if necessary to protect the revenues of the state.

(r) A bond must be a continuing instrument, must constitute a new and separate obligation in the penal sum named in the bond for each calendar year or portion of a year while the bond is in force, and must remain in effect until the surety on the bond is released and discharged.

(s) In lieu of filing a surety bond, an applicant for a permit may substitute the following security:

(1) cash in the form of United States currency in an amount equal to the required bond, to be deposited in the suspense account of the state treasury;

(2) an assignment to the comptroller of a certificate of deposit in any bank or savings and loan association in Texas that is a member of the FDIC in an amount equal to the bond amount required; or

(3) an irrevocable letter of credit to the comptroller from any bank or savings and loan association in Texas that is a member of the FDIC in an amount of credit at least equal to the bond amount required.

(t) If the amount of an existing bond becomes insufficient or a security becomes unsatisfactory or unacceptable, the comptroller may require the filing of a new or of an additional bond or security.

(u) No surety bond or other form of security may be released until it is determined by examination or audit that no fee, penalty, or interest liability exists. The cash or securities shall be released within 60 days after the comptroller determines that no liability exists.

(v) The comptroller may use the cash or certificate of deposit security to satisfy a final determination of delinquent liability or a judgment secured in any action by this state to recover fees, cost, penalties, and interest found to be due this state by a person in whose behalf the cash or certificate security was deposited.

(w) A surety on a bond furnished by a permittee shall be released and discharged from liability to the state accruing on the bond

after the expiration of 30 days after the date on which the surety files with the comptroller a written request to be released and discharged. The request does not relieve, release, or discharge the surety from a liability already accrued, or that accrues before the expiration of the 30-day period. Promptly after receipt of the request, the comptroller shall notify the permittee who furnished the bond, and unless the permittee, before the expiration date of the existing security, files with the comptroller a satisfactory new bond or other security, the comptroller shall cancel the permit.

(x) The comptroller shall notify immediately the issuer of a letter of credit of a final determination of the bulk facility operator's delinquent liability or a judgment secured in any action by this state to recover fees, cost, penalties, and interest found to be due this state by a bulk facility operator in whose behalf the letter of credit was issued. A letter of credit accepted as security shall contain a statement that the issuer agrees to respond to the comptroller's notice of liability with amounts sufficient to satisfy the comptroller's delinquency claim against the bulk facility operator.

(y) An examination or audit may be requested to obtain release of the security when the permit holder relinquishes the permit or desires to substitute one form of security for an existing one.

This 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 May 10, 2012.

TRD-201202363
Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 475-0387

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PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CHAPTER 103. CALCULATIONS OR TYPES OF BENEFITS

34 TAC §103.3

The Texas County and District Retirement System (TCDRS) proposes an amendment to §103.3, concerning the validity of spousal consents. Currently, §103.3 requires that at the time a distribution of benefits would commence, the member must certify as to their marital status, if married, the member's spouse must consent to the distribution, if the distribution will be made in a form other than as a qualified joint and survivor annuity naming the spouse as sole primary beneficiary. The current rule requires that the spousal consent must be in writing and either witnessed by an officer or employee of the system or acknowledged by a notary. If a member intends to evade the spousal consent requirement, the more common practice is for the member to falsely certify their status as non-married. Incidents of a forged spousal signature are extremely rare. Given the extreme rarity of forged signatures, the requirement to have a signature notarized merely operates as an additional administrative burden upon the vast and overwhelming majority of retiring members who are not intent upon circumventing the spousal consent requirement, without the benefit of otherwise ensuring full and complete compliance with the requirement by those members who do intend to circumvent it. As the administrative burden is not offset by a measurable benefit, this proposed amendment deletes the notarization requirement.

Tom Harrison, General Counsel, Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Harrison has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be the further streamlining of the retirement process for members by eliminating an administrative burden that provides no measurable benefit. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Tom Harrison, General Counsel, Texas County and District Retirement System, P.O. Box 2034, Austin, Texas 78768-2034.

The amendment is proposed under the Government Code, §844.010(d), which authorizes the board of trustees of the Texas County and District Retirement System to adopt rules concerning the designation and validity of beneficiaries under the TCDRS Act.

The Government Code, §844.010(b), is affected by this proposed rule.

§103.3. Beneficiary Designations and Payment Elections Requiring Spousal Consent.

(a) A member eligible for retirement must certify to the current marital status of the member on any withdrawal or retirement application filed with the system.

(1) A member eligible for retirement who is married may not select a form of payment of a retirement benefit other than as a qualified joint-and-survivor annuity unless the member's spouse consents to the selection.

(2) A member eligible for retirement who is married may not withdraw from membership and receive a refund unless the member's spouse consents to the refund.

(3) A member who is unmarried may designate any beneficiary and select any form of payment of a retirement benefit permitted under the Act.

~~[(b) The consent of a spouse required by subsection (a) of this section must be in writing and either witnessed by an officer or employee of the system or acknowledged by a notary public.]~~

(b) ~~[(c)]~~ The consent required by subsection (a) of this section is not required if it is established to the satisfaction of the system that:

(1) there is no spouse;

(2) the spouse cannot be located;

(3) the spouse has been judicially declared incompetent in which case the consent may be given by the guardian or other ad litem;

(4) a duly licensed physician has determined that the spouse is not mentally capable of managing his or her own affairs and the director is satisfied that a guardianship of the estate is not necessary;

(5) the spouse and the member will have been married for less than one year as of the date the member files a valid application for a refund of the member's accumulated deposits, or as of the effective retirement date designated by the member on the member's valid application for retirement; or

(6) no service performed by the member as an employee of a participating subdivision and credited in the system was performed during the marriage of the member and the spouse.

(c) [~~(d)~~] For the purposes of this section, the term "qualified joint-and survivor annuity" means a retirement annuity for the life of the member with a survivor annuity for the life of the member's spouse which is not less than 50% of the amount of the annuity which is payable during the joint lives of the member and spouse.

(d) [~~(e)~~] An unrevoked beneficiary designation on file with the system as of December 31, 1999, or filed thereafter remains valid until revoked by the member, or, if the member's spouse is a designated beneficiary, until the member and the spouse become divorced.

(e) [~~(f)~~] The system and employees of the system may rely upon the certification of the member filed under this section, and are not liable to any person for making payments of any benefits in accordance with the certification even though the certification is later shown to have been untrue on the date of execution.

This 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 May 11, 2012.

TRD-201202370
Tom Harrison
General Counsel
Texas County and District Retirement System
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 637-3247

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CHAPTER 107. MISCELLANEOUS RULES

34 TAC §107.3

The Texas County and District Retirement System (TCDRS) proposes an amendment to §107.3, concerning direct rollovers and trustee-to-trustee transfers. The proposed amendment incorporates changes mandated by the Pension Protection Act of 2006 and the Worker, Retiree, and Employer Recovery Act of 2008. In accordance with those federal laws, the required amendment reflects the expanded list of plans eligible to receive direct rollovers and trustee-to-trustee transfers and the expanded group of distributees eligible to elect such rollovers and trustee-to-trustee transfers. These federal laws enlarge the opportunities of all living distributees of benefits payable under the Texas County and District Retirement System to preserve and protect the tax advantages associated with benefits payable as lump sums under qualified plans. There now is a mechanism for every living distributee of benefits payable in that form to continue the tax advantaged status of the distribution.

Tom Harrison, General Counsel, Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Harrison has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be the opportunity of all living distributees to protect and enhance their retirement security by continuing the tax advantaged status of benefits payable from the Texas County and District Retirement System. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendment may be submitted to Tom Harrison, General Counsel, Texas County and District Retirement System, P.O. Box 2034, Austin, Texas 78768-2034.

The amendment is proposed under the Government Code, §842.108(d), which requires the board of trustees of the Texas County and District Retirement System to adopt rules that are necessary to maintain the retirement system as a qualified plan under §401(a) of the Internal Revenue Code of 1986.

The Government Code, §842.108(c), is affected by this proposed rule.

§107.3. Direct Rollovers and Trustee-to-Trustee Transfers.

(a) The retirement system may establish procedures for the acceptance of an eligible rollover distribution, including a direct trustee-to-trustee transfer, from an eligible retirement plan for the payment of any portion of the deposit a member is permitted to make for the purchase of types of credit in the retirement system, except that the system may not accept the distribution, if the system is to separately account for the amounts.

(b) Effective January 1, 1993, a distributee may elect, at the time and in the manner prescribed by the system, to have any portion of an eligible rollover distribution paid directly to an eligible retirement plan specified by the distributee in a direct rollover.

(c) Definitions:

(1) Eligible Rollover Distribution--An eligible rollover distribution is any distribution of all or any portion of the balance to the credit of the distributee, except that an eligible rollover distribution does not include:

(A) any distribution that is one of a series of substantially equal periodic payments (not less frequently than annually) made for the life (or life expectancy) of the distributee or the joint lives (or joint life expectancies) of the distributee and the distributee's designated beneficiary, or for a specified period of 10 years or more;

(B) any distribution to the extent such distribution is required under §401(a)(9) of the Internal Revenue Code of 1986.[~~; and~~]

[~~(C) the portion of any distribution that is not includable in gross income.~~]

(2) Eligible Retirement Plan--An eligible retirement plan is:

(A) an individual retirement account described in §408(a) of the Internal Revenue Code of 1986;

(B) an individual retirement annuity described in §408(b) of the Internal Revenue Code of 1986;

(C) a qualified trust described in §401(a) of the Internal Revenue Code of 1986 or an annuity plan described in §403(a) of the Internal Revenue Code of 1986 that accepts the eligible rollover distribution;

(D) for distribution made on or after December 31, 2001, an annuity contract described in §403(b) of the Internal Revenue Code of 1986;

(E) for distributions made on or after December 31, 2001, an eligible plan under §457(b) of the Internal Revenue Code of 1986 which is maintained by a state, a political subdivision of a state, or any agency or instrumentality of a state or political subdivision of a state which agrees to separately account for amounts transferred into such plan from this system; and

(F) for distributions made on or after December 31, 2007, a Roth IRA described in §408A of the Internal Revenue Code of 1986;

(3) Distributee--A distributee includes a member or former member. In addition, the member's or former member's surviving spouse and the member's or former member's spouse or former spouse who is the alternate payee under a domestic relations order, as defined in §109.2 of this title (relating to Definitions), are distributees with regard to the interest of the spouse or former spouse.

(4) Direct Rollover--A direct rollover is a payment by the system to the eligible retirement plan specified by the distributee.

(d) The system shall, upon the request of a beneficiary of a deceased member who is not a distributee, within the meaning of subsection (c)(3) of this section, transfer a lump sum distribution to the trustee of an individual retirement account established under §408 of the Internal Revenue Code of 1986 (or for distributions after December 31, 2009, to the trustee of an individual retirement account established under §408A of the Internal Revenue Code of 1986) in accordance with the provisions of §402(c)(11) of the Internal Revenue Code.

(e) Notwithstanding anything in this section to the contrary, a distribution shall not fail to be an eligible rollover distribution merely because a portion of the distribution consists of after-tax contributions which are not includible in gross income. However, such portion may be paid only to an individual retirement account or annuity described in Internal Revenue Code §408(a) or (b), or to a qualified [~~defined contribution~~] plan described in Internal Revenue Code §401(a) or §403(a) that agrees to separately account for amounts so transferred, including separate accounting for the portion of such distribution which is includible in gross income and the portion of such distribution which is not so includible.

(f) The retirement system shall implement this section in a manner that causes the retirement system to be considered a qualified plan under §401(a) of the Internal Revenue Code of 1986. It is the responsibility of the distributee or beneficiary to determine that the transferee plan is an eligible plan for receiving a transfer pursuant to this 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 May 11, 2012.

TRD-201202374
Tom Harrison
General Counsel
Texas County and District Retirement System
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 637-3247

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34 TAC §107.4

The Texas County and District Retirement System (TCDRS) proposes new §107.4, concerning the definition and description of a bona fide termination of employment. Under the rules and regulations of the Internal Revenue Service, a distribution of benefits from a defined benefit plan before there has been a bona fide termination of employment is considered to be an impermissible in-service distribution. An in-service distribution jeopardizes the qualification of the employer's plan, may cause the loss of the tax-deferred status of the contributions to the plan and may result in the assessment of back taxes, interest and penalties on those contributions. Recognizing the serious implications of a disqualification caused by an in-service distribution, Texas Government Code, §842.110, requires that a benefit distribution must be based on a bona fide termination of employment from the subdivision and a break in service of at least one calendar month before the person may resume employment with the same subdivision. A member receiving a distribution of benefits, but who does not satisfy both requirements before returning to employment with the same subdivision, is considered to have been ineligible for a refund or retirement distribution and must return any amounts distributed and payments received. The proposed new rule sets out these dual requirements and provides guidance as to factors that could cause the termination to not be a bona fide termination. The rule clarifies that under the TCDRS Act, for purposes of determining whether the termination is bona fide, the term "employment" includes service in a public elective or appointive office that is compensated by the employer, as well as service as a common law employee.

Tom Harrison, General Counsel, Texas County and District Retirement System, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Harrison has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the rule will be assurance that no disqualifying in-service distribution is made thereby jeopardizing the tax-exempt status of the benefits administered by the System. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed new rule may be submitted to Tom Harrison, General Counsel, Texas County and District Retirement System, P.O. Box 2034, Austin, Texas 78768-2034.

The new rule is proposed under the Government Code, §845.507, which authorizes the board of trustees of the Texas County and District Retirement System to adopt rules that are necessary for the retirement system to be considered a qualified plan under §401(a) of the Internal Revenue Code of 1986, and under Texas Government Code, §845.102, authorizing the board of trustee to establish system-wide standards.

The Government Code, §842.110, is affected by this proposed rule.

§107.4. Bona Fide Termination of Employment.

(a) Distributions without a bona fide termination of employment are prohibited under Texas Government Code, §842.110(a) and (b). A distribution of benefits to a member before there has been a bona fide termination of employment under Texas Government Code, §842.110(a) is an in-service distribution and an operational error which could lead to a plan disqualification under the Internal Revenue Code

and results in the assessment of taxes, back taxes, interest and penalties against the subdivision and its participants.

(b) The term "employment" under Texas Government Code §842.110(a) includes service as an employee and service as an appointed or elected official.

(c) A person who is employed by, or holds an elected or appointed position or office in, a subdivision is in active employment and is not separated from service for purposes of retirement eligibility and is not eligible to receive a distribution of benefits with respect to the subdivision before a complete and bona fide termination of employment occurs. A member who has experienced a bona fide termination of employment is an inactive member.

(d) Whether a termination of employment is a bona fide termination is dependent on the facts and circumstances surrounding the termination.

(e) With respect to employees of a subdivision, a termination is not a bona fide termination if there has not been a complete termination and severance of the employer-employee relationship. Failure to strictly follow the employer's termination policies, practices, processes and procedures regularly followed by the employer suggests that the termination was not bona fide.

(f) A termination is not a bona fide termination merely because the period of separation of employment from the employer, or separation from service from elected or appointed office, is greater than one calendar month. The statutory requirement of a break in service of at least one calendar month is a further limitation upon the eligibility of a reemployed person to have received a distribution and is in addition to, and not in lieu of, the requirement that the termination of employment must be a bona fide termination of employment.

(g) Notwithstanding strict adherence to the employer's regular employment termination polices, practices, processes and procedures or any other facts and circumstances, a termination is not a bona fide termination of employment if at the time of termination there is an expectation, understanding or agreement, whether express or implied, between the employer or employee, or an agent of either, that the termination is or will be temporary or that the person will be rehired in the future, whether such rehire is:

(1) for the same position or a different position;

(2) at a greater, lesser, or equivalent level of compensation;

(3) in the same or any other division or department of the employer;

(4) as a full-time, part-time or temporary employee; or

(5) as an independent contractor performing essentially the same services that the individual was performing as an employee.

This 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 May 11, 2012.

TRD-201202375
Tom Harrison
General Counsel
Texas County and District Retirement System
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 637-3247

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 9. TEXAS COMMISSION ON JAIL STANDARDS

CHAPTER 273. HEALTH SERVICES

37 TAC §273.2

The Texas Commission on Jail Standards proposes an amendment to §273.2, concerning Health Services Plan, to comply with changes enacted by the 81st Legislature and clarify the requirements for the use of restraints for known pregnant inmates.

Adan Munoz, 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 or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§273.2. Health Services Plan.

Each facility shall have and implement a written plan, approved by the Commission, for inmate medical, mental, and dental services. The plan shall:

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

(5) provide procedures for medical, mental, nutritional requirements, special housing, [~~and~~] appropriate work assignments, and the documented use of restraints during labor, delivery and recovery for known pregnant inmates;

(6) - (11) (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 May 10, 2012.

TRD-201202368
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 463-8236

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37 TAC §273.6

The Texas Commission on Jail Standards proposes an amendment to §273.6, concerning Restraints, to comply with changes enacted by the 81st Legislature and clarify the requirements for the use of restraints for known pregnant inmates.

Adan Munoz, 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 or administering the amended section.

Mr. Munoz has determined that for each year of the first five years the amendment is in effect the public benefits anticipated as a result of enforcing the amendment as proposed will be clarification of existing standards. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed.

Comments on the proposal may be submitted to Brandon S. Wood, P.O. Box 12985, Austin, Texas 78711, (512) 463-5505.

The amendment is proposed under Government Code, Chapter 511, which provides the Texas Commission on Jail Standards with the authority to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

The statutes that are affected by this amendment are Local Government Code, Chapter 351, §351.002 and §351.015.

§273.6. Restraints.

Inmates exhibiting behavior indicating that they are a danger to themselves or others shall be managed in such a way as to minimize the threat of injury or harm. If restraints are determined to be necessary, they shall be used in a humane manner, only for the prevention of injury, and not as a punitive measure.

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

(6) Documentation of use of restraints during labor, delivery and recovery for known pregnant inmates shall include, but not be limited to the following: the events leading up to the need for restraints, the time the restraints were applied, the justification for their use, observations of the inmate's behavior and condition and the time the restraints were removed.

(7) [~~(6)~~] Restraints shall be removed from an inmate at the earliest possible time that the inmate no longer exhibits behavior necessitating restraint. In no case shall an inmate be kept in restraints longer than 24 hours.

This 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 May 10, 2012.

TRD-201202369
Brandon S. Wood
Assistant Director
Texas Commission on Jail Standards
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 463-8236

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PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 427. TRAINING FACILITY CERTIFICATION

SUBCHAPTER C. TRAINING PROGRAMS FOR ON-SITE AND DISTANCE TRAINING PROVIDERS

37 TAC §427.305

The Texas Commission on Fire Protection (the Commission) proposes amendments to §427.305, concerning Procedures for Testing Conducted by On-Site and Distance Training Providers.

The purpose of the proposed amendments is to more clearly define how a final test must be conducted and defines who a proctor can be. It also specifies how an examination is to be conducted if a course is taught in phases.

Mike Baker, Director of the Fire Service Standards and Certification Division, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no fiscal impact on state or local governments.

Mr. Baker has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit from the passage is to assure individuals taking a comprehensive final test that it is being conducted by a Commission-approved proctor. It will also let the individuals know ahead of time that a test will be required for each phase of the course that is being taught. There will be no effect on micro businesses, small businesses or persons required to comply with the amended section as proposed; therefore, no regular flexibility analysis is required.

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Don Wilson, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to info@tcfp.texas.gov. Comments will be reviewed and discussed at a future Commission meeting.

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the Commission the authority to propose rules for the administration of its powers and duties; and §419.032, which provides the Commission the authority to propose rules to establish qualifications for fire protection personnel.

The proposed amendments implement Texas Government Code §419.008, and §419.032.

§427.305. Procedures for Testing Conducted by On-Site and Distance Training Providers.

(a) The requirements and provisions in this section apply to procedures for periodic and final testing conducted by training providers. For procedures regarding state examinations for certification Commission examinations that occur after a training program is completed, see Chapter 439 of this title (relating to Examinations for Certification).

(b) Periodic and comprehensive final tests shall be given by the training provider in addition to the Commission examination required in Chapter 439 of this title.

(c) Periodic tests shall be administered at the ratio of one test per 50 hours of recommended training, or portion thereof. An average score of 70% must be achieved on all required periodic tests.

(d) In addition to periodic tests, a comprehensive final test must be administered. The final test must be conducted in a proctored setting. For purposes of this section, a proctor can be an approved TCFP Field Examiner, or a member or testing center of an educational institution. A passing score of 70% must be achieved.

(e) If a [~~the Fire Investigator~~] course is taught in phases, a [~~one~~] comprehensive exam for each phase [~~final test~~] shall be administered upon completion of each [~~the final~~] phase and a passing score of 70% must be achieved.

This 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 May 14, 2012.

TRD-201202394
Don Wilson
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 936-3813

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CHAPTER 431. FIRE INVESTIGATION
SUBCHAPTER A. MINIMUM STANDARDS FOR ARSON INVESTIGATOR CERTIFICATION

37 TAC §431.9

The Texas Commission on Fire Protection (the Commission) proposes amendments to §431.9, concerning Minimum Standards for Master Arson Investigator Certification.

The purpose of the proposed amendments is to allow criminal justice subjects related to fire or arson investigation to be used to meet the requirements of obtaining a Master Arson Investigator certification from the Commission.

Mike Baker, Director of the Fire Service Standards and Certification Division, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no fiscal impact on state or local governments.

Mr. Baker has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit from the passage is to enable an individual to use criminal justice fire or arson investigation subjects to count toward the minimum requirements to obtain a Master Arson Investigator Certification. There will be no effect on micro businesses, small businesses or persons required to comply with the amended section as proposed; therefore, no regular flexibility analysis is required.

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Don Wilson, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to info@tcfp.texas.gov. Comments will be reviewed and discussed at a future Commission meeting.

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the Commission the authority to propose rules for the administration of its powers and duties; §419.022, which provides the Commission the authority to establish minimum education, training, physical and mental standards for admission to employment as fire protection personnel; and §419.032, which provides the Commission the authority to propose rules to establish qualifications for fire protection personnel.

The proposed amendments implement Texas Government Code §§419.008, 419.022, and 419.032.

§431.9. Minimum Standards for Master Arson Investigator Certification.

(a) Applicants for Master Arson Investigator Certification must complete the following requirements:

(1) hold as a prerequisite an Advanced Arson Investigator Certification as defined in §431.7 of this title (relating to Minimum Standards for Advanced Arson Investigator Certification); and

(2) acquire a minimum of twelve years of fire protection experience, and 60 college semester hours or an associate's [~~associate~~] degree, either of which includes at least 18 college semester hours in fire science subjects or criminal justice subjects related to fire and or arson investigation.

(b) College level courses from both the upper and lower division may be used to satisfy the education requirement for Master Arson Investigator Certification.

This 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 May 14, 2012.

TRD-201202399
Don Wilson
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 936-3813

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CHAPTER 437. FEES

37 TAC §437.15

The Texas Commission on Fire Protection (the Commission) proposes amendments to §437.15, concerning International Fire Service Accreditation Congress (IFSAC) Seal Fees.

The purpose of the proposed amendments is to increase the fee from $10 to $15 to cover a portion of the cost of processing the application.

Mike Baker, Director of the Fire Services Standards and Certification Division, has determined that for each year of the first five year period the proposed amendments are in effect, there will be a negligible fiscal impact on state or local governments due to the fees typically being paid by the individuals. Some government entities by employee agreements do pay these fees and will be the exception.

Mr. Baker has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit from the passage is it allows an individual to obtain a seal at a rate determined to be equitable through competitive market pricing. These seals are not required by the state. There will be no effect on micro businesses, small businesses or persons required to comply with the amended section as proposed; therefore, no regular flexibility analysis is required.

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Don Wilson, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to info@tcfp.texas.gov. Comments will be reviewed and discussed at a future Commission meeting.

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the Commission the authority to propose rules for the administration of its powers and duties; §419.026, which provides the commission the authority to set and collect fees for examinations and certificates.

The proposed amendments implement Texas Government Code §419.008, and §419.026.

§437.15. International Fire Service Accreditation Congress (IFSAC) Seal Fees.

A non-refundable $15 [~~$10.00~~] fee shall be charged for each IFSAC seal issued by the commission effective October 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 May 14, 2012.

TRD-201202395
Don Wilson
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 936-3813

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CHAPTER 439. EXAMINATIONS FOR CERTIFICATION

SUBCHAPTER A. EXAMINATIONS FOR ON-SITE DELIVERY TRAINING

37 TAC §439.1, §439.11

The Texas Commission on Fire Protection (the Commission) proposes amendments to §439.1, concerning Requirements--General; and §439.11, concerning Commission-Designated Performance Skill Evaluations.

The purpose of the proposed amendments is to define the total number of sections a Wildland Fire Protection certification examination will consist of if proposed new Chapter 455 is adopted by the Commission. It will also ensure that testing participants are provided proper NFPA compliant personal protective gear and SCBA when an IDLH environment exists during skills testing.

Mike Baker, Director of the Fire Service Standards and Certification Division, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no fiscal impact on state or local governments.

Mr. Baker has also determined that for each year of the first five years the proposed amendments are in effect, the public benefit from the passage will be to provide clear and concise rules regarding the testing process as well as ensure safety for all students who are performing skills testing. There will be no effect on micro businesses, small businesses or persons required to comply with the amended section as proposed; therefore, no regular flexibility analysis is required.

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Don Wilson, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to info@tcfp.texas.gov. Comments will be reviewed and discussed at a future Commission meeting.

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the Commission the authority to propose rules for the administration of its powers and duties; and §419.022, which provides the Commission the authority to establish minimum education, training, physical, and mental standards for admission to employment as fire protection personnel; and §419.032, which provides the Commission the authority to propose rules to establish qualifications for fire protection personnel.

The proposed amendments implement Texas Government Code §§419.008, 419.022 and 419.032.

§439.1. Requirements--General.

(a) The administration of examinations for certification, including performance skill evaluations, shall be conducted in compliance with the Commission and International Fire Service Accreditation Congress (IFSAC) regulations. It is incumbent upon Commission staff, committee members, training officers and field examiners to maintain the integrity of any state examination (or portion thereof) for which they are responsible.

(b) Exams will be based on curricula as currently adopted in the Commission's Certification Curriculum Manual.

(c) Commission examinations that receive a passing grade shall expire two years from the date of the examination.

(d) The Commission shall prescribe the content of any certification examination that tests the knowledge and/or skill of the examinee concerning the discipline addressed by the examination.

(1) An examination based on Chapter 1, "Basic Fire Suppression Curriculum" as identified in the Certification Curriculum Manual may consist of four sections: Fire Fighter I, Fire Fighter II, First Responder Awareness, and First Responder Operations.

(2) An examination based on Chapter 4, "Basic Fire Inspector Curriculum" as identified in the Certification Curriculum Manual may consist of three sections: Inspector I, Inspector II, and Plan Examiner I.

(3) An examination based on the applicable chapters for "Basic Fire Suppression Curriculum" and "Wildland Fire Protection Curriculum" in the Certification Curriculum Manual shall consist of five sections: Fire Fighter I, Fire Fighter II, First Responder Awareness, First Responder Operations, and Intermediate Wildland Fire Protection.

(4) [~~(3)~~] All other state examinations consist of only one section.

(5) [~~(4)~~] The Head of Department examination will be based on NFPA 1021, Chapter 7.

(e) The individual who fails to pass a Commission examination for state certification will be given one additional opportunity to pass the examination or section thereof. This opportunity must be exercised within 180 days after the date of the first failure. An individual who passes the applicable state certification examination but fails to pass a section thereof for an IFSAC seal(s) will be given one additional opportunity to pass the section thereof. This opportunity must be exercised within two years after the date of the first attempt. An examinee

who fails to pass the examination within the required time may not sit for the same examination again until the examinee has re-qualified by repeating the curriculum applicable to that examination.

(f) An individual may obtain a new certificate in a discipline which was previously held by passing a Commission proficiency examination.

(g) If an individual who has never held certification in a discipline defined in §421.5 of this title (relating to Definitions), seeks certification in that discipline, the individual shall complete all certification requirements.

(h) If an individual completes an approved training program that has been evaluated and deemed equivalent to a certification curriculum approved by the Commission, such as an out-of-state or military training program or a training program administered by the State Firemen's and Fire Marshals' Association of Texas, the individual must pass a Commission examination for certification status and meet any other certification requirements in order to become eligible for certification by the Commission as fire protection personnel.

(i) An individual or entity may petition the Commission for a waiver of the examination required by this section if the person's certificate expired because of the individual's or employing entity's good faith clerical error, or expired as a result of termination of the person's employment where the person has been restored to employment through a disciplinary procedure or a court action. All required renewal fees including applicable late fees and all required continuing education must be submitted before the waiver request may be considered.

(1) Applicants claiming good faith clerical error must submit a sworn statement together with any supporting documentation that evidences the applicant's good faith efforts to comply with Commission renewal requirements and that failure to comply was due to circumstances beyond the control of the applicant.

(2) Applicants claiming restoration to employment as a result of a disciplinary or court action must submit a certified copy of the order, ruling or agreement restoring the applicant to employment.

§439.11. Commission-Designated Performance Skill Evaluations.

(a) The Commission-designated performance evaluations are randomly selected from each subject area within the applicable curriculum containing actual skill evaluations. This applies only for curricula in which performance standards have been developed. The provider of training will receive from the Commission, with the course approval notice, one envelope for each subject area as identified in the applicable curriculum.

(b) During the course of instruction, the training provider shall test for competency, the Commission-designated performance skills. The skill evaluations may be scheduled at any time during the course, but must take place after all training on the identified subject area has been completed. The date(s), time(s) and location(s) for the Commission-designated skill evaluations must be submitted on the Commission-designated skill schedule contained within the Training Prior Approval form. The Commission must be notified immediately of any deviation from the submitted Commission-designated skill schedule. All skills must be evaluated by a Commission-approved field examiner.

(c) In order to qualify for the Commission certification examination, the student must successfully complete and pass all designated skill evaluations. The student may be allowed two attempts to complete each skill. A second failure during the evaluation process will require remedial training in the failed skill area with a certified instructor before being allowed a third attempt. A third failure shall require that the student repeat the entire certification curriculum.

(d) The training facility must maintain records (electronic or paper) of skills testing on each examinee. The records must reflect the results of the evaluation of skills, the dates the evaluation of skills took place, and the names of the field examiners who conducted the evaluations.

(e) For certification disciplines in which an IDLH environment may exist, all skill testing participants shall have available for use NFPA compliant PPE and SCBA as defined in §435.1 of this title (relating to Protective Clothing) and §435.3 of this title (relating to Self-Contained Breathing Apparatus).

This 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 May 14, 2012.

TRD-201202396
Don Wilson
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 936-3813

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CHAPTER 455. MINIMUM STANDARDS FOR WILDLAND FIRE PROTECTION CERTIFICATION

37 TAC §§455.1, 455.3, 455.5, 455.7

The Texas Commission on Fire Protection (the Commission) proposes new Chapter 455, §455.1, concerning Minimum Standards for Wildland Fire Protection Personnel; §455.3, concerning Minimum Standards for Basic Wildland Fire Protection Certification; §455.5, concerning Minimum Standards for Intermediate Wildland Fire Protection Certification; and §455.7, concerning Examination Requirements.

The purpose of the proposed new chapter is to provide a clear and concise set of rules defining what a wildland firefighter is and also outlining state requirements for obtaining the certification.

Mike Baker, Director of the Fire Service Standards and Certification Division, has determined that for each year of the first five year period the proposed new chapter is in effect, there will be no fiscal impact on state or local governments.

Mr. Baker has also determined that for each year of the first five years the proposed new chapter is in effect, the public benefit from the passage is that all firefighters deployed on a wildland fire will be safer because they will have had the required training as specified by the Texas Forest Service. Although the training specified in the rules is required, the certification is voluntary. There will be no effect on micro businesses, small businesses or persons required to comply with the chapter as proposed; therefore, no regular flexibility analysis is required.

Comments regarding the proposed new chapter may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Don Wilson, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to info@tcfp.texas.gov. Comments will be reviewed and discussed at a future Commission meeting.

The new chapter is proposed under Texas Government Code, Chapter 419, §419.008, which provides the Commission the authority to propose rules for the administration of its powers and duties; §419.022, which provides the Commission the authority to establish minimum education, training, physical, and mental standards for admission to employment as fire protection personnel; and §419.032, which provides the Commission the authority to propose rules to establish qualifications for fire protection personnel.

The proposed new chapter implements Texas Government Code §§419.008, 419.022 and 419.032.

§455.1. Minimum Standards for Wildland Fire Protection Personnel.

(a) A wildland fire fighter is defined as an individual whose assigned function is suppression of fires in the wildland or wildland-urban interface setting.

(b) Individuals holding Wildland Fire Protection certification shall be required to comply with the continuing education requirements in Chapter 441 of this title (relating to Continuing Education).

§455.3. Minimum Standards for Basic Wildland Fire Protection Certification.

In order to be certified as Basic Wildland fire protection personnel, an individual must:

(1) possess valid documentation of accreditation from the International Fire Service Accreditation Congress as Wildland Fire Fighter Level I; or

(2) complete a commission-approved Basic Wildland Fire Protection program and successfully pass the commission examination as specified in Chapter 439 of this title (relating to Examinations for Certification). An approved Basic Wildland Fire Protection training program shall consist of one of the following:

(A) completion of the commission-approved Basic Wildland Fire Protection Curriculum, as specified in the applicable chapter of the commission's Certification Curriculum Manual; or

(B) completion of the following Texas Forest Service/National Wildfire Coordinating Group courses:

(i) S-130: Firefighter Training

(ii) S-190: Introduction to Wildland Fire Behavior

(iii) L-180: Human Factors on the Fireline

(iv) I-100: Introduction to the Incident Command System, or an equivalent basic incident command system course such as NIMS IS-100

(3) The commission examination requirement is waived for individuals who have completed the training requirements in paragraph (2)(A) or (B) of this section and apply for certification by August 31, 2013. After this date, individuals must successfully pass the commission examination prior to applying for certification.

§455.5. Minimum Standards for Intermediate Wildland Fire Protection Certification.

(a) In order to be certified as Intermediate Wildland Fire Protection personnel, an individual must:

(1) hold Basic Wildland Fire Protection certification issued by the commission, and

(2) individuals who hold Structure Fire Protection certification issued by the commission must complete the Texas Forest Service/National Wildfire Coordinating Group course G-131: Wildland Training (FFT1) for Structural Firefighters or the Texas Forest Service/National Wildfire Coordinating Group courses S-131 and S-133, including the associated position task book as adopted by the Texas Forest Service/NWCG 310-1/NFPA 1051 latest edition, and successfully pass the commission examination as specified in Chapter 439 of this title (relating to Examinations for Certification), or

(3) individuals who hold a State Fireman's and Fire Marshal's Association Advanced Accredited certification issued prior to January 1, 2012, or a State Fireman's and Fire Marshal's Association Firefighter II certification issued on or after January 1, 2012, must complete the Texas Forest Service/National Wildfire Coordinating Group course G-131: Wildland Training (FFT1) for Structural Firefighters or the Texas Forest Service/National Wildfire Coordinating Group courses S-131 and S-133, including the associated position task book as adopted by the Texas Forest Service/NWCG 310-1/NFPA 1051 latest edition, and successfully pass a commission examination which includes both Basic Structure Fire Protection and Intermediate Wildland Fire Protection, as specified in Chapter 439 of this title.

(b) The commission examination requirement is waived for individuals in subsection (a)(2) of this section who have completed the training requirement and apply for certification by August 31, 2013. After this date, individuals must successfully pass the commission examination prior to applying for certification.

(c) The application processing fee for the initial examination is waived for individuals in subsection (a)(3) of this section who have completed the training requirement and submit the application for the commission examination by August 31, 2013. After this date, the application processing fee for examinations will be required.

(d) The application processing fee for the certification is not waived for individuals in subsection (c) of this section.

§455.7. Examination Requirements.

(a) Examination requirements of Chapter 439 of this title (relating to Examinations for Certification) must be met in order to receive Wildland Fire Protection Certification.

(b) Persons seeking a commission certification referenced in this chapter who do not currently hold a certification issued by the Texas Commission on Fire Protection must meet all requirements regarding application for initial certification.

This 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 May 14, 2012.

TRD-201202397
Don Wilson
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 936-3813

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CHAPTER 457. MINIMUM STANDARDS FOR INCIDENT SAFETY OFFICER

37 TAC §§457.1, 457.3, 457.5

The Texas Commission on Fire Protection (the Commission) proposes new Chapter 457, §457.1, concerning Incident Safety Officer Certification; §457.3, concerning Minimum Standards for

Incident Safety Officer Certification; and §457.5, concerning Examination Requirements.

The purpose of the proposed new chapter is to provide a clear and concise set of rules defining what an Incident Safety Officer is and outlining state requirements for obtaining the certification.

Mike Baker, Director of the Fire Service Standards and Certification Division, has determined that for each year of the first five year period the proposed new chapter is in effect, there will be no fiscal impact on state or local governments.

Mr. Baker has also determined that for each year of the first five years the proposed new chapter is in effect, the public benefit from the passage is that it provides another certification for individuals who seek higher levels of certification for professional development, even though it is a voluntary certification. There will be no effect on micro businesses, small businesses or persons required to comply with the chapter as proposed; therefore, no regular flexibility analysis is required.

Comments regarding the proposed new chapter may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register* to Don Wilson, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to info@tcfp.texas.gov. Comments will be reviewed and discussed at a future Commission meeting.

The new chapter is proposed under Texas Government Code, Chapter 419, §419.008, which provides the Commission the authority to propose rules for the administration of its powers and duties; §419.022, which provides the Commission the authority to establish minimum education, training, physical, and mental standards for admission to employment as fire protection personnel; and §419.032, which provides the Commission the authority to propose rules to establish qualifications for fire protection personnel.

The proposed new chapter implements Texas Government Code §§419.008, 419.022 and 419.032.

§457.1. Incident Safety Officer Certification.

(a) An Incident Safety Officer is defined as a member of the command staff responsible for monitoring and assessing safety hazards or unsafe situations and for developing measures for ensuring personnel safety at an incident.

(b) All individuals holding an Incident Safety Officer certification shall be required to comply with the continuing education requirements in Chapter 441 of this title (relating to Continuing Education).

§457.3. Minimum Standards for Incident Safety Officer Certification.

In order to be certified as an Incident Safety Officer an individual must:

(1) hold commission certification as Fire Officer I and;

(2) possess valid documentation of accreditation from the International Fire Service Accreditation Congress as an Incident Safety Officer; or

(3) complete a commission-approved Incident Safety Officer program and successfully pass the commission examination as specified in Chapter 439 of this title (relating to Examinations for Certification). An approved Incident Safety Officer program must consist of one of the following:

(A) completion of a commission-approved Incident Safety Officer curriculum as specified in the applicable chapter of the commission's Certification Curriculum Manual; or

(B) completion of the National Fire Academy Incident Safety Officer course; or

(C) completion of the Fire Department Safety Officers Association Incident Safety Officer course; or

(D) completion of an out-of-state, educational institution of higher education, and/or military training program that has been submitted to the commission for evaluation and found to be equivalent to, or exceeds the commission-approved Incident Safety Officer curriculum.

(4) The commission examination requirement is waived for individuals who have completed one of the training programs in paragraph (3)(B) - (D) of this section and apply for certification by August 31, 2013. After this date, individuals must successfully pass the commission examination prior to applying for certification.

§457.5. Examination Requirements.

Examination requirements of Chapter 439 of this title (relating to Examinations for Certification) must be met in order to receive an Incident Safety Officer certification, unless otherwise specified in this chapter.

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

Filed with the Office of the Secretary of State on May 14, 2012.

TRD-201202398
Don Wilson
Executive Director
Texas Commission on Fire Protection
Earliest possible date of adoption: June 24, 2012
For further information, please call: (512) 936-3813

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TITLE 43. TRANSPORTATION

PART 9. NORTH TEXAS TOLLWAY AUTHORITY

CHAPTER 201. PROCUREMENT OF GOODS AND SERVICES AND DISPOSITION OF PROPERTY

The North Texas Tollway Authority (NTTA) proposes to repeal the entire Chapter 201, including Subchapter A, §§201.1 - 201.13, concerning Procurements; Subchapter B, §§201.20 - 201.25, concerning Appendices; and Subchapter C, §201.30, concerning Definitions. All sections will be repealed.

Shortly after the adoption of Chapter 201, the NTTA's governing statute, Transportation Code, Chapter 366, was amended to allow the NTTA to pass regulations by publishing the rules in a newspaper of general circulation in the area in which the NTTA is located. Under the new §366.033(b), the NTTA is no longer required to publish rules in the *Texas Register* or the Texas Administrative Code. The NTTA has since promulgated a new procurement policy, following the procedures outlined in current §366.033(b). Chapter 201 is now outdated and should be repealed.

The proposed repeal was approved by the NTTA Board of Directors by Resolution No. 12-64, in furtherance of its responsibility

to adopt rules for the regulation of the NTTA's affairs and the conduct of its business.

The repeal was developed pursuant to Transportation Code, Title 6, Subtitle G, Chapter 366, §366.033(j), which authorizes the NTTA to adopt written procedures governing its procurement of goods and services.

FISCAL NOTE

Gerry Carrigan, the Executive Director, has determined that for each of the first five years the repeal is in effect, there are no fiscal implications for the state or units of local government as a result of enforcing or administering the repeal.

PUBLIC BENEFIT

Mr. Carrigan has also determined that for each of the first five years the repeal is in effect, the public benefit will be eliminating confusion based on different version of the procurement policy. The repeal should have no adverse effect on small businesses or possible economic cost to persons who were required to comply with them. An updated procurement policy is currently on file with the NTTA.

SUBMITTAL OF COMMENTS

Comments may be submitted in writing to Felix Alvarez, Director of Procurement, North Texas Tollway Authority, P.O. Box 260928, Plano, Texas 75093. The deadline for receipt of comments is 5:00 p.m. on June 25, 2012.

SUBCHAPTER A. PROCUREMENTS

43 TAC §§201.1 - 201.13

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

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, Title 6, Subtitle G, Chapter 366, §366.033(j), which authorizes the NTTA to adopt written procedures governing its procurement of goods and services that are consistent with general laws applicable to the Authority.

CROSS REFERENCE TO STATUTE

Transportation Code, §366.033, Transportation Code, §366.184, Transportation Code, §366.185, Local Government Code, Chapter 271, Local Government Code, Chapter 272, Government Code, Chapter 791, Government Code, Chapter 2252, and Government Code, Chapter 2258.

§201.1. Purpose, Organization and Applicability of this Policy; Procedures; Conflicts.

§201.2. Summary of Procurement Options.

§201.3. Required Board Approval, Generally.

§201.4. Conflict of Interest; Contact with the Authority.

§201.5. Disadvantaged Business Participation; Compliance with Policy.

§201.6. Emergency Procurements, Generally.

§201.7. Electronic Bidding.

§201.8. Confidentiality of Information in Bids or Proposals.

§201.9. Standard, Implied Contract Provisions.

§201.10. Interruption, Delay, or Cancellation of Procurement.

§201.11. Nonresident Bidders.

§201.12. Prior Employees.

§201.13. Bid Protests.

This 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 May 10, 2012.

TRD-201202360
Bob Schell
Assistant Director of General Counsel
North Texas Tollway Authority
Earliest possible date of adoption: June 24, 2012
For further information, please call: (214) 461-2043

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SUBCHAPTER B. APPENDICES

43 TAC §§201.20 - 201.25

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

STATUTORY AUTHORITY

The repeals are proposed under Transportation Code, Title 6, Subtitle G, Chapter 366, §366.033(j), which authorizes the NTTA to adopt written procedures governing its procurement of goods and services that are consistent with general laws applicable to the Authority.

CROSS REFERENCE TO STATUTE

Transportation Code, §366.033, Transportation Code, §366.184, Transportation Code, §366.185, Local Government Code, Chapter 271, Local Government Code, Chapter 272, Government Code, Chapter 791, Government Code, Chapter 2252, and Government Code, Chapter 2258.

§201.20. Appendix A. Construction and Maintenance Contracts.

§201.21. Appendix B. Professional Services.

§201.22. Appendix C. General Goods and Services.

§201.23. Appendix D. Participation in State and Cooperative Purchasing Programs; Intergovernmental Agreements.

§201.24. Appendix E. Consulting Services.

§201.25. Appendix F. Disposition of Salvage or Surplus Property.

This 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 May 10, 2012.

TRD-201202361
Bob Schell
Assistant Director of General Counsel
North Texas Tollway Authority
Earliest possible date of adoption: June 24, 2012
For further information, please call: (214) 461-2043

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SUBCHAPTER C. DEFINITIONS

43 TAC §201.30

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

STATUTORY AUTHORITY

The repeal is proposed under Transportation Code, Title 6, Subtitle G, Chapter 366, §366.033(j), which authorizes the NTTA to adopt written procedures governing its procurement of goods and services that are consistent with general laws applicable to the Authority.

CROSS REFERENCE TO STATUTE

Transportation Code, §366.033, Transportation Code, §366.184, Transportation Code, §366.185, Local Government Code, Chapter 271, Local Government Code, Chapter 272, Government Code, Chapter 791, Government Code, Chapter 2252, and Government Code, Chapter 2258.

§201.30. Definitions.

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

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

TRD-201202362
Bob Schell
Assistant Director of General Counsel
North Texas Tollway Authority
Earliest possible date of adoption: June 24, 2012
For further information, please call: (214) 461-2043

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 7. GAS SERVICES DIVISION

SUBCHAPTER E. RATES AND RATE-SETTING PROCEDURES

16 TAC §7.501

Proposed amended §7.501, published in the November 11, 2011, issue of the *Texas Register* (36 TexReg 7631), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on May 14, 2012.

TRD-201202390

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 103. HEALTH AND SAFETY

SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING SAFE SCHOOLS

19 TAC §103.1201, §103.1203

The Texas Education Agency withdraws the proposed amendments to §103.1201 and §103.1203 which appeared in the May 11, 2012, issue of the *Texas Register* (37 TexReg 3519).

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

TRD-201202367
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Effective date: May 10, 2012
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 341. LICENSE RENEWAL

22 TAC §341.8

The Texas Board of Physical Therapy Examiners withdraws the proposed amendment to §341.8, which appeared in the February 10, 2012, issue of the *Texas Register* (37 TexReg 599).

Filed with the Office of the Secretary of State on May 7, 2012.

TRD-201202304
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Effective date: May 7, 2012
For further information, please call: (512) 305-6900

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 18. ORGANIC STANDARDS AND CERTIFICATION

SUBCHAPTER F. ADMINISTRATIVE

DIVISION 5. MISCELLANEOUS PROVISIONS

4 TAC §18.700, §18.705

The Texas Department of Agriculture (the department) adopts amendments to §18.700 and §18.705, concerning organic standards and certification, without changes to the proposal published in the March 30, 2012, issue of the *Texas Register* (37 TexReg 2135).

The amendment to §18.700 removes subsection (d) which provides a retention period for the department to keep records of adverse actions against a person certified under the program. The department maintains a record retention schedule in accordance with §441.185 of the Texas Government Code. The subsection is removed to ensure there are no conflicts with the department's record retention schedule or federal regulations. The amendment to §18.705(b) corrects a typographical error that was created by the amendment of §18.100 that became effective on September 1, 2011.

No comments were received on the proposal.

The amendments to §18.700 and §18.705 are adopted under Texas Agriculture Code (the Code), §18.002, which provides the department with the authority to adopt rules to establish a program for the administration and enforcement of standards related to organic agricultural products, including the certification of organic products.

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 May 11, 2012.

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Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
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For further information, please call: (512) 463-4075

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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 B. TRANSFER OF CREDIT, CORE CURRICULUM AND FIELD OF STUDY CURRICULA

19 TAC §4.28

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §4.28, concerning Core Curriculum, with one additional change to the proposed text as published in the February 3, 2012, issue of the *Texas Register* (37 TexReg 442).

The intent of this amendment is to clarify the requirements for the Component Area Option under §4.28(b)(4)(A), and to allow institutions of higher education that offer the fully-transferrable core curriculum an alternative appropriate for interdisciplinary courses for the Component Area Option under §4.28(b)(4)(B). This alternative would allow an institution to certify that a course or courses used to complete up to three semester credit hours of the Component Area Option meets the definition specified for one or more of the foundational component areas, and include(s) a minimum of three Core Objectives, including Critical Thinking Skills, Communication Skills, and one of the remaining Core Objectives of the institution's choice. The amendment to §4.28(b)(4) adds new subparagraph (C) that states, for the purposes of gaining approval for or reporting a Component Area Option course under the amended provisions in subsection (b)(4)(B), an institution would not be required to notify the Board of the specific foundational component area(s) and Core Objectives associated with the course(s).

Comments received during the comment period led to one additional amendment to §4.28(g), providing that any semester credit hours (SCH) for a course approved to meet a Foundational Component Area (FCA) requirement, but that exceed the number of SCH required to fulfill the FCA, must either be applied to the Component Area Option or must be required by the specific degree program such that the number of SCH required to complete the program would not increase.

Three comments were received regarding these amendments.

Comment: The UT System commented on behalf of The University of Texas at El Paso (UTEP) that "...[t]he required reduction to

42 semester credit hours will lead to the evaluation of our core menu but also negatively impacts our University (UNIV 1301) core offering which has resulted in improved entering student outcomes."

Response: No change is recommended as a result of this comment. The rules offered for comment did not propose any change to the number of semester credit hours (SCH) required in the core curriculum, which were approved in October 2011 to be 42, as required by Texas Education Code, §61.822. Although institutions had previously been allowed to request an exception to offer a larger core curriculum, this variation led to many problems with transfer of credit among institutions. The decision to create better consistency by requiring all institutions to offer a 42 SCH core curriculum does not necessarily preclude an institution from offering any particular course, as long as the course meets the criteria and includes the Core Objectives for one of the Foundational Component Areas.

Comment: Lamar University commented that §4.28(g) is too restrictive, and recommended a change to allow any SCH for a course that exceed the number of SCH required to fulfill the Foundational Component Area requirement to either be applied to the Component Area Option or to be applied to the degree plan requiring the course, such that the additional SCH would not increase the SCH required for completion of the degree program.

Response: As a result of the comment received, a change is proposed to §4.28(g). The change would allow for a course that carries additional SCH in excess of the number required to complete a Foundational Component Area (FCA) requirement to apply the additional SCH to either the Component Area Option or to the degree plan that requires the course, e.g., a 4 SCH Calculus course required for a Bachelor of Science in Mathematics, to fulfill the 3 SCH Foundational Component Area requirement for Mathematics, and the additional 1 SCH to be accounted for in the degree plan requirements, such that the extra semester credit hour would not increase the total number of SCH required for completion of the specific degree program.

Comment: Austin Community College (ACC) commented that §4.28(g) seems contradictory, stating that a course can only apply to one Foundational Component Area (FCA), but that credit in excess of the requirement for a FCA must be applied to the Component Area Option. ACC suggested that this section should be revised, but did not suggest a particular revision.

Response: No change is recommended as a result of this comment. Staff believes that the modification proposed in response to the comment from Lamar University will also satisfy the concern from Austin Community College.

The amendments are adopted under Texas Education Code, Chapter 61, Subchapter S, §61.822 which provides the Coordinating Board with the authority to establish a core curriculum for institutions of higher education that offer academic undergraduate degree programs and §61.827 which provides the Coordinating Board with rulemaking authority to implement the subchapter.

§4.28. Core Curriculum.

(a) General.

(1) In accordance with Texas Education Code, §§61.821 - 61.832, each institution of higher education that offers an undergraduate academic degree program shall design and implement a core curriculum, including specific courses composing the curriculum, of no less than 42 lower-division semester credit hours.

(2) No upper-division course shall be approved to fulfill a foundational component area requirement in the core curriculum if it is substantially comparable in content or depth of study to a lower-division course listed in the Lower-Division Academic Course Guide Manual.

(3) Medical or dental units that admit undergraduate transfer students should encourage those students to complete their core curriculum requirement at a general academic teaching institution or public junior college.

(b) Texas Core Curriculum. Each institution of higher education that offers an undergraduate academic degree program shall develop its core curriculum by using the Board-approved purpose, core objectives, and foundational component areas of the Texas Core Curriculum.

(1) Statement of Purpose. Through the Texas Core Curriculum, students will gain a foundation of knowledge of human cultures and the physical and natural world, develop principles of personal and social responsibility for living in a diverse world, and advance intellectual and practical skills that are essential for all learning.

(2) Core Objectives. Through the Texas Core Curriculum, students will prepare for contemporary challenges by developing and demonstrating the following core objectives:

(A) Critical Thinking Skills: to include creative thinking, innovation, inquiry, and analysis, evaluation and synthesis of information;

(B) Communication Skills: to include effective development, interpretation and expression of ideas through written, oral and visual communication;

(C) Empirical and Quantitative Skills: to include the manipulation and analysis of numerical data or observable facts resulting in informed conclusions;

(D) Teamwork: to include the ability to consider different points of view and to work effectively with others to support a shared purpose or goal;

(E) Personal Responsibility: to include the ability to connect choices, actions and consequences to ethical decision-making; and

(F) Social Responsibility: to include intercultural competence, knowledge of civic responsibility, and the ability to engage effectively in regional, national, and global communities.

(3) Foundational Component Areas with Content Descriptions, Core Objectives and Semester Credit Hour (SCH) Requirements. Each institution's core curriculum will be composed of courses that adhere to the content description, core objectives, and semester credit hour requirements for a specific component area. The foundational component areas are:

(A) Communication (6 SCH).

(i) Courses in this category focus on developing ideas and expressing them clearly, considering the effect of the message, fostering understanding, and building the skills needed to communicate persuasively.

(ii) Courses involve the command of oral, aural, written, and visual literacy skills that enable people to exchange messages appropriate to the subject, occasion, and audience.

(iii) The following four Core Objectives must be addressed in each course approved to fulfill this category requirement:

Critical Thinking Skills, Communication Skills, Teamwork, and Personal Responsibility.

(B) Mathematics (3 SCH).

(i) Courses in this category focus on quantitative literacy in logic, patterns, and relationships.

(ii) Courses involve the understanding of key mathematical concepts and the application of appropriate quantitative tools to everyday experience.

(iii) The following three Core Objectives must be addressed in each course approved to fulfill this category requirement: Critical Thinking Skills, Communication Skills, and Empirical and Quantitative Skills.

(C) Life and Physical Sciences (6 SCH).

(i) Courses in this category focus on describing, explaining, and predicting natural phenomena using the scientific method.

(ii) Courses involve the understanding of interactions among natural phenomena and the implications of scientific principles on the physical world and on human experiences.

(iii) The following four Core Objectives must be addressed in each course approved to fulfill this category requirement: Critical Thinking Skills, Communication Skills, Empirical and Quantitative Skills, and Teamwork.

(D) Language, Philosophy, and Culture (3 SCH).

(i) Courses in this category focus on how ideas, values, beliefs, and other aspects of culture express and affect human experience.

(ii) Courses involve the exploration of ideas that foster aesthetic and intellectual creation in order to understand the human condition across cultures.

(iii) The following four Core Objectives must be addressed in each course approved to fulfill this category requirement: Critical Thinking Skills, Communication Skills, Personal Responsibility, and Social Responsibility.

(E) Creative Arts (3 SCH).

(i) Courses in this category focus on the appreciation and analysis of creative artifacts and works of the human imagination.

(ii) Courses involve the synthesis and interpretation of artistic expression and enable critical, creative, and innovative communication about works of art.

(iii) The following four Core Objectives must be addressed in each course approved to fulfill this category requirement: Critical Thinking Skills, Communication Skills, Teamwork, and Social Responsibility.

(F) American History (6 SCH).

(i) Courses in this category focus on the consideration of past events and ideas relative to the United States, with the option of including Texas History for a portion of this component area.

(ii) Courses involve the interaction among individuals, communities, states, the nation, and the world, considering how these interactions have contributed to the development of the United States and its global role.

(iii) The following four Core Objectives must be addressed in each course approved to fulfill this category requirement: Critical Thinking Skills, Communication Skills, Personal Responsibility, and Social Responsibility.

(G) Government/Political Science (6 SCH).

(i) Courses in this category focus on consideration of the Constitution of the United States and the constitutions of the states, with special emphasis on that of Texas.

(ii) Courses involve the analysis of governmental institutions, political behavior, civic engagement, and their political and philosophical foundations.

(iii) The following four Core Objectives must be addressed in each course approved to fulfill this category requirement: Critical Thinking Skills, Communication Skills, Personal Responsibility, and Social Responsibility.

(H) Social and Behavioral Sciences (3 SCH).

(i) Courses in this category focus on the application of empirical and scientific methods that contribute to the understanding of what makes us human.

(ii) Courses involve the exploration of behavior and interactions among individuals, groups, institutions, and events, examining their impact on the individual, society, and culture.

(iii) The following four Core Objectives must be addressed in each course approved to fulfill this category requirement: Critical Thinking Skills, Communication Skills, Empirical and Quantitative Skills, and Social Responsibility.

(4) Component Area Option (6 SCH).

(A) Except as provided in subparagraph (B) of this paragraph, each course designated to complete the Component Area Option must meet the definition and Core Objectives specified in one of the foundational component areas outlined in paragraph (3)(A) - (H) of this subsection.

(B) As an option for up to three (3) semester credit hours of the Component Area Option, an institution may certify that the course(s):

(i) Meet(s) the definition specified for one or more of the foundational component areas; and

(ii) Include(s) a minimum of three Core Objectives, including Critical Thinking Skills, Communication Skills, and one of the remaining Core Objectives of the institution's choice.

(C) For the purposes of gaining approval for or reporting a Component Area Option course under subparagraph (B) of this paragraph, an institution is not required to notify the Board of the specific foundational component area(s) and Core Objectives associated with the course(s).

(5) Applicability of Texas Core Curriculum.

(A) Any student who first enrolls in an institution of higher education following high school graduation in fall 2014 or later shall be subject to the current Texas Core Curriculum requirements.

(B) Any student who is admitted under the terms of the Academic Fresh Start program and who first enrolls under that admission in fall 2014 or later shall be subject to the current Texas Core Curriculum requirements.

(C) Any student who first enrolled in an institution of higher education prior to fall 2014 shall, after consultation with an academic advisor, have the choice to:

(i) complete the core curriculum requirements in effect in summer 2014; or

(ii) transition to the current core curriculum requirements, in which case, previously completed core curriculum courses shall be applied to the current core curriculum requirements under the same terms as those that apply to a student who transfers from one institution to another. The student shall then complete the remaining requirements under the current core curriculum.

(c) Transfer of Credit--Completed Core Curriculum. If a student successfully completes the 42 semester credit hour core curriculum at a Texas public institution of higher education, that block of courses may be transferred to any other Texas public institution of higher education and must be substituted for the receiving institution's core curriculum. A student shall receive academic credit for each of the courses transferred and may not be required to take additional core curriculum courses at the receiving institution.

(d) Concurrent Enrollment.

(1) A student concurrently enrolled at more than one institution of higher education shall follow the core curriculum requirements in effect for the institution at which the student is classified as a degree-seeking student.

(2) A student who is concurrently enrolled at more than one institution of higher education may be classified as a degree-seeking student at only one institution.

(3) If a student maintains continuous enrollment from a spring semester to the subsequent fall semester at an institution at which the student has declared to be seeking a degree, the student remains a degree-seeking student at that institution regardless of the student's enrollment during the intervening summer session(s) at another institution.

(e) Transfer of Credit--Core Curriculum Not Completed. Except as specified in subsection (f) of this section, a student who transfers from one institution of higher education to another without completing the core curriculum of the sending institution shall receive academic credit within the core curriculum of the receiving institution for each of the courses that the student has successfully completed in the core curriculum of the sending institution. Following receipt of credit for these courses, the student may be required to satisfy the remaining course requirements in the core curriculum of the receiving institution.

(f) Satisfaction of Foundational Component Areas. Each student must meet the number of semester credit hours in each foundational component area; however, an institution receiving a student in transfer is not required to apply to the fulfillment of a foundational component area requirement semester credit hours beyond the number of semester credit hours specified in a foundational component area.

(g) A course may only apply to a single foundational component area. If the SCH for a course in a foundational component exceed the number of SCH allotted in that foundational component area, the excess SCH must either be applied to the Component Area Option or as part of the specific degree requirements, such that the additional SCH will not increase the number of required SCH to complete the degree.

(h) Transcripts. All undergraduate student transcripts should indicate whether a student has completed the core curriculum satisfactorily, and which courses satisfied a requirement of the institution's core curriculum. Identifying numbers recommended by the Texas Association of Collegiate Registrars and Admissions Officers (TACRAO) must identify each completed core curriculum course on students' transcripts, in order to indicate courses utilized to satisfy core curriculum foundational component area requirements as follows:

(1) Communication = 010;

(2) Mathematics = 020;

(3) Life and Physical Sciences = 030;

(4) Language, Philosophy and Culture = 040;

(5) Creative Arts = 050;

(6) American History = 060;

(7) Government/Political science = 070;

(8) Social and Behavioral Sciences = 080; and

(9) Component Area Option = 090.

(i) Notice. Each institution must publish and make readily available to students its core curriculum requirements stated in terms consistent with the Texas Common Course Numbering System.

(j) Substitutions and Waivers. No institution or institutional representative may approve course substitutions or waivers of the institution's core curriculum requirements for any currently enrolled student, except as provided in subsection (k) of this section. For students who transfer to a public institution from a college or university that is not a Texas public institution of higher education, courses the student completed prior to admission should be evaluated to determine whether they apply to one of the institution's core curriculum component areas. Only those courses the institution has accepted for transfer that can demonstrate fulfillment of the foundational component area content descriptions, core objectives, and semester credit hours required for the appropriate foundational component area or areas should be applied to the institution's core curriculum.

(k) Accommodations.

(1) An institution of higher education may, on a case-by-case basis, approve an accommodation of a specific core curriculum foundational component area requirement as described in paragraph (3) of this subsection for a student with a medically-documented learning disability, including but not limited to dyslexia, dysgraphia, or Asperger's Syndrome.

(2) Accommodation shall not include a waiver or exemption of any core curriculum requirement.

(3) An institution may approve for core curriculum applicability a course the institution offers but that is not approved as a part of the institution's core curriculum, if the institution demonstrates that the course has been approved to fulfill the same specific foundational component area requirement at five or more other Texas public colleges or universities. The Texas Common Course Numbering System course number may be used as evidence of the suitability of the course under this subsection.

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
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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SUBCHAPTER N. PUBLIC ACCESS TO COURSE INFORMATION

19 TAC §4.227

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §4.227, concerning Public Access to Course Information, without changes to the proposed text as published in the February 3, 2012, issue of the *Texas Register* (37 TexReg 443). The amendment clarifies the definition of "syllabus".

The intent of the amendment is to update the definition of "learning objectives" in this section to make it consistent with the language in §4.104. The language in §4.104 was adopted as a result of Senate Bill 1726, 82nd Legislature, which specified that, with certain exceptions, "each institution of higher education shall identify, adopt, and make available for public inspection measurable learning outcomes for each undergraduate course offered by the institution."

No comments were received concerning the amendment.

The amendment is adopted under Texas Education Code, Chapter 51, Subchapter Z, §51.974(g) and §51.96851(d), which provide the Coordinating Board with the authority to adopt rules regarding institutions of higher education making certain information available to the public.

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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CHAPTER 5. RULES APPLYING TO PUBLIC UNIVERSITIES, HEALTH-RELATED INSTITUTIONS, AND/OR SELECTED PUBLIC COLLEGES OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER B. ROLE AND MISSION, TABLES OF PROGRAMS, COURSE INVENTORIES

19 TAC §5.24

The Texas Higher Education Coordinating Board (Coordinating Board) adopts an amendment to §5.24, concerning Criteria and Approval of Mission Statements and Tables of Programs, with changes to the proposed text as published in the February 3, 2012, issue of the *Texas Register* (37 TexReg 444).

The intent of the amendment is to bring consistency across the Coordinating Board rules for the standards applying to new doctoral programs. In particular, the amendment specifies the undergraduate success measure that an institution must meet in order to satisfy §5.24(b)(5) and to be in line with §5.46 adopted in January 2011. The Coordinating Board approved changes to §5.46, adding an additional criterion for the approval of new doctoral degree programs. Section 5.46 stipulates that the most recent six-year baccalaureate degree graduation rate of the institution proposing a new doctoral program must equal or exceed the most recent statewide six-year baccalaureate degree graduation rate. The statewide six-year graduation rate is calculated by determining the number of first-time, full-time undergraduate students at public universities, excluding those enrolled at The University of Texas at Austin and Texas A&M University, and calculating the percentage of those students who graduated in six years from the same or another institution in Texas.

Three comments were received concerning the amendments.

Comment: The University of Texas at El Paso (UTEP) stated that the six-year baccalaureate graduation rate is not fair to their student demographic. A large percentage of UTEP students are not first-time-in-college (FTIC) students, receive financial aid, and work part or full-time. The median income of the El Paso metropolitan region makes a policy based on statewide comparisons potentially discriminatory. One of the alternative measures, comparing the change in one institution's degrees to at-risk students to the statewide average, should be weighted according to the size of the institution.

Response: The Board already approved the six-year graduation measures at the January 2011 meeting. The current proposal in rule language only brings the standards for preliminary authority in line with the existing standards that will be used to approve any new doctoral programs an institution may bring forward under that authority. No change was made as a result of this comment.

Comment: First, The University of Texas-Pan American (UTPA) stated that preliminary authority grants an institution permission to begin the development of new doctoral programs and that this development could be undertaken concurrently with an institution's initiatives to improve its six-year baccalaureate graduation rate. Second, inclusion of the three alternate success criteria would provide institutions with more flexibility to meet the standard for preliminary authority. Third, the proposed change in language disproportionately impacts institutions serving minority populations. Fourth, the Graduate Education Advisory Committee was not solicited for feedback prior to the proposed rule change.

Response: First, the addition of the six-year graduation rate standards to the preliminary authority rules is intended to provide an incentive for institutions to focus on the proven success of their undergraduate programs before beginning new doctoral programs. Second, staff agrees that the three alternative criteria should be included in the new preliminary authority standard, and the language of the proposal has been adjusted accordingly. Third, the inclusion of the three alternative criteria includes consideration of the change in the number of baccalaureate degrees awarded to "at risk" students which will mitigate the impact on institutions serving minority populations. Fourth, the Graduate Education Advisory Committee discussed the six-year graduation rate standards at their meeting on November 19, 2010.

Comment: First, The University of Texas at San Antonio stated that there is a contradiction between new doctoral programs being evaluated according to their quality and preliminary authority being evaluated according to an institution's quantity of graduates. The growth of doctoral programs should not be linked to

any measures associated with undergraduate programs, particularly those that evaluate the quantity of graduates rather than the quality of those undergraduate programs. Information already collected by the Coordinating Board, including external reviews and numbers of low-producing programs, could be used to evaluate the quality of undergraduate programs. Second, the statewide graduation rates do not take into account the number of at-risk students or those who have transferred from community colleges. Graduation rates should be adjusted for variables that moderate graduation outcomes.

Response: First, staff does not see a necessary contradiction between the quality of undergraduate programs and the number of their graduates. The intention of the measure is to ensure that institutions are giving adequate attention to the quality and productivity of their undergraduate programs before beginning new doctoral programs. Increasing the number of degree-holding undergraduates is also one of the key goals of Closing the Gaps. Second, staff agree that the number of at-risk students at an institution should be considered, and the proposed new language has been adjusted to include the alternative criteria.

The amendment is adopted under Texas Education Code, Chapter 61, Subchapter C, §61.051(e), which provides the Coordinating Board with the authority to approve new degree programs at public postsecondary institutions operating in Texas.

§5.24. Criteria and Approval of Mission Statements and Tables of Programs.

(a) In reviewing a request for preliminary authority to add a program (baccalaureate, master's, and doctoral) to the institution's Table of Programs, the Commissioner shall consider:

(1) a demonstrated need for a future program in terms of present and future vocational needs of the state and the nation;

(2) whether the proposed addition would complement and strengthen existing programs at the institution;

(3) whether a future program would unnecessarily duplicate other programs within the region, state, or nation; and

(4) whether a critical mass of students and faculty is likely to be available to allow the program to be offered at a high level of quality and to become self-sufficient on the basis of state funding.

(b) In reviewing a request for preliminary authority to add a doctoral program to the institution's Table of Programs, the Commissioner shall consider the criteria set out in subsection (a) of this section and the following additional criteria:

(1) a demonstrated regional, state, or national unmet need for doctoral graduates in the field, or an unmet need for a doctoral program with a unique approach to the field;

(2) evidence that existing doctoral programs in the state cannot accommodate additional students (or accessibility to these programs is restricted), or that expanding existing programs is not feasible or would not best serve the state;

(3) if appropriate to the discipline, the institution has self-sustaining baccalaureate- and master's-level programs in the field and/or programs in related and supporting areas;

(4) the program has the potential to obtain state or national prominence and the institution has the demonstrable capacity, or is uniquely suited, to offer the program and achieve that targeted prominence;

(5) demonstrated current excellence of the institution's existing undergraduate and graduate degree programs and how this excellence shall be maintained with the development and addition of a high quality doctoral program; measures of excellence include the number of graduates and six-year baccalaureate graduation rates which should equal or exceed the most recent annual statewide average six-year baccalaureate graduation rate as defined in Subchapter C, §5.46(15) of this chapter (relating to Criteria for New Doctoral Programs). If the graduation rate is below this state average, preliminary authority may still be considered if the institution meets at least two of the following three criteria:

(A) The percent of change in the ratio of baccalaureate degrees awarded to the total undergraduate enrollment is at or above the statewide percent of change over the most recent three years, and the institution has had an increase in productivity over the most recent three years.

(B) The percent of change in the total number of baccalaureate degrees awarded is at or above the statewide percent of change for the most recent three years, and the institution has had an increase in productivity over the most recent three years.

(C) The percent of change in the number of baccalaureate degrees awarded to "at risk" students as defined in Chapter 13, Subchapter I, §13.150 of this title (relating to Definitions) is at or above the state percent of change for the most recent three years, and the institution has had an increase in productivity over the most recent three years.

(6) satisfactory placement rates for graduates of the institution's current doctoral programs, with comparison to peer group placement rates when available;

(7) how the program will address Closing The Gaps by 2015;

(8) institutional resources to develop and sustain a high-quality program; and

(9) where appropriate, a demonstration of plans for external accreditation, licensing, or other applicable professional recognition of the program.

(c) Review and Approval Process.

(1) As provided by Texas Education Code, §61.051(e), at least every four years the Board shall review the role and mission statements, the table of programs and all degree and certificate programs offered by each public senior university or health related institution. Requests for preliminary authority for new degree programs shall be presented as part of this review. The review shall include the participation of the institution's board of regents.

(2) The review process shall be determined by the Commissioner, but shall include a review of low-producing degree programs at the institution.

(3) The Board shall approve or re-approve the mission statement. Each institution shall be given an opportunity to be heard by the Board about these matters.

(4) Preliminary authority is not required if a degree program meets all of the following conditions:

(A) The program has institutional and Board of Regents approval.

(B) The program is a non-doctoral program.

(C) The program is a non-engineering program (i.e., not classified under CIP code 14).

(D) The program would be offered by a university or health-related institution.

(5) All other requests for preliminary authority shall be made using the standard preliminary authority request form and shall be approved or denied by the Commissioner.

(6) An institution may appeal decisions regarding preliminary authority to the Board at one of its quarterly meetings.

(7) Outside the normal review process described in paragraph (1) of this subsection, an institution may request of the Board an amendment to its authorized role and mission and/or preliminary authority for additional degree programs at any time the Commissioner determines that compelling circumstances warrant.

(8) After approval or re-approval, requests for new programs and administrative changes shall be considered in the context of the approved role and mission for the institution.

(9) The Commissioner may approve minor changes to the mission statement of an institution during the period between the reviews referenced in paragraph (1) of this subsection.

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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CHAPTER 7. DEGREE GRANTING COLLEGES AND UNIVERSITIES OTHER THAN TEXAS PUBLIC INSTITUTIONS

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §7.3, §7.14

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §7.3 and §7.14, concerning Degree Granting Colleges and Universities Other Than Texas Public Institutions, with changes to the proposed text as published in the February 3, 2012, issue of the *Texas Register* (37 TexReg 445).

The amendment to §7.3 defines the meaning of a reciprocal state exemption agreement as it relates to out-of-state postsecondary institutions wanting to offer distance education in Texas. The new definition will provide a clearer understanding for out-of-state institutions to which Chapter 7 rules apply. The amendment to §7.14(1) includes an exemption based upon participation in a reciprocal state exemption agreement. The intent of the amendment is to clarify the process by which out-of-state institutions receive approval for offering distance education in Texas. This amendment allows for the Coordinating Board to enter into reciprocal state exemption agreements that could benefit Texas public institutions of higher education by exempting them from the oversight of other state higher education agencies for the purpose of distance education.

A comment was received from the president of the Independent Colleges and Universities of Texas on behalf of its membership.

Comment: "... the proposed rules be further modified to cover private or independent institutions of higher education exempting them from the oversight of other state higher education agencies for the purpose of distance education."

Response: Changes to §7.3(34) have been made to make clear the inclusion of Texas private institutions as defined in the Texas Education Code, §61.003.

A comment was received from a representative of Career Education Corporation.

Comment: It is unclear in the proposed rules if an institution must fulfill the requirements laid out in §7.14(1)(A) and (B) or if there are alternative methods of qualification for exemption.

Response: Staff agree that the proposed language is confusing and have inserted clarifying language in §7.14(1)(D). This section now includes the following language: "An institution's exemption under subparagraph (A) or (B) of this paragraph continues as long as it is in compliance with subparagraph (A) or (B) of this paragraph. Exempt institutions must also maintain compliance with subparagraph (C) of this paragraph."

A comment was received from Texas Tech University supporting the proposed rules in their entirety.

Response: Staff appreciates the support. No changes are necessary.

The amendments are adopted under Texas Education Code, Chapter 61, Subchapters G and H, which provide the Coordinating Board with the authority to administer the laws regulating private and out-of-state public postsecondary institutions operating in Texas.

§7.3. Definitions.

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

(1) Academic Associate Degree Program--A grouping of courses designed to transfer to an upper-level baccalaureate program. This specifically refers to the associate of arts and the associate of science degrees.

(2) Accreditation--The status of public recognition that an accrediting agency grants to an educational institution.

(3) Accrediting Agency--A legal entity that conducts accreditation activities through voluntary peer review and makes decisions concerning the accreditation status of institutions.

(4) Agent--A person employed by or representing a postsecondary educational institution within or without Texas who:

(A) solicits any Texas student for enrollment in the institution (excluding the occasional participation in a college/career fair involving multiple institutions or other event similarly limited in scope in the state of Texas);

(B) solicits or accepts payment from any Texas student for any service offered by the institution; or

(C) while having a physical presence in Texas, solicits students or accepts payment from students who do not reside in Texas.

(5) Alternative Certificate of Authority--A type of certificate of authority for approval of postsecondary institutions, with operations in the state of Texas, to confer degrees or courses applicable

to degrees, or to solicit students for enrollment in institutions that confer degrees or courses applicable to degrees that is governed by flexible, streamlined procedures, emphasizing the importance of innovation, consumer choice, and measurable outcomes in the delivery of educational services.

(6) Applied Associate Degree Program--A grouping of courses designed to lead the individual directly to employment in a specific career and that includes at least fifteen (15) semester credit hours or twenty-three (23) quarter credit hours of general education courses. This specifically refers to the associate of applied arts and the associate of applied science degrees.

(7) Associate Degree Program--A grouping of courses designed to lead the individual directly to employment in a specific career, or to transfer to an upper-level baccalaureate program. This specifically refers to the associate of arts, the associate of science, the associate of applied arts and the associate of applied science.

(8) Board--The Texas Higher Education Coordinating Board.

(9) Board Staff--The staff of the Texas Higher Education Coordinating Board including the Commissioner of Higher Education and all employees who report to the Commissioner.

(10) Career School or College--Any business enterprise operated for a profit, or on a nonprofit basis, that maintains a place of business in the State of Texas or solicits business within the State of Texas, and that is not specifically exempted by Texas Education Code §132.002 or §7.4 of this chapter (relating to Standards for Operations of Institutions), and:

(A) that offers or maintains a course or courses of instruction or study; or

(B) at which place of business such a course or courses of instruction or study is available through classroom instruction, by electronic media, by correspondence, or by some or all, to a person for the purpose of training or preparing the person for a field of endeavor in a business, trade, technical, or industrial occupation, or for career or personal improvement.

(11) Certificate of Approval--The Texas Workforce Commission's approval of career schools or colleges with operations in Texas to maintain, advertise, solicit for, or conduct any program of instruction in this state.

(12) Certificate of Authority--The Board's approval of postsecondary institutions (other than exempt institutions), with operations in the state of Texas, to confer degrees or courses applicable to degrees, or to solicit students for enrollment in institutions that confer degrees or courses applicable to degrees.

(13) Certificate of Authorization--The Board's acknowledgment that an institution is qualified for an exemption from the regulations in this subchapter.

(14) Certification Advisory Council--

(A) Council to advise the Board on standards and procedures related to certification of private, nonexempt postsecondary educational institutions, and to assist the Commissioner in the examination of individual applications for certificates of authority, and to perform other duties related to certification that the Board finds to be appropriate.

(B) The council shall consist of six members with experience in higher education, three of whom must be drawn from exempt private postsecondary institutions in Texas.

(C) The members shall be appointed for two year fixed and staggered terms.

(15) Change of Ownership or Control--Any change in ownership or control of a career school or college or an agreement to transfer control of such institution.

(A) The ownership or control of a career school or college is considered to have changed:

(i) in the case of ownership by an individual, when more than fifty (50) percent of the institution has been sold or transferred;

(ii) in the case of ownership by a partnership or a corporation, when more than fifty (50) percent of the institution or of the owning partnership or corporation has been sold or transferred; or

(iii) when the board of directors, officers, shareholders, or similar governing body has been changed to such an extent as to significantly alter the management and control of the institution.

(B) A change of ownership or control does not include a transfer that occurs as a result of the retirement or death of the owner if transfer is to a member of the owner's family who has been directly and constantly involved in the management of the institution for a minimum of two years preceding the transfer. For the purposes of this section, a member of the owner's family is a parent, sibling, spouse, or child; spouse's parent or sibling; or sibling's or child's spouse.

(16) Cited--Any reference to an institution in a negative finding or action by an accrediting agency.

(17) Classification of Instructional Programs (CIP) Code--The four (4) or six (6)-digit code assigned to an approved degree program in accordance with the CIP manual published by the U.S. Department of Education, National Center for Education Statistics. CIP codes define the authorized teaching field of the specified degree program, based upon the occupation(s) for which the program is designed to prepare its graduates.

(18) Commissioner--The Commissioner of Higher Education.

(19) Concurrent Instruction--Students enrolled in different classes, courses, and/or subjects being taught, monitored, or supervised simultaneously by a single faculty member.

(20) Conditional Certificate of Authorization--The Board's acknowledgement that an institution is qualified for an exemption, once certain specified conditions have been satisfied, from the regulations herein. This certificate will have a specific effective and expiration date determined by the nature of the conditions that must be satisfied. These conditions will be outlined in the certificate of authorization letter that accompanies the certificate.

(21) Degree--Any title or designation, mark, abbreviation, appellation, or series of letters or words, including "associate," "bachelor's," "master's," "doctor's" and their equivalents and foreign cognates, which signify, purport to signify, or are generally taken to signify satisfactory completion of the requirements of all or part of a program of study which is generally regarded and accepted as an academic degree-level program by accrediting agencies recognized by the Board.

(22) Educational or Training Establishment--An enterprise offering a course of instruction, education, or training that is not represented as being applicable to a degree.

(23) Exempt Institution--An institution that is accredited by an agency recognized by the Board under §7.6 of this chapter (relating to Recognition of Accrediting Agencies) or a career school or col-

lege that applies for and is declared exempt under this chapter, by the Texas Workforce Commission as described in Texas Education Code, §61.003(8), or Texas Education Code Chapter 132, respectively. Exempt institutions may still have to comply with certain Board rules.

(24) Fictitious Degree--A counterfeit or forged degree or a degree that has been revoked.

(25) Fraudulent or Substandard Degree--A degree conferred by a person who, at the time the degree was conferred, was:

(A) operating in this state in violation of this subchapter;

(B) not eligible to receive a certificate of authority under this subchapter and was operating in another state in violation of a law regulating the conferral of degrees in that state or in the state in which the degree recipient was residing or without accreditation by a recognized accrediting agency, if the degree is not approved through the review process described by §7.12 of this chapter (relating to Review and Use of Degrees from Institutions Not Eligible for Certificates of Authority); or

(C) not eligible to receive a certificate of authority under this subchapter and was operating outside the United States, and whose degree the Board, through the review process described by §7.12 of this chapter, determines is not the equivalent of an accredited or authorized degree.

(26) Occasional Courses--Courses offered not more than twice at any given location in the state.

(27) Out-of-State Public Postsecondary Institution--Any senior college, university, technical institute, junior or community college, or the equivalent which is controlled by a public body organized outside the boundaries of the State of Texas.

(28) Person--Any individual, firm, partnership, association, corporation, enterprise, or other private entity or any combination thereof.

(29) Physical Presence--

(A) while in Texas a representative of the school or a person being paid by the school who conducts an activity related to postsecondary education, including for the purposes of recruiting students (excluding the occasional participation in a college/career fair involving multiple institutions or other event similarly limited in scope in the state of Texas), teaching or proctoring courses including internships, clinicals, externships, practicums, and other similarly constructed educational activities (excluding those individuals that are involved in teaching courses in which there is no physical contact with Texas students), or grants certificates or degrees; and/or

(B) the institution has any location within the state of Texas which would include any address, physical site, telephone number, or facsimile number within or originating from within the boundaries of the state of Texas. Advertising to Texas students, whether through print, billboard, internet, radio, television, or other medium alone does not constitute a physical presence.

(30) Postsecondary Educational Institution--An educational institution which:

(A) is not a public community college, public technical college, public senior college or university, medical or dental unit or other agency as defined in Texas Education Code §61.003;

(B) is incorporated under the laws of this state, or maintains a place of business in this state, or has an agent or representative present in this state, or solicits business in this state; and

(C) furnishes or offers to furnish courses of instruction in person, by electronic media, by correspondence, or by some means or all leading to a degree; provides or offers to provide credits alleged to be applicable to a degree; or represents that credits earned or granted are collegiate in nature, including describing them as "college-level," or at the level of any protected academic term.

(31) Private Postsecondary Educational Institution--An institution which:

(A) is not an institution of higher education as defined by Texas Education Code §61.003;

(B) is incorporated under the laws of this state, maintains a place of business in this state, has a representative presence in this state, or solicits business in this state; and

(C) furnishes or offers to furnish courses of instruction in person, by electronic media, or by correspondence leading to a degree or providing credits alleged to be applied to a degree.

(32) Program or Program of Study--Any course or grouping of courses which are represented as entitling a student to a degree or to credits applicable to a degree.

(33) Protected Term--The terms "college," "university," "school of medicine," "medical school," "health science center," "school of law," "law school," or "law center," its abbreviation, foreign cognate or equivalents.

(34) Reciprocal State Exemption Agreement--An agreement entered into by the Board with an out-of-state state higher education agency or higher education system for the purpose of creating a reciprocal arrangement whereby that entity's institutions are exempted from the Board oversight for the purposes of distance education. In exchange, participating Texas public or private institutions of higher education as defined in Texas Education Code §61.003 would be exempted from that state's oversight for the purposes of distance education.

(35) Recognized Accrediting Agency--Any accrediting agency the standards of accreditation or membership for which have been found by the Board to be sufficiently comprehensive and rigorous to qualify its institutional members for an exemption from the operation of this chapter.

(36) Representative--A person who acts on behalf of an institution regulated under this subchapter. The term includes, without limitation, recruiters, agents, tutors, counselors, business agents, instructors, and any other instructional or support personnel.

(37) Required State or National Licensure--The requirement for graduates of certain professional programs to obtain a license from state or national entities for entry-level practice.

(38) Substantive Change--Any change in principal location, ownership, or governance.

§7.14. Distance Education Approval Processes for Degree Granting Colleges and Universities Other Than Texas Public Institutions.

An institution which does not meet the definition of institution of higher education contained in Texas Education Code §61.003 and wishes to offer distance education to students in Texas must follow the requirements in paragraphs (1) and (2) of this section. For the purposes of this section distance education shall mean education or training delivered off campus via educational technologies where the student(s) and the instructor(s) are separated by physical distance and/or time.

(1) Exempt Institutions.

(A) An institution is exempt and does not need to receive permission from the Board to offer distance education programs and courses to Texas students if it fulfills the following:

(i) Accredited to offer degrees at a specific level by an accrediting agency recognized by the Board or approved by a Texas state agency which authorizes the school's graduates to take a professional or career and technical state licensing examination administered by that agency; and

(ii) No physical presence in the state as defined by §7.3 of this chapter (relating to Definitions).

(B) An institution is also exempt and does not need to receive permission from the Board to offer distance education programs and courses to Texas students if it is covered by a reciprocal state exemption agreement.

(C) An institution's exemption applies only to the degree level for which the programs or institution is accredited.

(D) An institution's exemption under subparagraph (A) or (B) of this paragraph continues as long as it is in compliance with subparagraph (A) or (B) of this paragraph. Exempt institutions must also maintain compliance with subparagraph (C) of this paragraph. If an institution is no longer accredited by an accreditor recognized by Texas and/or maintains a physical presence in Texas or if an institution is no longer covered by a reciprocal state exemption agreement, the institution is no longer eligible for an exemption and must receive Board authority to offer distance education to Texas students.

(2) Nonexempt Institutions.

(A) An institution is not exempt and must receive Board permission to offer distance education programs and courses to Texas students if it fulfills any of the following:

(i) Is accredited to offer degrees at a specific level by an accrediting agency recognized by the Board or approved by a Texas state agency which authorizes the school's graduates to take a professional or career technical state licensing examination administered by that agency and maintains a physical presence in Texas as defined by §7.3 of this chapter; or

(ii) Is not accredited to offer degrees at a specific level by an accrediting agency recognized by the Board nor approved by a Texas state agency which authorizes the school's graduates to take a professional or career technical state licensing examination administered by that agency.

(B) An institution that is accredited to offer degrees at a specific level by an accrediting agency recognized by the Board or approved by a Texas state agency which authorizes the school's graduates to take a professional or career technical state licensing examination by that agency and maintains a physical presence in Texas as defined by §7.3 of this chapter must follow the guidelines established in §7.7 of this chapter (relating to Institutions Accredited by Board Recognized Accreditors).

(C) An institution that is not accredited to offer degrees at a specific level by an accrediting agency recognized by the Board nor approved by a Texas state agency which authorizes the school's graduates to take a professional or career technical state licensing examination administered by that agency, whether or not it maintains a physical presence in Texas as defined by §7.3 of this chapter must follow the guidelines established in §7.8 of this chapter (relating to Institutions Not Accredited by a Board Recognized Accreditor).

(D) An institution that would like to offer a degree program or courses leading to a degree in a religious discipline via distance education is exempt from seeking Board approval. A religious institution that would like to offer a degree program or courses leading to a degree in a non-religious discipline via distance education must follow the requirements outlined in subparagraph (B) or (C) of this paragraph.

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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CHAPTER 21. STUDENT SERVICES
SUBCHAPTER G. TEACH FOR TEXAS LOAN REPAYMENT ASSISTANCE PROGRAM

19 TAC §§21.173, 21.174, 21.176

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §§21.173, 21.174, and 21.176, concerning Teach for Texas Loan Repayment Assistance Program, without changes to the proposed text as published in the January 20, 2012, issue of the *Texas Register* (37 TexReg 180).

Specifically, the amendment to §21.173 reverses the order of two priorities of application acceptance. Currently, the rule lists financial need as second among the three established priorities. The amendment changes financial need to the third priority, after severity of shortage of teachers in the community and/or teaching field. The amendments to §21.174 add language to clarify that the eligibility requirements must be met during the service period for which the teacher receives repayment assistance. The amendment to §21.176 authorizes the Commissioner to determine the annual repayment amount, taking into consideration the amount of available funding; it deletes the statement that the annual amount shall not exceed $5,000 and the aggregate amount shall not exceed $20,000. These amounts are not specified in statute, but rather, are aligned with the conditional grants awarded in the program that was the predecessor to the loan repayment program. The 82nd Texas Legislature authorized funding for the Teach for Texas Loan Repayment Assistance Program in the amount of $500,000 for each year of the 2012-2013 biennium. This represents a 91 percent decrease in funding compared with the previous four years. This program was oversubscribed before the decrease, with almost 6,000 teachers applying for approximately 1,350 loan repayment awards in FY2011. The severity of the reduction in funding necessitates both a reduction in the award amount and a greater emphasis on the most critical shortages when renewal applications are ranked for FY2012 and FY2013 awards.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §56.352, which provides the Coordinating Board with the authority to adopt rules for the administration of Texas Education Code, §§56.351 - 56.355; and under Texas Education Code, §56.353(c), which provides that if the money available for the

loan repayment assistance is insufficient, the Coordinating Board shall establish priorities for awarding repayment assistance to address the most critical teacher shortages.

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 T. THE VACCINATION AGAINST BACTERIAL MENINGITIS FOR ENTERING STUDENTS AT PUBLIC AND PRIVATE OR INDEPENDENT INSTITUTIONS OF HIGHER EDUCATION

19 TAC §21.612, §21.614

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §21.612 and §21.614, concerning the Vaccination Against Bacterial Meningitis for Entering Students at Public and Private or Independent Institutions of Higher Education, without changes to the proposed text as published in the February 3, 2012, issue of the *Texas Register* (37 TexReg 446).

The intent of the amendment to §21.612(1)(A) is to expand the definition of a new student to include a student previously exempt under §21.614(a)(2) - (5), should their exception no longer apply. The proposed amendment in §21.614(b)(2) is to delete the requirement that a student seeking an exception from an initial bacterial meningitis vaccination or booster dose for reasons of conscience, including a religious belief, be required to use a conscientious objection form obtained from the Texas Department of State Health Services (DSHS). The amended rules will allow a student to use a form developed by the Coordinating Board, which can be downloaded from the agency website, notarized, and filed with the student's institution of higher education.

Summary of comments received and staff responses to those comments.

Comment: A UT Dallas registrar commented that the proposed rules for the definition change in §21.612(1)(A) would be difficult to implement as their current system identifies the student as being enrolled the previous term and could bypass the checks. Further, including the definition change under "new student" could be misleading to the student as the student is considered a "continuing student" except in the area of bacterial meningitis. The students would not fall into the "returning student" definition as they would not have stopped out for a semester.

Response: Staff recommend no change, as staff believe that the computer systems at institutions could be changed to flag a student that has an exemption that could change, such as when an entering student enrolls for a semester in all online courses, followed by taking courses in a classroom setting the following semester.

Comment: One comment was received from Amarillo College supporting the proposed change to §21.614(b)(2).

Comment: A total of seven similar comments were received from: Texas Medical Association/Texas Academy of Family Physicians/Texas Pediatric Society; Patsy Schanbaum; Greg and Arlene Williams; Dr. Karen Jarrell, UT Dallas office of the Registrar; Anna Dragsbaek, JD, The Immunization Partnership, Houston, TX; Senator Wendy Davis; and Trish Parnell, Director, PKIDs (Parents of Kids with Infectious Diseases), Vancouver, WA.

The commenters oppose the change to §21.614(b)(2) and state that having the conscientious objection form available for download on the Coordinating Board's website will make it considerably easier for students to refuse the meningitis vaccine. Further, it is believed this will significantly increase the number of students who decide not to get the vaccine for reasons of convenience instead of genuine medical or religious reasons. Comments from the Immunization Partnership stated that there would be negative public health ramifications as a result of the proposed change including:

Elimination of the ability to track the prevalence of students without a meningitis vaccination;

Disruption of the ability of medical personnel to target vaccine stock and emergency medical supplies in the event of a major meningitis outbreak; and

Elimination of the state's ability to monitor the number of students without a vaccination and the potential creation of clusters of susceptible students.

The Immunization Partnerships comments further stated that if the proposed rules pass, the Coordinating Board should continue to work with DSHS to make improvements to the process of obtaining an exemption. Suggestions included requiring students to view educational materials prior to obtaining the exemption form that encourage students to consider the consequences of refusing the vaccine. Another suggestion would require colleges to report the number of exemptions that are recorded for their campus to DSHS, and for the Coordinating Board to provide extensive training to registrars and administration officials to encourage best practices on college campuses.

Comments from a joint letter from the Texas Medical Association/Texas Academy of Family Physicians/Texas Pediatric Society stated that their organizations worked closely with state legislators, DSHS representatives, and State Health Services Council members to ensure that conscientious exemption process housed at DSHS was appropriately rigorous and discouraged parents or individuals from seeking an exemption as an easy route to school enrollment. They further commented that establishing a secondary process would weaken the ability to understand patterns of vaccine refusal in the backdrop of potential threats of disease epidemics. Additionally, they stated that creating an additional, less-structured process for nonmedical exemptions housed at the Coordinating Board is damaging to public health policy in Texas. Allowing for a separate agency to oversee a separate opt-out process dilutes the public health practice of providing immunizations and takes the process away from the expertise and authority to accomplish this mission.

Response: Staff recommended no change, as the legislation allows entering students the ability to opt-out of the bacterial

meningitis vaccine requirement and does not require that a form from DSHS be used.

The amendments are adopted under Texas Education Code, Chapter 51, §51.9192(e) which provides the Coordinating Board with the authority to adopt rules to administer this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER II. EDUCATIONAL AIDE EXEMPTION PROGRAM

19 TAC §§21.1083 - 21.1086

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §§21.1083 - 21.1086, concerning Educational Aide Exemption Program, without changes to the proposed text as published in the February 10, 2012, issue of the *Texas Register* (37 TexReg 588).

Specifically, the amendments to §21.1083 bring program rules into compliance with provisions of Senate Bill 1, 82nd Legislature, First Special Session, which indicate that new persons entering the program in fall 2012 or later must be enrolled in courses required for teacher certification in one or more subject areas determined by the Texas Education Agency to be experiencing a critical shortage of teachers at the public schools in Texas. Subsequent paragraphs of the section are renumbered accordingly. The amendment to §21.1084(c) clarifies that the provisions of that subsection will only apply if funding is provided for reimbursing institutions and the funding amount is not enough to cover all awards. The amendment to §21.1085(b)(2) clarifies that the student is to be reimbursed for the relevant tuition and fee charges if the institution chooses to make the exemption after the student has paid the charges. Amendments to §21.1085(c) indicate the Coordinating Board will not distribute application forms to colleges and students, but rather will post the summer and fall/spring applications on its website for the colleges to download and provide their students; that the colleges are not to make spring term awards unless they have confirmation from the relevant school districts that the students are to be employed for that term; and that the summer application will be posted on the Coordinating Board's website by March 1 of each year. Amendments to the title of §21.1086 and to §21.1086(b) and (c) indicate that the provisions of this section will come into play only if funds are made available for reimbursing institutions for the costs of the exemptions.

The following comment was received regarding the amendments.

Comment: The University of Texas System commented that the new requirement of verifying a degree plan and/or actual class enrollment and changes prior to approval each semester will add additional financial aid staff duties and potentially cause a delay in the approval process that might extend beyond tuition due dates. Also, if required courses within the approved subject areas are only offered as upper-level courses, the exemption could possibly be available only at the junior and senior levels for some institutions.

Response: The Board does not recommend any change based on this comment. Although it is recognized that the new requirements will add complexity and possible delays to the process of identifying eligible students, the requirement that students be enrolled in courses required for certification in a subject area experiencing a critical shortage of teachers in Texas is statutorily mandated by Senate Bill 1, 82nd Texas Legislature, First Special Session. The requirement applies only to persons receiving their first exemption in fall 2012 or later, and as students become aware of this additional restriction, the number of ineligible applicants should decrease.

The amendments are adopted under Texas Education Code §54.363 (formerly §54.214(e)) which authorizes the 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 TT. EXEMPTION PROGRAM FOR DEPENDENT CHILDREN OF PERSONS WHO ARE MEMBERS OF ARMED FORCES DEPLOYED ON COMBAT DUTY

19 TAC §§21.2270 - 21.2275

The Texas Higher Education Coordinating Board (Coordinating Board) adopts new §§21.2270 - 21.2275, concerning Exemption Program for Dependent Children of Persons Who Are Members of Armed Forces Deployed on Combat Duty, without changes to the proposed text as published in the February 10, 2012, issue of the *Texas Register* (37 TexReg 589).

This exemption program is currently found in 19 TAC §21.2111. Section 21.2111 was proposed for repeal in the April 20, 2012, issue of the *Texas Register* (37 TexReg 3857). The decision was made to have the exemption program for the children of deployed members of the military as stand-alone rules so they would be easier for people to locate. The new sections include information regarding the authority and purpose for the rules, definitions of terms used in the rules, eligibility requirements, and procedures governing the reimbursement of foregone tuition.

The following comment was received regarding the new sections.

Comment: The University of Texas System asked the following questions: How will the new program requirement for maximum semester credit hours per student be monitored? Will there eventually be another institutional report to submit to the Coordinating Board? If not, how will institutions monitor remaining hours of eligibility and verify eligibility prior to tuition due dates?

Response: It will be the institution's responsibility to track the students' hours. Tracking hours for students who remain at the same school should be straightforward, but if institutions receive incoming transfer students who apply for this exemption, it will be advisable for them to ask the student about his or her prior use of the program and/or contact the previous school for related statistics. No change was made to the rules based on this comment.

The new sections are adopted under the Texas Education Code, §54.2031(i), which provide the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §54.2031.

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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CHAPTER 22. GRANT AND SCHOLARSHIP PROGRAMS
SUBCHAPTER K. PROVISIONS FOR SCHOLARSHIPS FOR STUDENTS GRADUATING IN THE TOP 10 PERCENT OF THEIR HIGH SCHOOL CLASS

19 TAC §§22.197 - 22.202

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §§22.197 - 22.202, concerning 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 February 10, 2012, issue of the *Texas Register* (37 TexReg 590).

Specifically, the amendments to §22.197 remove the capitalization of the word "staff" in the phrase "Board Staff" and provide a better definition for the term "financial need" as used in this subchapter.

Amendments to §22.198 list requirements that must be met by institutions in order to participate or continue to participate in the program and repercussions for failure to do so. The requirements include such things as exercising no discrimination in the identification of award recipients, maintaining a current agreement with the Coordinating Board to abide by the rules and regulations of the program, notifying the Coordinating Board staff and their students if they are placed on probation by their accrediting agency, maintaining adequate records for the disbursement of funds to eligible students, and meeting all program reporting requirements in a timely manner. The repercussions for failure to follow program requirements include required refunds to the Coordinating Board of program funds and submission to program reviews.

The amendments to §22.199 clarify the requirements that students receiving an initial Top 10 Percent Scholarship award must meet, including: (1) graduation from a public or private high school in Texas while ranked in the top 10 percent of the graduating class; (2) submission of the Free Application for Federal Student Aid (FAFSA) in time to generate the Central Processing System (CPS) results in a non-rejected status or the Texas Application for State Financial Aid (TASFA) to the financial aid office by the deadline set each year by the Coordinating Board; (3) full-time enrollment as of the census date; and (4) registration with Selective Service or being exempt from that registration.

The amendments to §22.200 bring the section title more into alignment with its contents and revise subsection (c) to clarify that each year the Coordinating Board will establish a deadline by which students must submit their FAFSA or TASFA. The amendments also clarify that this deadline defines two "priority" levels of applicants. The Coordinating Board will process vouchers for students in the first "priority" level and then determine if additional funding is available to process vouchers for students in the second "priority" level. Obsolete language in subsection (c) was removed since high schools are no longer responsible for submitting to the Coordinating Board the names and addresses of potential award recipients. New language was added to indicate all awards are for the fall semester or terms only and that no student may receive more than four awards through the program.

The amendments to §22.201 clarify how students can qualify for continuation awards, which students can qualify for extensions to the four-year award limit, and the documentation that institutions must keep for students granted an extension. The amendments also explain that completing a bachelor's degree terminates a student's eligibility to receive additional awards.

The amendments to §22.202 replace references to "Board Staff" with "Board staff" and clarify the process by which institutions request funds from the Coordinating Board.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, §61.027, which provides the Coordinating Board with general rulemaking authority, and Rider 35 to Article III of the General Appropriations Act of the 82nd 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.

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PART 2. TEXAS EDUCATION AGENCY

CHAPTER 74. CURRICULUM REQUIREMENTS

The State Board of Education (SBOE) adopts amendments to §74.1 and §74.3 and new §§74.71-74.74, concerning curriculum requirements. The amendment to §74.1 and new §74.71 are adopted without changes to the proposed text as published in the December 16, 2011, issue of the *Texas Register* (36 TexReg 8482) and will not be republished. The amendment to §74.3 and new §§74.72-74.74 are adopted with changes to the proposed text as published in the December 16, 2011, issue of the *Texas Register* (36 TexReg 8482). Sections 74.1 and 74.3 address the curriculum that school districts are required to provide. The adopted amendments update requirements for school districts to align with recently passed legislation and provide additional clarification regarding requirements. The adopted new sections update the graduation requirements to align with recently passed legislation, allow additional courses to satisfy certain graduation requirements, and provide additional clarification regarding requirements.

The amendments to 19 TAC Chapter 74, Subchapter F, Graduation Requirements, Beginning with School Year 2007-2008, adopted by the SBOE in November 2006, included changes to reflect the four years of mathematics and science graduation requirements of House Bill (HB) 1, 79th Texas Legislature, Third Called Session, 2006. These changes only applied to the Recommended High School and Distinguished Achievement Programs found in 19 TAC §74.63 and 19 TAC §74.64.

The 81st Texas Legislature, 2009, passed HB 3, amending the TEC, §28.025, to increase flexibility in graduation requirements for students. While HB 3 removed SBOE authority to designate a specific course or a specific number of credits in the enrichment curriculum as requirements for the Recommended High School Program (RHSP), the SBOE retains authority in the foundation and enrichment curriculum for the Minimum High School Program (MHSP) and the Distinguished Achievement Program (DAP).

In January 2010, the SBOE adopted amendments to 19 TAC Chapter 74, Subchapter F, to incorporate changes to high school graduation programs in light of new graduation requirements from HB 3. In addition, the amendments allowed three career and technical education (CTE) courses to count for the fourth mathematics credit under the RHSP and two CTE courses to count for the fourth mathematics credit under the DAP. The SBOE approved changes allowing five new CTE courses to count for the fourth science credit under the RHSP and DAP. Additionally, changes were adopted allowing the Professional Communications course to satisfy the speech graduation requirement and the Principles and Elements of Floral Design course to satisfy the fine arts graduation credit.

In January 2011, the SBOE approved a new course, Advanced Quantitative Reasoning, to satisfy the fourth mathematics graduation requirement. In April 2011, the SBOE adopted revisions to the Texas Essential Knowledge and Skills in technology applications. The adopted changes allow Digital Art and Animation and 3-D Modeling and Animation to satisfy the fine arts graduation requirement.

The 82nd Texas Legislature, 2011, passed legislation impacting SBOE rules, including provisions relating to high school graduation requirements for a student who is unable to participate in physical activity due to disability or illness and inclusion of certain career and technical education courses as options for satisfying certain mathematics and science graduation requirements.

In November 2011, the SBOE approved for first reading and filing authorization proposed amendments to 19 TAC §74.1 and §74.3 and proposed new 19 TAC Chapter 74, Subchapter G, that would update and clarify school district requirements and graduation requirements beginning with students entering Grade 9 in the 2012-2013 school year.

In response to public comment, §74.3(b)(2)(C) was modified at adoption to require school districts to offer two additional science courses along with Integrated Physics and Chemistry (IPC), Biology, Chemistry, and Physics, with the provision that the requirement to offer two additional science courses may be reduced to one under certain circumstances. Also in response to public comment, subsection (b)(8) in §§74.72-74.74 was modified at adoption to remove language relating to the combination of two half credits for fine arts credit. In addition, language was modified at adoption in §74.72(b)(2)(A), relating to mathematics; subsection (b)(5), relating to academic elective; and subsection (c), relating to elective courses, to clarify that half credits for courses that have end-of-course assessments cannot be combined with half credits from different courses to satisfy graduation requirements. The same change was made at adoption in §74.73(c), relating to elective courses, and §74.74(c), relating to elective courses.

The SBOE took action to approve the amendments and new sections for second reading and final adoption during its January 2012 meeting.

The adopted amendments and new sections have no new procedural and reporting requirements. The adopted amendments and new sections have no new locally maintained paperwork requirements.

The Texas Education Agency determined that there is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

In accordance with the TEC, §7.102(f), the SBOE approved the amendments and new sections for adoption by a vote of two-thirds of its members to specify an effective date earlier than the beginning of the 2012-2013 school year. The earlier effective date will enable districts to plan for future course offerings and schedule students in courses appropriately. The effective date for the amendments and new sections is 20 days after filing as adopted.

Following is a summary of the public comments received and the corresponding responses regarding the proposed amendments and new sections.

Comment: One administrator asked if the proposed language in 19 TAC §74.72(b)(5), "a student may satisfy the academic elective credit through a combination of two science courses only if neither is a course for which there is an end-of-course assessment," would apply to all science courses or only to Medical Microbiology and Pathophysiology as those are the only courses allowed for one-half to one credit.

Response: The SBOE did not take action to adopt the proposed language in 19 TAC §74.72(b)(5). The SBOE did take action to adopt language that reads, "Academic elective--one credit. The credit must be selected from World History Studies, World Geography Studies, or science course(s) approved by the SBOE

for science credit as found in Chapter 112 of this title (relating to Texas Essential Knowledge and Skills for Science). If a student elects to replace IPC with either Chemistry or Physics as described in subsection (b)(3) of this section, the academic elective must be the other of these two science courses. A student may not combine a half credit of either World History Studies or World Geography Studies with a half credit from another academic elective course to satisfy the academic elective credit requirement."

Comment: One teacher stated that 19 TAC §74.71(c)(3) allows students who have failed to be promoted to Grade 10 one or more times to move to the Minimum High School Plan. The commenter stated that such students should be flagged as at-risk and given additional learning opportunities that will help the students quickly earn credits and prepare for the State of Texas Assessments of Academic Readiness (STAAR) exams.

Response: The SBOE disagreed. This comment addresses methodology that would be used by a local school district. Under statute, TEC, §28.002(i), the SBOE may not adopt rules that designate the methodology used by a teacher.

Comment: One teacher stated that there is a need to help at-risk students who are behind in credits by providing support and opportunities to keep them enrolled in school and making progress toward graduation.

Response: This comment is outside the scope of the proposed rulemaking.

Comment: One teacher stated that if biblical literature is to be part of the required enrichment curriculum, then other religious texts (e.g., the Koran, the Book of Mormon) must be covered and compared and contrasted.

Response: The SBOE disagreed and determined that the required enrichment curriculum was appropriate as proposed. Under statute, TEC, §28.011(i), the board of trustees of a school district is not prohibited from offering an elective course based on the books of a religion other than Christianity.

Comment: One administrator stated that there continues to be some confusion regarding whether a student who completed IPC, Biology, and Chemistry but did not pass the Chemistry end-of-course assessment could shift to the MHSP and use Chemistry as an elective. The commenter suggested including the wording in the graduation rule to prevent confusion.

Response: The SBOE disagreed and determined that the proposed language regarding science graduation requirements was sufficiently clear.

Comment: One administrator asked if the proposed phrase "a final credit may be selected from one or a combination of two of the following" means that students can fulfill this requirement only by combining courses that allow one-half to one credit.

Response: The SBOE did not take action to adopt the language as proposed. The SBOE did take action to adopt language that specifies courses for which a student may not combine two or more half credits in order to satisfy a graduation requirement.

Comment: One community member stated that in §74.73(b)(3)(B) and (C) and §74.74(b)(3)(A) and (B) it would be helpful if the wording used less conditional language. The commenter suggested the following language, "The third and fourth science may be taken concurrently."

Response: The SBOE disagreed and determined that the amended language was appropriately clear. Under statute, TEC, §28.025(b-2), the SBOE is required to allow a student to comply with the curriculum requirements for a mathematics course taken after the successful completion of Algebra I and geometry and either after the successful completion of or concurrently with Algebra II or a science course taken after the successful completion of biology and chemistry and either after the successful completion of or concurrently with physics by successfully completing an advanced career and technical course designated by the SBOE as containing substantively similar and rigorous academic content.

Comment: One administrator expressed agreement with the proposed change to make the sequence of mathematics and science courses the same on both the RHSP and DAP.

Response: The SBOE disagreed and determined that the sequences should be the same on the RHSP and DAP as required by statute. However, the SBOE took action to adopt additional sequence requirements related to courses that are allowed on the RHSP, but not on the DAP.

Comment: Two administrators expressed concern with proposed course sequencing of CTE courses that can satisfy the fourth science credit in §74.73(b)(3)(C) and §74.74(b)(3)(B).

Response: The SBOE disagreed and determined that the language was appropriate as amended. Under statute, TEC, §28.025(b-2), the SBOE is required to allow a student to comply with the curriculum requirements for a mathematics course taken after the successful completion of Algebra I and geometry and either after the successful completion of or concurrently with Algebra II or a science course taken after the successful completion of biology and chemistry and either after the successful completion of or concurrently with physics by successfully completing an advanced career and technical course designated by the SBOE as containing substantively similar and rigorous academic content.

Comment: One teacher inquired about the language in §74.73(b)(3)(C) regarding course sequencing and CTE courses. The commenter asked how situations would be handled if a student was enrolled in a CTE course for science credit prior to completing biology and chemistry.

Response: The SBOE provided the following clarification. CTE courses completed out of the prescribed sequence would not satisfy the science or mathematics high school graduation requirements and would be state elective credits only.

Comment: One administrator stated that CTE course sequencing requirements for mathematics and science are difficult to explain and justify to parents.

Response: The SBOE disagreed and determined that the language was appropriate as amended. Under statute, TEC, §28.025(b-2), the SBOE is required to allow a student to comply with the curriculum requirements for a mathematics course taken after the successful completion of Algebra I and geometry and either after the successful completion of or concurrently with Algebra II or a science course taken after the successful completion of biology and chemistry and either after the successful completion of or concurrently with physics by successfully completing an advanced career and technical course designated by the SBOE as containing substantively similar and rigorous academic content.

Comment: One administrator stated that students who barely make it through Algebra II will be unsuccessful in a fourth mathematics course and should be allowed to complete Mathematical Models with Applications in order for the students to graduate on the RHSP.

Response: The SBOE disagreed and determined that the sequence of mathematics courses on the RHSP was appropriate as proposed.

Comment: Two administrators stated that the SBOE should amend the graduation requirements to allow courses to count for credit toward graduation regardless of the sequence in which they were taken.

Response: The SBOE disagreed and determined that course sequences were appropriate as proposed. Additionally, the sequence of CTE courses that satisfy the fourth mathematics and science graduation requirements is required under statute, TEC, §28.025(b-2).

Comment: One administrator encouraged the SBOE to consider delaying the implementation of the new graduation requirements in Subchapter G until 2013-2014. The commenter stated that since many districts are currently registering students for next year's courses, the students may have to redo course selection or miss opportunities for courses.

Response: The SBOE disagreed and determined that the timeline for implementation of 19 TAC Chapter 74, Curriculum Requirements, Subchapter G, Graduation Requirements, Beginning with School Year 2012-2013, was applicable only to students entering Grade 9 in 2012-2013 or later and was appropriate as proposed.

Comment: One administrator asked if students who entered high school before the 2012-2013 school year would be able to combine two one-half credits of fine arts to satisfy the fine arts graduation requirement. The commenter suggested that the SBOE make it clear in Subchapter F so that counselors would not be confused.

Response: The SBOE provided the following clarification. The proposed graduation requirements will apply for students entering high school beginning with school year 2012-2013. However, the rule in 19 TAC §74.26(d) that permits a school district, in accordance with local district policy, to award credit proportionately to students who are able to successfully complete only one semester of a two-semester course is applicable to all students who are in high school.

Comment: Three administrators expressed disagreement with proposed new §§74.72(b)(8), 74.73(b)(8), and 74.74(b)(8), and stated that if the concern behind the new fine arts graduation requirements is transfer students, who need this flexibility, then the language in Subchapter G should only refer to such situations.

Response: The SBOE agreed that some students may need the flexibility of combining two one-half credit courses. The SBOE determined that current rule in 19 TAC §74.26(d), which permits a school district, in accordance with local district policy, to award credit proportionately to students who are able to successfully complete only one semester of a two-semester course, is applicable to all students who are in high school and allows for this flexibility. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Eight teachers, eight administrators, two community members, and one university/college staff member stated that the proportionate credit language in 19 TAC Chapter 74, Subchapter C, already allows districts to address special situations such as students who relocate and need the second half of a course that the new school does not offer.

Response: The SBOE disagreed and determined that existing 19 TAC §74.26(d) allows for the award of proportionate credit in accordance with local district policy but does not limit this to special situations. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Two teachers, three administrators, one community member, and one university/college staff member stated that while there is a potential and defendable benefit for allowing transfer students to enroll in a different fine arts course if the course in which they were enrolled at the previous school is not offered at the new school, this shift in policy without clearly established guidelines for these special circumstances opens the door for educational malpractice.

Response: The SBOE disagreed and determined that existing 19 TAC §74.26(d) allows for the award of proportionate credit in accordance with local district policy but does not limit this to special situations. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: One teacher asked the SBOE to consider amending the fine arts graduation requirements to allow the CTE courses Interior Design and Fashion Design to satisfy the fine arts graduation requirement.

Response: The SBOE disagreed and determined that the courses that satisfy the fine arts graduation requirement were appropriate as proposed. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Two teachers stated opposition to the proposed new fine arts graduation requirements.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: One teacher and one administrator stated that allowing two one-half credits for fine arts would devalue sequential curriculum based on the TEKS.

Response: The SBOE disagreed and determined that existing 19 TAC §74.26(d) allows for the award of proportionate credit in accordance with local district policy. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: One teacher stated that apparently the SBOE does not understand the importance of prerequisites.

Response: The SBOE disagreed and determined that the language regarding prerequisites was appropriate as proposed.

Comment: One teacher stated that student choice is important, but students must complete level one fine arts courses before going to a higher level.

Response: The SBOE agreed and determined that level one fine arts courses are prerequisites for all level two fine arts courses. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: One administrator stated that students' grade point averages could be affected by the proposed new fine arts graduation requirements due to the fact that a student may not be ready for the rigor of the curriculum at mid-year.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Sixteen teachers, four administrators, two community members, and one university/college staff member stated that the proposed new fine arts graduation requirements would threaten any rigor and sequential organization that had been built into the curriculum and any student mastery that has been accomplished.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: One teacher stated that the arts have paramount importance to cognitive development in all subject areas, culture, and society and asked for consideration of the lasting ramifications of diluting arts programs.

Response: The SBOE agreed about the importance of the fine arts and determined that the fine arts graduation requirements were appropriate as proposed. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: One administrator stated that the proposed new fine arts graduation requirements are not good for students, teachers, curriculum, or instruction.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: One teacher and one administrator stated that the proposed new fine arts graduation requirements would affect budget and staffing management and future planning, all of which are already unpredictable due to current budget issues.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: One teacher stated that the proposed new fine arts graduation requirements will prevent students from developing discipline, commitment, and work ethic. The commenter added that this would prevent students from having the training necessary to get into college.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: One teacher stated that the proposed new fine arts graduation requirements would allow students to experience different types of arts, which is a good thing. The commenter added that new courses would need to be created in order to facilitate this.

Response: The SBOE disagreed and determined that new courses were not needed at this time. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Thirteen teachers, one administrator, two community members, and one university/college staff member stated that the proposed new fine arts graduation requirements would create a hardship on students who have received sequential instruction by introducing disparately prepared students into the same class.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Four teachers stated that the proposed new fine arts graduation requirements would change instruction. The commenters added that currently, students work on skills that take an entire year to master.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: One teacher stated that the proposed new fine arts graduation requirements would make it virtually impossible to teach a full year's curriculum in just a few months. The commenter added that this would not be fair to students.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. The SBOE provided the following clarification. Each local school district must ensure that sufficient time is provided for teachers to teach and for students to learn. Additionally, this comment addresses methodology that would be used by a local school district. Under statute, TEC, §28.002(i), the SBOE may not adopt rules that designate the methodology used by a teacher. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Three teachers stated that the proposed new fine arts graduation requirements would mean that courses would need to be changed to one-half credit only and provided for one semester. The commenters noted that courses are currently built for a full year.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. A local school district is permitted, but not required to award proportionate credit. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: One administrator stated that the proposed new fine arts graduation requirements would require school districts to offer identical courses each semester in order to be able to adequately educate a student starting a course mid-year.

Response: The SBOE disagreed and determined that existing 19 TAC §74.26(d) allows for the award of proportionate credit in accordance with local district policy. A local school district is permitted, but not required to award proportionate credit. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: One teacher suggested changing entry-level fine arts courses to one-half credit each. The commenter added that the upper-level fine arts courses would not be impacted as students will already have met their fine arts requirements for graduation.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. Existing 19 TAC §74.26(d) allows for the award of proportionate credit in accordance with local district policy. A local school district is permitted, but not required to award proportionate credit. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Three teachers suggested that to make the changes to the fine arts graduation requirements work, courses such as Theatre Appreciation, Music Appreciation, Dance Appreciation, and Art Appreciation should be changed to one-half credit courses, while leaving the other one credit courses for students who are more interested in an arts education.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: One teacher stated that the proposed new fine arts graduation requirements would water down art education and make it difficult for teachers to make sure art students have the same basic skills when they take more rigorous art classes.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriately rigorous as proposed. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Nine teachers, seventeen administrators, two community members, and one university/college staff member expressed a concern that allowing students to mix and match fine arts credits would create a potential for gaps in learning as students might miss fundamentals in a course in which the student enrolls halfway through a school year.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. Existing 19 TAC §74.26(d) allows for the award of proportionate credit in accordance with local district policy. A local school district is permitted, but not required to award proportionate credit. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Ten teachers, five administrators, and one community member stated that the SBOE should not allow students to combine two one-half credits of fine arts courses to satisfy the fine arts graduation requirement.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. Existing 19 TAC §74.26(d) allows for the award of proportionate credit in accordance with local district policy. A local school district is permitted, but not required to award proportionate credit. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Nine teachers, fifteen administrators, and two community members stated that the proposed new fine arts graduation requirements would have a negative impact on teaching and learning in the fine arts curriculum.

Response: The SBOE disagreed and determined that the proposed fine arts graduation requirements would not impact the current fine arts curriculum. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Seventeen teachers, twenty-eight administrators, two community members, and one university/college staff member expressed concern regarding the proposed new §§74.72(b)(8), 74.73(b)(8), and 74.74(b)(8) that would remove the requirement for one contiguous year of study in a single fine arts course.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. Existing 19 TAC §74.26(d) allows for the award of proportionate credit in accordance with local district policy. A local school district is permitted, but not required to award proportionate credit. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Six teachers, three administrators, one community member, and one university/college staff member stated that the current graduation requirements for fine arts should remain unchanged in the proposed Subchapter G.

Response: The SBOE agreed and took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Nine teachers, twelve administrators, and one university/college staff member stated that while providing districts with flexibility is important, the proposed new fine arts graduation requirements in Subchapter G are not an effective way to do so.

Response: The SBOE agreed that providing flexibility to districts is important and determined that current rule allows for this. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Two administrators stated that, just as students are not allowed to use two different semesters of a foreign language to complete the foreign language graduation requirement, students should not be allowed to use two one-half credits of two different fine arts courses to fulfill the fine arts graduation requirement.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. Existing 19 TAC §74.26(d) allows for the award of proportionate credit in accordance with local district policy. A local school dis-

trict is permitted, but not required to award proportionate credit. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Three teachers, two administrators, and one university/college staff member expressed concern that students entering a fine arts course in the second semester will not be able to fully assimilate the mandated TEKS.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. Existing 19 TAC §74.26(d) allows for the award of proportionate credit in accordance with local district policy. A local school district is permitted, but not required to award proportionate credit. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Three teachers and two administrators expressed concern that the new fine arts graduation requirements allowing students to combine two one-half credits in fine arts are potentially destructive to fine arts programs in school districts.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. Existing 19 TAC §74.26(d) allows for the award of proportionate credit in accordance with local district policy. A local school district is permitted, but not required to award proportionate credit. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Five teachers, six administrators, and one university/college staff member recommended that the SBOE delay action on the adoption of the proposed changes to the graduation requirements in fine arts until the fine arts TEKS review committees have had an opportunity to meet and provide a recommendation.

Response: The SBOE disagreed and determined that there was no need to delay the implementation of the proposed fine arts graduation requirements. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Two teachers stated that allowing students to enroll in a fine arts course without the first semester of instruction could be potentially dangerous to other students.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. Existing 19 TAC §74.26(d) allows for the award of proportionate credit in accordance with local district policy. A local school district is permitted, but not required to award proportionate credit. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Four administrators stated that students are not allowed the choice to mix and match in the core content areas and fine arts courses deserve the same consideration.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. Existing 19 TAC §74.26(d) allows for the award of proportionate credit in any subject area in accordance with local district policy. A local school district is permitted, but not required to award proportionate credit. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Three teachers and three administrators stated that the proposed new fine arts graduation requirements would allow students to collect a series of two completely disconnected sets of fine arts experiences and not allow them to get any of the depth that a full-year course would offer.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. Existing 19 TAC §74.26(d) allows for the award of proportionate credit in accordance with local district policy. A local school district is permitted, but not required to award proportionate credit. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Seven teachers, nine administrators, and one community member stated that, with the exception of Theatre Production I-IV, all fine arts courses are one credit courses for which the curriculum has traditionally been developed to address the TEKS over a full year of instruction.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. The SBOE provided the following clarification. Each local school district must ensure that sufficient time is provided for teachers to teach and for students to learn. Additionally, this comment addresses methodology that would be used by a local school district. Under statute, TEC, §28.002(i), the SBOE may not adopt rules that designate methodology. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Eight teachers, three administrators, two community members, and one university/college staff member stated that the proposed new fine arts graduation requirements would allow students to take fine arts courses in illogical sequences.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed and do not address course sequencing. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Five teachers and two administrators stated that the proposed new fine arts graduation requirements would have a negative impact on UIL competitions because students entering a course in the second semester would not be adequately prepared.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed. Existing 19 TAC §74.26(d) allows for the award of proportionate credit in any subject area in accordance with local district policy. A local school district is permitted, but not required to award proportionate credit. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: Nine teachers, one administrator, three community members, and one university/college staff member stated that the proposed new fine arts graduation requirements would place an unnecessary hardship on teachers as they try to teach two groups of students at disparate levels at the same time.

Response: The SBOE disagreed and determined that the fine arts graduation requirements were appropriate as proposed.

The SBOE provided the following clarification. Each local school district must ensure that sufficient time is provided for teachers to teach and for students to learn. Additionally, this comment addresses methodology that would be used by a local school district. Under statute, TEC, §28.002(i), the SBOE may not adopt rules that designate the methodology used by a teacher. In response to other comments, the SBOE took action to amend the proposed rules to revert to language consistent with current requirements.

Comment: One parent stated that mandating new rules regarding graduation plans without having everything in place before administering the first STAAR end-of-course exams is rushed. The commenter added that the graduation plans should not be modified until the SBOE had clearly documented and communicated all rules and expectations to parents and students.

Response: The SBOE disagreed and determined that the new graduation requirements in 19 TAC Chapter 74, Subchapter G, would not go into effect until 2012-2013 and would only be applicable to students who enter Grade 9 in 2012-2013 or later, allowing for sufficient time to communicate the changes to schools, parents, and students.

Comment: One teacher stated that a new diploma plan (distinct from MHSP, RHSP, and DAP) should be created to recognize students who are pursuing higher types of learning experiences.

Response: The SBOE disagreed and determined that the three graduation plans currently in use allow for students to pursue higher-level learning experiences by pursuing a diploma on the DAP.

Comment: One teacher stated that the language in §74.73(b)(2) and §74.74(b)(2) regarding the fourth credit in mathematics seems to alternate between "fourth credit" and "additional credit," which is confusing. The commenter suggested making the language consistent.

Response: The SBOE disagreed and determined that the language in §74.73(b)(2) and §74.74(b)(2) was appropriate as proposed.

Comment: One administrator stated that the proposed new Subchapter G would help her district, especially as it relates to mathematics.

Response: The SBOE agreed. The SBOE also took action to approve additional changes to respond to other comments.

Comment: One teacher asked how a student on the MHSP, who is required to take four credits of English, three credits of mathematics and social studies, and two credits of science, would be prepared for the STAAR test.

Response: The SBOE provided the following clarification. A student on the MHSP is only required to take end-of-course assessments for the courses the student completes that have an end-of-course assessment. Additionally, the content requirements for each course are the same regardless of whether the student is pursuing the MHSP, RHSP, or DAP.

Comment: One teacher and one community member stated opposition to the proposed new Subchapter G.

Response: The SBOE disagreed and determined that new 19 TAC Chapter 74, Curriculum Requirements, Subchapter G, Graduation Requirements, Beginning with School Year 2012-2013, as amended was appropriate.

Comment: One administrator asked if the proposed language in §§74.72(b)(6)(F), 74.73(b)(6)(G), and 74.74(b)(6)(G) would allow a student who is unable to participate in physical activity due to a disability to substitute a combination of one-half credit courses in English language arts, math, science, and social studies.

Response: The SBOE provided the following clarification. In accordance with local district policy, a student may combine one-half credit courses in courses for which there is no end-of-course assessment.

Comment: One teacher asked how students who graduate with Reading I, II, or III, (as per 19 TAC §74.71(f)) could pass a STAAR exam. The commenter stated there is a disconnect between the knowledge tested in the STAAR tests and the knowledge learned in these courses.

Response: The SBOE provided the following clarification. There is not a STAAR end-of-course assessment required of students enrolled in Reading I, II, or III. The English language arts end-of-course assessments are required of students in English I, II, and III and all students are required to take English I, II, and III regardless of whether or not they take Reading I, II, and/or III.

Comment: One parent stated that in 19 TAC §74.3, Description of a Required Secondary Curriculum, additional choices for fine arts, mathematics, and science would benefit both students and teachers.

Response: The SBOE agreed and determined additional choices were necessary in science. The SBOE took action to amend §74.3(b)(2)(C) to read as follows, "science--Integrated Physics and Chemistry, Biology, Chemistry, Physics, and at least two additional science courses selected from Aquatic Science, Astronomy, Earth and Space Science, Environmental Systems, Advanced Animal Science, Advanced Biotechnology, Advanced Plant and Soil Science, Anatomy and Physiology, Engineering Design and Problem Solving, Food Science, Forensic Science, Medical Microbiology, Pathophysiology, and Scientific Research and Design. The requirement to offer two additional courses may be reduced to one by the commissioner of education upon application of a school district with a total high school enrollment of less than 500 students. Science courses shall include at least 40% hands-on laboratory investigations and field work using appropriate scientific inquiry."

Comment: One community member asked for a list of courses that can satisfy the one-half credit speech graduation requirement.

Response: The SBOE provided the following clarification. The courses that may satisfy the speech requirement on the three graduation programs are Communication Applications and Professional Communications and are listed in §§74.72(b)(7), 74.73(b)(7), and 74.73(b)(7).

Comment: One community member stated that districts might look only to Subchapter G and disregard Subchapter A, which requires districts to offer Communication Applications. The commenter stated that this may cause districts to see the two courses that may satisfy the speech requirement and mistakenly decide they may offer either course to students.

Response: The SBOE disagreed and determined that the language in §74.3(b)(2)(J) made clear the speech course required to be offered by school districts.

Comment: Two teachers and three administrators expressed general support for the proposed new Subchapter G.

Response: The SBOE agreed. The SBOE also took action to approve additional changes to respond to other comments.

Comment: Three teachers and two parents expressed concern regarding proposed changes to §74.3(b)(4). The commenters recommended that the SBOE keep the requirement that schools actually teach a course in which ten or more students indicate they will participate.

Response: The SBOE disagreed and determined that the proposed language clarified the intent of this section of the rule.

SUBCHAPTER A. REQUIRED CURRICULUM

19 TAC §74.1, §74.3

The amendments are adopted under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to 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 Texas Education Code, §28.002. In addition, Texas Education Code, §28.027, requires the SBOE to establish a process under which science, technology, engineering, or mathematics courses may be reviewed and approved for purposes of satisfying the mathematics and science curriculum requirements for the recommended high school program imposed under Texas Education Code, §28.025(b-1)(1)(A).

The amendments implement the Texas Education Code, §§7.102(c)(4), 28.002, 28.025, and 28.027.

§74.3. Description of a Required Secondary Curriculum.

(a) Middle Grades 6-8.

(1) A school district that offers Grades 6-8 must provide instruction in the required curriculum as specified in §74.1 of this title (relating to Essential Knowledge and Skills). The district must ensure that sufficient time is provided for teachers to teach and for students to learn English language arts, mathematics, science, social studies, fine arts, health, physical education, technology applications, and to the extent possible, languages other than English. The school district may provide instruction in a variety of arrangements and settings, including mixed-age programs designed to permit flexible learning arrangements for developmentally appropriate instruction for all student populations to support student attainment of course and grade level standards.

(2) The school district must ensure that, beginning with students who enter Grade 6 in the 2010-2011 school year, each student completes one Texas essential knowledge and skills-based fine arts course in Grade 6, Grade 7, or Grade 8.

(b) Secondary Grades 9-12.

(1) A school district that offers Grades 9-12 must provide instruction in the required curriculum as specified in §74.1 of this title. The district must ensure that sufficient time is provided for teachers to teach and for students to learn the subjects in the required curriculum. The school district may provide instruction in a variety of arrangements and settings, including mixed-age programs designed to permit flexible learning arrangements for developmentally appropriate instruction for all student populations to support student attainment of course and grade level standards.

(2) The school district must offer the courses listed in this paragraph and maintain evidence that students have the opportunity to take these courses:

(A) English language arts--English I, II, III, and IV;

(B) mathematics--Algebra I, Algebra II, Geometry, Precalculus, and Mathematical Models with Applications;

(C) science--Integrated Physics and Chemistry, Biology, Chemistry, Physics, and at least two additional science courses selected from Aquatic Science, Astronomy, Earth and Space Science, Environmental Systems, Advanced Animal Science, Advanced Biotechnology, Advanced Plant and Soil Science, Anatomy and Physiology, Engineering Design and Problem Solving, Food Science, Forensic Science, Medical Microbiology, Pathophysiology, and Scientific Research and Design. The requirement to offer two additional courses may be reduced to one by the commissioner of education upon application of a school district with a total high school enrollment of less than 500 students. Science courses shall include at least 40% hands-on laboratory investigations and field work using appropriate scientific inquiry;

(D) social studies--United States History Studies Since 1877, World History Studies, United States Government, World Geography Studies, and Economics with Emphasis on the Free Enterprise System and Its Benefits;

(E) physical education--at least two courses selected from Foundations of Personal Fitness, Adventure/Outdoor Education, Aerobic Activities, or Team or Individual Sports;

(F) fine arts--courses selected from at least two of the four fine arts areas (art, music, theatre, and dance)--Art I, II, III, IV; Music I, II, III, IV; Theatre I, II, III, IV; or Dance I, II, III, IV;

(G) career and technical education--coherent sequences of courses selected from at least three of the following sixteen career clusters:

(i) Agriculture, Food, and Natural Resources;

(ii) Architecture and Construction;

(iii) Arts, Audio/Video Technology, and Communications;

(iv) Business Management and Administration;

(v) Education and Training;

(vi) Finance;

(vii) Government and Public Administration;

(viii) Health Science;

(ix) Hospitality and Tourism;

(x) Human Services;

(xi) Information Technology;

(xii) Law, Public Safety, Corrections, and Security;

(xiii) Manufacturing;

(xiv) Marketing;

(xv) Science, Technology, Engineering, and Mathematics; and

(xvi) Transportation, Distribution, and Logistics;

(H) languages other than English--Levels I, II, and III or higher of the same language;

(I) technology applications--at least four courses selected from Computer Science I, Computer Science II, Computer Science III, Digital Art and Animation, Digital Communications in the 21st Century, Digital Design and Media Production, Digital Forensics, Digital Video and Audio Design, Discrete Mathematics, Fundamentals of Computer Science, Game Programming and Design, Independent Study in Evolving/Emerging Technologies, Independent Study in Technology Applications, Mobile Application Development, Robotics Programming and Design, 3-D Modeling and Animation, Web Communications, Web Design, and Web Game Development; and

(J) speech--Communication Applications.

(3) Districts may offer additional courses from the complete list of courses approved by the State Board of Education to satisfy graduation requirements as referenced in this chapter.

(4) The school district must provide each student the opportunity to participate in all courses listed in subsection (b)(2) of this section. The district must provide students the opportunity each year to select courses in which they intend to participate from a list that includes all courses required to be offered in subsection (b)(2) of this section. If the school district will not offer the required courses every year, but intends to offer particular courses only every other year, it must notify all enrolled students of that fact. A school district must teach a course that is specifically required for high school graduation at least once in any two consecutive school years. For a subject that has an end-of-course assessment, the district must either teach the course every year or employ options described in Subchapter C of this chapter (relating to Other Provisions) to enable students to earn credit for the course and must maintain evidence that it is employing those options.

(5) For students entering Grade 9 beginning with the 2007-2008 school year, districts must ensure that one or more courses offered in the required curriculum for the recommended and advanced high school programs include a research writing component.

(c) Courses in the foundation and enrichment curriculum in Grades 6-12 must be provided in a manner that allows all grade promotion and high school graduation requirements to be met in a timely manner. Nothing in this chapter shall be construed to require a district to offer a specific course in the foundation and enrichment curriculum except as required by this subsection.

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. GRADUATION REQUIREMENTS, BEGINNING WITH SCHOOL YEAR 2012-2013

19 TAC §§74.71 - 74.74

The new sections are adopted under the Texas Education Code, §7.102(c)(4), which authorizes the SBOE to establish curriculum and graduation requirements; §28.002, which authorizes the SBOE to 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 Texas Education Code, §28.002. Texas Education Code, §28.025(b-2), requires the SBOE to allow for the inclusion of certain career and technical education courses as options for satisfying certain mathematics and science graduation requirements. Texas Education Code, §28.025(b-11), requires the SBOE to allow a student who is unable to participate in physical activity due to disability or illness to substitute one credit, as specified in §28.025(b-11), for one physical education credit. In addition, Texas Education Code, §28.027, requires the SBOE to establish a process under which science, technology, engineering, or mathematics courses may be reviewed and approved for purposes of satisfying the mathematics and science curriculum requirements for the recommended high school program imposed under Texas Education Code, §28.025(b-1)(1)(A).

The new sections implement the Texas Education Code, §§7.102(c)(4), 28.002, 28.025, and 28.027.

§74.72. Minimum High School Program.

(a) Credits. A student must earn at least 22 credits to complete the Minimum High School Program.

(b) Core courses. A student must demonstrate proficiency in the following.

(1) English language arts--four credits. Three of the credits must consist of English I, II, and III. (Students with limited English proficiency who are at the beginning or intermediate level of English language proficiency, as defined by §74.4(d) of this title (relating to English Language Proficiency Standards), may satisfy the English I and English II graduation requirements by successfully completing English I for Speakers of Other Languages and English II for Speakers of Other Languages.) The final credit may be selected from one full credit or a combination of two half credits from the following courses:

(A) English IV;

(B) Research and Technical Writing;

(C) Creative Writing;

(D) Practical Writing Skills;

(E) Literary Genres;

(F) Business English;

(G) Journalism;

(H) Advanced Placement (AP) English Language and Composition; and

(I) AP English Literature and Composition.

(2) Mathematics--three credits. Two of the credits must consist of Algebra I and Geometry.

(A) The final credit may be Algebra II. A student may not combine a half credit of Algebra II with a half credit from another mathematics course to satisfy the final mathematics credit requirement.

(B) The final credit may be selected from one full credit or a combination of two half credits from the following courses:

(i) Precalculus;

(ii) Mathematical Models with Applications;

(iii) Independent Study in Mathematics;

(iv) Advanced Quantitative Reasoning;

(v) AP Statistics;

(vi) AP Calculus AB;

(vii) AP Calculus BC;

(viii) AP Computer Science;

(ix) International Baccalaureate (IB) Mathematical Studies Standard Level;

(x) IB Mathematics Standard Level;

(xi) IB Mathematics Higher Level;

(xii) IB Further Mathematics Standard Level;

(xiii) Mathematical Applications in Agriculture, Food, and Natural Resources;

(xiv) Engineering Mathematics; and

(xv) Statistics and Risk Management.

(3) Science--two credits. The credits must consist of Biology and Integrated Physics and Chemistry (IPC). A student may substitute a chemistry credit (Chemistry, AP Chemistry, or IB Chemistry), or a physics credit (Physics, Principles of Technology, AP Physics, or IB Physics) and then must use the second of these two courses as the academic elective credit identified in subsection (b)(5) of this section.

(4) Social studies--three credits. Two of the credits must consist of United States History Studies Since 1877 (one credit), United States Government (one-half credit), and Economics with Emphasis on the Free Enterprise System and Its Benefits (one-half credit). The final credit may be selected from the following courses:

(A) World History Studies; and

(B) World Geography Studies.

(5) Academic elective--one credit. The credit must be selected from World History Studies, World Geography Studies, or science course(s) approved by the State Board of Education (SBOE) for science credit as found in Chapter 112 of this title (relating to Texas Essential Knowledge and Skills for Science). If a student elects to replace IPC with either Chemistry or Physics as described in subsection (b)(3) of this section, the academic elective must be the other of these two science courses. A student may not combine a half credit of either World History Studies or World Geography Studies with a half credit from another academic elective course to satisfy the academic elective credit requirement.

(6) Physical education--one credit.

(A) The required credit may be selected from any combination of the following one-half to one credit courses:

(i) Foundations of Personal Fitness;

(ii) Adventure/Outdoor Education;

(iii) Aerobic Activities; and

(iv) Team or Individual Sports.

(B) In accordance with local district policy, credit for any of the courses listed in subparagraph (A) of this paragraph may be earned through participation in the following activities:

(i) Athletics;

(ii) JROTC; and

(iii) appropriate private or commercially sponsored physical activity programs conducted on or off campus. The district must apply to the commissioner of education for approval of such programs, which may be substituted for state graduation credit in physical education. Such approval may be granted under the following conditions.

(I) Olympic-level participation and/or competition includes a minimum of 15 hours per week of highly intensive, professional, supervised training. The training facility, instructors, and the activities involved in the program must be certified by the superintendent to be of exceptional quality. Students qualifying and participating at this level may be dismissed from school one hour per day. Students dismissed may not miss any class other than physical education.

(II) Private or commercially sponsored physical activities include those certified by the superintendent to be of high quality and well supervised by appropriately trained instructors. Student participation of at least five hours per week must be required. Students certified to participate at this level may not be dismissed from any part of the regular school day.

(C) In accordance with local district policy, up to one credit for any one of the courses listed in subparagraph (A) of this paragraph may be earned through participation in any of the following activities:

(i) Drill Team;

(ii) Marching Band; and

(iii) Cheerleading.

(D) All substitution activities allowed in subparagraphs (B) and (C) of this paragraph must include at least 100 minutes per five-day school week of moderate to vigorous physical activity.

(E) Credit may not be earned for any course identified in subparagraph (A) of this paragraph more than once. No more than four substitution credits may be earned through any combination of substitutions allowed in subparagraphs (B) and (C) of this paragraph.

(F) A student who is unable to participate in physical activity due to disability or illness may substitute an academic elective credit (English language arts, mathematics, science, or social studies) for the physical education credit requirement. The determination regarding a student's ability to participate in physical activity will be made by:

(i) the student's admission, review, and dismissal (ARD) committee if the student receives special education services under the Texas Education Code (TEC), Chapter 29, Subchapter A;

(ii) the committee established for the student under Section 504, Rehabilitation Act of 1973 (29 United States Code, §794) if the student does not receive special education services under the TEC, Chapter 29, Subchapter A, but is covered by the Rehabilitation Act of 1973; or

(iii) a committee established by the school district of persons with appropriate knowledge regarding the student if each of

the committees described by clauses (i) and (ii) of this subparagraph is inapplicable. This committee shall follow the same procedures required of an ARD or a Section 504 committee.

(7) Speech--one-half credit. The credit may be selected from the following courses:

(A) Communication Applications; and

(B) Professional Communications.

(8) Fine arts--one credit. The credit may be selected from the following courses:

(A) Art, Level I, II, III, or IV;

(B) Dance, Level I, II, III, or IV;

(C) Music, Level I, II, III, or IV;

(D) Theatre, Level I, II, III, or IV;

(E) Principles and Elements of Floral Design;

(F) Digital Art and Animation; and

(G) 3-D Modeling and Animation.

(c) Elective courses--six and one-half credits. The credits must be selected from the list of courses specified in §74.71(h) of this title (relating to High School Graduation Requirements). A student may not combine a half credit of a course for which there is an end-of-course assessment with another elective credit course to satisfy an elective credit requirement.

(d) Substitutions. No substitutions are allowed in the Minimum High School Program, except as specified in this chapter.

§74.73. Recommended High School Program.

(a) Credits. A student must earn at least 26 credits to complete the Recommended High School Program.

(b) Core courses. A student must demonstrate proficiency in the following:

(1) English language arts--four credits. The credits must consist of English I, II, III, and IV. (Students with limited English proficiency who are at the beginning or intermediate level of English language proficiency, as defined by §74.4(d) of this title (relating to English Language Proficiency Standards), may satisfy the English I and English II graduation requirements by successfully completing English I for Speakers of Other Languages and English II for Speakers of Other Languages.)

(2) Mathematics--four credits. Three of the credits must consist of Algebra I, Algebra II, and Geometry.

(A) The additional credit may be Mathematical Models with Applications and must be successfully completed prior to Algebra II.

(B) The fourth credit may be selected from the following courses:

(i) Precalculus;

(ii) Independent Study in Mathematics;

(iii) Advanced Quantitative Reasoning;

(iv) Advanced Placement (AP) Statistics;

(v) AP Calculus AB;

(vi) AP Calculus BC;

(vii) AP Computer Science;

(viii) International Baccalaureate (IB) Mathematical Studies Standard Level;

(ix) IB Mathematics Standard Level;

(x) IB Mathematics Higher Level;

(xi) IB Further Mathematics Standard Level; and

(xii) pursuant to the Texas Education Code (TEC), §28.025(b-5), a mathematics course endorsed by an institution of higher education as a course for which the institution would award course credit or as a prerequisite for a course for which the institution would award course credit. The Texas Education Agency (TEA) shall maintain a current list of courses approved under this clause.

(C) The additional credit may be selected from the following courses and may be taken after the successful completion of Algebra I and Geometry and either after the successful completion of or concurrently with Algebra II:

(i) Engineering Mathematics;

(ii) Mathematical Applications in Agriculture, Food, and Natural Resources; and

(iii) Statistics and Risk Management.

(3) Science--four credits. Three of the credits must consist of a biology credit (Biology, AP Biology, or IB Biology), a chemistry credit (Chemistry, AP Chemistry, or IB Chemistry), and a physics credit (Physics, Principles of Technology, AP Physics, or IB Physics).

(A) The additional credit may be Integrated Physics and Chemistry (IPC) and must be successfully completed prior to chemistry and physics.

(B) The fourth credit may be selected from the following laboratory-based courses:

(i) Aquatic Science;

(ii) Astronomy;

(iii) Earth and Space Science;

(iv) Environmental Systems;

(v) AP Biology;

(vi) AP Chemistry;

(vii) AP Physics B;

(viii) AP Physics C;

(ix) AP Environmental Science;

(x) IB Biology;

(xi) IB Chemistry;

(xii) IB Physics;

(xiii) IB Environmental Systems; and

(xiv) pursuant to the TEC, §28.025(b-5), a science course endorsed by an institution of higher education as a course for which the institution would award course credit or as a prerequisite for a course for which the institution would award course credit. The TEA shall maintain a current list of courses approved under this clause.

(C) The additional credit may be selected from the following laboratory-based courses and may be taken after the successful completion of biology and chemistry and either after the successful completion of or concurrently with physics:

(i) Scientific Research and Design;

(ii) Anatomy and Physiology;

(iii) Engineering Design and Problem Solving;

(iv) Medical Microbiology;

(v) Pathophysiology;

(vi) Advanced Animal Science;

(vii) Advanced Biotechnology;

(viii) Advanced Plant and Soil Science;

(ix) Food Science; and

(x) Forensic Science.

(4) Social studies--four credits. The credits must consist of World History Studies (one credit), World Geography Studies (one credit), United States History Studies Since 1877 (one credit), United States Government (one-half credit), and Economics with Emphasis on the Free Enterprise System and Its Benefits (one-half credit).

(5) Languages other than English--two credits. The credits must consist of any two levels in the same language.

(6) Physical education--one credit.

(A) The required credit may be selected from any combination of the following one-half to one credit courses:

(i) Foundations of Personal Fitness;

(ii) Adventure/Outdoor Education;

(iii) Aerobic Activities; and

(iv) Team or Individual Sports.

(B) In accordance with local district policy, credit for any of the courses listed in subparagraph (A) of this paragraph may be earned through participation in the following activities:

(i) Athletics;

(ii) JROTC; and

(iii) appropriate private or commercially sponsored physical activity programs conducted on or off campus. The district must apply to the commissioner of education for approval of such programs, which may be substituted for state graduation credit in physical education. Such approval may be granted under the following conditions.

(I) Olympic-level participation and/or competition includes a minimum of 15 hours per week of highly intensive, professional, supervised training. The training facility, instructors, and the activities involved in the program must be certified by the superintendent to be of exceptional quality. Students qualifying and participating at this level may be dismissed from school one hour per day. Students dismissed may not miss any class other than physical education.

(II) Private or commercially sponsored physical activities include those certified by the superintendent to be of high quality and well supervised by appropriately trained instructors. Student participation of at least five hours per week must be required. Students certified to participate at this level may not be dismissed from any part of the regular school day.

(C) In accordance with local district policy, up to one credit for any one of the courses listed in subparagraph (A) of this paragraph may be earned through participation in any of the following activities:

(i) Drill Team;

(ii) Marching Band; and

(iii) Cheerleading.

(D) All substitution activities allowed in subparagraphs (B) and (C) of this paragraph must include at least 100 minutes per five-day school week of moderate to vigorous physical activity.

(E) Credit may not be earned for any course identified in subparagraph (A) of this paragraph more than once. No more than four substitution credits may be earned through any combination of substitutions allowed in subparagraphs (B) and (C) of this paragraph.

(F) If a student is unable to comply with all of the requirements for a physical education course due to a physical limitation certified by a licensed medical practitioner, a modification to a physical education course does not prohibit the student from earning a Recommended High School Program diploma. A student with a physical limitation must still demonstrate proficiency in the relevant knowledge and skills in a physical education course that do not require physical activity.

(G) A student who is unable to participate in physical activity due to disability or illness may substitute an academic elective credit (English language arts, mathematics, science, or social studies) for the physical education credit requirement. The determination regarding a student's ability to participate in physical activity will be made by:

(i) the student's admission, review, and dismissal (ARD) committee if the student receives special education services under the Texas Education Code, Chapter 29, Subchapter A;

(ii) the committee established for the student under Section 504, Rehabilitation Act of 1973 (29 United States Code, §794) if the student does not receive special education services under the TEC, Chapter 29, Subchapter A, but is covered by the Rehabilitation Act of 1973; or

(iii) a committee established by the school district of persons with appropriate knowledge regarding the student if each of the committees described by clauses (i) and (ii) of this subparagraph is inapplicable. This committee shall follow the same procedures required of an ARD or a Section 504 committee.

(7) Speech--one-half credit. The credit may be selected from the following courses:

(A) Communication Applications; and

(B) Professional Communications.

(8) Fine arts--one credit. The credit may be selected from the following courses:

(A) Art, Level I, II, III, or IV;

(B) Dance, Level I, II, III, or IV;

(C) Music, Level I, II, III, or IV;

(D) Theatre, Level I, II, III, or IV;

(E) Principles and Elements of Floral Design;

(F) Digital Art and Animation; and

(G) 3-D Modeling and Animation.

(c) Elective courses--five and one-half credits. The credits may be selected from the list of courses specified in §74.71(h) of this title (relating to High School Graduation Requirements). All students who wish to complete the Recommended High School Program are encouraged to study each of the four foundation curriculum areas (English

language arts, mathematics, science, and social studies) every year in high school. A student may not combine a half credit of a course for which there is an end-of-course assessment with another elective credit course to satisfy an elective credit requirement.

(d) Substitutions. No substitutions are allowed in the Recommended High School Program, except as specified in this chapter.

§74.74. Distinguished Achievement High School Program--Advanced High School Program.

(a) Credits. A student must earn at least 26 credits to complete the Distinguished Achievement High School Program.

(b) Core courses. A student must demonstrate proficiency in the following:

(1) English language arts--four credits. The credits must consist of English I, II, III, and IV. (Students with limited English proficiency who are at the beginning or intermediate level of English language proficiency, as defined by §74.4(d) of this title (relating to English Language Proficiency Standards), may satisfy the English I and English II graduation requirements by successfully completing English I for Speakers of Other Languages and English II for Speakers of Other Languages.)

(2) Mathematics--four credits. Three of the credits must consist of Algebra I, Algebra II, and Geometry.

(A) The fourth credit may be selected from the following courses after successful completion of Algebra I, Algebra II, and Geometry:

(i) Precalculus;

(ii) Independent Study in Mathematics;

(iii) Advanced Quantitative Reasoning;

(iv) Advanced Placement (AP) Statistics;

(v) AP Calculus AB;

(vi) AP Calculus BC;

(vii) AP Computer Science;

(viii) International Baccalaureate (IB) Mathematical Studies Standard Level;

(ix) IB Mathematics Standard Level;

(x) IB Mathematics Higher Level;

(xi) IB Further Mathematics Standard Level; and

(xii) pursuant to the Texas Education Code (TEC), §28.025(b-5), a mathematics course endorsed by an institution of higher education as a course for which the institution would award course credit or as a prerequisite for a course for which the institution would award course credit. The Texas Education Agency (TEA) shall maintain a current list of courses approved under this clause.

(B) The additional credit may be selected from the following courses and may be taken after the successful completion of Algebra I and Geometry and either after the successful completion of or concurrently with Algebra II:

(i) Engineering Mathematics; and

(ii) Statistics and Risk Management.

(3) Science--four credits. Three of the credits must consist of a biology credit (Biology, AP Biology, or IB Biology), a chemistry credit (Chemistry, AP Chemistry, or IB Chemistry), and a physics credit (Physics, AP Physics, or IB Physics).

(A) The fourth credit may be selected from the following laboratory-based courses:

(i) Aquatic Science;

(ii) Astronomy;

(iii) Earth and Space Science;

(iv) Environmental Systems;

(v) AP Biology;

(vi) AP Chemistry;

(vii) AP Physics B;

(viii) AP Physics C;

(ix) AP Environmental Science;

(x) IB Biology;

(xi) IB Chemistry;

(xii) IB Physics;

(xiii) IB Environmental Systems; and

(xiv) pursuant to the TEC, §28.025(b-5), a science course endorsed by an institution of higher education as a course for which the institution would award course credit or as a prerequisite for a course for which the institution would award course credit. The TEA shall maintain a current list of courses approved under this clause.

(B) The additional credit may be selected from the following laboratory-based courses and may be taken after the successful completion of biology and chemistry and either after the successful completion of or concurrently with physics:

(i) Scientific Research and Design;

(ii) Anatomy and Physiology;

(iii) Engineering Design and Problem Solving;

(iv) Medical Microbiology;

(v) Pathophysiology;

(vi) Advanced Animal Science;

(vii) Advanced Biotechnology;

(viii) Advanced Plant and Soil Science;

(ix) Food Science; and

(x) Forensic Science.

(4) Social studies--four credits. The credits must consist of World History Studies (one credit), World Geography Studies (one credit), United States History Studies Since 1877 (one credit), United States Government (one-half credit), and Economics with Emphasis on the Free Enterprise System and Its Benefits (one-half credit).

(5) Languages other than English--three credits. The credits must consist of any three levels in the same language.

(6) Physical education--one credit.

(A) The required credit may be selected from any combination of the following one-half to one credit courses:

(i) Foundations of Personal Fitness;

(ii) Adventure/Outdoor Education;

(iii) Aerobic Activities; and

(iv) Team or Individual Sports.

(B) In accordance with local district policy, credit for any of the courses listed in subparagraph (A) of this paragraph may be earned through participation in the following activities:

(i) Athletics;

(ii) JROTC; and

(iii) appropriate private or commercially sponsored physical activity programs conducted on or off campus. The district must apply to the commissioner of education for approval of such programs, which may be substituted for state graduation credit in physical education. Such approval may be granted under the following conditions.

(I) Olympic-level participation and/or competition includes a minimum of 15 hours per week of highly intensive, professional, supervised training. The training facility, instructors, and the activities involved in the program must be certified by the superintendent to be of exceptional quality. Students qualifying and participating at this level may be dismissed from school one hour per day. Students dismissed may not miss any class other than physical education.

(II) Private or commercially sponsored physical activities include those certified by the superintendent to be of high quality and well supervised by appropriately trained instructors. Student participation of at least five hours per week must be required. Students certified to participate at this level may not be dismissed from any part of the regular school day.

(C) In accordance with local district policy, up to one credit for any one of the courses listed in subparagraph (A) of this paragraph may be earned through participation in any of the following activities:

(i) Drill Team;

(ii) Marching Band; and

(iii) Cheerleading.

(D) All substitution activities allowed in subparagraphs (B) and (C) of this paragraph must include at least 100 minutes per five-day school week of moderate to vigorous physical activity.

(E) Credit may not be earned for any course identified in subparagraph (A) of this paragraph more than once. No more than four substitution credits may be earned through any combination of substitutions allowed in subparagraphs (B) and (C) of this paragraph.

(F) If a student is unable to comply with all of the requirements for a physical education course due to a physical limitation certified by a licensed medical practitioner, a modification to a physical education course does not prohibit the student from earning a Distinguished Achievement Program diploma. A student with a physical limitation must still demonstrate proficiency in the relevant knowledge and skills in a physical education course that do not require physical activity.

(G) A student who is unable to participate in physical activity due to disability or illness may substitute an academic elective credit (English language arts, mathematics, science, or social studies) for the physical education credit requirement. The determination regarding a student's ability to participate in physical activity will be made by:

(i) the student's admission, review, and dismissal (ARD) committee if the student receives special education services under the Texas Education Code (TEC), Chapter 29, Subchapter A;

(ii) the committee established for the student under Section 504, Rehabilitation Act of 1973 (29 United States Code, §794) if the student does not receive special education services under the TEC, Chapter 29, Subchapter A, but is covered by the Rehabilitation Act of 1973; or

(iii) a committee established by the school district of persons with appropriate knowledge regarding the student if each of the committees described by clauses (i) and (ii) of this subparagraph is inapplicable. This committee shall follow the same procedures required of an ARD or a Section 504 committee.

(7) Speech--one-half credit. The credit may be selected from the following courses:

(A) Communication Applications; and

(B) Professional Communications.

(8) Fine arts--one credit. The credit may be selected from the following courses:

(A) Art, Level I, II, III, or IV;

(B) Dance, Level I, II, III, or IV;

(C) Music, Level I, II, III, or IV;

(D) Theatre, Level I, II, III, or IV;

(E) Principles and Elements of Floral Design;

(F) Digital Art and Animation; and

(G) 3-D Modeling and Animation.

(c) Elective courses--four and one-half credits. The credits may be selected from the list of courses specified in §74.71(h) of this title (relating to High School Graduation Requirements). All students who wish to complete the Distinguished Achievement High School Program are encouraged to study each of the four foundation curriculum areas (English language arts, mathematics, science, and social studies) every year in high school. A student may not combine a half credit of a course for which there is an end-of-course assessment with another elective credit course to satisfy an elective credit requirement.

(d) Advanced measures. A student also must achieve any combination of four of the following advanced measures. Original research/projects may not be used for more than two of the four advanced measures. The measures must focus on demonstrated student performance at the college or professional level. Student performance on advanced measures must be assessed through an external review process. The student may choose from the following options:

(1) original research/project that is:

(A) judged by a panel of professionals in the field that is the focus of the project; or

(B) conducted under the direction of mentor(s) and reported to an appropriate audience; and

(C) related to the required curriculum set forth in §74.1 of this title (relating to Essential Knowledge and Skills);

(2) test data showing a student has earned:

(A) a score of three or above on the College Board advanced placement examination;

(B) a score of four or above on an International Baccalaureate examination; or

(C) a score on the Preliminary SAT/National Merit Scholarship Qualifying Test (PSAT/NMSQT) that qualifies the student for recognition as a commended scholar or higher by the College Board and National Merit Scholarship Corporation, as part of the

National Hispanic Recognition Program (NHRP) of the College Board or as part of the National Achievement Scholarship Program of the National Merit Scholarship Corporation. The PSAT/NMSQT score shall count as only one advanced measure regardless of the number of honors received by the student; or

(3) college academic courses, including those taken for dual credit, and advanced technical credit courses, including locally articulated courses, with a grade of 3.0 or higher.

(e) Substitutions. No substitutions are allowed in the Distinguished Achievement High School Program, except as specified in this chapter.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

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CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER BB. COMMISSIONER'S RULES CONCERNING STATE PLAN FOR EDUCATING ENGLISH LANGUAGE LEARNERS

19 TAC §§89.1201, 89.1203, 89.1205, 89.1207, 89.1210, 89.1215, 89.1220, 89.1225, 89.1227, 89.1228, 89.1230, 89.1233, 89.1235, 89.1240, 89.1245, 89.1250, 89.1265, 89.1267, 89.1269

The Texas Education Agency (TEA) adopts amendments to §§89.1201, 89.1205, 89.1207, 89.1210, 89.1215, 89.1220, 89.1225, 89.1230, 89.1233, 89.1235, 89.1240, 89.1245, 89.1250, and 89.1265 and new §§89.1203, 89.1227, 89.1228, 89.1267, and 89.1269, concerning the state plan for educating limited English proficient students. The amendments to §§89.1201, 89.1205, 89.1207, 89.1215, 89.1220, 89.1225, 89.1230, 89.1233, 89.1235, 89.1240, 89.1245, 89.1250, and 89.1265 and new §§89.1203, 89.1227, 89.1228, 89.1267, and 89.1269 are adopted without changes to the proposed text as published in the March 16, 2012, issue of the *Texas Register* (37 TexReg 1874) and will not be republished. The amendment to §89.1210 is adopted with changes to the proposed text as published in the March 16, 2012, issue of the *Texas Register.* The sections establish rules to guide the implementation of bilingual education and special language programs. The adopted revisions clarify that bilingual education and English as a second language (ESL) programs must be selected from certain program models in alignment with statute, amend and clarify provisions relating to the language proficiency assessment committee in alignment with statute, and clarify requirements for serving students who are English language learners and also qualify for special education services. Rules related to dual language instruction are incorporated into this subchapter to clarify the relationship between bilingual education and dual language instruction. The term limited English proficient is changed throughout the subchapter to align with current terminology. In addition, technical changes to correct cross-references to other administrative rules have been made.

In accordance with the Texas Education Code (TEC), Chapter 29, Subchapter B, Bilingual Education and Special Language Programs, the commissioner exercised rulemaking authority establishing rules to guide the implementation of bilingual education and special language programs. The commissioner's rules in 19 TAC Chapter 89, Subchapter BB, adopted to be effective September 1, 1996, and amended April 18, 2002, and September 17, 2007, establish the policy that every student in the state who has a home language other than English and who is identified as limited English proficient shall be provided a full opportunity to participate in a bilingual education or ESL program. These rules outline the requirements of the bilingual education and ESL programs, including program content and design, home language survey, the language proficiency assessment committee (LPAC), testing and classification, facilities, parental authority and responsibility, staffing and staff development, required summer school programs, and evaluation. During the recent statutorily required review of rules in 19 TAC Chapter 89, staff identified the need to update rules.

The adopted revisions to 19 TAC Chapter 89, Subchapter BB, include the following.

Section 89.1201, Policy, is amended to update terminology. No changes were made to this section since published as proposed.

Adopted new §89.1203, Definitions, is added to define terms used in this subchapter. No changes were made to this section since published as proposed.

Section 89.1205, Required Bilingual Education and English as a Second Language Programs, is amended to clarify that bilingual and ESL programs must be selected from the program models outlined in statute and explained in §89.1210. No changes were made to this section since published as proposed.

Section 89.1207, Exceptions and Waivers, is amended to change the deadline for exceptions and waivers from October 1 of each year to November 1 of each year to accommodate a later school start date required by statute. No changes were made to this section since published as proposed.

Section 89.1210, Program Content and Design, is amended to add descriptions of the various bilingual education and ESL program models to align with requirements of Senate Bill (SB) 1871, 80th Texas Legislature, 2007. In response to public comment, subsection (d)(4)(B) was modified at adoption to remove language relating to dominant English speakers from the dual language immersion/one-way program model.

Section 89.1215, Home Language Survey, is amended with minor, technical edits. No changes were made to this section since published as proposed.

Section 89.1220, Language Proficiency Assessment Committee, is amended to add a campus administrator to the composition of the LPAC to align with requirements in statute. Additional changes clarify documentation requirements for English language learners, more appropriately reference norm-referenced standardized achievement instruments, and specify that four weeks is equivalent to 20 school days. Additionally, the section is amended to permit a district to identify, exit, or place a student in a program without written approval from the student's parent

or guardian under certain circumstances. No changes were made to this section since published as proposed.

Section 89.1225, Testing and Classification of Students, is amended to clarify that tests used for identification, exit, and placement of students must be re-normed every eight years to align with timelines for requirements of similar tests included in statute. No changes were made to this section since published as proposed.

Adopted new §89.1227, Minimum Requirements for Dual Language Immersion Program Model, and adopted new §89.1228, Dual Language Immersion Program Model Implementation, incorporate language from 19 TAC Chapter 89, Subchapter FF, which has been repealed, to clarify the relationship between bilingual education and dual language instruction. No changes were made to these sections since published as proposed.

Section 89.1230, Eligible Students with Disabilities, is amended to clarify the requirements for serving students who are English language learners and who also qualify for special education services. No changes were made to this section since published as proposed.

Section 89.1233, Participation of Nonlimited English Proficiency Students, is amended to update terminology. The section title is also updated. No changes were made to this section since published as proposed.

Section 89.1235, Facilities, is amended to reference facilities instead of schools to address the use of newcomer centers. Amendments in this section also clarify the limit on the amount of time a student may be housed at a newcomer center. No changes were made to this section since published as proposed.

Section 89.1240, Parental Authority and Responsibility, is amended to update terminology. No changes were made to this section since published as proposed.

Section 89.1245, Staffing and Staff Development, is amended to update the reference to the rule regarding exceptions and waivers and change the application deadline to match language in §89.1207. No changes were made to this section since published as proposed.

Section 89.1250, Required Summer School Programs, is amended to clarify eligibility for students to enroll in the summer school program. No changes were made to this section since published as proposed.

Section 89.1265, Evaluation, is amended to delete a reference to a section of Chapter 89 that no longer exists. No changes were made to this section since published as proposed.

Adopted new §89.1267, Standards for Evaluation of Dual Language Immersion Program Models, and adopted new §89.1269, General Standards for Recognition of Dual Language Immersion Program Models, incorporate language from 19 TAC Chapter 89, Subchapter FF, which has been repealed, to clarify the relationship between bilingual education and dual language instruction. No changes were made to these sections since published as proposed.

In addition, the subchapter title is changed to "Commissioner's Rules Concerning State Plan for Educating English Language Learners."

The adopted rule actions have no new procedural or reporting implications. The adopted rule actions have no new locally maintained paperwork requirements.

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

The public comment period on the proposal began March 16, 2012, and ended April 16, 2012. Following is a summary of public comments received and corresponding agency responses regarding the proposed revisions to 19 TAC Chapter 89, Adaptations for Special Populations, Subchapter BB, Commissioner's Rules Concerning State Plan for Educating Limited English Proficient Students.

Comment: One administrator stated that the proposed language in §89.1203(2) that defines dual language immersion and states that the dual language program model is optional should be removed. The commenter expressed concerned that all program models are optional and this language may single out dual language implementation in the state.

Agency Response: The agency disagrees and maintains language as published as proposed. School districts that provide a bilingual education program may choose one of the four bilingual program models as described in §89.1210.

Comment: One teacher expressed disagreement with the proposed language in §89.1210(g) that places limits on the length of time a student is allowed to participate in an English as a Second Language (ESL) program.

Agency Response: The agency disagrees and maintains language as published as proposed. Section 89.1220(g)(5) requires language proficiency assessment committees to classify students as English proficient in accordance with the criteria described in §89.1225(h) and recommend their exit from the bilingual education or English as a second language program.

Comment: One administrator stated that the language in the proposed rule regarding a dual language immersion/one-way model should refer only to English language learners.

Agency Response: The agency agrees. Section 89.1210(d)(4)(B) has been modified to remove language relating to dominant English speakers from the dual language immersion/one-way program model.

Comment: One administrator inquired if school districts would have some flexibility concerning the proposed amendment to §89.1235 on the amount of time recent immigrant English language learners should spend in a newcomer center.

Agency Response: The agency disagrees and maintains language as published as proposed. In order for a student to have the opportunity to make adequate and timely progress toward graduation, it is important to move the student to mainstream classes at the earliest possible time.

Comment: One administrator stated that the use of the word "pull-out" in §89.1210(g)(2) is misleading and recommended either deleting the word, using it only in reference to elementary ESL classes, or distinguishing between an ESL class period at the secondary level and an ESL pull out at the elementary level.

Agency Response: The agency disagrees and maintains language as published as proposed. The term "pull-out" is the term used in statute in TEC, §29.066(b)(2)(B).

Comment: One administrator stated that there should be a third type of ESL program in rule and for use in the Public Education Information Management System (PEIMS) for students who are

receiving both ESL/English for Speakers of Other Languages classes and content-based ESL/sheltered instruction.

Agency Response: The agency disagrees and maintains language as published as proposed. Under statute, TEC, §29.066, districts that are required to offer bilingual education and ESL programs must follow the statutorily required program models and reporting requirements.

Comment: One administrator inquired about having a PEIMS category for classes focusing on long-term English language learners.

Agency Response: The agency provides the following clarification. Under statute, TEC, §29.066, districts that are required to offer bilingual education and ESL programs must follow the statutorily required program models and reporting requirements.

Comment: One administrator commented that Chapter 89 and PEIMS need to reflect best practices in ESL.

Agency Response: This comment is outside the scope of the proposed rulemaking.

Comment: One administrator inquired if funding would be suspended for a student who has not met exit criteria within five years of enrolling in school but is still being served.

Agency Response: The agency provides the following clarification. Section 89.1210(d)(1) - (4) and (g)(1) - (2) specify that a student who has met exit criteria in accordance with §89.1225(h), (j), and (k) may continue to receive services, but the school district will not receive the bilingual education allotment for that student.

The amendments and new sections are adopted under the Texas Education Code (TEC), §29.056, which authorizes the agency to establish standardized criteria for the identification, assessment, and classification of students of limited English proficiency eligible for entry into the program or exit from the program; the TEC, §29.053, which authorizes the agency to establish a procedure for identifying school districts that are required to offer bilingual education and special language programs in accordance with the TEC, Chapter 29, Subchapter B; and the TEC, §29.066, which requires the commissioner to adopt rules to classify bilingual education and special language programs. In addition, the TEC, §29.051, addresses state policy relating to bilingual education and special language programs. The TEC, §29.054, addresses exceptions to bilingual education programs. The TEC, §29.055, addresses program content and method of instruction for bilingual education and English as a second language programs. The TEC, §29.0561, addresses evaluation and reenrollment of exited bilingual students. The TEC, §29.057, addresses facilities and classes for bilingual education and special language programs. The TEC, §29.058, addresses enrollment of students who do not have limited English proficiency. The TEC, §29.059, addresses cooperation among districts to provide bilingual education and special language programs. The TEC, §29.060, addresses preschool, summer school, and extended time programs for bilingual and special language programs. The TEC, §29.063, addresses language proficiency assessment committees. The TEC, §29.064, addresses appeals by parents of students enrolled in bilingual education or special language programs.

The amendments and new sections implement the Texas Education Code, §§29.051, 29.053-29.060, 29.063, 29.064, and 29.066.

§89.1210. Program Content and Design.

(a) Each school district required to offer a bilingual education or English as a second language program shall provide each English language learner the opportunity to be enrolled in the required program at his or her grade level. Each student's level of proficiency shall be designated by the language proficiency assessment committee in accordance with §89.1220(g) of this title (relating to Language Proficiency Assessment Committee). The school district shall modify the instruction, pacing, and materials to ensure that English language learners have a full opportunity to master the essential knowledge and skills of the required curriculum. Students participating in the bilingual education program may demonstrate their mastery of the essential knowledge and skills in either their home language or in English for each content area.

(b) The bilingual education program shall be a full-time program of instruction in which both the students' home language and English shall be used for instruction. The amount of instruction in each language within the bilingual education program shall be commensurate with the students' level of proficiency in each language and their level of academic achievement. The students' level of language proficiency and academic achievement shall be designated by the language proficiency assessment committee. The Texas Education Agency (TEA) shall develop program guidelines to ensure that the programs are developmentally appropriate, that the instruction in each language is appropriate, and that the students are challenged to perform at a level commensurate with their linguistic proficiency and academic potential.

(c) The bilingual education program shall be an integral part of the regular educational program required under Chapter 74 of this title (relating to Curriculum Requirements). In bilingual education programs using Spanish and English as languages of instruction, school districts shall use state-adopted English and Spanish instructional materials and supplementary materials as curriculum tools to enhance the learning process; in addition, school districts may use other curriculum adaptations that have been developed. The bilingual education program shall address the affective, linguistic, and cognitive needs of English language learners as follows.

(1) Affective. English language learners shall be provided instruction in their home language to introduce basic concepts of the school environment, and instruction both in their home language and in English, which instills confidence, self-assurance, and a positive identity with their cultural heritages. The program shall address the history and cultural heritage associated with both the students' home language and the United States.

(2) Linguistic. English language learners shall be provided instruction in the skills of listening, speaking, reading, and writing both in their home language and in English. The instruction in both languages shall be structured to ensure that the students master the required essential knowledge and skills and higher-order thinking skills in all subjects.

(3) Cognitive. English language learners shall be provided instruction in language arts, mathematics, science, and social studies both in their home language and in English. The content area instruction in both languages shall be structured to ensure that the students master the required essential knowledge and skills and higher-order thinking skills in all subjects.

(d) The bilingual education program shall be implemented with consideration for each English language learner's unique readiness level through one of the following program models.

(1) Transitional bilingual/early exit is a bilingual program model that serves a student identified as limited English proficient in both English and Spanish, or another language, and transfers the stu-

dent to English-only instruction. This model provides instruction in literacy and academic content areas through the medium of the student's first language, along with instruction in English oral and academic language development. Non-academic subjects such as art, music, and physical education may also be taught in English. Exiting of a student to an all-English program of instruction will occur no earlier than the end of Grade 1 or, if the student enrolls in school during or after Grade 1, no earlier than two years or later than five years after the student enrolls in school. A student who has met exit criteria in accordance with §89.1225(h), (j), and (k) of this title (relating to Testing and Classification of Students) may continue receiving services, but the school district will not receive the bilingual education allotment for that student.

(2) Transitional bilingual/late exit is a bilingual program model that serves a student identified as limited English proficient in both English and Spanish, or another language, and transfers the student to English-only instruction. Academic growth is accelerated through cognitively challenging academic work in the student's first language along with meaningful academic content taught through the student's second language, English. The goal is to promote high levels of academic achievement and full academic language proficiency in the student's first language and English. A student enrolled in a transitional bilingual/late exit program is eligible to exit the program no earlier than six years or later than seven years after the student enrolls in school. A student who has met exit criteria in accordance with §89.1225(h), (j), and (k) of this title may continue receiving services, but the school district will not receive the bilingual education allotment for that student.

(3) Dual language immersion/two-way is a biliteracy program model that integrates students proficient in English and students identified as limited English proficient. This model provides instruction in both English and Spanish, or another language, and transfers a student identified as limited English proficient to English-only instruction. Instruction is provided to both native English speakers and native speakers of another language in an instructional setting where language learning is integrated with content instruction. Academic subjects are taught to all students through both English and the other language. Program exit will occur no earlier than six years or later than seven years after the student enrolls in school. A student who has met exit criteria in accordance with §89.1225(h), (j), and (k) of this title may continue receiving services, but the school district will not receive the bilingual education allotment for that student. The primary goals of a dual language immersion program model are:

(A) the development of fluency and literacy in English and another language for all students, with special attention given to English language learners participating in the program;

(B) the integration of English speakers and English language learners for academic instruction, in accordance with the program design and model selected by the school district board of trustees. Whenever possible, 50% of the students in a program should be dominant English speakers and 50% of the students should be native speakers of the other language at the beginning of the program; and

(C) the promotion of bilingualism, biliteracy, cross-cultural awareness, and high academic achievement.

(4) Dual language immersion/one-way is a biliteracy program model that serves only students identified as limited English proficient. This model provides instruction in both English and Spanish, or another language, and transfers a student to English-only instruction. Instruction is provided to English language learners in an instructional setting where language learning is integrated with content instruction. Academic subjects are taught to all students through both English and the other language. Program exit will occur no earlier than six years or later than seven years after the student enrolls in school. A student who has met exit criteria in accordance with §89.1225(h), (j), and (k) of this title may continue receiving services, but the school district will not receive the bilingual education allotment for that student. The primary goals of a dual language immersion program model are:

(A) the development of fluency and literacy in English and another language for all students, with special attention given to English language learners participating in the program;

(B) the integration of English speakers and English language learners for academic instruction, in accordance with the program design and model selected by the school district board of trustees; and

(C) the promotion of bilingualism, biliteracy, cross-cultural awareness, and high academic achievement.

(e) English as a second language programs shall be intensive programs of instruction designed to develop proficiency in listening, speaking, reading, and writing in the English language. Instruction in English as a second language shall be commensurate with the student's level of English proficiency and his or her level of academic achievement. In prekindergarten through Grade 8, instruction in English as a second language may vary from the amount of time accorded to instruction in English language arts in the general education program for English proficient students to a full-time instructional setting using second language methods. In high school, the English as a second language program shall be consistent with graduation requirements under Chapter 74 of this title. The language proficiency assessment committee may recommend appropriate services that may include content courses provided through sheltered instructional approaches by trained teachers, enrollment in English as a second language courses, additional state elective English courses, and special assistance provided through locally determined programs.

(f) The English as a second language program shall be an integral part of the regular educational program required under Chapter 74 of this title. School districts shall use state-adopted English as a second language instructional materials and supplementary materials as curriculum tools. In addition, school districts may use other curriculum adaptations that have been developed. The school district shall provide for ongoing coordination between the English as a second language program and the regular educational program. The English as a second language program shall address the affective, linguistic, and cognitive needs of English language learners as follows.

(1) Affective. English language learners shall be provided instruction using second language methods in English to introduce basic concepts of the school environment, which instills confidence, self-assurance, and a positive identity with their cultural heritages. The program shall address the history and cultural heritage associated with both the students' home language and the United States.

(2) Linguistic. English language learners shall be provided intensive instruction to develop proficiency in listening, speaking, reading, and writing in the English language. The instruction in academic content areas shall be structured to ensure that the students master the required essential knowledge and skills and higher-order thinking skills.

(3) Cognitive. English language learners shall be provided instruction in English in language arts, mathematics, science, and social studies using second language methods. The instruction in academic content areas shall be structured to ensure that the students master the required essential knowledge and skills and higher-order thinking skills.

(g) The English as a second language program shall be implemented with consideration for each English language learner's unique readiness level through one of the following program models.

(1) An English as a second language/content-based program model is an English program that serves only students identified as English language learners by providing a full-time teacher certified under the Texas Education Code (TEC), §29.061(c), to provide supplementary instruction for all content area instruction. The program integrates English as a second language instruction with subject matter instruction that focuses not only on learning a second language, but using that language as a medium to learn mathematics, science, social studies, or other academic subjects. Exiting of a student to an all-English program of instruction without English as a second language support will occur no earlier than the end of Grade 1 or, if the student enrolls in school during or after Grade 1, no earlier than two years or later than five years after the student enrolls in school. At the high school level, the English language learner receives sheltered instruction in all content areas. A student who has met exit criteria in accordance with §89.1225(h), (j), and (k) of this title may continue receiving services, but the school district will not receive the bilingual education allotment for that student.

(2) An English as a second language/pull-out program model is an English program that serves only students identified as English language learners by providing a part-time teacher certified under the TEC, §29.061(c), to provide English language arts instruction exclusively, while the student remains in a mainstream instructional arrangement in the remaining content areas. Instruction may be provided by the English as a second language teacher in a pull-out or inclusionary delivery model. Exiting of a student to an all-English program of instruction without English as a second language support will occur no earlier than the end of Grade 1 or, if the student enrolls in school during or after Grade 1, no earlier than two years or later than five years after the student enrolls in school. At the high school level, the English language learner receives sheltered instruction in all content areas. A student who has met exit criteria in accordance with §89.1225(h), (j), and (k) of this title may continue receiving services, but the school district will not receive the bilingual education allotment for that student.

(h) Except in the courses specified in subsection (i) of this section, English as a second language strategies, which may involve the use of the students' home language, may be provided in any of the courses or electives required for promotion or graduation to assist the English language learners to master the essential knowledge and skills for the required subject(s). The use of English as a second language strategies shall not impede the awarding of credit toward meeting promotion or graduation requirements.

(i) In subjects such as art, music, and physical education, the English language learners shall participate with their English-speaking peers in regular classes provided in the subjects. The school district shall ensure that students enrolled in bilingual education and English as a second language programs have a meaningful opportunity to participate with other students in all extracurricular activities.

(j) The required bilingual education or English as a second language programs shall be provided to every English language learner with parental approval until such time that the student meets exit criteria as described in §89.1225(h) of this title or graduates from high school.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
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Proposal publication date: March 16, 2012
For further information, please call: (512) 475-1497

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SUBCHAPTER FF. COMMISSIONER'S RULES CONCERNING DUAL LANGUAGE IMMERSION PROGRAMS

19 TAC §§89.1601, 89.1603, 89.1605, 89.1607, 89.1609, 89.1611, 89.1613

The Texas Education Agency (TEA) adopts the repeal of §§89.1601, 89.1603, 89.1605, 89.1607, 89.1609, 89.1611, and 89.1613, concerning dual language immersion programs. The repeals are adopted without changes to the proposed text as published in the March 16, 2012, issue of the *Texas Register* (37 TexReg 1885) and will not be republished. The sections establish rules for the implementation of dual language programs in Texas school districts. The adopted repeals remove language related to dual language instruction, which is incorporated as part of the commissioner's rules concerning the state plan for educating English language learners in 19 TAC Chapter 89, Subchapter BB. This is necessary to clarify the relationship between bilingual education and dual language instruction.

In accordance with the TEC, §28.0051, the commissioner of education exercised rulemaking authority to establish rules for the implementation of dual language programs in Texas school districts, including the establishment of minimum requirements for such a program, standards for evaluating program success and performance, and standards for recognizing exceptional programs and students who successfully complete these programs. The commissioner's rules in 19 TAC Chapter 89, Subchapter FF, adopted to be effective July 23, 2007, provide for dual language immersion programs that would result in students with a demonstrated mastery of the required curriculum in both English and one other language.

During the recent statutorily required review of rules in 19 TAC Chapter 89, staff identified the need to update rules. Accordingly, the repeal of 19 TAC Chapter 89, Subchapter FF, removes rules concerning dual language immersion programs and incorporates the rules into 19 TAC Chapter 89, Subchapter BB, concerning educating English language learners. This change integrates and streamlines the two sets of rules.

The adopted repeals have no procedural or reporting implications. The adopted repeals have no locally maintained paperwork requirements.

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

The public comment period on the proposal began March 16, 2012, and ended April 16, 2012. Following is a summary of the public comment received and the corresponding agency response regarding the proposed repeal of 19 TAC Chapter 89,

Adaptations for Special Populations Subchapter FF, Commissioner's Rules Concerning Dual Language Immersion Programs.

Comment: An individual expressed support for the repeal given there are challenges and limited resources in providing a quality education in two languages concurrently.

Agency Response: The agency provides the following clarification. The repeal of 19 TAC Chapter 89, Subchapter FF, removes rules concerning dual language immersion programs and incorporates the rules into 19 TAC Chapter 89, Subchapter BB, concerning educating English language learners. This change integrates and streamlines the two sets of rules.

The repeals are adopted under the Texas Education Code (TEC), §28.0051, which requires the commissioner of education by rule to adopt minimum requirements for a dual language immersion program implemented by a school district; standards for evaluating the success of a dual language immersion program and the performance of schools that implement a dual language immersion program; and standards for recognizing schools that offer an exceptional dual language immersion program and students who successfully complete a dual language immersion program.

The repeals implement the Texas Education Code, §28.0051.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cristina De La Fuente-Valadez
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For further information, please call: (512) 475-1497

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CHAPTER 101. ASSESSMENT

The Texas Education Agency (TEA) adopts the repeal of §101.3001 and §101.3003 and new §§101.3011 and 101.3021-101.3024, concerning implementation of testing program. The repeals and new sections are adopted without changes to the proposed text as published in the March 2, 2012, issue of the *Texas Register* (37 TexReg 1458) and will not be republished. Section 101.3001 addresses implementation of assessment instruments. Section 101.3003 addresses assessment requirements for graduation. The adopted rule actions reflect changes to the state assessment program beginning with the implementation of the State of Texas Assessments of Academic Readiness (STAAR) in the 2011-2012 and 2012-2013 school years.

The adopted repeal of 19 TAC Chapter 101, Subchapter CC, §101.3001 and §101.3003, and new 19 TAC Chapter 101, Subchapter CC, §§101.3011 and 101.3021-101.3024, reflect the changes made to the state assessment program as a result of the implementation of the STAAR program. In the 2011-2012 school year, the STAAR will be administered statewide to students in Grades 3-8 and to students first entering Grade 9.

Adopted new §101.3011, Implementation and Administration of Academic Content Area Assessment Instruments, retains provisions from repealed rule, §101.3001, for the implementation of the TEC, §39.023(a), (b), (c), (l), and any further testing required due to federal law. The new rule also includes provisions that allow the continued use of the Texas Assessment of Knowledge and Skills (TAKS) in Grades 10 and 11 and provisions for making available certain assessments in an alternative form. In addition, the adopted new rule specifies that the implementation date for the 15% course grade requirement begins in the 2012-2013 school year.

Adopted new §101.3021, Required Participation in Academic Content Area Assessments and Course Grading, stipulates that a student first entering Grade 9 in the 2011-2012 school year or thereafter shall be required to meet the end-of-course (EOC) requirements in the TEC, §39.025. Districts are required to institute a policy where a result on the applicable EOC assessment shall account for 15% of a student's final course grade beginning in the 2012-2013 school year. The new rule also addresses the following requirements.

To receive a Texas diploma, a student receiving high school course credit through credit by examination or by participating in a dual-credit course or distance-learning course must still meet the EOC assessment requirements for the student's high school graduation program.

A student receiving course credit by participation in a dual-credit or distance-learning course, or through an advanced placement or International Baccalaureate course, is subject to the 15% course grade requirement beginning in the 2012-2013 school year.

Students are not subject to the 15% course grade requirement if course credit is received through credit by examination. The 15% course grade requirement does not apply for certain eligible English language learners and students receiving special education services who take an alternate or modified form of an EOC assessment.

Adopted new §101.3021 also specifies those students who are not required to take certain EOC assessments due to completion of a course for high school credit prior to the 2011-2012 spring administration for a course for which an EOC assessment would normally apply.

Adopted new §101.3022, Assessment and Cumulative Score Requirements for the Minimum, Recommended, and Distinguished Achievement High School Programs, specifies the assessment and cumulative score requirements for the Texas diploma high school programs. New §101.3022 pertains to the minimum high school program (MHSP), the recommended high school program (RHSP), and the distinguished achievement high school program (DAP). If a student on the MHSP is enrolled in a course that is not specified by the curriculum requirements as listed in 19 TAC Chapter 74 for the MHSP program, the student's score on the EOC assessment for that course may count toward the cumulative score requirement for the content area at the student's discretion. Students on the RHSP and DAP must take all 12 EOC assessments to receive a Texas diploma. Further, students on the RHSP must also achieve satisfactory performance on Algebra II and English III EOC assessments, and students on the DAP must achieve the advanced standard on Algebra II and English III EOC assessments. The standard in place when a student first takes an EOC assessment is the standard that will be maintained throughout the student's school career for that content area.

Adopted new §101.3023, Participation, Graduation Assessment, and Cumulative Score Requirements for Students Receiving Special Education Services, specifies the following.

The admission, review, and dismissal (ARD) committee shall determine if a student receiving special education services will need to meet satisfactory performance on an EOC assessment and the cumulative score requirements for purposes of graduation.

Beginning with the 2011-2012 school year, all Grades 9-12 students with significant cognitive disabilities who are assessed with an alternate assessment as specified in the student's individualized education program (IEP) will be assessed using alternate versions of EOC assessments.

A student who is receiving special education services and who is first enrolled in Grade 9 or below in the 2011-2012 school year will be administered a modified version of an EOC assessment instrument as required by the student's IEP.

If a student who is receiving special education services is administered an alternate or modified form of an EOC assessment, the 15% course grade requirement of the TEC, §39.023(c), will not apply and a cumulative score will not be reported for alternative or modified assessments.

If a student receiving special education services is enrolled in a course for which there is an EOC assessment but no corresponding modified or alternate version of that assessment, the student is not required to take an assessment for that course. However, if a student who is receiving special education services is administered a general education EOC assessment as listed in the TEC, §39.023(c), the 15% course grade requirement will apply beginning in the 2012-2013 school year and a cumulative score will be reported for the student.

Adopted new §101.3024, Assessment Requirements for Students First Enrolled in Grade 9 Prior to 2011-2012 School Year or First Enrolled in Grade 10 or Above in 2011-2012 School Year, retains provisions from repealed rule, §101.3003, to specify the assessment graduation requirements needed to achieve a Texas high school diploma. The new rule also specifies that the TAKS-Modified assessments will continue to be the assessment requirement for a student receiving special education services who is enrolled above Grade 9 in the 2011-2012 school year and for whom an IEP specifies that the student will take a modified version of an assessment.

The adopted rule actions have no procedural and reporting implications beyond those that apply to all Texas students with respect to implementation of the new STAAR program. The adopted rule actions have minimal effect on the paperwork required and maintained by school districts, language proficiency assessment committees, and/or ARD committees in making and tracking assessment and accommodation decisions for Texas students.

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

The public comment period on the proposal began March 2, 2012, and ended April 2, 2012. Following is a summary of the public comments received and the corresponding agency responses regarding proposed new 19 TAC Chapter 101, Assessment, Subchapter CC, Commissioner's Rules Concerning Implementation of the Academic Content Areas Testing Program.

Comment: The Texas Classroom Teachers Association (TCTA) commented that rule language in §101.3011(f) and §101.3021(d) is unclear about whether districts are required to count the applicable EOC for 15% of the course grade for the 2011-2012 school year for students in Grade 8 or lower taking a high school course for credit.

Agency Response: The agency disagrees. Section 101.3011(f) states that the 15% course grade requirement specified in §101.3021 (relating to Required Participation in Academic Content Area Assessments and Course Grading) and §101.3023 (relating to Participation, Graduation Assessment, and Cumulative Score Requirements for Students Receiving Special Education Services) shall be implemented by school districts beginning in the 2012-2013 school year. The one-year suspension of the 15% course grade requirement extends to all students taking an EOC assessment.

Comment: An individual asked whether the entering class of 2015 will be required to take the EOC and the advanced placement (AP) test for the same course to receive a Texas diploma on the distinguished achievement high school program.

Agency Response: The agency provides the following clarification. The graduation requirements for the entering class of 2015, including any requirements to receive a diploma on the distinguished achievement high school program, will most likely be similar to the graduation requirements for the entering class of 2012. As required by the Texas Education Code, §39.025(a-1), the agency does plan to conduct a study in 2013-2014 to determine a link between the state-developed EOC assessments and the AP, International Baccalaureate, and other advanced assessments. If a link is established between those assessments and the STAAR EOCs, substitution of an EOC by an approved assessment would be allowed in order to meet the state's assessment graduation requirements.

Comment: An educator from Tuloso-Midway High School made several observations concerning the English I EOC. The commenter stated that expecting English language learners (ELLs) to pass English I if they have only been in the U.S. a few years is unrealistic given the time needed to become proficient in a second language. The commenter also stated, regarding course grading, that it is impractical to expect a 9th grade student to realize the importance of passing an assessment for graduation purposes. The commenter expressed agreement with the one-year waiver for the 15% course grade requirement and recommended that the 15% rule be eliminated completely or modified to fit the various scheduling needs of Texas schools, including year-round schools.

Agency Response: For the ELL testing requirements, the agency acknowledges the varying views about the amount of English students should possess to reasonably engage in state assessments in English. The agency does not agree that students must have a certain level of English language proficiency before taking an assessment as long as appropriate uses are made of the test scores. Knowing how ELLs perform on the STAAR assessments, even ELLs who are new to the U.S. and appear to know very little English, provides baseline data from which to set progress targets and monitor growth. For the English I and II EOC assessments, certain allowances for course grading, cumulative scoring, and retesting as specified under 19 TAC §101.1007 (relating to Assessment Provisions for Graduation) are made for ELLs who have been in U.S. schools three years or less (five years or less if a qualifying unschooled asylee or refugee) and who have not yet demonstrated English

language proficiency in reading on the Texas English Language Proficiency Assessment System.

Per the state's graduation requirements, with passage of Senate Bill 1031, 80th Texas Legislature, 2007, the Texas Education Code requires that, in order to receive a Texas diploma, students must take 12 EOC assessments beginning in Grade 9 and achieve a cumulative score indicating satisfactory performance in four content areas (English language arts, mathematics, science, social studies). The agency does not have the legal authority to modify these requirements.

For the 15% course grade requirement, the agency does not have the authority to eliminate this provision. The agency is also statutorily constrained in when it can administer the state EOC assessments, which impacts the reporting of results to districts. Since most spring EOC testing cannot begin until the first full week in May, reporting cannot occur before the end of May or the first weeks of June. The agency is aware of district concerns and will continue to explore methods to report results to districts as quickly as possible.

Comment: An individual asked if the 15% course grade requirement will apply to all high school students (except special education students and some ELL students) starting in the 2012-2013 school year. The individual also requested clarification concerning whether students first enrolled in Grade 9 prior to the 2011-2012 school year or enrolled in Grade 10 or above in the 2011-2012 school year are required to pass the exit-level TAKS to receive a Texas diploma, and if the EOC assessments will affect final course grades for those students whose assessment graduation requirement is TAKS.

Agency Response: The agency provides the following clarification. The 15% course grade requirement will only apply to students first entering Grade 9 in the 2011-2012 school year or thereafter. Since a student who first enrolled in Grade 9 prior to the 2011-2012 school year or enrolled in Grade 10 or above in the 2011-2012 school year must meet the TAKS assessment graduation requirements, those students will not be administered a STAAR EOC for a course in which they are enrolled and will not receive a score that can be applied to a course grade.

SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING IMPLEMENTATION OF TESTING PROGRAM

19 TAC §101.3001, §101.3003

The repeals are adopted under the Texas Education Code (TEC), §39.025, which authorizes the commissioner to adopt rules requiring a student participating in the recommended or advanced high school program to be administered each end-of-course assessment instrument listed in Section 39.023(c) and requiring a student participating in the minimum high school program to be administered an end-of-course assessment instrument listed in Section 39.023(c) only for a course in which the student is enrolled and for which an end-of-course assessment instrument is administered. Additionally, the TEC, §39.025(f), authorizes the commissioner to adopt by rule a transition plan to implement the amendments made by Chapter 1312 (S.B. No. 1031), Acts of the 80th Legislature, Regular Session, 2007, replacing general subject assessment instruments administered at the high school level with end-of-course assessment instruments. The TEC, §39.023, authorizes the agency to adopt end-of-course assessment instruments for secondary-level courses identified in the TEC, §39.023(c).

The repeals implement the Texas Education Code, §39.023 and §39.025.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

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SUBCHAPTER CC. COMMISSIONER'S RULES CONCERNING IMPLEMENTATION OF THE ACADEMIC CONTENT AREAS TESTING PROGRAM

19 TAC §§101.3011, 101.3021 - 101.3024

The new sections are adopted under the Texas Education Code (TEC), §39.025, which authorizes the commissioner to adopt rules requiring a student participating in the recommended or advanced high school program to be administered each end-of-course assessment instrument listed in Section 39.023(c) and requiring a student participating in the minimum high school program to be administered an end-of-course assessment instrument listed in Section 39.023(c) only for a course in which the student is enrolled and for which an end-of-course assessment instrument is administered. Additionally, the TEC, §39.025(f), authorizes the commissioner to adopt by rule a transition plan to implement the amendments made by Chapter 1312 (S.B. No. 1031), Acts of the 80th Legislature, Regular Session, 2007, replacing general subject assessment instruments administered at the high school level with end-of-course assessment instruments. The TEC, §39.023, authorizes the agency to adopt end-of-course assessment instruments for secondary-level courses identified in the TEC, §39.023(c).

The new sections implement the Texas Education Code, §39.023 and §39.025.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cristina De La Fuente-Valadez
Director, Rulemaking
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CHAPTER 157. HEARINGS AND APPEALS

The Texas Education Agency (TEA) adopts amendments to §§157.1041, 157.1055, 157.1071, 157.1072, 157.1081-157.1084, and 157.1101-157.1103, concerning hearings and appeals. The amendments are adopted with no changes to the proposed text as published in the March 23, 2012, issue of the *Texas Register* (37 TexReg 1977) and will not be republished. The sections address general provisions for hearings before the commissioner of education, specific appeals to the commissioner, hearings of appeals arising under federal law and regulations, and hearings conducted by independent hearing examiners. The adopted amendments include clarifying requirements for motions requiring a certificate of conference and hearings procedures regarding federal programs, adding procedures regarding subpoenas and depositions, updating federal statutory references, and increasing the total amount of compensation for independent hearing examiners in local employment cases.

The provisions of 19 TAC Chapter 157, Subchapter AA, General Provisions for Hearings Before the Commissioner of Education, were adopted effective April 7, 1993, and amended effective July 20, 2004. In Subchapter AA, the adopted amendment to §157.1041, Scope and Purpose, adds the web addresses for the Texas Rules of Civil Evidence and Texas Rules of Civil Procedure. The adopted amendment to §157.1055, Motions, clarifies requirements for motions requiring a certificate of conference.

The provisions of 19 TAC Chapter 157, Subchapter BB, Specific Appeals to the Commissioner, were adopted effective July 20, 2004. In Subchapter BB, the adopted amendment to §157.1071, Hearings in Which the Texas Education Agency is a Party, clarifies procedures for requesting and issuing subpoenas and commissions for deposition. The adopted amendment to §157.1072, Hearings Brought Under Texas Education Code, Chapter 21, Subchapter G, clarifies requirements for motions requiring a certificate of conference.

The provisions of 19 TAC Chapter 157, Subchapter CC, Hearings of Appeals Arising Under Federal Law and Regulations, were adopted effective May 8, 1996. In Subchapter CC, the adopted amendment to §157.1081, Applicant's Opportunity for a Hearing, updates statutory references for federal programs. The section title has been changed for clarification. The adopted amendment to §157.1082, Grantee's or Subgrantee's Opportunity for a Hearing, clarifies hearings procedures. The section title has been changed for clarification. The adopted amendment to §157.1083, Procedures for Hearing, clarifies requirements for requesting a hearing. The section title has been changed for clarification. The adopted amendment to §157.1084, Appeal from the Decision of the Commissioner of Education, updates a cross-reference.

The provisions of 19 TAC Chapter 157, Subchapter DD, Hearings Conducted by Independent Hearing Examiners, were adopted effective May 8, 1996, and amended effective May 7, 2006. In Subchapter DD, the adopted amendment to §157.1101, Rates of Independent Hearing Examiners, increases the total amount of compensation for independent hearing examiners in local employment cases. The adopted amendment to §157.1102, Assignment of Independent Hearing Examiners, standardizes references to independent hearing examiners. The adopted amendment to §157.1103, Report of the Independent Hearing Examiner, addresses technological advances.

The adopted amendments have no procedural or reporting implications. The adopted amendments have no locally maintained paperwork requirements.

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

The public comment period on the proposal began March 23, 2012, and ended April 23, 2012. No public comments were received.

SUBCHAPTER AA. GENERAL PROVISIONS FOR HEARINGS BEFORE THE COMMISSIONER OF EDUCATION

19 TAC §157.1041, §157.1055

The amendments are adopted under the Texas Education Code (TEC), §7.057, which addresses provisions relating to appeals; the TEC, §21.301, which authorizes the commissioner of education to adopt rules governing the conduct of an appeal to the commissioner; and the Texas Government Code, §2001.004, which authorizes a state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

The amendments implement the TEC, §7.057 and §21.301, and Texas Government Code, §2001.004.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

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SUBCHAPTER BB. SPECIFIC APPEALS TO THE COMMISSIONER

19 TAC §157.1071, §157.1072

The amendments are adopted under the TEC, §7.057, which addresses provisions relating to appeals; the TEC, §12.116, which authorizes the commissioner to adopt a procedure to be used for modifying, placing on probation, revoking, or denying renewal of the charter of an open-enrollment charter school; the TEC, §21.301, which authorizes the commissioner of education to adopt rules governing the conduct of an appeal to the commissioner; and the Texas Government Code, §2001.004, which authorizes a state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

The amendments implement the TEC, §§7.057, 12.116, and 21.301, and Texas Government Code, §2001.004.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Cristina De La Fuente-Valadez
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SUBCHAPTER CC. HEARINGS OF APPEALS ARISING UNDER FEDERAL LAW AND REGULATIONS

19 TAC §§157.1081 - 157.1084

The amendments are adopted under 34 Code of Federal Regulations (CFR) §76.401, which directs the agency to provide an applicant for specific federal funds with notice and an opportunity for a hearing before disapproving the application, and 34 CFR §80.43(a), which addresses provisions relating to enforcement, including remedies for noncompliance, hearings and appeals, effects of suspension and termination, and relationship to debarment and suspension.

The amendments implement 34 CFR §76.401 and §80.43(a).

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER DD. HEARINGS CONDUCTED BY INDEPENDENT HEARING EXAMINERS

19 TAC §§157.1101 - 157.1103

The amendments are adopted under the TEC, §21.252, which authorizes the commissioner of education to set hourly rates of compensation for a hearing examiner and to set a maximum amount of compensation a hearing examiner may receive for a hearing; the TEC, §21.254, which addresses provisions relating to the assignment of hearing examiners, and the TEC, §21.304, which addresses provisions relating to a decision of the commissioner.

The amendments implement the TEC, §§21.252, 21.254, and 21.304.

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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TITLE 22. EXAMINING BOARDS

PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 329. LICENSING PROCEDURE

22 TAC §329.1

The Texas Board of Physical Therapy Examiners adopts amendments to §329.1, regarding General Licensure Requirements and Procedures, without changes to the proposed text as published in the February 10, 2012, issue of the *Texas Register* (37 TexReg 596).

The amendments clarify and update the license application requirements. The amendments update rules to reflect changes to procedures, eliminate a copy of the diploma as proof of program completion and graduation, and reflect the addition of the mailing address as contact information.

No comments were received regarding the changes.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 7, 2012.

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John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
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Proposal publication date: February 10, 2012
For further information, please call: (512) 305-6900

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22 TAC §329.5

The Texas Board of Physical Therapy Examiners adopts amendments to §329.5, regarding Licensing Procedures for Foreign-Trained Applicants, without changes to the proposed text as published in the February 10, 2012, issue of the *Texas Register* (37 TexReg 597).

The amendments decrease impediments to licensure for applicants with H1-B visas and clarify other exemptions. The amendments add H1-B visa holders to the list of applicants eligible for an exemption from English language proficiency requirements, if they meet the other requirements of the exemption. They also reinsert language exempting graduates of foreign CAPTE-accredited programs from the educational evaluation.

No comments were received regarding the changes.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

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CHAPTER 337. DISPLAY OF LICENSE

22 TAC §337.1

The Texas Board of Physical Therapy Examiners adopts amendments to §337.1, regarding License and Renewal Certificate, without changes to the proposed text as published in the February 10, 2012, issue of the *Texas Register* (37 TexReg 598).

The amendments reflect changes to requirements for display of license.The amendments delete references to the wallet-sized certificate, which is being eliminated.

No comments were received regarding the changes.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

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CHAPTER 341. LICENSE RENEWAL

22 TAC §341.1

The Texas Board of Physical Therapy Examiners adopts amendments to §341.1, regarding Requirements for Renewal, without changes to the proposed text as published in the February 10, 2012, issue of the *Texas Register* (37 TexReg 599).

The amendments make it clear that the most accurate and secure information regarding a license issued by the Board is to be found on the agency website. The amendments establish that the board's secure website is the appropriate resource for verification of license status (e.g., active, inactive, expired). The amendments eliminate the requirement that a person have a paper copy of their license in hand in order to provide physical therapy services. They also eliminate the use of the online transaction receipt as proof of licensure.

No comments were received regarding the changes.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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John P. Maline
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CHAPTER 347. REGISTRATION OF PHYSICAL THERAPY FACILITIES

22 TAC §347.5

The Texas Board of Physical Therapy Examiners adopts amendments to §347.5, regarding Requirements for Registered Facilities, without changes to the proposed text as published in the February 10, 2012, issue of the *Texas Register* (37 TexReg 600).

The amendment deletes references to the renewal certificate, which will no longer be mailed.

No comments were received regarding the proposed changes.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 7, 2012.

TRD-201202309
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Effective date: May 27, 2012
Proposal publication date: February 10, 2012
For further information, please call: (512) 305-6900

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22 TAC §347.8

The Texas Board of Physical Therapy Examiners adopts amendments to §347.8, regarding Change in Facility Ownership, without changes to the proposed text as published in the February 10, 2012, issue of the *Texas Register* (37 TexReg 601).

The amendment deletes references to the renewal certificate, which will no longer be mailed.

No comments were received regarding the proposed changes.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 305-6900

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22 TAC §347.9

The Texas Board of Physical Therapy Examiners adopts amendments to §347.9, regarding Renewal of Registration, without changes to the proposed text as published in the February 10, 2012, issue of the *Texas Register* (37 TexReg 602). The amendments will increase the agency's efficiency and establish the Board's website as the authority for facility registration status. The amendments delete references to the facility renewal certificate, which is being eliminated, and establish that the recognized source of valid, current information about the status of a facility registration is the board's website. The amendments establish that once a current registration can be validated on the board's website, physical therapy services may be provided at that facility. They also eliminate the use of the online transaction receipt as proof of renewal of registration. In addition, the amendments eliminate the delayed status, which is used by a very small number of registered facilities to allow them to remain registered without providing services due to the lack of a Therapist in Charge. In the future, facilities that do not have a Therapist in Charge at time of renewal will be required to close the facility and reopen at a later date.

No comments were received regarding the proposed changes.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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

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22 TAC §347.12

The Texas Board of Physical Therapy Examiners adopts amendments to §347.12, regarding Restoration of Registration, without changes to the proposed text as published in the February 10, 2012, issue of the *Texas Register* (37 TexReg 602). The amendments will increase agency efficiency and simplify the registration withdrawal process for facility owners. The amendments delete references to the renewal certificate, which will no longer be mailed, and clarifies that notification of facility closure must be in writing.

No comments were received regarding the proposed changes.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 305-6900

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TITLE 28. INSURANCE

PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 133. GENERAL MEDICAL PROVISIONS

SUBCHAPTER D. DISPUTE OF MEDICAL BILLS

28 TAC §133.307, §133.308

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance (Department), Division of Workers' Compensation (Division) adopts amendments to §133.307 and §133.308 (relating to MDR of Fee Disputes and MDR of Medical Necessity Disputes, respectively). The amendments to

§133.307 and §133.308 are adopted with changes to the proposed text as published in the March 23, 2012, issue of the *Texas Register* (37 TexReg 1980). These changes are more fully discussed below. These changes do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

In accordance with Government Code §2001.033(a)(1), the Division's reasoned justification for these rules is set out in this order, which includes the preamble. The preamble contains a summary of the factual basis of the rules, a summary of comments received from interested parties, the names of entities who commented and whether they were in support of or in opposition to the adoption of the rule, and the reasons why the Division agrees or disagrees with the comments and recommendations.

The Division published an informal draft of the proposed amendments on the Division's website for informal comment on December 6, 2011. There were five informal comments received. Following formal proposal of the amendments, the Division conducted a public hearing on April 13, 2012. The public comment period closed on April 23, 2012. The Division received nine formal public comments.

The Division also published the following drafts of TDI-DWC forms for informal comment simultaneously with the rules proposed for formal comments. These informal draft forms pertain to medical dispute resolution and arbitration: *Medical Fee Dispute Resolution Request,* DWC Form-060; *Election to Engage in Arbitration,* DWC Form-044; *Request to Schedule, Reschedule, or Cancel a Benefit Review Conference for Appeal of a Medical Fee Dispute Decision (BRC-MFD),* DWC-Form 45M; and *Request to Schedule Medical Contested Case Hearing (MCCH),* DWC Form-49.

These adopted amendments implement statutory changes in House Bill 2605 and Senate Bill 809, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011 (HB 2605 and SB 809) that concern the appeals process for medical fee disputes and medical necessity disputes, as well as the expedited provision of medical benefits for certain injuries sustained by first responders. These adopted rules also clarify and update Division rules in accordance with the provisions of other Division rules and Labor Code, Title 5 when performing medical dispute resolution activities under the Act.

HB 2605 made several legislative amendments that impact the resolution of medical fee dispute cases adjudicated by the Division. This bill enacted Labor Code §413.0312, which alters the appeals process applicable to medical fee disputes after the Division's review under Labor Code §413.031. Newly added Labor Code §413.0312 provides one appeal process for medical fee disputes regardless of the amount of reimbursement sought. Prior to the enactment of HB 2605, appeals of medical fee disputes were handled by a Division contested case hearing (CCH) if the amount of reimbursement sought by the requestor in an individual fee dispute was $2,000 or less or a contested case hearing conducted by the State Office of Administrative Hearings (SOAH) if the amount of reimbursement sought exceeded $2,000. Parties who had exhausted all administrative remedies and who were aggrieved by the final decision of SOAH could seek judicial review of the decision in the manner provided for judicial review of a contested case under Chapter 2001, Subchapter G Government Code.

Pursuant to Labor Code §413.0312, the appealing party is now required to mediate the medical fee dispute at a benefit review conference (BRC) under Labor Code Chapter 410, Subchapter B. If the dispute remains unresolved after a BRC, the parties may elect to engage in binding arbitration as provided by Labor Code §413.0312(d) and under Chapter 410, Subchapter C. However, if arbitration is not elected, the party is entitled to a contested case hearing at SOAH to resolve the dispute in the manner provided for a contested case under Chapter 2001, Government Code. A party who has exhausted all administrative remedies and who is aggrieved by a final decision of SOAH may seek judicial review of the decision in the manner provided for judicial review of a contested case under Chapter 2001, Subchapter G Government Code and Labor Code §413.031(k-1).

In addition to altering the appellate process applicable to medical fee disputes, Labor Code §413.0312 also requires reimbursement to the Division for the costs for services provided by SOAH in a contested case hearing involving a medical fee dispute. Except in cases where the injured employee is the nonprevailing party, Labor Code §413.0312(g) requires the nonprevailing party in the contested case hearing to reimburse the Division for the costs of a SOAH proceeding. If an injured employee is a nonprevailing party, Labor Code §413.0312(g) requires the insurance carrier to reimburse the Division for the SOAH costs unless otherwise agreed by the parties. Reimbursement must be remitted to the Division not later than the 30th day after the date of receiving a bill or statement from the Division. Labor Code §413.0312(k) requires the Commissioner of Workers' Compensation to adopt rules that establish a procedure that will enable the Division to charge a party to a medical fee dispute, other than an injured employee, for the costs of services provided by SOAH in medical fee dispute cases.

In accordance with §44 of HB 2605, the above described legislative amendments affecting medical fee disputes apply only to the appeal of a medical fee dispute that is based on a review conducted by the Division on or after June 1, 2012. An appeal of a medical fee dispute that is based on a review conducted by the Division before that date is governed by the prior law.

HB 2605 also enacted legislative changes that affect the manner in which a person appeals a decision by an independent review organization (IRO). Specifically, this bill (1) amended Insurance Code §1305.355 and added §1305.356 which concerns the appeal of an IRO decision involving health care in a certified workers' compensation network; (2) amended Labor Code §413.031(k) and (k-1) which concerns the appeal of an IRO decision involving health care provided outside of a certified network; and (3) enacted Labor Code §504.054 which concerns the appeal of an IRO decision involving health care provided by a political subdivision in accordance with Labor Code §504.053(b)(2). These statutory amendments provide that a party to a medical necessity dispute that remains unresolved after review by an IRO is entitled to a contested case hearing conducted by a Division hearing officer in accordance with Labor Code §413.0311. Additionally, the new provisions require that in cases involving health care in a certified network, the hearing officer conducting the hearing shall consider evidence-based treatment guidelines adopted by the certified network. In a similar manner, the new statutory provisions in the Labor Code require that in cases involving health care provided by a political subdivision under Labor Code §504.053(b)(2), the hearing officer conducting the hearing shall consider any treatment guidelines adopted by the political subdivision or pool if those guidelines meet the standards provided by Labor Code §413.011(e). A party who has exhausted all administrative remedies and who is aggrieved by a final decision of the Division's hearing officer may seek judicial

review of the decision in the manner provided for judicial review of a contested case under Chapter 2001, Subchapter G Government Code.

As stated above, this adoption is also designed to implement provisions in SB 809 which concern a party's right to seek judicial review after exhausting the applicable administrative remedies in the medical fee dispute or review of the IRO decision as described above. HB 2605 provides for judicial review for network appeals. SB 809 amended Labor Code §413.031(k-1) and specifies the time frames for a party seeking judicial review. In a medical fee dispute, SB 809 provides in Labor Code §413.031(k-1) that the party seeking judicial review of a SOAH decision must file suit not later than the 45th day after the date on which SOAH mailed the party the notification of the decision. For purposes of Labor Code §413.031(k-1), the mailing date is considered to be the fifth day after the date the decision was issued by SOAH. In an appeal of an IRO decision, SB 809 provides in Labor Code §413.0311(d) that a party seeking judicial review of a decision of a Division hearing officer must file suit not later than the 45th day after the date on which the Division mailed the party the decision of the hearings officer. The mailing date is considered to be the fifth day after the date the decision of the hearings officer was filed with the Division.

Finally, this adoption implements provisions in HB 2605 that concern a first responder's claim for medical benefits. HB 2605 enacted Labor Code §504.055 and §504.056 which apply to a first responder as defined in Labor Code §504.055 who sustains a serious bodily injury in the course and scope of employment. These statutes require the political subdivision, Division, and insurance carrier to accelerate and give priority to a first responder's claim for medical benefits, including all health care required to cure or relieve the effects naturally resulting from a compensable injury. These statutes further require the Division to accelerate, under rules adopted by the Commissioner, a contested case hearing requested by or an appeal submitted by a first responder regarding the denial of a claim for medical benefits. A first responder is required to provide notice to the Division and IRO that the contested case or appeal involves a first responder.

These adopted amendments are necessary in order to implement and incorporate the above described amendments and new provisions into existing Division rules that govern medical dispute resolution. The adopted amendments conform §133.307 to the appeal process provisions in HB 2605 for medical fee disputes, including provisions that require reimbursement to the Division for the costs of SOAH in a medical fee dispute. The adopted amendments to §133.308 conform that rule to legislative changes in HB 2605 that govern the appeal of an IRO decision in a medical necessity dispute. These adopted amendments also incorporate into §133.307 and §133.308 provisions that will provide for the accelerated review of a covered first responder's claim for medical benefits in medical fee and medical necessity disputes.

These adopted amendments also include changes that are intended to provide system participants with a clearer understanding of the appeals process for the appeal of Medical Fee Dispute Resolution (MFDR) Section decisions and IRO decisions. These changes will also provide the Division with greater flexibility in performing the appeals processes. Finally, to conform to current nomenclature this adoption also makes non-substantive changes in terminology throughout §133.307 and §133.308 such as adding the language "in the form and manner required by the division" to text and changing the terms "Department" to "department", "Department's" to "department's", "Division of Workers' Compensation" or "Division" to "division", "Division's" to "division's", and adding the words "health care" to "provider", "injured" to "employee", and "insurance" to "carrier." The terms "provider" and "MDR" have been deleted from these adopted rules and replaced with the terms "health care provider" and "medical fee dispute resolution", respectively. In some instances, the acronym "MDR" has been deleted and changed to "MFDR." The term "MDR" has meant medical dispute resolution. The proposed term "MFDR" means medical fee dispute resolution and the process for the resolution of medical fee disputes is the focus of adopted §133.307.

The Division has changed some of the proposed language in the text of the rule as adopted in response to public comments received. The Division received a comment recommending that the Division clarify the information that subclaimant requestors are required to submit to the Division when seeking MFDR. In response to this comment, the Division removed the word "subclaimant" from §133.307(c)(2) and adopted new §133.307(c)(3) which contains requirements for subclaimant dispute requests. Adopted §133.307(c)(3) provides that the requestor shall provide the appropriate information with the request that is consistent with the provisions of 28 TAC §140.6 or §140.8 of this title (relating to Subclaimant Status: Establishment, Rights, and Procedures and Procedures for Health Care Insurers to Pursue Reimbursement of Medical Benefits under Labor Code §409.0091). A request made by a subclaimant under Labor Code §409.009 shall comply with 28 TAC §140.6. A request made by a subclaimant under Labor Code §409.0091 shall comply with the document requirements of 28 TAC §140.8.

The Division received comments that disagreed with language in proposed §133.307(g). The commenters believed the proposed text could be misconstrued to prohibit the parties from raising at a BRC or at SOAH defenses relating to disputes over compensability, extent of injury, liability, or medical necessity that have not yet been finally adjudicated, and that the proposed text would prohibit parties from abating the case until the issues are resolved. Since the Division's proposed language was intended to prevent litigation of the issues affecting the injured employee without their presence, in response to suggested language the Division changed §133.307(g) to state that "if a party provides the benefit review officer or administrative law judge with documentation listed in subsection (d)(2)(H) or (I) of this section that shows unresolved issues regarding compensability, extent of injury, liability, or medical necessity for the same service subject to the fee dispute, then the benefit review officer or administrative law judge shall abate the proceedings until those issues have been resolved." This adopted rule is necessary to prevent the injured employee who may not be a party to the fee dispute from being bound by the ruling. Furthermore, it prevents a carrier from being ordered to pay for a bill in which it has no underlying legal obligation. Finally, it prevents conflicting or duplicative decisions. The requirement to present evidence is so the benefit review officer or administrative law judge can verify the existence of a dispute before abating the proceedings.

The Division received a comment that requested text in §133.307(g) that would allow a party to a medical fee dispute to appear at a benefit review conference via telephone. In response, the Division adopted text in §133.307(g)(1) that provides that a party may appear at a benefit review conference via telephone.

The Division received comments that disagreed with proposed text that would require an insurance carrier or the insurance carrier's utilization review agent to provide to the IRO a list of the health care providers known by the insurance carrier to have provided care to the injured employee who have medical records relevant to the review. In response to this comment, the Division did not adopt this requirement.

The Division has also made changes to some of the proposed text that are not in response to comment that are non-substantive and necessary to clarify and correct as proposed. First, the Division throughout §133.307 and §133.308 has replaced the term "reconsideration" with "appeal." This nonsubstantive change is being made due to ongoing standardization of this terminology across the health care industry and in Division and Department rules. This change occurs in §133.307(c)(2)(J), (d)(2)(B), (f)(3)(A); and §133.308(h), (i)(3), (k)(5) and (s)(2)(D). The Division clarifies that the usage of the term "appeal" in §133.307(c)(2)(J), (d)(2)(B), and (f)(3)(A) refers to appeals submitted to the insurance carrier in accordance with §133.250 of this title regarding medical bill processing/audit by insurance carrier. The Division also clarifies that the usage of the term "appeal" in §133.308(h), (i)(3), (k)(5) and (s)(2)(D) refers to appeals submitted to the insurance carrier or the insurance carrier's utilization review agent in accordance with §133.250 of this title or §134.600 of this title regarding prospective and concurrent review of health care, as applicable. Second, the Division in §133.308(g)(2) has corrected the name of the area within the Department from which a person may obtain an IRO request form. The Division has corrected this name to read the "Managed Care Quality Assurance Office."

Description of adopted amendments to §133.307

Section 133.307 governs non-certified network medical fee dispute resolution. The adopted amendments to subsection (a) make this rule applicable to a request for MFDR as authorized by the Act that is filed on or after June 1, 2012. Fee disputes filed with the Division prior to June 1, 2012 will be governed by the statutes and rules in effect immediately before the effective date of HB 2605. The Division has adopted the date of June 1, 2012 in §133.307 to be consistent with §44 of HB 2605. This adopted amendment is necessary because under §44 of HB 2605, the new appellate process applies only to the appeal of a medical fee dispute that is based on a review conducted by the Division on or after June 1, 2012. Additionally, since HB 2605 now places the financial liability of SOAH costs on the non-prevailing party in a medical fee dispute, this adopted applicability date is necessary because it will ensure that parties requesting appeals of medical fee disputes at SOAH will have clear notification of their potential liability in the cases.

Adopted §133.307(a)(3) requires that a request for medical fee dispute resolution that involves a first responder's request for reimbursement of medical expenses paid by the first responder be accelerated by the Division and given priority in accordance with the provisions of Labor Code §504.055. This adopted amendment is necessary in order to implement Labor Code §504.055(e) which requires the Division to accelerate, under rules adopted by the Commissioner, an appeal submitted by a first responder regarding the denial of a claim for medical benefits.

The adopted amendments to §133.307(b) update the persons who may be requestors under the rule by adding subclaimants to the list of persons who may be requestors. Subclaimants are added in accordance with §§140.6, 140.7, and 140.8 of this title (relating to Subclaimant Status: Establishment, Rights, and Procedures; Health Care Insurer Reimbursement under Labor Code §409.0091; and Procedures for Health Care Insurers to Pursue Reimbursement of Medical Benefits under Labor Code §409.0091, respectively), which provide rules allowing subclaimants to participate in medical fee dispute resolution before the Division. This adopted amendment is necessary to conform §133.307 with those Chapter 140 rules.

The adopted amendments to §133.307(c)(1) state that a decision by the MFDR Section that a request was not timely filed is not a dismissal and may be appealed pursuant to adopted subsection (g) of this rule. This adopted amendment is necessary because there may be a dispute over the timeliness which parties should be permitted the opportunity to appeal.

Section 133.307(c)(2) will govern requests for MFDR by health care providers and pharmacy processing agents. The adopted amendments to §133.307(c)(2) remove reference to the DWC-60 table and describes the information that must be included in requests for MFDR by health care providers and pharmacy processing agents (PPAs). These adopted amendments are necessary in order to provide clarity in Division rules on the information required to be included in a request for MFDR from a health care provider and pharmacy processing agent. The adopted amendments are also necessary in order to allow other relevant records related to the date of service in dispute to be sent with the request and not to unduly limit the records that may be sent since other relevant records related to the service in dispute may be available to support a party's position. To this end, the Division has provided in adopted amendments to §133.307(c)(2)(M) that a request for MFDR is to include a copy of all applicable medical records "related" to the dates of service in dispute as opposed to "specific" to the dates of service in dispute. Additionally, adopted §133.307(c)(2)(Q) will allow a requestor to submit any other documentation that the requestor deems applicable to the medical fee dispute.

Also included in the adopted amendments to §133.307(c)(2) are changes to §133.307(c)(2)(J) and (K). The adopted amendments to §133.307(c)(2)(J) state that the requestor must provide a paper copy of all medical bills related to the dispute as originally submitted to the insurance carrier in accordance with Chapter 133 of this title and a paper copy of all medical bill(s) submitted to the insurance carrier for an appeal in accordance with §133.250 of this chapter. The adopted amendments to §133.307(c)(2)(K) require the requestor to provide a paper copy of each explanation of benefits (EOB) related to the dispute as originally submitted to the health care provider in accordance with Chapter 133 of this title. These adopted amendments require the submission of paper copies of the medical bills, appeal requests, and EOBs. If medical bills, appeal requests, or explanation of benefits (remittance advice) were processed electronically in accordance with Chapter 133, Subchapter G, the parties may submit the documentation using the paper forms and formats described in Chapter 133, or they may choose to provide other documentation that contains all the same information found in the paper equivalent. These adopted amendments are necessary because currently there are technological barriers that prevent the Division from safely accepting and distributing the information in electronic formats as a matter of standard process. However, the Division is working on addressing these issues so that the Division may consider accepting these documents electronically in the future.

Finally, the adopted amendments to §133.307(c)(2)(O) incorporate into this rule provisions that will also allow a requestor to submit documentation that supports the requestor's position that the payment amount being sought for pharmaceutical services where the Division has not established a reimbursement rate is a fair and reasonable reimbursement in accordance with the Division's pharmacy fee guideline. These adopted amendments are necessary to reflect recent adopted amendments to the Division's pharmacy fee guideline in 28 TAC §134.503 which included the removal of maximum allowable reimbursement (MAR) terminology from that rule and provided for "reimbursement rates that are fair and reasonable" in certain specified instances.

Section 133.307(c)(3) will govern requests for MFDR from subclaimants. The adopted amendments clarify the information that must be submitted to the Division for a request for medical fee dispute by a subclaimant. These adopted amendments are necessary in order to conform this rule to existing Division rules applicable to requests for MFDR submitted by subclaimants, specifically §140.6 and §140.8. Section 140.6 governs subclaims pursued under Labor Code §409.009 and §140.8 provides procedures for health care insurers to pursue reimbursement of medical benefits under Labor Code §409.0091. Both sections include rules that govern how each respective subclaimant participates in medical fee dispute resolution. Thus, the adopted rule provides that the subclaimant requesting medical fee dispute resolution shall provide the appropriate information with the request that is consistent with 28 TAC §140.6 or §140.8. The adopted amendments provide that a request made by a subclaimant under Labor Code §409.009 shall comply with 28 TAC §140.6 and submit the documents to the Division required thereunder, and a request made by a subclaimant under Labor Code §409.0091 shall comply with the document requirements of 28 TAC §140.8 and submit the documents to the Division required thereunder.

Section 133.307(c)(4) will govern requests for MFDR by injured employees. The adopted amendments to these provisions remove reference to the DWC-60 table and describes the information that must be included in requests for MFDR injured employees. These adopted amendments are necessary in order to provide clarity in Division rules on the information required to be included in a request for MFDR from an injured employee and to ensure the Division has the necessary information to resolve the disputes.

The adopted amendments to §133.307(d) which governs a respondent's response to a request for MFDR specifies the information and records that are required to be submitted by the respondent to the Division. These adopted amendments are necessary to provide clarity in Division rules as to the information and records that must be included in a response and to ensure the Division has the necessary information to resolve the disputes.

Additionally, consistent with the amendments to subsection (c) of this section, the adopted amendments to subsection (d)(2)(B) and (C) of this section delete the requirement of "using an appropriate DWC approved paper billing format" and provides for the submission of a paper copy of all initial and appeal EOBs related to the dispute not submitted by the requestor, and a paper copy of all medical bills related to the dispute if different from that originally submitted to the insurance carrier. As with the adopted amendments to §133.307(c)(2)(J) and (K), these amendments only require the respondent to provide documentation using the paper forms and formats described in Chapter 133, or they may choose to provide other documentation that contains all the same information found in the paper equivalent. These adopted amendments are necessary because as stated the Division currently cannot safely receive and distribute this documentation electronically as a matter of standard process.

Also consistent with adopted amendments to subsection (c), adopted amendments to §133.307(d)(2)(E)(v) incorporate into this rule provisions that will also allow a respondent to submit documentation that supports the respondent's position that the amount paid for pharmaceutical services where the Division has not established a reimbursement rate is a fair and reasonable reimbursement in accordance with the Division's pharmacy fee guideline. These adopted amendments are necessary to reflect recent adopted amendments to the Division's pharmacy fee guideline in 28 TAC §134.503 which included the removal of MAR terminology from that rule and provided for "reimbursement rates that are fair and reasonable" in certain specified instances.

Adopted §133.307(e) states that a requestor may withdraw its request for MFDR by notifying the Division prior to a decision. This provision is necessary in order to provide clarity in Division rules that a requestor of MFDR may choose to withdraw its dispute from the medical fee dispute resolution process.

The adopted amendments to §133.307(f)(3) concern the authority of the Division to dismiss a request for MFDR. The adopted amendments clarify that the dismissal of a request for MFDR is not a final decision by the Division, and that a request for MFDR dismissed by the Division may be submitted for review as a new dispute that is subject to the requirements of §133.307. These adopted amendments are intended to clarify that the appropriate procedure for a party that is requesting MFDR after a dismissal is not an appeal of the dismissal, but instead to correct and submit the corrected request as a new request that would also be subject to the requirements of this section. These adopted amendments are necessary to provide clarity to the parties that a requestor does have the opportunity to correct and re-file the new request for MFDR and the new request will be subject to the provisions in §133.307.

The adopted amendments also delete from this subsection several grounds that previously served as a basis for a dismissal. The ground in former subsection (f)(3)(A) which allowed the Division to dismiss a request when the requestor informed the Division, or the Division otherwise determined, that the dispute no longer exists is deleted because that basis equates to withdrawing of the request now addressed in adopted §133.307(e). In addition, the Division's determination that a dispute no longer exists is good cause for dismissal. Good cause dismissals are provided for by subsection (f)(3)(E). The grounds previously listed in subsection (f)(3)(B), (D), and (E) are deleted because a Division determination that the requestor is not a proper party, the dispute was previously adjudicated, or a request was untimely are decisions better characterized as final decisions that may be appealed by the requestor. The ground allowing dismissal when the dispute is for health care services provided pursuant to a private contractual fee arrangement is deleted because under the Act the Division has original jurisdiction to ensure that these contracts comply with applicable statutory requirements and that the pharmacy informal or voluntary network complies with the health care provider notice requirements under Labor Code §408.0281.

Finally, the adopted amendments clarify and delete unnecessary language in provisions that allow the Division to dismiss a med-

ical fee dispute when the request contains unresolved issues of medical necessity, compensability, extent of injury, or liability.

Section 133.307(g) governs the appeal of a Division decision in a fee dispute and these adopted amendments are necessary to implement the changes made by HB 2605 to Labor Code §413.031 and the addition of Labor Code §413.0312. The amendments also delete provisions that are no longer required and clarify the procedures for the appeal of an MFDR decision in accordance with changes made by HB 2605.

As previously stated, HB 2605 provides one appeal process for appealing a Division decision in a medical fee dispute. Consistent with HB 2605, the appealing party is now required to first mediate the dispute at a BRC at the Division. The adopted amendments §133.307(g) provide that the Division's decision in a medical fee dispute is final if a request for a BRC is not requested. The adopted amendments to §133.307(g)(1) provide that an appealing party must request a BRC within 20 days from the date of the party's receipt of the decision. These amendments are necessary in order to provide for the timely resolution of medical fee disputes.

The adopted amendments to §133.307(g) also provide that if a party provides the benefit review officer or administrative law judge with documentation listed in §133.307(d)(2)(H) or (I) that shows unresolved issues regarding compensability, extent of injury, liability, or medical necessity for the same service subject to the fee dispute, then the benefit review officer or administrative law judge shall abate the proceedings until those issues have been resolved. This adopted rule is necessary to prevent the injured employee who may not be a party to the fee dispute from being bound by the ruling. Furthermore, it prevents a carrier from being ordered to pay for a bill in which it has no underlying legal obligation. Finally, it prevents conflicting or duplicative decisions. The requirement to present evidence is so the benefit review officer or administrative law judge can verify the existence of a dispute before abating the proceedings.

The adopted amendments to §133.307(g)(1)(B) prohibit the parties at a BRC from resolving the dispute by negotiating fees that are inconsistent with any applicable fee guidelines adopted by the Commissioner of Workers' Compensation. These adopted amendments are consistent with statutory provisions in Labor Code §413.0312(c) and are necessary in order to ensure that reimbursements for health care services are not in violation of the applicable fee guidelines adopted by the Commissioner.

The adopted amendments to §133.307(g)(1)(C) incorporate the first responder provisions in HB 2605 by providing that a first responder's request for a benefit review conference must be accelerated by the division and given priority in accordance with Labor Code §504.055, and the first responder must provide notice to the division that the case involves a first responder.

The adopted amendments to §133.307(g)(1)(C) also clarify that a request for a BRC shall include a copy of the MFDR decision which will satisfy the documentation requirements under the Division rules governing BRCs, specifically §141.1(a) of this title (relating to Requesting and Setting a Benefit Review Conference). This adopted amendment is necessary in order to provide guidance to the parties as to what documents will satisfy the documentation requirements under the Division's BRC rules.

Consistent with HB 2605, the adopted amendments in to §133.307(g)(2) provide that if the medical fee dispute remains unresolved after a Division BRC, the parties may elect to engage in arbitration as provided by Labor Code Chapter 410, Subchapter C, and Chapter 144 of this title (relating to Dispute Resolution). However, if arbitration is not elected then the parties are entitled to request a contested case hearing at SOAH to resolve the dispute in the manner provided for a contested case under Chapter 2001, Government Code. The adopted amendments to §133.307(g)(2)(A) specify that a written request for a contested case hearing at State Office of Administrative Hearings must be filed not later than 20 days after conclusion of the BRC. This 20 day filing deadline is consistent with filing deadlines for requesting a SOAH hearing currently in §148.3. Finally, the adopted amendments §133.307(g)(2) implement the first responder amendments in HB 2605 by providing that the Division will accelerate a first responder's request for arbitration by the Division or a request for a contested case hearing before the State Office of Administrative Hearings, and the first responder must provide notice to the Division that the contested case involves a first responder.

The adopted amendments in §133.307(g)(3) provide that a party to a medical fee dispute who has exhausted all administrative remedies may seek judicial review of the decision of the Administrative Law Judge at SOAH. The Division and the Department are not considered to be parties to the medical dispute pursuant to Labor Code §413.031(k-2) and §413.0312(f). These adopted amendments are necessary in order to implement the provisions in HB 2605 that govern judicial review in medical fee dispute cases. Additionally, the adopted amendments in §133.307(g)(3) incorporate the legislative amendments in SB 809 that require a party seeking judicial review of a decision of SOAH to file suit not later than the 45th day after the date on which SOAH mailed the party the notification of the decision. SB 809 and these adopted amendments deem the mailing date the fifth day after the date the decision was issued by SOAH. Finally, the adopted amendments clarify that a party seeking judicial review of the decision of the administrative law judge shall at the time the petition for judicial review is filed with the district court file a copy of the petition with the division's chief clerk of proceedings. These provisions are adopted in accordance with Government Code §2001.176(b) which requires a copy of the petition to be filed with the agency. This amendment is also necessary because it will provide the Division with the information necessary to prepare the record of proceedings for the district court.

The adopted amendments in §133.307(h)require the non-prevailing party at SOAH to reimburse the Division for the costs for services provided by the SOAH, including any interest required by law, not later than the 30th day after the date of receiving a bill or statement from the division. If the injured employee is the non-prevailing party, these adopted amendments require the insurance carrier to reimburse the Division for the costs for services provided by SOAH. The adopted amendments also provide that in the event of a dismissal, the party requesting the hearing, other than the injured employee, shall reimburse the Division for the costs for services provided by SOAH unless otherwise agreed by the parties. These adopted amendments are necessary to implement Labor Code §413.0312(k) which requires that the Commissioner by rule to establish procedures to enable the Division to charge a party to a medical fee dispute, other than an injured employee, for the costs of services provided by SOAH.

Description of adopted amendments to §133.308

The adopted amendments amend the title of this section to "MDR of Medical Necessity Disputes" in order to provide more clarity as to the contents of this section.

The adopted amendments to §133.308(a) provide that the section is applicable to the independent review of medical necessity disputes filed with the Division on or after June 1, 2012. The adopted appeal procedure applies to any decision appealed following an IRO in accordance with the provisions of HB 2605. Accordingly, the adopted amendments provide that dispute resolution requests filed prior to June 1, 2012 shall be resolved in accordance with the statutes and rules in effect at the time the request was filed. These amendments are necessary to make the rule more current and to comply with the provisions of HB 2605 and SB 809.

The adopted amendments to §133.308(b) update and clarify that rule by adding that IROs are also required be certified pursuant to Chapter 12 of this title (relating to Independent Review Organizations). These amendments are necessary to conform this rule to current Department rules that govern the certification of IROs.

The adopted amendments §133.308(c) clarify that IRO doctors that perform reviews of health care services provided under this section must also hold the appropriate credentials under Chapter 180 of this title (relating to Monitoring and Enforcement). The adopted amendments further clarify that personnel employed by or under contract with the IRO to perform independent review shall also comply with the personnel and credentialing requirements under Chapter 12 of this title. The amendments to adopted subsection (c) are necessary to update and clarify the rule so that it is consistent with other Division and Department rules.

The adopted amendments delete specialty requirements in previous subsection (d) as those requirements are included in the applicable credentialing requirements incorporated in the adopted amendments to subsection (c).

The adopted amendments to §133.308(d) relate to conflicts of interest. These amendments update and clarify this rule by adding §12.204 and §12.206 of this title (relating to Prohibitions of Certain Activities and Relationships with Independent Review Organizations, and Notice of Determinations Made by Independent Review Organizations) to the list of existing provisions that the Department may review to determine if a conflict of interest exists in accordance with existing Division rules. The adopted amendments also update this rule in accordance with the provisions of Labor Code §413.032(b) which requires notification of each IRO decision to include in its certification by the IRO that the reviewing health care provider has certified that no known conflicts of interest exist between the health care provider and the "injured employee's employer, the insurance carrier, the utilization review agent, any of the treating health care providers, or any of the health care providers utilized by the insurance carrier to review the case for determination prior to referral to the IRO."

The adopted amendments to §133.308(e) clarify the Division's monitoring and investigative duties under the Act by stating in this rule that the Division will make inquiries, conduct audits, receive and investigate complaints, and take all actions permitted by the Labor Code and other applicable law against an IRO or personnel employed by or under contract with an IRO to perform independent review to determine compliance with applicable law, this section, and other applicable division rules.

Section 133.308(f)(1) lists who may request an IRO in network disputes. The adopted amendments allow a person acting on behalf of an injured employee to be a requestor in medical necessity disputes. This amendment is necessary to conform this rule with Insurance Code §1305.355(a)(1) which pertains to certified networks and independent review, and requires the URA agent to permit the employee or person acting on behalf of the employee to seek review of an adverse determination by an IRO. The adopted amendments to subsection (f)(1) also clarify that subclaimants in accordance with §140.6 of this title (relating to Subclaimant Status: Establishment, Rights, and Procedures), §140.7 of this title (relating to Health Care Insurer Reimbursement under Labor Code §409.0091), or §140.8 of this title (relating to Procedures for Health Care Insurers to Pursue Reimbursement of Medical Benefits under Labor Code §409.0091), as applicable, may be a requestor in a medical necessity dispute. This amendment is necessary to conform this rule to existing Division rules governing subclaimants and medical necessity disputes.

Section 133.308(f)(2) lists the persons who may request an IRO in non-network disputes. The adopted amendment clarifies that an injured employee's representative may request a review by an IRO. The adopted amendments to subsection (f)(2) also clarify that subclaimants in accordance with §140.6 of this title (relating to Subclaimant Status: Establishment, Rights, and Procedures), §140.7 of this title (relating to Health Care Insurer Reimbursement under Labor Code §409.0091), or §140.8 of this title (relating to Procedures for Health Care Insurers to Pursue Reimbursement of Medical Benefits under Labor Code §409.0091), as applicable, may be a requestor in a medical necessity dispute. This amendment is necessary to conform this rule to existing Division rules governing subclaimants and medical necessity disputes.

The adopted amendments to §133.308(g) updated the Department's website address to the most current address. The adopted amendments also delete and replace the name "Health and Workers' Compensation Network Certification and Quality Assurance Division" with the current name which is "Managed Care Quality Assurance Office."

The adopted amendments to §133.308(o) delete from that rule provisions that require an IRO in a network dispute whose decision is contrary to the network's treatment guidelines to indicate in the decision the specific basis for its divergence in the review of medical necessity of network health care. The amendment is necessary in order to better align this rule with statutes governing reviews by independent review organizations. Additionally, a certified network's treatment guidelines are not presumed reasonable by statute in the same way the treatment guidelines adopted by the Division are under Labor Code §413.017, which is why Labor Code §413.031 requires an IRO to explain any divergence from the Division's adopted treatment guidelines in non-network disputes. No similar statute requires an IRO to explain any divergence from treatment guidelines adopted by a certified network.

The adopted amendments to §133.308(o) also correct a typographical error in subsection (o)(1)(F) by replacing Chapter "4201" with Chapter "4202."

The adopted amendments to §133.308(q) removes a reference to the Division's Approved Doctor List because that list no longer exists and the language is no longer necessary.

The adopted amendments to §133.308(r) for clarity incorporates into this rule the statutory provision in Labor Code §413.031(m) that provides that the decision of an IRO under Labor Code §413.031(d) is binding during the pendency of a dispute. This adopted amendment restates statutory requirements.

Section 133.308(s) governs the appeal of an IRO decision, and the adopted amendments to these provisions are necessary to implement the requirements of HB 2605 that prescribe the manner in which a party may appeal a decision of an IRO. As stated, HB 2605 provides one appeal process following the decision by an IRO, and this appeals process will apply to an IRO review of a medical service provided in a certified network, outside of a certified network, and by a political subdivision pursuant to Labor Code §504.053(b)(2). Specifically, consistent with HB 2605 the adopted amendments provide that a party may appeal an IRO decision by requesting a Division contested case hearing conducted by a Division hearing officer. A BRC is not a prerequisite to a Division CCH. Under the adopted amendments the appeal must be filed with the Division's Chief Clerk of Proceeds no later than 20 days after the date the IRO decision is sent to the appealing party. The language proposed for deletion in §133.308(s) is proposed for the purpose of conforming the rule to the provisions of HB 2605.

The adopted amendments to §133.308(s) specifies the respective treatment guidelines that the hearing officer at a Division CCH must consider when reviewing the decision by an IRO. These adopted amendments are necessary to implement provisions in Insurance Code §1305.356 enacted by HB 2605 which require the hearing officer in a certified network dispute to consider evidence-based treatment guidelines adopted by the network. The amendments are also necessary to implement Labor Code §504.054 enacted by HB 2605. This statute requires the hearing officer in a dispute involving a political subdivision that provides medical benefits under Labor Code §504.053(b)(2) to consider any treatment guidelines adopted by the political subdivision or pool if those guidelines meet the standards provided by Labor Code §413.011(e). Finally, these adopted amendments are necessary to provide clarity to the hearing officer and parties to the medical dispute as to what treatment guidelines must be considered by the hearing officer during the dispute.

The adopted amendments to subsection (s) also include amendments to the letter of clarification process. These adopted amendments clarify that the Department may at its discretion forward the party's request for a letter of clarification to the IRO that conducted the independent review. It also states that the Department will not forward to the IRO a request for a letter of clarification that asks the IRO to reconsider its decision or issue a new decision. The purpose of this adopted amendment is to prevent unnecessary referrals of a request for a LOC to the IRO.

Finally, the adopted amendments in subsection (s) are necessary to implement legislative amendments in SB 809 concern judicial review in medical necessity disputes. The adopted amendments state a party seeking judicial review under this section must file suit not later than the 45th day after the date on which the division mailed the party the decision of the hearing officer. The mailing date is considered to be the fifth day after the date the decision of the hearing officer was filed with the division. The adopted amendments also provide that the judicial review will be governed by the substantial evidence rule. This adopted amendment is necessary to clarify the applicable standard of review in a judicial review of a medical necessity dispute.

Adopted new §133.308(u) states that in accordance with Labor Code §504.055(d), an appeal regarding the denial of a claim for medical benefits, including all health care required to cure or relieve the effects naturally resulting from a compensable injury involving a first responder will be accelerated by the division and given priority. The party seeking to expedite the contested case hearing or appeal shall provide notice to the division and independent review organization that the contested case hearing or appeal involves a first responder. These adopted amendments are necessary to implement provisions in HB 2605 which require the Division to accelerate a contested case hearing requested by or submitted by a first responder regarding the denial of a claim for medical benefits, including all health care required to cure or relieve the effects naturally resulting from a compensable injury.

The adopted amendments to §133.308(v) state that the department or the division may initiate appropriate proceedings under Chapter 12 of this title (relating to Independent Review Organizations) or Labor Code, Title 5 and division rules against an independent review organization or a person conducting independent reviews. This amendment is necessary to clarify the enforcement authority of the Department or the Division against IROs or persons conducting independent reviews.

Adopted §133.307 contains the requirements and process for: (1) the request for medical fee dispute resolution by the Division, including the acceleration of first responder requests; (2) a party to respond to a request for medical fee dispute resolution; (3) a party to appeal the decision of the MFDR Section; (4) a party to seek judicial review; and (5) the billing of a non-prevailing party, other than an injured employee, for the costs of services provided by SOAH.

Adopted §133.308 contains requirements for: (1) the Division's monitoring activities of IROs; (2) the certification and professional licensing of independent review organizations (IROs); (3) who may request a decision by an IRO; (4) the information that must be included with the request; (5) the timeframe for the IRO decisions and the information that must be included in the IRO decisions; and (6) IRO fees. Additionally, this rule also sets forth the process and requirements necessary to: (1) appeal a medical necessity (IRO) dispute through the Division; (2) seek judicial review; and (3) accelerate and give priority to a request by a first responder's request for an appeal regarding the denial of a claim for medical benefits. Last, this rule provides that the Department or the Division may initiate appropriate enforcement proceedings under 28 TAC Chapter 12 or Labor Code, Title 5 and Division rules against an IRO or a person conducing independent reviews.

SUMMARY OF COMMENTS AND AGENCY'S RESPONSE TO COMMENTS

§133.307(a)(1): A commenter does not agree with substituting "as authorized by the Texas Workers' Compensation Act" for the phrase "non-network or certain authorized out-of-network health care not subject to a contract." The commenter states that the proposed amendment is not sufficiently clear that network fee disputes are not subject to resolution under this provision.

Agency Response: The Division disagrees that this adopted amendment makes §133.307 unclear. The authority of the MFDR Section to adjudicate medical fee disputes comes from Labor Code Chapter 413, Insurance Code Chapter 1305, and related Department and Division rules.

§133.307(a)(3), (g)(1)(C), and (g)(2): One commenter suggests the following language "first responder or a person acting on behalf of the first responder" and states that the purpose of the legislation seems better served by letting more than just the first responder make the request to expedite. Commenters recommend that the rules be modified to allow the "requestor" to provide notice that the dispute involves a first responder because in most fee disputes it is the health care provider submitting the

dispute. The commenter hopes the Division allows the doctor or other health care provider who is seeking dispute resolution to provide the notice that the dispute involves a first responder because there is a concern that the first responder may have to additionally submit a notice to the Division. Several commenters are concerned that the proposed language will limit or exclude who may make a request under this section with respect to "first responders" and ask that the language be changed to ensure that there are no limitations on who may make a request on behalf of or assist a "first responder." Another commenter disagrees with any text that would allow a health care provider to request dispute resolution on behalf of an injured employee under Labor Code §504.055.

Agency Response: The Division disagrees that the recommended modifications are necessary because allowing a health care provider to identify the injured employee as a first responder in a request for medical fee dispute resolution will not expedite "medical benefits" under Labor Code §504.055 for the first responder as the health care has already been rendered. The Division notes that nothing in the Act or Division rules prevent a first responder from obtaining assistance in completing the forms to request expedited medical fee dispute resolution in situations where the first responder is the requestor. Additionally, pursuant to 28 TAC §150.3, a representative or lay representative may submit the request on behalf of the first responder when there is a dispute involving an injured employee's request for reimbursement from an insurance carrier for expenses paid by the injured employee.

§133.307(a)(3) and §133.308(u): A commenter also requested clarification as to how a "first responder" satisfies notification that the claim relates to a "first responder" and if the notification applies in all applicable situations. The commenter asks if the Division provided form for requesting medical fee dispute resolution in and of itself provide the notice the case involves a first responder or does there have to be a separate notification from the first responder.

Agency Response: The Division clarifies that a first responder who indicates on the Division's revised form for requesting medical fee dispute resolution that the dispute involves a first responder will be deemed by the Division to have provided the notice required by the rule. The first responder would not be required to file with the Division a separate notification in order to have the dispute expedited by the Division.

§133.307(a)(3) and §133.308(u): A commenter suggested that there may need to be more specific rule language to ensure that subsection (c) of Labor Code §504.055 is addressed and to ensure that insurance carriers and political subdivisions are required to accelerate claims for "first responders" in all applicable situations.

Agency Response: The Division disagrees. The Division notes that language requiring insurance carriers and utilization review agents who perform utilization review to comply with the provisions in Labor Code §504.055 is already contained in 28 TAC §§133.240, 133.250 and 134.600. Additionally, the Department has posted for informal comment rules in 28 TAC Chapter 19 relating to agent's licensing and utilization review that will require the acceleration of claims of first responders by insurance carriers, utilization review agents, and health care providers. Provisions in these rules requiring insurance carriers and political subdivisions to accelerate claims for "first responders" are outside the scope of these rules and better addressed in other Division and Department rules.

§133.307(a)(3) and §133.308(u): A commenter states that the use of the term "first responder" lends itself to the misinterpretation that all first responders, regardless of where they might be employed, when appealing a denied claim are entitled to the procedures set out in Labor Code §504.055(d). The commenter suggests clarification that §137.308(u) only applies to first responders either employed by or volunteering for a political subdivision as restricted under Labor Code §504.055(a).

Agency Response: The Division disagrees that the term "first responder" lends itself to misinterpretation. Labor Code §504.055 defines the term and states to what first responders the section applies. Additionally, the Division has recently adopted amendments to 28 TAC §133.305 effective July 1, 2012 which defines "first responder" and "serious bodily injury" for purposes of 28 TAC Chapter 133, Subchapter D. This definition tracks the statutory definitions of "first responder" and "serious bodily injury."

§133.307(b)(2): Commenter requests that a carrier be added as an eligible requestor for medical fee dispute resolution. The commenter states that currently, if an overpayment is made and a refund is requested from the healthcare provider; the only recourse a carrier has is to file a formal complaint. The commenter states it would be helpful if the carrier could go to medical fee dispute resolution instead when a refund is not received within the required timeframes.

Agency Response: The Division disagrees with adding insurance carriers to the list of persons who have standing to request MFDR under §133.307. The request is outside the scope of this rule and would need to be addressed as a separate rulemaking project.

§133.307(b)(3) and (4): A commenter recommends these rules be revised to read "the injured employee or person acting on behalf of an injured employee." The commenter notes that this language is included in §133.308(f)(1)(B) and the definition of requestor should be the same in all types of medical disputes.

Agency Response: The Division disagrees with adding the commenter's suggested language to adopted subsection (b) of this rule. This suggested text is unnecessary because existing Division rules in 28 TAC Chapter 150 allow attorneys and authorized representatives to provide services to injured employees in accordance with those rules. The Division notes that the language "the injured employee or person acting on behalf of an injured employee" is adopted in §133.308(f)(1)(B) because the language mirrors language in Texas Insurance Code §1305.355(a), which relates to the independent review of adverse determinations in certified network cases.

§133.307(b)(5): The commenters state that granting requestor status to subclaimants for dispute resolution under Chapter 133 of this title appears to be inappropriate. The commenter states that "rule 140.6(d) requires carriers to process reimbursement requests under Chapters 133 and 134 but requires dispute resolution to be processed under Chapters 140 - 143." The commenter further states "similarly, rule 140.8(h)(1)(C) requires that a subclaim dispute based on a denial of reimbursement due to compensability or extent of injury is subject to dispute resolution pursuant to Chapters 140 - 143 of this title." The commenter recommends the following clarifying language be included in this rule: "However, disputes regarding liability, extent of injury, or medical necessity must be resolved prior to pursuing a medical fee dispute."

Agency Response: The Division disagrees that it is inappropriate to grant requestor status to subclaimants in medical fee

disputes. Current Division rules in 28 TAC Chapter 140 provide that §133.307 will govern a medical fee dispute between a subclaimant and an insurance carrier. The Division also disagrees with adopting commenter's recommended rule language because that language is unnecessary in this rule. This adopted amendment conforms §133.307 with these Chapter 140 rules and clarify that a subclaimant may be a requestor of medical fee dispute resolution in accordance with those rules.

§133.307(c)(2): The commenter states that under 28 TAC §140.6, subclaimants must pursue a claim for reimbursement of medical benefits and participate in medical dispute resolution in the same manner as an injured employee or health care provider. The commenter opines that the Division has failed to recognize the application of rules concerning health care insurers and MFDR. The commenter states health care insurers often do not have the documentation necessary for health insurance claims and that because of the limits on the documentation that health care insurers have, the Legislature set out requirements for health care insurers in Labor Code §409.0091(f). Commenter asserts that the Division exceeds this authority by asking for more than the statute. The commenter states that under 28 TAC §140.8 a health care insurer shall only be required to include with a request for medical fee dispute resolution, a copy of the health care insurer reimbursement request as originally submitted to the workers' compensation insurance carrier, a copy of the explanation of benefits (EOB) relevant to the fee dispute received from the workers' compensation insurance carrier, and sufficient information to substantiate the claim. The commenter states that the requirement of the proposed rule extend beyond those of §140.8 and contradict that section.

Agency Response: The Division agrees that this rule needs to be clarified with regard to the information a subclaimant must submit in a request for MFDR so that it is consistent with existing Division rules in 28 TAC Chapter 140. Therefore, the Division has adopted §133.307(c)(3) which specifically applies to subclaimant dispute requests. Under this adopted rule, subclaimants described by Labor Code §409.009 shall provide the required information that is consistent with 28 TAC §140.6 and subclaimants described by Labor Code §409.0091 shall provide the required information that is consistent with 28 TAC §140.8.

§133.307(c)(1): The commenter supports proposed §133.307(c)(1).

Agency Response: The Division appreciates the supportive comment.

§133.307(c): A commenter states that it assumes that a request for MFDR would be imaged by the Division and therefore one copy of the request would suffice. Alternatively, the commenter questions whether accepting an electronic filing would also suffice and if so, would not a form be a better vehicle for such a filing.

Agency Response: The Division disagrees with the requestor because there are technological barriers that prevent the Division from safely accepting and distributing the information in the suggested electronic methods. Therefore, the Division must receive two legible paper copies of the request so that the Division will have a copy to forward to the respondent. The Division will continue to explore ways to allow parties to electronically transmit information for medical fee disputes to the Division; however, the Division does not currently have the means to securely accept and transmit these requests.

§133.307(c)(2)(J) and (K); and (c)(3): A commenter states that permitting parties to provide "documentation that contains all the same information found in the paper equivalent" instead of providing either an electronic form or promulgated electronic format that is capable of being printed on paper where such form or format was originally used could lead to unnecessary confusion and prolong the time needed for review of the submitted documents to find the necessary information. The commenter states that if there is an electronic form or promulgated electronic format that is capable of being printed on paper, that electronic document should be printed and submitted in place of having to cull through documentation that contains all the same information. A commenter also recommends replacing the word "facsimile" in this rule with "electronic transmission" in order to make this provision consistent with other filing provisions in Division rules.

Agency Response: The Division disagrees with allowing the submission of the information required by this rule in the suggested electronic formats. Currently, there are technological barriers that prevent the Division from safely accepting and distributing the information in the suggested electronic methods. The Division is working on addressing these issues so that the Division may consider accepting these transmissions in the future. The Division notes that under this adopted rule any paper format would suffice as long as the submission contains all of the information contained on the medical bill and explanation of benefits.

§133.307(c)(2)(C) and (3)(A): A commenter states that the proposed rules require form and manner prescription but deletes references to the DWC-60. The commenter states that the DWC-60 is a better alternative than submitting the same information in various documents accompanying a MFDR request as the DWC-60 provides check boxes and fields that seek to elicit or reference the MFDR-required information for determination of filing requirement compliance, and provides expedited recognition through standardized presentation of organized information. The commenter inquires whether the Division proposes to discontinue the DWC-60 and/or accept MFDR requests that are not on a promulgated alternative form.

Agency Response: The Division clarifies that the DWC Form-60 is still required to be used and has been amended to conform to changes in these adopted rules. Adopted §133.307(c) requires the request to be submitted "in the form and manner prescribed by the division." The "form and manner" continues to be the DWC Form-60.

§133.307(c)(2)(M), (d)(2)(B) and (C): A commenter states that expanding the scope to require all relevant documents related to the date of service in dispute, as opposed to only requiring specific documents, is unnecessary, creates unnecessary expenses, vague, overbroad and overly burdensome. The commenter states that documents should be limited to those that are specific yet relevant to the contested issues and not those that are simply relevant to the date of service. A commenter also states that requiring an insurance carrier to provide a paper copy of all EOBs and medical bills (if different from that originally submitted to the insurance carrier for reimbursement) related to the dispute is unnecessarily burdensome, particularly as it is incumbent upon the provider to construct and support their own case in chief for additional reimbursement and provide adequate evidence to legally justify any order doing so. The commenter recommends narrowing the scope from "related to" to "relevant to the issue(s) in dispute."

Agency Response: The Division disagrees and declines to make the recommended change. The Division's use of the word "related" is clearly not intended to include non-relevant documents.

§133.307(c)(2)(P): A commenter asks the Division to clarify in the preamble that pharmacy processing agents may not seek reimbursement greater than that their assignor pharmacies would be entitled to receive had the pharmacy billed the carrier directly without the use of a processing agent.

Agency Response: This comment addresses pharmaceutical reimbursement which was discussed more fully in the adoption of §134.503 and is outside the scope of these rules.

§133.307(d)(2): A commenter inquires what if the request is missing required information, and will incomplete requests be handled or rejected by the division? It is commenter's opinion that requests that are missing required information should be rejected by the Division until they are complete. Another commenter opines that rules which require a carrier "provide any missing information not provided by the requestor and known to the respondent" threatens to improperly shift the burden to a respondent if there is no prima facie dispute.

Agency Response: The Division disagrees that all incomplete requests for medical fee dispute resolution should be dismissed at the outset. There may be cases where the requestor for medical fee dispute resolution does not have access to required information. Additionally, the Division disagrees that requiring the respondent to provide any missing information not provided by the requestor and known to the respondent improperly shifts the burden of proof upon the respondent. This provision is similar to a discovery process and allows for the Division to obtain all the information it needs to adjudicate the fee dispute given the relevant statutory provisions and relevant rules.

§133.307(d)(2)(E)(v): A commenter requests that the Division clarify what the term "reimbursement rate" refers to in the context of fair and reasonable reimbursement and suggests the following language: "documentation that discusses, demonstrates, and justifies that the amount the respondent paid is a fair and reasonable reimbursement in accordance with Labor Code §413.011 and §134.1 or §134.503 of this title if the dispute involves health care for which the division has not established a MAR or pharmaceutical reimbursement rate, as applicable."

Agency Response: The Division disagrees that clarification is necessary because the adopted amendments are sufficiently clear when read together with §134.503. The Division notes that these adopted amendments reflect recent adopted amendments to the Division's pharmacy fee guideline in 28 TAC §134.503 which included the removal of MAR terminology from that rule and provided for "reimbursement rates that are fair and reasonable" in certain specified instances.

§133.307(e): A commenter supports permitting a requestor to withdraw its request for medical fee dispute resolution (MFDR) by notifying the Division but suggests it may be beneficial to have a form the requestor may use to notify all parties of its withdrawal. Another commenter recommends the following language be added at the end of proposed §133.307(e): "If all parties to a dispute agree to withdraw the requestor's request, any party may withdraw the request for MFDR by notifying the division in writing of dispute resolution with sufficient documentation in support of resolution agreement."

Agency Response: The Division disagrees with prescribing a specific form because the Division's MFDR Section's internal process is to notify the respondent via the carrier representative boxes of the requestor's withdrawal from medical fee dispute resolution. The Division also disagrees with the recommended language that would allow any party to notify the Division of the withdrawal of a request for MFDR and declines to add the suggested language. Allowing the respondent to withdraw the dispute may lead to disagreements as to whether the requestor truly intended to withdraw a dispute. Requiring the requestor to communicate the withdrawal to the Division will prevent such disputes from arising.

§133.307(f)(3): A commenter states that the Division should clarify that the applicable medical fee dispute resolution deadlines are not tolled by a filing that is dismissed. The commenter suggests adding to this subsection "Deadlines. All filings must comply with the requirements of §133.307(c)(1) related to timeliness."

Agency Response: The Division disagrees and declines to add the suggested language because adopted §133.307(c)(1) already states that a requestor shall timely file the request with the Division's MFDR Section or waive the right to MFDR. The instances where a deadline is tolled are set forth in 28 TAC §133.307(c)(1)(B). Also, 28 TAC §140.8 provides that a subclaimant under that section is not subject to the one year filing deadline.

§133.307(f)(3)(B) and (D): A commenter believes the two subparagraphs should not be deleted from subsection (f)(3) as it is appropriate for the DWC to dismiss a request for medical fee dispute resolution when the requestor is not a proper party to the dispute or the fee disputes for the date(s) health care in question have been previously adjudicated by the DWC.

Agency Response: The Division disagrees and believes they should not be grounds for dismissal. Adopted §133.307(f)(3) clarifies that the dismissal of a request for MFDR is not a final decision by the Division, and that a request for MFDR dismissed by the Division may be submitted for review as a new dispute, which will also be subject to the requirements of this section. These adopted amendments are intended to clarify that the appropriate procedure for a party that is requesting MFDR after a dismissal is not an appeal of the dismissal, but instead to correct and submit the corrected request as a new request. The deletion of these grounds for dismissal are not intended to allow an improper party into a medical fee dispute or allow for the re-adjudication of a dispute previously adjudicated. Rather, a Division determination that the requestor is not a proper party or the dispute was previously adjudicated is a decision better characterized as a final decision that may be appealed but not resubmitted.

§133.307(f)(3)(D): A commenter suggests that this rule should require that all legal grounds for and facts supporting the good cause determination be explicitly set out in detail in the order of dismissal.

Agency Response: The Division disagrees that the requested provisions are necessary for this rule. The Division's practice when dismissing a request is to provide a written dismissal that includes the reasons for the dismissal.

§133.307(f)(4): The commenter suggests adding a timeframe for the Division to render a decision on medical fee disputes just as there is a deadline for medical necessity disputes as well as specific timeframes for all other parties in a medical fee dispute. The commenter opines that depending upon the amount ordered the lengthy delay in the Division's medical fee dispute process could

result in a higher interest payment than the additional amount owed in the finding. The commenter states that it would be helpful to all parties of a medical fee dispute if the Division were held to a specific timeframe to render a decision.

Agency Response: The division disagrees with adding language regarding a timeframe within which the Division must render a decision on medical fee disputes. Medical fee disputes are adjudicated on a case-by-case basis. The Division's goal is to give each fee dispute its due diligence in order to ensure appropriateness and consistency. Factors such as new issues raised (not previously addressed by the Division), legal challenges impacting the dispute, and whether the Division requires additional information to adjudicate the dispute are all considered and may affect the Division's ability to process a fee dispute.

§133.307(g): Several commenters disagree with the proposed text because they say the text may be construed to prohibit a party at a BRC or at SOAH from raising unresolved issues regarding liability, extent of injury, compensability, or medical necessity. Commenters think that this draft proposal is inconsistent with proposed §133.307(f)(3) because that subsection allows the Division to dismiss a request for medical fee dispute resolution if there are unresolved issues of medical necessity, compensability, extent of injury, or liability. The commenters are concerned that if there is an award while a dispute involving compensability, extent of injury, liability, or medical necessity is outstanding, a party may be forced to pay a medical fee for a claim later determined to be non-compensable or a medical service later determined to be unrelated to the compensable injury. The commenters state the rule should be clarified to state, "Should a party raise unresolved issues regarding liability, extent of injury, compensability, or medical necessity at a benefit review conference or contested case hearing at the State Office of Administrative Hearings for a medical fee dispute then the proceeding shall be abated until the issues relevant to the medical fee dispute are resolved. Another commenter states that the proposed rule should be clarified that while one may not raise the issue at the hearing, one can use such evidence.

Agency Response: The Division agrees that clarification of the proposed language is necessary to prevent parties from misconstruing the language of the proposed rule to create a process that prohibits abatement. Although the Division does not adopt the text suggested by the commenters, the Division has adopted similar text stating that if a party provides the benefit review officer or administrative law judge with documentation listed in §133.307(d)(2)(H) or (I) that shows unresolved issues regarding compensability, extent of injury, liability, or medical necessity for the same service subject to the fee dispute, then the benefit review officer or administrative law judge shall abate the proceedings until those issues have been resolved. This adopted rule is necessary to prevent the injured employee who may not be a party to the fee dispute from being bound by the ruling. Furthermore, it prevents a carrier from being ordered to pay for a bill in which it has no underlying legal obligation. Finally, it prevents conflicting or duplicative decisions. The requirement to present evidence is so the benefit review officer or administrative law judge can verify the existence of a dispute before abating the proceedings.

§133.307(g)(1): A commenter suggests that the rule provide for parties to appear telephonically for medical fee dispute benefit review conferences. The commenter states that the Division has allowed telephonic appearances for parties in the past at medical fee dispute prehearings, and formal language in the rule would secure this courtesy. The commenter suggests adding the language "A party may appear at a benefit review conference via telephone" to this rule.

Agency Response: The division agrees. Adopted §133.307(g)(1) establishes the BRC be conducted in the manner required by Labor Code Chapter 410, Subchapter B and 28 TAC Chapter 141. Nothing in Labor Code Chapter 410, Subchapter B or 28 TAC Chapter 141 prohibits a party from appearing at a BRC for a medical fee dispute telephonically. Therefore, for clarity, the Division has added the text recommended by the commenter to subsection (g)(1).

§133.307(g)(1)(B): A commenter does not support this section of the proposed rule. Commenter questions the reason for this addition and does not understand why if the parties agree to a different amount it would not be allowed. There has already been additional costs incurred by all parties to go through the administrative process and negotiation of amounts at this level can be effective for both parties to resolve the matter.

Agency Response: The Division disagrees. The Division clarifies that the reason parties may not resolve the dispute by negotiating fees that are inconsistent with any applicable fee guidelines adopted by the Commissioner at a BRC is because this provision is required by statute. Specifically, Labor Code §413.0312(c) provides that "at a benefit review conference conducted under this section, the parties to the dispute may not resolve the dispute by negotiating fees that are inconsistent with any applicable fee guidelines adopted by the commissioner." Additionally, this adopted rule is consistent with longstanding principles in workers' compensation law that disallow settlements outside of the statutes and Commissioner rules. The Division also notes that Labor Code §413.031(c) states that in resolving disputes over the amount of payment due for services determined to be medically necessary and appropriate for treatment of a compensable injury, the role of the division is to adjudicate the payment given the relevant statutory provisions and commissioner rules.

§133.307(h): A commenter states that it is aware that this provision providing for the billing of the non-prevailing party is necessary because it is required by HB 2605. The commenter provides various reasons why it disagrees with this law.

Agency Response: The Division agrees that HB 2605 requires a non-prevailing party in a medical fee dispute to pay the SOAH costs and these adopted rules are adopted in accordance with the requirements of HB 2605.

§133.308(c): A commenter states that this section makes references to the licensing qualifications of the individuals who may perform certain reviews under the aegis of an Independent Review Organization. Commenter suggests that the language in subsection (d) of this rule not be struck and remain in whole or in part so that it is clear, without having to seek out the other references, which licensed health care professional may perform a review on another similarly licensed health care professional. Commenter further opines that, in particular, the rule should clearly state that a reviewer for an IRO should be in the same or similar specialty and, if a surgical intervention is the subject of a review, a surgeon of the same or similar specialty should be the licensed health care professional performing the review.

Agency Response: The Division disagrees because adopted subsection (c) of this section merely repeats existing specialty requirements in 28 TAC §12.202(f). 28 TAC §12.202(f) states that "an [IRO] that performs independent review of a health care service provided under the Labor Code Title 5 or the Insurance Code

Chapter 1305 shall comply with the licensing and professional specialty requirements for personnel performing independent review as provided by the Labor Code §§408.0043 - 408.0045 and 413.031; the Insurance Code §1305.355; and Chapters 133 and 180 of this title (relating to General Medical Provisions and Monitoring and Enforcement)."

§133.308(f): A commenter opposes these amendments because it requires a health care insurer subclaimant to engage in medical necessity disputes. The commenter further argues that all medical necessity disputes will be resolved prior to the subclaimant obtaining the claim since the health care insurer has already made a determination of whether the health care that is the subject of the subclaim is medically necessary.

Agency Response: The Division disagrees. These rules do not require a health care insurer to pursue a medical necessity denial in every case but allow them to engage in dispute resolution when appropriate. If the denial is based on medical necessity, 28 TAC §133.308 provides the process to resolve the dispute. The Division notes that Labor Code §409.0091(l) provides that "any dispute that arises from a failure to respond to or a reduction or denial of a request for reimbursement of services that form the basis of the subclaim must go through the appropriate dispute resolution process under the Act and Division rules."

§133.308(f)(1)(C) and (2)(C): A commenter states that granting requestor status to subclaimants for dispute resolution under Chapter 133 of this title appears to be inappropriate. The commenter states that "rule 140.6(d) requires carriers to process reimbursement requests under Chapters 133 and 134 but requires dispute resolution to be processed under Chapters 140 - 143." The commenter further states "similarly, rule 140.8(h)(1)(C) requires that a subclaim dispute based on a denial of reimbursement due to compensability or extent of injury is subject to dispute resolution pursuant to Chapters 140 - 143 of this title." The commenter recommends the following clarifying language be included in this rule: "However, disputes regarding liability, extent of injury, or medical necessity must be resolved prior to pursuing a medical fee dispute."

Agency Response: The Division disagrees that it is inappropriate to grant requestor status to subclaimants in appeals of medical necessity disputes. Subclaimants are already permitted to be requestors pursuant to statute and other division rules. These adopted amendments merely conform §133.308 with Labor Code §409.009 and §409.0091 and Division rules in Chapter 140. The Division also disagrees with adopting commenter's recommended rule language. This rule governs appeals of an IRO decision. The commenters recommended text pertains to medical fee disputes.

§133.308(f)(2)(B): A commenter suggests that this section be revised to read "injured employees or a person acting on behalf of an injured employee" rather than "injured employees or injured employee's representative." Commenter states that this language is included in proposed §133.308(f)(1)(B) which deals with who may be a requestor in network medical necessity disputes and commenter does not believe that a difference in the definition of requestor is required or warranted for non-network medical disputes.

Agency Response: The Division disagrees with adding the commenter's suggested language to adopted subsection (f)(2)(B) because that subsection applies in non-network disputes and the adopted terminology in the rule regarding representatives is consistent with existing Division rules in Chapter 150 which govern representation of parties before the agency and qualifications of the representatives. Additionally, the Division has also adopted this representative terminology in subsection (f)(2)(B) in order to distinguish that provision from the adopted provisions regarding "a person acting on behalf" in subsection (f)(1)(B) which apply to network dispute and is modeled after statutory language in Insurance Code §1305.355(a).

§133.308(h): Several commenters state that the provision in this rule that provides for immediate review by an IRO in cases involving an injured employee with a "life-threatening condition" is inappropriate for the workers' compensation rules. The commenters states that "Labor Code §413.014 and Insurance Code §1305.351 expressly exempt emergency treatment and services from preauthorization" and "DWC Rule §134.600 exempts emergency medical treatment and services from prospective and concurrent utilization review requirements." Commenter states that interjecting that term into the workers compensation rules could mislead stakeholders into believing that the expedited utilization review and appeal provisions for life-threatening conditions covered by health insurance and health benefit plans also applies to workers compensation.

Agency Response: The Division disagrees that the terms as used in this rule are inappropriate. The terms "life threatening condition" and "emergency treatment" are not the same. "Life threatening" is an existing term that is defined in Insurance Code §4201.002 and 28 TAC §12.5 and §133.305. "Emergency care" and "emergency" are defined in Insurance Code §4201.002 and 28 TAC §133.2, respectively. These terms have been used without any noted disruption or confusion reported to the Division by system participants.

§133.308(k)(6): Several commenters state that the proposed requirement in this subsection that a list of the health care providers known by the insurance carrier to have provided care to the injured employee who have medical records relevant to the review be submitted to the IRO by the insurance carrier or insurance carrier's URA is unreasonably burdensome and should be deleted. The commenters give the example of legacy workers' compensation claims involving whether or not opiate narcotic medication should be continued five years after the date of injury. The commenters state it is absurd to require the insurance carrier to identify all the health care providers who performed services in the emergency room on the date of the accident and all physical therapists who rendered medical care five years prior to the date that the prescription for narcotics was issued. Further, some commenters state that under subsection (k)(2) the insurance carrier is already required to submit all medical records in the possession of the insurance carrier or utilization review agent (URA) that are relevant to the review. Consequently, the list is not needed to identify health care providers who provided relevant care since that information is readily available to the independent review organization (IRO) by reviewing the submitted records and the proposed list serves no legitimate purpose.

Agency Response: The Division agrees that the list is not necessary at this time and has made the suggested change.

§133.308(n)(1): A commenter states it understands that an IRO cannot make an immediate determination in a case involving a life-threatening condition; however, it would seem that when a life-threatening condition is involved, the IRO should be able to make a determination in no more than three days after receipt of the dispute as opposed to the eight days permitted by the current rule.

Agency Response: The Division disagrees because Insurance Code §4202.003(1)(B) provides that "the eighth day after the date the organization receives the request that the determination be made" is appropriate for a life-threatening condition as defined by Insurance Code §4201.002.

§133.308(o): Several commenters believe that the proposed deletion of subsection (o)(1)(G)(ii) is improper. Commenters make several statutory construction, policy, and general rulemaking authority arguments in support of retaining this provision.

Agency Response: The Division disagrees that the proposed deletion of subsection (o)(1)(G)(ii) is improper. For non-network cases, Labor Code §413.031(e-1) states that in performing a review of medical necessity under Labor Code §413.031(d) or (e), the IRO shall consider the Division's healthcare reimbursement policies and guidelines adopted under Labor Code §413.011. Further, if the IRO's decision is contrary to the Division's policies or guidelines adopted under Labor Code §413.011, the IRO must indicate in the decision the specific basis for its divergence in the review of medical necessity. However, there is no comparable statute that requires an IRO in a certified network case whose decision is contrary to the network's adopted guidelines to indicate in the decision the specific basis for its divergence from the network's guidelines. Since non-network treatment guidelines have a presumption of reasonableness under Labor Code §413.017, it is important that the reason for any divergence by an IRO is explained in the IRO decision. There is no such statutory presumption for treatment guidelines adopted by a certified network, therefore it is less important for an IRO to explain a divergence from a network's treatment guidelines. However, it should be noted that IROs are still required to describe the source of the screening criteria or clinical basis used in making their decisions as well as provide an analysis and explanation for their decisions, including findings and conclusions used to support the decision. Thus, in light of the statutory requirement on IROs in non-network cases and the lack of such statutory requirement for network cases, it is appropriate to delete this requirement from the rule. Additionally, it is not the intent of the Division in deleting this requirement from the rule to allow an IRO to ignore a certified network's treatment guidelines, nor will the deletion prevent the Division from adequately monitoring decisions issued by IROs.

§133.308(r): A commenter seeks clarification of what is meant by "An insurance carrier may claim a defense to a medical necessity dispute if the insurance carrier timely complies with the IRO decision with respect to the medical necessity or appropriateness of health care for an injured employee." The commenter states that if the purpose of the provision is to say that the carrier should comply with the IRO decision and provide care to the injured employee consistent with that decision, the rule should state that purpose explicitly.

Agency Response: The Division clarifies that this provision provides that an insurance carrier does not waive a medical necessity defense during an appeal of an IRO decision because the carrier timely complied with the IRO decision.

§133.308(r): A commenter requests clarification on the rule that provides "the decision of an IRO under Labor Code §413.031(m) is binding during the pendency of a dispute." The commenter seeks clarification as to whether during the time a carrier appeals the IRO decision to a CCH and the IRO decision is reversed, can the carrier go to the subsequent injury fund (SIF) for reimbursement of the money that has been paid to the health care provider?

Agency Response: The Division disagrees that clarification in this rule is necessary. As stated in the adoption of amendments to §116.11 of this title (relating to Request for Reimbursement from the Subsequent Injury Fund) in 2009, an IRO decision is not an order or decision of the Commissioner. Thus, an insurance carrier would not qualify for SIF reimbursement in cases where an IRO decision is overturned.

§133.308(s): A commenter supports the addition of the added language, "A party to a medical dispute that remains unresolved after review under Labor Code §504.053(d)(3) or Insurance Code §1305.355 is entitled to a contested care hearing in the same manner as a hearing conducted under Labor Code §413.0311."

Agency Response: The Division appreciates the supportive comment.

§133.308(s): A commenter recommends revising proposed amendments to §133.308(s) to address prehearing procedures regarding the exchange of documents. The commenter recommends that the rule address procedures at the prehearings that have been conducted at the field offices on medical necessity disputes. The commenter states that the Division sends out prehearing orders for medical necessity disputes many of which in accordance with 28 TAC §142.13(g) require all documentary evidence not previously exchanged to be exchanged not later than 3 days prior to the date of the scheduled prehearing. The commenter states that 28 TAC §142.13(g) allows the Division to include time limits for discovery in a notice setting an expedited hearing or a hearing held without a prior BRC. The commenter states that strictly speaking a prehearing order is not a notice of hearing. The commenter recommends revising this rule to include the following language: "Before the division CCH, the division will convene a telephonic prehearing. Parties may exchange pertinent information at any time before the telephonic prehearing."

Agency Response: The Division disagrees with the suggested language and declines to make the change at this time because the comment is outside the scope of these rules and pertain to rule in 28 TAC Chapter 142.

§133.308(s): A commenter states that the standards for the CCH decision should be similar to the standards for IRO decisions found in draft §133.308(o) and recommends the following language: "CCH Decision. The division CCH decision must include: (A) a list of all medical records and other documents reviewed by the hearing officer including the dates of those documents; (B) an analysis of, and explanation for, the decision including the findings of fact and conclusions of law used to support the decision; (C) a statement that clearly states whether or not medical necessity exists for each of the health care services in dispute; (D) if the hearing officer's decision is contrary to the IRO decision then the decision must specify the basis for not following the IRO decision; (E) if the hearing officer's decision is contrary to the applicable treatment guideline identified in this section then the decision must specify the basis for the divergence from the treatment guideline."

Agency Response: The Division declines to add the commenter's language because these provisions are not necessary since the contents of a hearing officer's decision is governed by the applicable provisions of 28 TAC Chapter 142. Those rules already provide that decisions will be in writing, include findings of fact and conclusions of law, and be signed by the hearing officer.

§133.308(s)(1)(D): A commenter seeks clarification and asks what happens if the treatment guidelines adopted by the political subdivision or pool do not meet the standards provided by Labor Code §413.011(e)? The commenter asks if this section means that when the guidelines do not meet those standards the hearing officer should proceed as if the guidelines do not exist, then this section should state that explicitly.

Agency Response: The Division disagrees that any clarification to this rule is necessary. This adopted rule mirrors statutory language in Labor Code §504.054(b) and already clearly provides that the hearing officer shall consider any treatment guidelines adopted by the political subdivision or pool that provides medical benefits under §504.053(b)(2) if those guidelines meet the standards provided by §413.011(e).

§133.308(s)(1)(E)(ii): A commenter disagrees with including language that a letter of clarification cannot "ask the IRO to reconsider its decision or to issue a new decision." The commenter states that in those instances where the clarification calls into question the accuracy of the IRO decision, it seems of little value to preclude the IRO from having the opportunity to make necessary corrections.

Agency Response: Adopted §133.308(s)(1)(E)(ii) states that the Department may at its discretion forward the party's request for a letter of clarification to the IRO that conducted the independent review and that the Department will not forward to the IRO a request for a letter of clarification that asks the IRO to reconsider its decision or issue a new decision. The purpose of this adopted amendment is to prevent unnecessary referrals of a request for a letter of clarification to the IRO. The Division clarifies that the purpose of a letter of clarification in this instance is for the requestor to be able to ask the IRO to clarify or explain its decision. The purpose is not for the requestor to have an opportunity to ask the IRO to reconsider its decision or to issue a new decision.

§133.308(s)(1)(D): A Commenter urges the Division to place language requiring the hearing officer to consider "evidence based" treatment guidelines in these rules. The commenter opines that when treatment guidelines are used, they should always be based on evidence derived from sound scientific methods. Such evidence should demonstrate which treatment guidelines are appropriate and beneficial, with the benefits outweighing the side effects or risks of that treatment.

Agency Response: The Division declines to add the words "evidence-based" because the statutes cited within this adopted rule already require treatment guidelines to be evidence-based.

§133.308(u): The commenters recommend that the rules be clarified to allow the "requestor" to provide notice that the dispute involves a first responder. One commenter suggests the following language "first responder or a person acting on behalf of the first responder" and states that the purpose of the legislation seems better served by letting more than just the first responder make the request to expedite. Several commenters are concerned that the proposed language will limit or exclude who may make a request under this section in respect to "first responders" and ask that the language be changed to ensure that there are no limitations on who may make a request on behalf of or assist a "first responder." Another commenter disagrees with any text that would allow a health care provider to request dispute resolution on behalf of an injured employee under Labor Code §504.055.

Agency Response: The Division agrees with the commenters that request clarification and has changed the rule text to read: "In accordance with Labor Code §504.055(d), an appeal regarding the denial of a claim for medical benefits, including all health care required to cure or relieve the effects naturally resulting from a compensable injury involving a first responder will be accelerated by the division and given priority. The party seeking to expedite the contested case hearing or appeal shall provide notice to the division and independent review organization that the contested case hearing or appeal involves a first responder." The Division declines to include the text "first responder or a person acting on behalf of the first responder", but has made changes because a request to expedite a medical necessity dispute proceeding may expedite medical benefits for the first responder pursuant to Labor Code §504.055. These changes clarify that a request for an expedited appeal regarding the denial of a claim for medical benefits, including all health care required curing or relieving the effects naturally resulting from a compensable injury involving a first responder will be accelerated by the division and given priority. The changes also state that the party seeking to expedite the contested case hearing or appeal shall provide notice to the division and independent review organization that the contested case hearing or appeal involves a first responder.

§133.308(u): A commenter supports the removal of the separate appeal requirements regarding spinal surgeries. The commenter believes all medical necessity disputes should be treated the same and appreciates the division's changes regarding this matter.

Agency Response: The Division appreciates the supportive comment.

THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

For, with changes: Property Casualty Insurers Association of America; State Office of Risk Management; Burck, Lapidus, Jackson & Chase, P.C.; Texas Medical Association; Insurance Council of Texas; The Law Office of Pamela R. Beachley; Texas Association of School Boards Risk Management Fund; Office of Injured Employee Counsel; Texas Mutual Insurance Company; and the Combined Law Enforcement Association of Texas

Against: None

The amendments are adopted under Labor Code §§401.011(31); 402.00111; 402.00116(a) and (b); 402.061; 413.031(e-1), (k), (k-1), and (m); 413.0311(a); 413.0312; 413.032(b); 504.054; 504.055; Insurance Code §§1305.355, 1305.356, 4201.002(7), and 4202.003(1)(A) and (B); and Government Code §2001.176(b).

Labor Code §401.011(31) defines "medical benefit" as payment for health care reasonably required by the nature of a compensable injury and intended to cure or relieve the effects naturally resulting from the compensable injury, including reasonable expenses incurred by the employee for necessary treatment to cure and relieve the employee from the effects of an occupational disease before and after the employee knew or should have known the nature of the disability and its relationship to the employment; promote recovery; or enhance the ability of the employee to return to or retain employment.

Labor Code §402.00111 provides that except as otherwise provided by Labor Code, Title 5, the Commissioner of Workers' Compensation (Commissioner) shall exercise all executive authority, including rulemaking authority, under Labor Code, Title 5.

Labor Code §402.00116(a) provides that the Commissioner is the Division's chief executive and administrative officer and shall administer and enforce Labor Code, Title 5, other workers' compensation laws of this state, and other laws granting jurisdiction to or applicable to the Division or the Commissioner.

Labor Code §402.00116(b) provides that the Commissioner has the powers and duties vested in the Division by Labor Code, Title 5 and other workers' compensation laws of this state.

Labor Code §402.061 provides that the Commissioner shall adopt rules as necessary for the implementation and enforcement of the Act.

Labor Code §413.031(e-1) states that in performing a review of medical necessity under Labor Code §413.031(d) or (e), the IRO shall consider the Division's healthcare reimbursement policies and guidelines adopted under Labor Code §413.011. Further, if the IRO's decision is contrary to the Division's policies or guidelines adopted under Labor Code §413.011, the IRO must indicate in the decision the specific basis for its divergence in the review of medical necessity.

Labor Code §413.031(k) and (k-1) provide that a party to a medical dispute that remains unresolved after a review of the medical service under this statute is entitled to a hearing under Labor Code §413.0311 or §413.0312, as applicable. Further, Labor Code §413.031(k-1) provides that a party who has exhausted all administrative remedies described by subsection (k) of this statute and who is aggrieved by a final decision of the division or the State Office of Administrative Hearings may seek judicial review of the decision. Judicial review under subsection (k-1) of this statute shall be conducted in the manner provided for judicial review of a contested case under Chapter 2001, Subchapter G Government Code, except that in the case of a medical fee dispute the party seeking judicial review under this statute must file suit not later than the 45th day after the date on which the State Office of Administrative Hearings mailed the party the notification of the decision. Further, subsection (k-1) of this statute, the mailing date is considered to be the fifth day after the date the decision was issued by the State Office of Administrative Hearings.

Labor Code §413.031(m) provides that the decision of an independent review organization under Labor Code §413.031(d) is binding during the pendency of a dispute.

Labor Code §413.0311(a) applies to the appeal of an independent review organization decision regarding determination of the medical necessity for a health care service.

Labor Code §413.0312 applies to medical fee disputes that remain unresolved after any applicable review under Labor Code §413.031(b) - (i). This statute requires that, at a benefit review conference conducted under this section, the parties to the dispute may not resolve the dispute by negotiating fees that are inconsistent with any applicable fee guidelines adopted by the Commissioner. This statute provides that parties may elect arbitration as provided in Labor Code §410.104 after the benefit review conference. If arbitration is not elected as described by subsection (d) of this statute, a party to a medical fee dispute described by subsection (a) of this statute is entitled to a contested case hearing at the State Office of Administrative Hearings. This statute requires that all medical fee dispute cases go to a contested case hearing at the State Office of Administrative Hearings on appeal from the benefit review conference if arbitration is not elected and those hearings shall be conducted in the manner provided for a contested case hearing under Chapter 2001, Government Code. This statute also specifies that the Commissioner or the Division may participate in a contested case hearing at the State Office of Administrative Hearings under subsection (e) of this statute if the hearing involves the interpretation of fee guidelines adopted by the Commissioner. The Division and the Department are not considered to be parties to the medical fee dispute for purposes of this statute. Further, under this statute, the cost of the contested case hearing shall be paid by the non-prevailing party. This statute additionally provides that on appeal, judicial review follows the contested case hearing held at the State Office of Administrative for the medical fee dispute and the suit must be filed within 45 days of the date that the State Office of Administrative Hearings mailed the party the decision (and the mailing date is the 5th day after the date the decision was filed with the Division).

Labor Code §413.032(b) provides that the IRO shall certify that each physician or other health care provider who reviews the decision certifies that no known conflicts of interest exist between that provider and the injured employee, the injured employee's employer, the injured employee's insurance carrier, the utilization review agent, or any of the treating doctors or insurance carrier health care providers who reviewed the case for decision before referral to the IRO.

Labor Code §504.054 provides that a party to a medical dispute that remains unresolved after the review described by Labor Code §504.053(d)(3) is entitled to a contested case hearing which is to be conducted by the Division in the same manner as a hearing conducted under Labor Code §413.0311. This statute further provides that the hearing officer shall consider any treatment guidelines adopted by the political subdivision or pool that provides medical benefits under Labor Code §504.053(b)(2) if those guidelines meet the standards provided by Labor Code §413.011(e); furthermore, a party that has exhausted all administrative remedies and is aggrieved by a final decision of the Division may seek judicial review in the manner provided for a contested case under Chapter 2001, Subchapter G Government Code and the review is governed by the substantial evidence rule.

Labor Code §504.055 provides for the expedited provision of medical benefits for certain injuries sustained by first responders in the course and scope of employment. This statute defines "first responder" and in Labor Code §504.055(b) specifies that this statute applies only to a first responder who sustains a serious bodily injury, as defined by Penal Code §1.07, in the course and scope of employment and includes a first responder providing services on a volunteer basis. Labor Code §504.055(c) provides that the political subdivision, Division, and insurance carrier shall accelerate and give priority to an injured first responder's claim for medical benefits, including all health care required to cure or relieve the effects naturally resulting from a compensable injury described by Labor Code §504.055(b). Labor Code §504.055(d) requires the Division to accelerate a contested case hearing requested by or an appeal submitted by a first responder regarding the denial of a claim for medical benefits, including all health care required to cure or relieve the effects naturally resulting from a compensable injury described by Labor Code §504.055(b). This statute further requires first responders to provide notice to the Division and independent review organization that the contested case or appeal involves a first responder.

Insurance Code §1305.355 pertains to the independent review of adverse determinations and contains numerous provisions, including that a party to a medical dispute that remains unresolved

after a review under that section is entitled to a hearing and judicial review of the decision in accordance with Insurance Code §1305.355; a determination of an independent review organization related to a request for preauthorization or concurrent review is binding during the pendency of a dispute and the insurance carrier and network shall comply with the determination; and the utilization review agent shall provide to the IRO, not later than the third business day after the date the utilization review agent receives notification of the assignment of the request to an IRO a list of the providers who provided care to the employee and who may have medical records relevant to the review.

Insurance Code §1305.356 provides that a party to a medical dispute that remains unresolved after review under Insurance Code §1305.355 is entitled to a Division contested case hearing in the same manner as a hearing conducted under Labor Code §413.0311. Further, at a Division contested case hearing for the resolution of a medical dispute involving a network the hearing officer shall consider evidence based treatment guidelines adopted by the network under Insurance Code §1305.304. A party that has exhausted all administrative remedies under Insurance Code §1305.356(a) and is aggrieved by a final decision of the Division may seek judicial review of the decision and this review shall be conducted in the manner provided for judicial review of a contested case under Chapter 2001, Subchapter G Government Code, and is governed by the substantial evidence rule.

Insurance Code §4201.002(7) defines "life-threatening" to mean a disease or condition from which the likelihood of death is probable unless the course of the disease or condition is interrupted.

Insurance Code §4202.003(1)(A) and (B) provides that the standards adopted under Insurance Code §4202.002 must require each IRO to make the organization's determination for a life-threatening condition as defined by Insurance Code §4201.002, not later than the earlier of the fifth day after the date the organization receives the information necessary to make the determination; or the eighth day after the date the organization receives the request that the determination be made.

Government Code §2001.051 provides that in a contested case, each party is entitled to an opportunity for hearing after reasonable notice of not less than 10 days and to respond and to present evidence and argument on each issue involved in the case. Government Code §2001.176(b)(2) requires a person who initiates judicial review in a contested case to serve upon the state agency a copy of petition for judicial review.

§133.307. MDR of Fee Disputes.

(a) Applicability. The applicability of this section is as follows.

(1) This section applies to a request to the division for medical fee dispute resolution (MFDR) as authorized by the Texas Workers' Compensation Act that is filed on or after June 1, 2012. Dispute resolution requests filed prior to June 1, 2012, shall be resolved in accordance with the statutes and rules in effect at the time the request was filed.

(2) In resolving disputes regarding the amount of payment due for health care determined to be medically necessary and appropriate for treatment of a compensable injury, the role of the division is to adjudicate the payment, given the relevant statutory provisions and division rules.

(3) In accordance with Labor Code §504.055 a request for medical fee dispute resolution that involves a first responder's request for reimbursement of medical expenses paid by the first responder will be accelerated by the division and given priority. The first responder shall provide notice to the division that the request involves a first responder.

(b) Requestors. The following parties may be requestors in medical fee disputes:

(1) the health care provider, or a qualified pharmacy processing agent, as described in Labor Code §413.0111, in a dispute over the reimbursement of a medical bill(s);

(2) the health care provider in a dispute about the results of a division or insurance carrier audit or review which requires the health care provider to refund an amount for health care services previously paid by the insurance carrier;

(3) the injured employee in a dispute involving an injured employee's request for reimbursement from the insurance carrier of medical expenses paid by the injured employee;

(4) the injured employee when requesting a refund of the amount the injured employee paid to the health care provider in excess of a division fee guideline; or

(5) a subclaimant in accordance with §140.6 of this title (relating to Subclaimant Status: Establishment, Rights, and Procedures), §140.7 of this title (relating to Health Care Insurer Reimbursement under Labor Code §409.0091), or §140.8 of this title (relating to Procedures for Health Care Insurers to Pursue Reimbursement of Medical Benefits under Labor Code §409.0091), as applicable.

(c) Requests. Requests for MFDR shall be filed in the form and manner prescribed by the division. Requestors shall file two legible copies of the request with the division.

(1) Timeliness. A requestor shall timely file the request with the division's MFDR Section or waive the right to MFDR. The division shall deem a request to be filed on the date the MFDR Section receives the request. A decision by the MFDR Section that a request was not timely filed is not a dismissal and may be appealed pursuant to subsection (g) of this section.

(A) A request for MFDR that does not involve issues identified in subparagraph (B) of this paragraph shall be filed no later than one year after the date(s) of service in dispute.

(B) A request may be filed later than one year after the date(s) of service if:

(i) a related compensability, extent of injury, or liability dispute under Labor Code Chapter 410 has been filed, the medical fee dispute shall be filed not later than 60 days after the date the requestor receives the final decision, inclusive of all appeals, on compensability, extent of injury, or liability;

(ii) a medical dispute regarding medical necessity has been filed, the medical fee dispute must be filed not later than 60 days after the date the requestor received the final decision on medical necessity, inclusive of all appeals, related to the health care in dispute and for which the insurance carrier previously denied payment based on medical necessity; or

(iii) the dispute relates to a refund notice issued pursuant to a division audit or review, the medical fee dispute must be filed not later than 60 days after the date of the receipt of a refund notice.

(2) Health Care Provider or Pharmacy Processing Agent Request. The requestor shall provide the following information and records with the request for MFDR in the form and manner prescribed by the division. The provider shall file the request with the MFDR

Section by any mail service or personal delivery. The request shall include:

(A) the name, address, and contact information of the requestor;

(B) the name of the injured employee;

(C) the date of the injury;

(D) the date(s) of the service(s) in dispute;

(E) the place of service;

(F) the treatment or service code(s) in dispute;

(G) the amount billed by the health care provider for the treatment(s) or service(s) in dispute;

(H) the amount paid by the workers' compensation insurance carrier for the treatment(s) or service(s) in dispute;

(I) the disputed amount for each treatment or service in dispute;

(J) a paper copy of all medical bill(s) related to the dispute, as originally submitted to the insurance carrier in accordance with this chapter and a paper copy of all medical bill(s) submitted to the insurance carrier for an appeal in accordance with §133.250 of this chapter (relating to General Medical Provisions);

(K) a paper copy of each explanation of benefits (EOB) related to the dispute as originally submitted to the health care provider in accordance with this chapter or, if no EOB was received, convincing documentation providing evidence of insurance carrier receipt of the request for an EOB;

(L) when applicable, a copy of the final decision regarding compensability, extent of injury, liability and/or medical necessity for the health care related to the dispute;

(M) a copy of all applicable medical records related to the dates of service in dispute;

(N) a position statement of the disputed issue(s) that shall include:

(i) the requestor's reasoning for why the disputed fees should be paid or refunded,

(ii) how the Labor Code and division rules, including fee guidelines, impact the disputed fee issues, and

(iii) how the submitted documentation supports the requestor's position for each disputed fee issue;

(O) documentation that discusses, demonstrates, and justifies that the payment amount being sought is a fair and reasonable rate of reimbursement in accordance with §134.1 of this title (relating to Medical Reimbursement) or §134.503 of this title (relating to Pharmacy Fee Guideline) when the dispute involves health care for which the division has not established a maximum allowable reimbursement (MAR) or reimbursement rate, as applicable;

(P) if the requestor is a pharmacy processing agent, a signed and dated copy of an agreement between the processing agent and the pharmacy clearly demonstrating the dates of service covered by the contract and a clear assignment of the pharmacy's right to participate in the MFDR process. The pharmacy processing agent may redact any proprietary information contained within the agreement; and

(Q) any other documentation that the requestor deems applicable to the medical fee dispute.

(3) Subclaimant Dispute Request. The requestor shall provide the appropriate information with the request that is consistent with the provisions of §140.6 or §140.8 of this title. A request made by a subclaimant under Labor Code §409.009 shall comply with §140.6 of this title and submit the documents to the Division required thereunder. A request made by a subclaimant under Labor Code §409.0091 shall comply with the document requirements of §140.8 of this title and submit the documents to the Division required thereunder.

(4) Injured Employee Dispute Request. An injured employee who has paid for health care may request MFDR of a refund or reimbursement request that has been denied. The injured employee's dispute request shall be sent to the MFDR Section in the form and manner prescribed by the division by mail service, personal delivery or facsimile and shall include:

(A) the name, address, and contact information of the injured employee;

(B) the date of the injury;

(C) the date(s) of the service(s) in dispute;

(D) a description of the services paid;

(E) the amount paid by the injured employee;

(F) the amount of the medical fee in dispute;

(G) an explanation of why the disputed amount should be refunded or reimbursed, and how the submitted documentation supports the explanation for each disputed amount;

(H) proof of employee payment (including copies of receipts, health care provider billing statements, or similar documents); and

(I) a copy of the insurance carrier's or health care provider's denial of reimbursement or refund relevant to the dispute, or, if no denial was received, convincing evidence of the injured employee's attempt to obtain reimbursement or refund from the insurance carrier or health care provider.

(5) Division Response to Request. The division will forward a copy of the request and the documentation submitted in accordance with paragraph (2), (3), or (4) of this subsection to the respondent. The respondent shall be deemed to have received the request on the acknowledgment date as defined in §102.5 of this title (relating to General Rules for Written Communications to and from the Commission).

(d) Responses. Responses to a request for MFDR shall be legible and submitted to the division and to the requestor in the form and manner prescribed by the division.

(1) Timeliness. The response will be deemed timely if received by the division via mail service, personal delivery, or facsimile within 14 calendar days after the date the respondent received the copy of the requestor's dispute. If the division does not receive the response information within 14 calendar days of the dispute notification, then the division may base its decision on the available information.

(2) Response. Upon receipt of the request, the respondent shall provide any missing information not provided by the requestor and known to the respondent. The respondent shall also provide the following information and records:

(A) the name, address, and contact information of the respondent;

(B) a paper copy of all initial and appeal EOBs related to the dispute, as originally submitted to the health care provider in

accordance with this chapter, related to the health care in dispute not submitted by the requestor or a statement certifying that the respondent did not receive the health care provider's disputed billing prior to the dispute request;

(C) a paper copy of all medical bill(s) related to the dispute, submitted in accordance with this chapter if different from that originally submitted to the insurance carrier for reimbursement;

(D) a copy of any pertinent medical records or other documents relevant to the fee dispute not already provided by the requestor;

(E) a statement of the disputed fee issue(s), which includes:

(i) a description of the health care in dispute;

(ii) a position statement of reasons why the disputed medical fees should not be paid;

(iii) a discussion of how the Labor Code and division rules, including fee guidelines, impact the disputed fee issues;

(iv) a discussion regarding how the submitted documentation supports the respondent's position for each disputed fee issue; and

(v) documentation that discusses, demonstrates, and justifies that the amount the respondent paid is a fair and reasonable reimbursement in accordance with Labor Code §413.011 and §134.1 or §134.503 of this title if the dispute involves health care for which the division has not established a MAR or reimbursement rate, as applicable.

(F) The response shall address only those denial reasons presented to the requestor prior to the date the request for MFDR was filed with the division and the other party. Any new denial reasons or defenses raised shall not be considered in the review. If the response includes unresolved issues of compensability, extent of injury, liability, or medical necessity, the request for MFDR will be dismissed in accordance with subsection (f)(3)(B) or (C) of this section.

(G) If the respondent did not receive the health care provider's disputed billing or the employee's reimbursement request relevant to the dispute prior to the request, the respondent shall include that information in a written statement.

(H) If the medical fee dispute involves compensability, extent of injury, or liability, the insurance carrier shall attach a copy of any related Plain Language Notice in accordance with §124.2 of this title (relating to Carrier Reporting and Notification Requirements).

(I) If the medical fee dispute involves medical necessity issues, the insurance carrier shall attach a copy of documentation that supports an adverse determination in accordance with §19.2005 of this title (relating to General Standards of Utilization Review).

(e) Withdrawal. The requestor may withdraw its request for MFDR by notifying the division prior to a decision.

(f) MFDR Action. The division will review the completed request and response to determine appropriate MFDR action.

(1) Request for Additional Information. The division may request additional information from either party to review the medical fee issues in dispute. The additional information must be received by the division no later than 14 days after receipt of this request. If the division does not receive the requested additional information within 14 days after receipt of the request, then the division may base its decision on the information available. The party providing the additional information shall forward a copy of the additional information to all other parties at the time it is submitted to the division.

(2) Issues Raised by the Division. The division may raise issues in the MFDR process when it determines such an action to be appropriate to administer the dispute process consistent with the provisions of the Labor Code and division rules.

(3) Dismissal. A dismissal is not a final decision by the division. The medical fee dispute may be submitted for review as a new dispute that is subject to the requirements of this section. The division may dismiss a request for MFDR if:

(A) the division determines that the medical bills in the dispute have not been submitted to the insurance carrier for an appeal, when required;

(B) the request contains an unresolved adverse determination of medical necessity;

(C) the request contains an unresolved compensability, extent of injury, or liability dispute for the claim; or

(D) the division determines that good cause exists to dismiss the request, including a party's failure to comply with the provisions of this section.

(4) Decision. The division shall send a decision to the disputing parties or to representatives of record for the parties, if any, and post the decision on the department's website.

(5) Division Fee. The division may assess a fee in accordance with §133.305 of this subchapter (relating to MDR--General).

(g) Appeal of MFDR Decision. A party to a medical fee dispute may seek review of the decision. Parties are deemed to have received the MFDR decision as provided in §102.5 of this title. The MFDR decision is final if the request for the benefit review conference is not timely made. If a party provides the benefit review officer or administrative law judge with documentation listed in subsection (d)(2)(H) or (I) of this section that shows unresolved issues regarding compensability, extent of injury, liability, or medical necessity for the same service subject to the fee dispute, then the benefit review officer or administrative law judge shall abate the proceedings until those issues have been resolved.

(1) A party seeking review of an MFDR decision must request a benefit review conference no later than 20 days from the date the MFDR decision is received by the party. The party that requests a review of the MFDR decision must mediate the dispute in the manner required by Labor Code, Chapter 410, Subchapter B and request a benefit review conference under Chapter 141 of this title (relating to Dispute Resolution--Benefit Review Conference). A party may appear at a benefit review conference via telephone. The benefit review conference will be conducted in accordance with Chapter 141 of this title.

(A) Notwithstanding §141.1(b) of this title (relating to Requesting and Setting a Benefit Review Conference), a seeking review of an MFDR decision may request a benefit review conference.

(B) At a benefit review conference, the parties to the dispute may not resolve the dispute by negotiating fees that are inconsistent with any applicable fee guidelines adopted by the commissioner.

(C) A party must file the request for a benefit review conference in accordance with Chapter 141 of this title and must include in the request a copy of the MFDR decision. Providing a copy of the MFDR decision satisfies the documentation requirements in §141.1(d) of this title. A first responder's request for a benefit review conference must be accelerated by the division and given priority in accordance with Labor Code §504.055. The first responder must

provide notice to the division that the contested case involves a first responder.

(2) If the medical fee dispute remains unresolved after a benefit review conference, the parties may request arbitration as provided in Labor Code, Chapter 410, Subchapter C and Chapter 144 of this title (relating to Dispute Resolution). If arbitration is not elected, the party may appeal the MFDR decision by requesting a contested case hearing before the State Office of Administrative Hearings. A first responder's request for arbitration by the division or a contested case hearing before the State Office of Administrative Hearings must be accelerated by the division and given priority in accordance with Labor Code §504.055. The first responder must provide notice to the division that the contested case involves a first responder.

(A) To request a contested case hearing before State Office of Administrative Hearings, a party shall file a written request for a State Office of Administrative Hearings hearing with the Division's Chief Clerk of Proceedings not later than 20 days after conclusion of the benefit review conference in accordance with §148.3 of this title (relating to Requesting a Hearing).

(B) The party seeking review of the MFDR decision shall deliver a copy of its written request for a hearing to all other parties involved in the dispute at the same time the request for hearing is filed with the division.

(3) A party to a medical fee dispute who has exhausted all administrative remedies may seek judicial review of the decision of the Administrative Law Judge at the State Office of Administrative Hearings. The division and the department are not considered to be parties to the medical dispute pursuant to Labor Code §413.031(k-2) and §413.0312(f). Judicial review under this paragraph shall be conducted in the manner provided for judicial review of contested cases under Chapter 2001, Subchapter G Government Code, except that in the case of a medical fee dispute the party seeking judicial review must file suit not later than the 45th day after the date on which the State Office of Administrative Hearings mailed the party the notification of the decision. The mailing date is considered to be the fifth day after the date the decision was issued by the State Office of Administrative Hearings. A party seeking judicial review of the decision of the administrative law judge shall at the time the petition for judicial review is filed with the district court file a copy of the petition with the division's chief clerk of proceedings.

(h) Billing of the non-prevailing party. Except as otherwise provided by Labor Code §413.0312, the non-prevailing party shall reimburse the division for the costs for services provided by the State Office of Administrative Hearings and any interest required by law.

(1) The non-prevailing party shall remit payment to the division not later than the 30th day after the date of receiving a bill or statement from the division.

(2) In the event of a dismissal, the party requesting the hearing, other than the injured employee, shall reimburse the division for the costs for services provided by the State Office of Administrative Hearings unless otherwise agreed by the parties.

(3) If the injured employee is the non-prevailing party, the insurance carrier shall reimburse the division for the costs for services provided by the State Office of Administrative Hearings.

§133.308. MDR of Medical Necessity Disputes.

(a) Applicability. The applicability of this section is as follows.

(1) This section applies to the independent review of medical necessity disputes that are filed on or after June 1, 2012. Dispute resolution requests filed prior to June 1, 2012 shall be resolved in accordance with the statutes and rules in effect at the time the request was filed.

(2) When applicable, retrospective medical necessity disputes shall be governed by the provisions of Labor Code §413.031(n) and related rules.

(3) All independent review organizations (IROs) performing reviews of health care under the Labor Code and Insurance Code, regardless of where the independent review activities are located, shall comply with this section. The Insurance Code, the Labor Code and related rules govern the independent review process.

(b) IRO Certification. Each IRO performing independent review of health care provided in the workers' compensation system shall be certified pursuant to Insurance Code Chapter 4202 and Chapter 12 of this title (relating to Independent Review Organizations).

(c) Professional licensing requirements. Notwithstanding Insurance Code Chapter 4202, an IRO that uses doctors to perform reviews of health care services provided under this section may only use doctors licensed to practice in Texas that hold the appropriate credentials under Chapter 180 of this title (relating to Monitoring and Enforcement). Personnel employed by or under contract with the IRO to perform independent review shall also comply with the personnel and credentialing requirements under Chapter 12 of this title.

(d) Conflicts. Conflicts of interest will be reviewed by the department consistent with the provisions of the Insurance Code §4202.008, Labor Code §413.032(b), §§12.203, 12.204, and 12.206 of this title (relating to Conflicts of Interest Prohibited, Prohibitions of Certain Activities and Relationships of Independent Review Organizations and Individuals or Entities Associated with Independent Review Organizations, and Notice of Determinations Made by Independent Review Organizations, respectively), and any other related rules. Notification of each IRO decision must include a certification by the IRO that the reviewing health care provider has certified that no known conflicts of interest exist between that health care provider and the injured employee, the injured employee's employer, the insurance carrier, the utilization review agent, any of the treating health care providers, or any of the health care providers utilized by the insurance carrier to review the case for determination prior to referral to the IRO.

(e) Monitoring. The division will monitor IROs under Labor Code §§413.002, 413.0511, and 413.0512. The division shall report the results of the monitoring of IROs to the department on at least a quarterly basis. The division will make inquiries, conduct audits, receive and investigate complaints, and take all actions permitted by the Labor Code and other applicable law against an IRO or personnel employed by or under contract with an IRO to perform independent review to determine compliance with applicable law, this section, and other applicable division rules.

(f) Requestors. The following parties may be requestors in medical necessity disputes:

(1) In network disputes:

(A) health care providers, or qualified pharmacy processing agents acting on behalf of a pharmacy, as described in Labor Code §413.0111, for preauthorization, concurrent, and retrospective medical necessity dispute resolution;

(B) injured employees or a person acting on behalf of an injured employee for preauthorization, concurrent, and retrospective medical necessity dispute resolution; and

(C) subclaimants in accordance with §§140.6, 140.7, or 140.8 of this title, as applicable.

(2) In non-network disputes:

(A) health care providers, or qualified pharmacy processing agents acting on behalf of a pharmacy, as described in Labor Code §413.0111, for preauthorization, concurrent, and retrospective medical necessity dispute resolution;

(B) injured employees or injured employee's representative for preauthorization and concurrent medical necessity dispute resolution; and, for retrospective medical necessity dispute resolution when reimbursement was denied for health care paid by the injured employee; and

(C) subclaimants in accordance with §140.6 of this title (relating to Subclaimant Status: Establishment, Rights, and Procedures), §140.7 of this title (relating to Health Care Insurer Reimbursement under Labor Code §409.0091), or §140.8 of this title (relating to Procedures for Health Care Insurers to Pursue Reimbursement of Medical Benefits under Labor Code §409.0091), as applicable.

(g) Requests. A request for independent review must be filed in the form and manner prescribed by the department. The department's IRO request form may be obtained from:

(1) the department's website at http://www.tdi.texas.gov/; or

(2) the Managed Care Quality Assurance Office, Mail Code 103-6A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

(h) Timeliness. A requestor shall file a request for independent review with the insurance carrier that actually issued the adverse determination or the insurance carrier's utilization review agent (URA) that actually issued the adverse determination no later than the 45th calendar day after receipt of the insurance carrier's denial of an appeal. The insurance carrier shall notify the department of a request for an independent review within one working day from the date the request is received by the insurance carrier or its URA. In a preauthorization or concurrent review dispute request, an injured employee with a life-threatening condition, as defined in §133.305 of this subchapter (relating to MDR--General), is entitled to an immediate review by an IRO and is not required to comply with the procedures for an appeal to the insurance carrier.

(i) Dismissal. The department may dismiss a request for medical necessity dispute resolution if:

(1) the requestor informs the department, or the department otherwise determines, that the dispute no longer exists;

(2) the requestor is not a proper party to the dispute pursuant to subsection (f) of this section;

(3) the department determines that the dispute involving a non-life-threatening condition has not been submitted to the insurance carrier for an appeal;

(4) the department has previously resolved the dispute for the date(s) of health care in question;

(5) the request for dispute resolution is untimely pursuant to subsection (h) of this section;

(6) the request for medical necessity dispute resolution was not submitted in compliance with the provisions of this subchapter; or

(7) the department determines that good cause otherwise exists to dismiss the request.

(j) IRO Assignment and Notification. The department shall review the request for IRO review, assign an IRO, and notify the parties about the IRO assignment consistent with the provisions of Insurance Code §4202.002(a)(1), §1305.355(a), Chapter 12, Subchapter F of this title (relating to Random Assignment of Independent Review Organizations), any other related rules, and this subchapter.

(k) Insurance Carrier Document Submission. The insurance carrier or the insurance carrier's URA shall submit the documentation required in paragraphs (1) - (6) of this subsection to the IRO not later than the third working day after the date the insurance carrier or URA receives the notice of IRO assignment. The documentation shall include:

(1) the forms prescribed by the department for requesting IRO review;

(2) all medical records of the injured employee in the possession of the insurance carrier or the URA that are relevant to the review, including any medical records used by the insurance carrier or the URA in making the determinations to be reviewed by the IRO;

(3) all documents, guidelines, policies, protocols and criteria used by the insurance carrier or the URA in making the decision;

(4) all documentation and written information submitted to the insurance carrier in support of the appeal;

(5) the written notification of the initial adverse determination and the written adverse determination of the appeal to the insurance carrier or the insurance carrier's URA; and

(6) any other information required by the department related to a request from an insurance carrier for the assignment of an IRO.

(l) Additional Information. The IRO shall request additional necessary information from either party or from other health care providers whose records are relevant to the review.

(1) The party or health care providers with relevant records shall deliver the requested information to the IRO as directed by the IRO. If the health care provider requested to submit records is not a party to the dispute, the insurance carrier shall reimburse copy expenses for the requested records pursuant to §134.120 of this title (relating to Reimbursement for Medical Documentation). Parties to the dispute may not be reimbursed for copies of records sent to the IRO.

(2) If the required documentation has not been received as requested by the IRO, the IRO shall notify the department and the department shall request the necessary documentation.

(3) Failure to provide the requested documentation as directed by the IRO or department may result in enforcement action as authorized by statutes and rules.

(m) Designated Doctor Exam. In performing a review of medical necessity, an IRO may request that the division require an examination by a designated doctor and direct the injured employee to attend the examination pursuant to Labor Code §413.031(g) and §408.0041. The IRO request to the division must be made no later than 10 days after the IRO receives notification of assignment of the IRO. The treating doctor and insurance carrier shall forward a copy of all medical records, diagnostic reports, films, and other medical documents to the designated doctor appointed by the division, to arrive no later than three working days prior to the scheduled examination. Communication with the designated doctor is prohibited regarding issues not related to the medical necessity dispute. The designated doctor shall complete a report and file it with the IRO, in the form and manner prescribed by the division no later than seven working days after completing the examination. The designated doctor report shall address all issues as directed by the division.

(n) Time Frame for IRO Decision. The IRO will render a decision as follows:

(1) for life-threatening conditions, no later than eight days after the IRO receipt of the dispute;

(2) for preauthorization and concurrent medical necessity disputes, no later than the 20th day after the IRO receipt of the dispute;

(3) for retrospective medical necessity disputes, no later than the 30th day after the IRO receipt of the IRO fee; and

(4) if a designated doctor examination has been requested by the IRO, the above time frames begin on the date of the IRO receipt of the designated doctor report.

(o) IRO Decision. The decision shall be mailed or otherwise transmitted to the parties and to representatives of record for the parties and transmitted in the form and manner prescribed by the department within the time frames specified in this section.

(1) The IRO decision must include:

(A) a list of all medical records and other documents reviewed by the IRO, including the dates of those documents;

(B) a description and the source of the screening criteria or clinical basis used in making the decision;

(C) an analysis of, and explanation for, the decision, including the findings and conclusions used to support the decision;

(D) a description of the qualifications of each physician or other health care provider who reviewed the decision;

(E) a statement that clearly states whether or not medical necessity exists for each of the health care services in dispute;

(F) a certification by the IRO that the reviewing health care provider has no known conflicts of interest pursuant to the Insurance Code Chapter 4202, Labor Code §413.032, and §12.203 of this title; and

(G) if the IRO's decision is contrary to the division's policies or guidelines adopted under Labor Code §413.011, the IRO must indicate in the decision the specific basis for its divergence in the review of medical necessity of non-network health care.

(2) The notification to the department shall also include certification of the date and means by which the decision was sent to the parties.

(p) Insurance Carrier Use of Peer Review Report after an IRO Decision. If an IRO decision determines that medical necessity exists for health care that the insurance carrier denied and the insurance carrier utilized a peer review report on which to base its denial, the peer review report shall not be used for subsequent medical necessity denials of the same health care services subsequently reviewed for that compensable injury.

(q) IRO Fees. IRO fees will be paid in the same amounts as the IRO fees set by department rules. In addition to the specialty classifications established as tier two fees in department rules, independent review by a doctor of chiropractic shall be paid the tier two fee. IRO fees shall be paid as follows:

(1) In network disputes, a preauthorization, concurrent, or retrospective medical necessity dispute for health care provided by a network, the insurance carrier must remit payment to the assigned IRO within 15 days after receipt of an invoice from the IRO;

(2) In non-network disputes, IRO fees for disputes regarding non-network health care must be paid as follows:

(A) in a preauthorization or concurrent review medical necessity dispute or retrospective medical necessity dispute resolution when reimbursement was denied for health care paid by the injured employee, the insurance carrier shall remit payment to the assigned IRO within 15 days after receipt of an invoice from the IRO.

(B) in a retrospective medical necessity dispute, the requestor must remit payment to the assigned IRO within 15 days after receipt of an invoice from the IRO.

(i) If the IRO fee has not been received within 15 days of the requestor's receipt of the invoice, the IRO shall notify the department and the department shall dismiss the dispute with prejudice.

(ii) After an IRO decision is rendered, the IRO fee must be paid or refunded by the nonprevailing party as determined by the IRO in its decision.

(3) Designated doctor examinations requested by an IRO shall be paid by the insurance carrier in accordance with the medical fee guidelines under the Labor Code and related rules.

(4) Failure to pay or refund the IRO fee may result in enforcement action as authorized by statute and rules.

(5) For health care not provided by a network, the non-prevailing party to a retrospective medical necessity dispute must pay or refund the IRO fee to the prevailing party upon receipt of the IRO decision, but not later than 15 days regardless of whether an appeal of the IRO decision has been or will be filed.

(6) The IRO fees may include an amended notification of decision if the department determines the notification to be incomplete. The amended notification of decision shall be filed with the department no later than five working days from the IRO's receipt of such notice from the department. The amended notification of decision does not alter the deadlines for appeal.

(7) If a requestor withdraws the request for an IRO decision after the IRO has been assigned by the department but before the IRO sends the case to an IRO reviewer, the requestor shall pay the IRO a withdrawal fee of $150 within 30 days of the withdrawal. If a requestor withdraws the request for an IRO decision after the case is sent to a reviewer, the requestor shall pay the IRO the full IRO review fee within 30 days of the withdrawal.

(8) In addition to department enforcement action, the division may assess an administrative fee in accordance with Labor Code §413.020 and §133.305 of this subchapter.

(9) This section shall not be deemed to require an employee to pay for any part of a review. If application of a provision of this section would require an employee to pay for part of the cost of a review, that cost shall instead be paid by the insurance carrier.

(r) Defense. An insurance carrier may claim a defense to a medical necessity dispute if the insurance carrier timely complies with the IRO decision with respect to the medical necessity or appropriateness of health care for an injured employee. Upon receipt of an IRO decision for a retrospective medical necessity dispute that finds that medical necessity exists, the insurance carrier must review, audit, and process the bill. In addition, the insurance carrier shall tender payment consistent with the IRO decision, and issue a new explanation of benefits (EOB) to reflect the payment within 21 days upon receipt of the IRO decision. The decision of an IRO under Labor Code §413.031(m) is binding during the pendency of a dispute.

(s) Appeal of IRO decision. A decision issued by an IRO is not considered an agency decision and neither the department nor the division is considered a party to an appeal. In a division Contested Case

Hearing (CCH), the party appealing the IRO decision has the burden of overcoming the decision issued by an IRO by a preponderance of evidence based medical evidence. A party to a medical dispute that remains unresolved after a review under Labor Code §504.053(d)(3) or Insurance Code §1305.355 is entitled to a contested case hearing in the same manner as a hearing conducted under Labor Code §413.0311. A party to a medical necessity dispute may seek review of a dismissal or decision at a division CCH as follows:

(1) A party to a medical necessity dispute may appeal the IRO decision by requesting a division CCH conducted by a division hearing officer. A benefit review conference is not a prerequisite to a division CCH under this subsection.

(A) The written appeal must be filed with the division's Chief Clerk of Proceedings no later than the later of the 20th day after the effective date of this section or 20 days after the date the IRO decision is sent to the appealing party and must be filed in the form and manner required by the division. Requests that are timely submitted to a division location other than the division's Chief Clerk of Proceedings, such as a local field office of the division, will be considered timely filed and forwarded to the Chief Clerk of Proceedings for processing; however, this may result in a delay in the processing of the request.

(B) The party appealing the IRO decision shall send a copy of its written request for a hearing to all other parties involved in the dispute. The IRO is not required to participate in the division CCH or any appeal.

(C) Except as otherwise provided in this section, a division CCH shall be conducted in accordance with Chapters 140 and 142 of this title (relating to Dispute Resolution--General Provisions and Dispute Resolution--Benefit Contested Case Hearing).

(D) At a division CCH, the hearing officer shall consider the treatment guidelines:

(i) adopted by the network under Insurance Code §1305.304, for a network dispute;

(ii) adopted by the division under Labor Code §413.011(e) for a non-network dispute; or

(iii) adopted, if any, by the political subdivision or pool that provides medical benefits under Labor Code §504.053(b)(2) if those treatment guidelines meet the standards provided by Labor Code §413.011(e).

(E) Prior to a division CCH, a party may submit a request for a letter of clarification by the IRO to the division's Chief Clerk of Proceedings. A copy of the request for a letter of clarification must be provided to all parties involved in the dispute at the time it is submitted to the division.

(i) A party's request for a letter of clarification must be submitted to the division no later than 10 days before the date set for hearing. The request must include a cover letter that contains the names of the parties and all identification numbers assigned to the hearing or the independent review by the division, the department, or the IRO.

(ii) The department may at its discretion forward the party's request for a letter of clarification to the IRO that conducted the independent review. The department will not forward to the IRO a request for a letter of clarification that asks the IRO to reconsider its decision or issue a new decision.

(iii) The IRO shall send a response to the request for a letter of clarification to the department and to all parties that received a copy of the IRO's decision within 5 days of receipt of the party's request for a letter of clarification. The IRO's response is limited to clarifying statements in its original decision; the IRO shall not reconsider its decision and shall not issue a new decision in response to a request for a letter of clarification.

(iv) A request for a letter of clarification does not alter the deadlines for appeal.

(F) A party to a medical necessity dispute who has exhausted all administrative remedies may seek judicial review of the division's decision. Judicial review under this paragraph shall be conducted in the manner provided for judicial review of contested cases under Chapter 2001, Subchapter G Government Code, and is governed by the substantial evidence rule. The party seeking judicial review under this section must file suit not later than the 45th day after the date on which the division mailed the party the decision of the hearing officer. The mailing date is considered to be the fifth day after the date the decision of the hearing officer was filed with the division. A decision becomes final and appealable when issued by a division hearing officer. If a party to a medical necessity dispute files a petition for judicial review of the division's decision, the party shall, at the time the petition is filed with the district court, send a copy of the petition for judicial review to the division's Chief Clerk of Proceedings. The division and the department are not considered to be parties to the medical necessity dispute pursuant to Labor Code §413.031(k-2) and §413.0311(e).

(G) Upon receipt of a court petition seeking judicial review of a division CCH held under this subparagraph, the division shall prepare and submit to the district court a certified copy of the entire record of the division CCH under review.

(i) The following information must be included in the petition or provided to the division by cover letter:

(I) any applicable division docket number for the dispute being appealed;

(II) the names of the parties;

(III) the cause number;

(IV) the identity of the court; and

(V) the date the petition was filed with the court.

(ii) The record of the hearing includes:

(I) all pleadings, motions, and intermediate rulings;

(II) evidence received or considered;

(III) a statement of matters officially noticed;

(IV) questions and offers of proof, objections, and rulings on them;

(V) any decision, opinion, report, or proposal for decision by the officer presiding at the hearing and any decision by the division; and

(VI) a transcription of the audio record of the division CCH.

(iii) The division shall assess to the party seeking judicial review expenses incurred by the division in preparing the certified copy of the record, including transcription costs, in accordance with the Government Code §2001.177 (relating to Costs of Preparing Agency Record). Upon request, the division shall consider the financial ability of the party to pay the costs, or any other factor that is relevant to a just and reasonable assessment of costs.

(2) If a party to a medical necessity dispute properly requests review of an IRO decision, the IRO, upon request, shall provide

a record of the review and submit it to the requestor within 15 days of the request. The party requesting the record shall pay the IRO copying costs for the records. The record shall include the following documents that are in the possession of the IRO and which were reviewed by the IRO in making the decision including:

(A) medical records;

(B) all documents used by the insurance carrier in making the decision that resulted in the adverse determination under review by the IRO;

(C) all documentation and written information submitted by the insurance carrier to the IRO in support of the review;

(D) the written notification of the adverse determination and the written determination of the appeal to the insurance carrier or the insurance carrier's URA;

(E) a list containing the name, address, and phone number of each health care provider who provided medical records to the IRO relevant to the review;

(F) a list of all medical records or other documents reviewed by the IRO, including the dates of those documents;

(G) a copy of the decision that was sent to all parties;

(H) copies of any pertinent medical literature or other documentation (such as any treatment guideline or screening criteria) utilized to support the decision or, where such documentation is subject to copyright protection or is voluminous, then a listing of such documentation referencing the portion(s) of each document utilized;

(I) a signed and certified custodian of records affidavit; and

(J) other information that was required by the department related to a request from an insurance carrier or the insurance carrier's URA for the assignment of the IRO.

(t) Medical Fee Dispute Request. If the requestor has an unresolved non-network fee dispute related to health care that was found medically necessary, after the final decision of the medical necessity dispute, the requestor may file a medical fee dispute in accordance with §133.305 and §133.307 of this subchapter (relating to MDR-General and MDR of Fee Disputes, respectively).

(u) In accordance with Labor Code §504.055(d), an appeal regarding the denial of a claim for medical benefits, including all health care required to cure or relieve the effects naturally resulting from a compensable injury involving a first responder will be accelerated by the division and given priority. The party seeking to expedite the contested case hearing or appeal shall provide notice to the division and independent review organization that the contested case hearing or appeal involves a first responder.

(v) Enforcement. The department or the division may initiate appropriate proceedings under Chapter 12 of this title or Labor Code, Title 5 and division rules against an independent review organization or a person conducting independent reviews.

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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CHAPTER 144. DISPUTE RESOLUTION

SUBCHAPTER A. ARBITRATION

28 TAC §§144.1 - 144.7, 144.9 - 144.16

The Commissioner of Workers' Compensation (Commissioner), Texas Department of Insurance, Division of Workers' Compensation (Division) adopts amendments to §§144.1 - 144.7 and §§144.9 - 144.16 (relating to Authority and Duties of Arbitrators; Ex Parte Communications; Delivery of Copies of Documents; Election to Engage in Arbitration; Statement of Disputes; Assignment of Arbitrator; Setting the Arbitration Proceeding; Exchange of Evidence and Proposed Resolution; Stipulations, Agreements, and Settlements; Continuance; Failure to Attend Arbitration; Rights of Parties; Usual Order of Proceedings; Award of the Arbitrator; and Requesting a Copy of the Record, respectively). The amendments to §§144.1 - 144.3, 144.6, 144.7, and 144.9 - 144.16 are adopted without changes to the proposed text as published in the March 23, 2012, issue of the *Texas Register* (37 TexReg 1997). The amendments to §144.4 and §144.5 are adopted with changes to the proposed text as published in the March 23, 2012, issue of the *Texas Register* (37 TexReg 1997). These changes, however, do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

In accordance with Government Code §2001.033, the Division's reasoned justification for these amendments is set out in this order, which includes the preamble, which in turn includes the rules. The reasoned justification is contained throughout the preamble, including the reasons why the amended rules are necessary; the factual, policy and legal bases for the amended rules; a summary of comments received from interested parties, names of the entities that commented and whether they were in support of or in opposition to the adoption of the rules, and the reasons why the Division agrees or disagrees with the comments and recommendations.

The Division published an informal draft of these proposed amendments on the Division's website for informal comment on December 6, 2011. There were two informal comments received. Following formal proposal of the amendments, the Commissioner conducted a public hearing on the proposed amendments on April 13, 2012. Three entities provided public testimony at this hearing. The public comment period for these proposed amended rules ended on April 24, 2012. The Division received four public comments.

These adopted amendments to Chapter 144 are necessary to implement portions of House Bill 2605, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011 (HB 2605), that change the appellate process for appeals of medical fee dispute resolution cases.

HB 2605 added Labor Code §413.0312 which applies to medical fee disputes that remain unresolved after review by the Division under Labor Code §413.031(b) - (i) and also provides the appeal process for all medical fee disputes. Included in this new appel-

late process is the opportunity for the parties to elect to engage in arbitration as provided by Labor Code §413.0312(d) and Labor Code Chapter 410, Subchapter C.

Labor Code §413.0312(b) requires parties who appeal a Division medical fee dispute resolution (MFDR) decision to mediate the dispute in a benefit review conference (BRC) under Labor Code Chapter 410, Subchapter B. 28 TAC §133.307(g) and (g)(1) have been simultaneously adopted elsewhere in this issue of the *Texas Register* and contain the process and requirements for seeking a review of a decision by the Division's MFDR Section. Labor Code §413.0312(d) provides that if issues remain unresolved after a BRC, then the parties may elect to engage in arbitration as provided under Labor Code §410.104 which describes the process and consequences for electing arbitration by the Division instead of a contested case hearing and the limits of this arbitration. Labor Code §413.0312(e) provides that if arbitration is not elected by the parties to a medical fee dispute as described by this statute then the party is entitled to a contested case hearing at the State Office of Administrative Hearings (SOAH) in the manner provided for a contested case under Government Code Chapter 2001.

The Division adopts these amendments to Chapter 144 which are necessary to: (1) implement changes made by new Labor Code §413.0312 to the Division's arbitration procedures; (2) conform with changes made to simultaneously adopted amendments to 28 TAC §133.307 (relating to MDR of Fee Disputes) which are published elsewhere in this issue of the *Texas Register;* (3) clarify and update Division rules concerning how documents relating to arbitration under Chapter 144 may be sent, including for consistency directing the parties to send arbitration related documentation to the Division's chief clerk of proceedings; (4) preserve the rights of parties and system participants in arbitration; and (5) make other nonsubstantive changes that clarify these Division rules.

The adopted amendments to §144.1(a) correct an outdated citation to the former codification of the Texas Workers' Compensation Act and replace it with the correct citation to Labor Code §410.005 and §410.109.

The adopted amendments to §144.1(b) clarify that the arbitrator has a duty to disclose to the division's chief clerk of proceedings and to all parties the existence of any potential conflicts of interest prior to and during the arbitration, including any pecuniary, personal or business related interest. The amendments require the disclosure of any circumstances that may reasonably raise a question as to the impartiality of the arbitrator, including any past or present relationships with the parties. The adopted amendments are made in accordance with the provisions of Labor Code §410.102(b) and (c) and §410.111 and the *Code of Professional Responsibility and Conduct for the National Academy of Arbitrators.* These conflict provisions are necessary because Labor Code §410.111 requires the commissioner to adopt rules for arbitration consistent with generally recognized arbitration principles and procedures.

An arbitrator in a case is required to protect the interests of all parties under adopted §144.1(b)(2) and these adopted amendments clarify when an arbitrator has a conflict of interest in a case. The Division adopts these amendments to clarify that both actual and apparent conflicts of interest should be disclosed as either actual conflict of interest or appearance of are both capable of eroding trust in the arbitration process, and that the Division and parties should be made aware of any actual or apparent conflicts. Disclosure of conflicts is necessary for the protection of the parties interests as stated in §144.1(b)(2). Labor Code §410.102 requires that the Commissioner adopt rules relating to the qualifications of arbitrators. Requiring disclosure of an arbitrator's potential conflicts of interests is also necessary to provide parties with sufficient information for rejection of an assigned arbitrator consistent with §144.6(c).

The adopted amendment to §144.1(b)(9) clarifies that the arbitrator also has a duty to comply with the codes of professional responsibility and conduct promulgated by the arbitrator's professional association. Adoption of these amendments is consistent with the goal of impartial dispute resolution.

The adopted amendment to §144.2 deletes subsection (c) of this rule because it is unnecessary since any violation of a rule, order, or decision of the Commissioner is an administrative violation under Labor Code Chapter 415, specifically §415.021(a).

The adopted amendments to §144.3 clarify that a party that sends a document relating to the arbitration proceeding shall send it to the division's chief clerk of proceedings or the arbitrator and deliver copies to all other parties or their representatives or attorneys.

The nonsubstantive language "one or more" has been deleted from §144.4(a) because it is unnecessary.

The adopted amendments to §144.4(b) are adopted to clarify that a request for arbitration must be completed and signed by both parties, requested on a form prescribed by the Division, and sent to the division's chief clerk of proceedings. The title "Arbitration Section of the Division of Hearings" has been deleted from the adopted text because the title is outdated.

The adopted amendments to §144.4(c)(3) clarify that a party's response to the disputes identified as unresolved in the benefit review officer's report shall be sent to the division's chief clerk of proceedings for proper internal handling on behalf of the Director of Hearings.

The adopted amendments to §144.4(d) clarify that, except as provided by §144.10, the decision to proceed with arbitration is also binding and irrevocable for the resolution of fee disputes. This adopted amendment is necessary to reflect Labor Code §410.104(c) and clarify the effect of an election. This amendment is also necessary to clarify the limitations of stipulations in arbitration. Parties to medical fee dispute arbitration may not enter into a settlement or enter into a stipulation on a dispute regarding compensability, extent of injury, liability, or medical necessity for the same service for which there is a medical fee dispute. The adopted amendment to §144.4(d) is necessary because parties not involved in the dispute of medical fees can be party to other parts of a claim and those parties could be prejudiced by inclusion of those disputes in arbitration. This change is also included to prevent duplicative or contradictory resolution of disputes.

The adopted amendment to §144.5(a) is a nonsubstantive change that deletes the unnecessary language "benefit dispute or disputes" and replaces it simply with "dispute(s)."

The adopted amendment to §144.5(b)(3) clarifies that a statement of dispute in the arbitration of a medical fee dispute may not include the issues described in adopted §144.5(d) which are disputes regarding compensability, extent of injury, liability, or medical necessity for the same service for which there is a medical fee dispute. These adopted amendments are necessary to clarify what issues may not be adjudicated during the arbitra-

tion of a medical fee dispute in accordance with the provisions of §133.307 of this title.

The adopted amendment to §144.5(c) updates the subsection by clarifying that additional disputes submitted by consent shall be sent to the division's chief clerk of proceedings not later than 10 days before the arbitration proceedings.

The adopted §144.5(d) provides that the statement of dispute in the arbitration of a medical fee dispute may not include a dispute regarding compensability, extent of injury, liability, or medical necessity for the same service for which there is a medical fee dispute. Chapter 133, Subchapter D of this title (relating to Dispute of Medical Bills) requires parties to resolve such disputes prior to requesting medical fee dispute resolution by the division. The adopted amendment to §144.5(d) is necessary because parties not involved in the dispute of medical fees can be party to other parts of a claim and those parties could be prejudiced by inclusion of those disputes in arbitration. This change is also included to prevent duplicative or contradictory resolution of disputes.

Adopted §144.5(d) also provides that if a party provides the arbitrator with documentation listed in §133.307(d)(2)(H) or (I) of this title (relating to MDR of Fee Disputes) that shows unresolved issues regarding compensability, extent of injury, liability, or medical necessity for the same service subject to the fee dispute, then the arbitrator shall abate the arbitration proceedings until those issues have been resolved. This adopted rule is necessary to prevent the injured employee who may not be a party to the fee dispute from being bound by the ruling. Furthermore, it prevents a carrier from being ordered to pay for a bill in which it has no underlying legal obligation. Finally, it prevents conflicting or duplicative decisions. The requirement to present evidence is so arbitrator can verify the existence of a dispute before abating the proceedings.

The adopted amendments to §144.6(a) replace "director of the Division of Hearings" with "division" because "director of the Division of Hearings" is an outdated job title.

The adopted amendments to §144.9(b) delete an obsolete classification of a Class D administrative violation penalty and maximum penalty amount for a party that does not comply with the provisions of that section. These adopted amendments conform this rule with Labor Code §410.112.

The adopted amendments to §144.10(a) update citations to the Act's definition of a agreement and settlement.

The adopted new §144.10(d) provides that the parties to a medical fee dispute may not enter into a: (1) settlement; or (2) a stipulation or agreement on a dispute regarding compensability, extent of injury, liability, or medical necessity for the same service for which there is a medical fee dispute. This adopted amendment is consistent with the purposes underlying adopted §144.5(d) and is necessary in order prevent the arbitrator and parties to the arbitration of a medical fee dispute from adjudicating issues regarding compensability, extent of injury, liability, or medical necessity for the same service for which there is a medical fee dispute.

The adopted new §144.10(e) states that parties to a medical fee dispute may not resolve the dispute by negotiating fees that are inconsistent with any applicable fee guidelines adopted by the Commissioner. This amendment is consistent with provisions in the Act that govern the adjudication of medical fee disputes such as Labor Code §413.031(c) and §413.0312(c). Labor Code §413.031(c) requires the Division in a medical fee dispute to adjudicate the payment given the relevant statutory provisions and Commissioner rules. Relevant statutory provisions and commissioner rules include statutes and rules governing fee guidelines adopted by the Commissioner. Labor Code §413.0312(c) prohibits the parties at a BRC for a medical fee dispute from negotiating fees that are inconsistent with any applicable fee guidelines adopted by the Commissioner.

The adopted amendments to §144.11(a) clarify that any request for a continuance must be directed to the division's chief clerk of proceedings and are necessary because the title "Arbitration Section of the Division" is outdated. This adopted amendment is necessary to direct requests for continuance to the appropriate area of the Division.

The adopted amendments to §144.12 delete the "Class D" classification of the administrative violation and the maximum penalty amount for a party who fails to attend any session of the arbitration proceeding after electing arbitration. This adopted amendment is necessary to conform this rule to Labor Code §410.113.

The adopted nonsubstantive amendments to §144.13 change the reference to "commission" rules to "division" rules and provide that a stenographic report created by a party is to be sent to the "division's chief clerk of proceedings" as opposed to the "commission."

The adopted amendments to §144.15(a)(4) require the final award by the arbitrator to be sent to the division.

The adopted amendments to §144.15(b) update a citation to a section of the Texas Workers' Compensation Act that has been recodified to state Labor Code §410.121. This amendment is necessary to clarify the circumstances under which an arbitrator's award may be vacated. Labor Code §410.121 restricts the ability of a court to vacate an arbitrator's award to situations in which: "(1) the award was procured by corruption, fraud, or misrepresentation; (2) the decision of the arbitrator was arbitrary and capricious; or (3) the award was outside the jurisdiction of the division." The adopted amendments to §144.15(b) also clarify that the absence of the right of appeal of the award of the arbitrator also means there is no right to judicial review. These adopted amendments are necessary for implementation of §413.0312(d), which allows arbitration of medical fee disputes consistent with the statutory limits on judicial review contained in Labor Code §410.121.

The adopted amendment to §144.16 updates terminology in that section by changing the term "commission" to "division".

Adopted amendments to §§144.3, 144.6(d)(3), 144.7(b), 144.11(a), and 144.15(a)(4) delete the requirement that certain documents sent for Division arbitration be sent return receipt requested because it is not necessary. These sections have been amended to allow delivery of certain documents (including notice of the assignment of an arbitrator, notice of rejection of the assigned arbitrator, notice of the time and place scheduled for the arbitration, a request for continuance, and the award of the arbitrator) by certified mail without the requirement that this certified mail be delivered with a return receipt requested. Adopted amendments to these sections also replace the word "telephonic" with the word "electronic" to incorporate more current methods of communication and to conform terminology in this rule to terminology in 28 TAC §102.4 and §102.5 concerning the electronic transmission of information.

Other adopted amendments to the Chapter 144 rules make minor and administrative changes to the rule text to: (i) correct typographical, grammatical, and punctuation errors in the current rule text; (ii) re-letter and renumber rule text; (iii) clarify existing provisions in the rules; and (iv) make nonsubstantive changes to terminology such as changing the term "he/she" to "arbitrator," "requester" to "requestor," "Department" to "department," "claimant" to "injured employee," "Department's" to "department's," "Division" to "division," "Division's" to "division's," and adding the word "injured" to "employee" and "chief" to "clerk of proceedings."

The Division has made some changes to the proposed text in response to comments. Specifically, in response to comments on text in §144.5(d), the Division has clarified that rule by adding text that provides if a party provides the arbitrator with documentation listed in 28 TAC §133.307(d)(2)(H) or (I) that shows unresolved issues regarding compensability, extent of injury, liability, or medical necessity for the same service subject to the fee dispute, then the arbitrator shall abate the arbitration proceedings until those issues have been resolved. This adopted rule is necessary to prevent the injured employee who may not be a party to the fee dispute from being bound by the ruling. Furthermore, it prevents a carrier from being ordered to pay for a bill in which it has no underlying legal obligation. Finally, it prevents conflicting or duplicative decisions. The requirement to present evidence is so arbitrator can verify the existence of a dispute before abating the proceedings.

The Division has also made nonsubstantive changes to the proposed text for the purpose of providing consistency in terminology in the text. First, the Division inserted "chief" before "clerk of proceedings" in §144.5(c)(4) in order to make that term consistent with other adopted rules in Chapter 144 which provide for documents related to arbitration be sent to the chief clerk of proceedings. Second, the Division has added "and irrevocable" after "binding" in §144.4(d). This change clarifies that an election for arbitration in a medical fee dispute is binding and irrevocable on parties. Labor Code §410.104(c) uses "binding and irrevocable" and so the Division adopts this change in order to reflect the statutory authority.

Section 144.1 describes the authority and duties of arbitrators. Section 144.1(a) allows the arbitrator to perform specific enumerated tasks relevant to the arbitration of eligible disputes. Section §144.1(b) states the duties of an arbitrator in an eligible dispute.

Section §144.2 prohibits the arbitrator from communicating with any party outside of the arbitration regarding the substantive facts, issues, law, or rules unless the communication is in writing and a copy must be delivered to all parties to the arbitration. This section allows parties to communicate with the arbitrator about any procedural matter.

Section 144.3 provides that a party to an arbitration that sends any information to the chief clerk of proceedings or arbitrator must also deliver a copy of that information to all the other parties or their representatives, and specifies the manner by which that information can be sent. This section also requires a statement certifying such delivery to be included on any document sent by a party to the division's chief clerk of proceedings or arbitrator.

Section 144.4 contains the rules that attach when parties mutually agree to engage in arbitration.

Section 144.5 states the contents and requirements for a statement of disputes. This rule states the procedure by which parties may, by unanimous consent, submit additional disputes not included in the benefit review officer's report or the responses of the parties. This rule also provides that a statement of dispute in the arbitration of a medical fee dispute may not include a dispute regarding compensability, extent of injury, liability, or medical necessity for the same service for which there is a medical fee dispute. If a party provides the arbitrator with documentation listed in §133.307(d)(2)(H) or (I) of this title (relating to MDR of Fee Disputes) that shows unresolved issues regarding compensability, extent of injury, liability, or medical necessity for the same service subject to the fee dispute, then the arbitrator shall abate the arbitration proceedings until those issues have been resolved.

Section 144.6 provides that the Division will maintain a list of qualified arbitrators and provides procedures for assignment of an arbitrator by the Division and how a party may reject an assigned arbitrator.

Section 144.7 sets forth the procedure for setting an arbitration proceeding. This section also contains restrictions regarding the setting of an arbitration.

Section 144.9 contains requirements related to the exchange of evidence and the proposed resolution of the dispute. This rule also provides that the failure to comply with this rule without good cause as determined by the arbitrator is an administrative violation.

Section 144.10 sets forth how parties may enter into stipulations and also contains some limits on what stipulations can contain. This rule also prohibits parties to a medical fee dispute from negotiating fees that are inconsistent with any applicable fee guidelines adopted by the Commissioner.

Section 144.11 sets out how a continuance may be requested. This rule provides that a continuance may be granted for up to 30 days only upon a determination of good cause. This rule also limits each party to one continuance.

Adopted §144.12 provides that failure to attend any session of the arbitration is an administrative violation unless the arbitrator determines that the party had good cause not to attend.

Adopted §144.13 state the rights of parties during Division arbitration.

Adopted §144.14 states the usual order of proceedings in an arbitration and provides that an electronic recording of the proceedings will be made by the arbitrator.

Adopted §144.15 contain requirements for the awards by arbitrators.

Adopted §144.16 provides that a party may request a copy of the record of the arbitration and the cost for the record is assessed by the Division.

SUMMARY OF COMMENTS AND AGENCY'S RESPONSE TO COMMENTS

§144.5: Commenters express concern that if an arbitrator issues an award while a dispute involving compensability, extent of injury, liability, or medical necessity is outstanding, a party may be forced to pay a medical fee for a claim later determined to be noncompensable or unrelated to the compensable injury or for a health care service later determined to be not medically necessary. The commenters believe that the proposed rule should be clarified to include, "Should a party raise unresolved issues regarding compensability, medical necessity, liability and extent of

injury for the same service then the arbitration proceeding shall be abated until the issues relevant to the medical fee dispute have been resolved."

Agency Response: The Division agrees that clarification in the process is necessary to prevent the risk of ordering payment for a health care service later determined to be not medically necessary, a noncompensable injury or for a medical condition that is unrelated to the compensable injury. Although the Division does not adopt the text suggested by the commenters, the Division has adopted similar text stating that if a party provides the arbitrator with documentation listed in 28 TAC §133.307(d)(2)(H) or (I) that shows unresolved issues regarding compensability, extent of injury, liability, or medical necessity for the same service subject to the fee dispute, then the arbitrator shall abate the arbitration proceedings until those issues have been resolved. This adopted rule is necessary to prevent a carrier from being ordered to pay for a bill in which it has no underlying legal obligation. Furthermore, it prevents the injured employee who may not be a party to the fee dispute from being bound by the ruling. Finally, it prevents conflicting or duplicative decisions. The requirement to present evidence is so the arbitrator can verify the existence of a dispute before abating the proceedings.

§144.5: Commenter had concerns about the language in the informal proposal, in that it had prohibited a discussion of compensability, extent of injury, liability, or medical necessity in the arbitration of a medical fee dispute which are addressed, and Commenter supports the provision as proposed.

Agency Response: The Division appreciates the supportive comment. The Division reiterates that changes were made to §144.5 as proposed.

§144.11: A commenter states that in the interest of clarity, the Division should indicate whether the arbitrator or some other entity at the Division will be making the decision to grant or deny the continuance. The commenter states that a continuance request might be more properly directed to the arbitrator.

Agency Response: The Division disagrees that clarity in this rule is necessary. The Division also declines to change rule language as proposed in §144.11, as under the Labor Code §410.110, an arbitrator cannot rule on a request for a continuance. Labor Code §410.110(a) explains a request for continuance must be directed to the director, which is the director of hearings, and that the director may grant a continuance only if the director determines, giving due regard to the availability of the arbitrator, that good cause for the continuance exists. The Division cannot change the rule to contradict statutory authority.

For: Texas Medical Association

For, with changes: Insurance Council of Texas, Property and Casualty Insurer's Association of America, Office of Injured Employee Counsel

Against: None

Neither for or Against: None

The amendments are adopted under the Labor Code §§402.00111, 402.061, 410.005(b), 410.102, 410.109, 410.111, 410.113, 410.121, 413.0312, and 415.021(a). Labor Code §402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority under Title 5 of the Labor Code. Labor Code §402.061 provides that the Commissioner of Workers' Compensation shall adopt rules as necessary for the implementation and enforcement of the Texas Workers' Compensation Act. Labor Code §410.005(b) pertains to the venue for administrative proceedings in arbitration cases and states the guidelines for where the arbitration proceedings may be held. Labor Code §410.102 requires that the Commissioner of Workers' Compensation establish procedures ensuring the qualifications of arbitrators. Labor Code §410.109 contains the requirements regarding the scheduling of the arbitration. Labor Code §410.111 requires the Commissioner of Workers' Compensation to adopt rules for arbitration that are consistent with generally recognized arbitration principles and procedures. Labor Code §410.113 states that each party shall attend the arbitration prepared to set forth in detail its position on unresolved issues and the issues on which it is prepared to stipulate. Further, this section states that a party commits an administrative violation if the party does not attend the arbitration unless the arbitrator determines that the party had good cause not to attend. Labor Code §410.121 contains the criteria whereby a court of competent jurisdiction is required to vacate an arbitrators award. Labor Code §413.0312 provides the requirements for the review of medical fee disputes by the Division. Labor Code §415.021(a) provides that in addition to any other provisions in Labor Code, Title 5, Subtitle A relating to violations, a person commits an administrative violation if the person violates, fails to comply with, or refuses to comply with Labor Code, Title 5, Subtitle A or a rule, order, or decision of the Commissioner or Workers' Compensation; in addition to any sanctions, administrative penalty, or other remedy authorized by Labor Code, Title 5, Subtitle A, the Commissioner may assess an administrative penalty against a person who commits an administrative violation; the administrative penalty shall not exceed $25,000 per day per occurrence; each day of noncompliance constitutes a separate violation; the Commissioner's authority under Labor Code Chapter 415 is in addition to any other authority to enforce a sanction, penalty, fine, forfeiture, denial, suspension, or revocation otherwise authorized by law.

§144.4. Election to Engage in Arbitration.

(a) Following a benefit review conference where disputed benefit issue(s) remain unresolved, the parties may mutually agree to engage in arbitration on those issues.

(b) Parties agreeing to engage in arbitration must complete and sign a form prescribed by the division and file it with the division's chief clerk of proceedings not later than the 20th day after the last day of the benefit review conference.

(c) A party may submit a response to the disputes identified as unresolved in the benefit review officer's report. The response shall:

(1) be in writing;

(2) describe and explain the party's position on the unresolved dispute or disputes;

(3) be sent to the division's chief clerk of proceedings no later than 20 days after receiving the benefit review officer's report; and

(4) be delivered to all other parties, as provided by §144.3 of this title (relating to Delivery of Copies of Documents).

(d) Except as provided by §144.10 of this title (relating to Stipulations, Agreements, and Settlements), the decision to proceed with arbitration in place of a division contested case hearing, once filed with the division's chief clerk of proceedings, is binding and irrevocable for the resolution of all disputes arising out of the claims that are under the jurisdiction of the division. For medical fee disputes arising from

Labor Code §413.0312, except as provided by §144.10 of this title, the decision to proceed with arbitration in place of a contested case hearing at the State Office of Administrative Hearings is binding and irrevocable for the resolution of that dispute.

§144.5. Statement of Disputes.

(a) Statement of disputes. The statement of disputes is a written description of the dispute(s) to be considered by the arbitrator. A dispute not expressly included in the statement of disputes will not be considered by the arbitrator.

(b) Statement of disputes after a benefit review conference. The statement of disputes for an arbitration proceeding conducted after a benefit review conference includes:

(1) the benefit review officer's report, identifying the disputes remaining unresolved at the close of the benefit review conference;

(2) the parties' responses to the benefit review officer's report, if any; and

(3) additional disputes by unanimous consent, as provided by subsections (c) and (d) of this section.

(c) Additional disputes by unanimous consent. Parties may, by unanimous consent, submit for inclusion in the statement of disputes one or more disputes not identified as unresolved in the benefit review officer's report. Additional disputes submitted by consent shall:

(1) be made in writing;

(2) identify the dispute and explain each party's position on it;

(3) be signed by all parties;

(4) be sent to the division's chief clerk of proceedings no later than 10 days before the arbitration proceeding; and

(5) explain why the issue was not raised earlier.

(d) The statement of dispute in the arbitration of a medical fee dispute may not include a dispute regarding compensability, extent of injury, liability, or medical necessity for the same service for which there is a medical fee dispute. Chapter 133, Subchapter D of this title (relating to Dispute of Medical Bills) requires parties to resolve such disputes prior to requesting medical fee dispute resolution by the division. If a party provides the arbitrator with documentation listed in §133.307(d)(2)(H) or (I) of this title (relating to MDR of Fee Disputes) that shows unresolved issues regarding compensability, extent of injury, liability, or medical necessity for the same service subject to the fee dispute, then the arbitrator shall abate the arbitration proceedings until those issues have been resolved.

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 May 11, 2012.

TRD-201202377
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
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Proposal publication date: March 23, 2012
For further information, please call: (512) 804-4703

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 13. TEXAS COMMISSION ON FIRE PROTECTION

CHAPTER 421. STANDARDS FOR CERTIFICATION

37 TAC §421.9

The Texas Commission on Fire Protection (the Commission) adopts amendments to §421.9, concerning Designation of Fire Protection Duties. The amendments are adopted without changes to the proposed text as published in the February 17, 2012, issue of the *Texas Register* (37 TexReg 896) and will not be republished.

The purpose of adopting the amendments is to require regulated entities to report the appointment of an individual to a certain discipline if it is part of their regularly assigned duties. It also informs the regulated entities how that report is to be submitted.

The adopted amendments will assure that the regulated entities as well as the individuals are correctly identified in the Commission's database and are abiding by Commission rules.

No comments were received from the public regarding the proposed amendments.

The amendments are adopted under Texas Government Code, Chapter 419, §419.008, which provides the Commission the authority to adopt rules for the administration of its powers and duties; §419.022, which provides the Commission the authority to establish minimum training standards for admission to employment as fire protection personnel; and §419.032, which provides the Commission the authority to propose rules to establish qualifications for fire protection personnel.

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 May 14, 2012.

TRD-201202392
Don Wilson
Executive Director
Texas Commission on Fire Protection
Effective date: June 3, 2012
Proposal publication date: February 17, 2012
For further information, please call: (512) 936-3813

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CHAPTER 435. FIRE FIGHTER SAFETY

37 TAC §435.1

The Texas Commission on Fire Protection (the Commission) adopts amendments to §435.1, concerning Protective Clothing. The amendments are adopted without changes to the proposed text as published in the February 17, 2012, issue of the *Texas Register* (37 TexReg 897) and will not be republished.

The purpose of adopting the amendments is to delete obsolete language contained in subsections (b) and (c) which is neces-

sary due to the language being superseded by the adoption of the National Fire Protection Association Standard 1851.

The adopted amendments will provide clear and concise rules regarding a regulated entity's duties to provide proper protective clothing to all of its fire protection personnel that meets National Fire Protection Standards.

No comments were received from the public regarding the proposed amendments.

The amendments are adopted under Texas Government Code, Chapter 419, §419.008, which provides the Commission the authority to adopt rules for the administration of its powers and duties; §419.0082, which provides the Commission rule making authority; §419.040, which provides the Commission the authority to require fire departments to provide a complete ensemble or appropriate protective clothing for its fire protection personnel; and §419.043, which provides the Commission the authority to require that all protective clothing meet applicable standards of the National Fire Protection Association.

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 May 14, 2012.

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §19.101, Definitions, and §19.1601, Infection Control, in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification, with changes to the proposed text as published in the April 6, 2012, issue of the *Texas Register* (37 TexReg 2349).

The amendments are adopted to implement portions of Senate Bill 7, 82nd Legislature, First Called Session, 2011. The amendments require nursing facilities to develop policies for the vaccination of employees and contractors as a means of protecting residents from vaccine preventable diseases in accordance with Texas Health and Safety Code, Chapter 224.

DADS received written comments from Texas Health Care Association, Texas Academy of Nutrition and Dietetics, and one individual. A summary of the comments and the responses follows.

Comment: Concerning §19.101(31) relating to definitions, a commenter requested that American Dietetic Association be changed to reflect the organization's new name, the Academy of Nutrition and Dietetics.

Response: The agency made the suggested change.

Comment: Concerning §19.1601 relating to infection control, a commenter suggested adding requirements for the use of disposable blood pressure cuffs in nursing facilities.

Response: This comment is outside the scope of the proposed rules, but the agency will take the comment under consideration for future amendments. No changes were made in response to this comment.

Comment: Concerning §19.1601, a commenter stated that the new vaccine preventable disease requirements in Texas Health and Safety Code, Chapter 224 will require nursing facilities to incur additional expenses and DADS should develop a mechanism to reimburse facilities for the additional expenses.

Response: The Texas Legislature has determined that a facility vaccine preventable disease policy is necessary to protect resident health and welfare. The rule does not require a nursing facility to pay for vaccine administration to employees or other costs associated with vaccine administration. No changes were made in response to this comment.

Comment: Concerning §19.1601(e)(1) relating to infection control, a commenter stated that "individuals with privileges to provide direct client care" are included as "covered individuals" in new Texas Health and Safety Code, Chapter 224 and suggested adding the term to the rule as one of the individuals a facility must include in its vaccine preventable disease policy.

Response: The agency agrees and the suggested change was made.

Comment: Concerning §19.1601(e)(1)(A)(v), a commenter suggested refining the term "diseases" to clarify that the diseases exempt individuals are required to protect residents from are those diseases that are subjects of the facility's vaccination policy only.

Response: The agency agrees that the procedures referenced in §19.1601(e)(1)(A)(v) are designed to protect residents from exposure to vaccine preventable diseases, therefore, the words vaccine preventable were added to the clause. The chapter contains other provisions related to infection control.

Comment: Concerning §19.1601(e)(2)(A)(i) and (B)(ii), a commenter suggested adding guidance as to when or how often proof of education should be recorded when facilities educate residents and their representatives regarding the risks, benefits and potential effects of the pneumococcal and influenza vaccines.

Response: The agency agrees and clarified in the rule that proof of education of the risks, benefits, and potential effects of the pneumococcal and influenza vaccine should be recorded in the resident's medical record when the vaccine is offered.

Comment: Concerning §19.1601(e)(2)(C), a commenter suggested adding in the rule that a facility must develop a method to identify employees at risk of directly contacting blood or potentially infectious material. The commenter also suggested adding language that when an employee initially declines the hepatitis B vaccination but at a later date decides to accept the vaccination, a facility must make the vaccination available within 10 days after the employee decides to accept the vaccination.

Response: The agency agrees and the suggested change was made.

Comment: Concerning §19.1601(e)(2)(D)(i), a commenter stated that the provision about renewal of the documentation of a resident's receipt or refusal of the annual influenza vaccination and the pneumococcal vaccination is unclear.

Response: The agency disagrees with the comment. The provision specifies anytime the influenza or pneumococcal vaccination is received or refused it must be documented. No change was made in response to this comment.

SUBCHAPTER B. DEFINITIONS

40 TAC §19.101

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

§19.101. Definitions.

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

(1) Abuse--Any act, failure to act, or incitement to act done willfully, knowingly, or recklessly through words or physical action which causes or could cause mental or physical injury or harm or death to a resident. This includes verbal, sexual, mental/psychological, or physical abuse, including corporal punishment, involuntary seclusion, or any other actions within this definition.

(A) "Involuntary seclusion"--Separation of a resident from others or from his room against the resident's will or the will of the resident's legal representative. Temporary monitored separation from other residents will not be considered involuntary seclusion and may be permitted if used as a therapeutic intervention as determined by professional staff and consistent with the resident's plan of care.

(B) "Mental/psychological abuse"--Mistreatment within the definition of "abuse" not resulting in physical harm, including, but not limited to, humiliation, harassment, threats of punishment, deprivation, or intimidation.

(C) "Physical abuse"--Physical action within the definition of "abuse," including, but not limited to, hitting, slapping, pinching, and kicking. It also includes controlling behavior through corporal punishment.

(D) "Sexual abuse"--Any touching or exposure of the anus, breast, or any part of the genitals of a resident without the voluntary, informed consent of the resident and with the intent to arouse or gratify the sexual desire of any person and includes but is not limited to sexual harassment, sexual coercion, or sexual assault.

(E) "Verbal abuse"--The use of any oral, written, or gestured language that includes disparaging or derogatory terms to a resident or within the resident's hearing distance, regardless of the resident's age, ability to comprehend, or disability.

(2) Act--Chapter 242 of the Texas Health and Safety Code.

(3) Activities assessment--See Comprehensive Assessment and Comprehensive Care Plan.

(4) Activities director--The qualified individual appointed by the facility to direct the activities program as described in §19.702 of this chapter (relating to Activities).

(5) Addition--The addition of floor space to an institution.

(6) Administrator--Licensed nursing facility administrator.

(7) Admission MDS assessment--An MDS assessment that determines a recipient's initial determination of eligibility for medical necessity for admission into the Texas Medicaid Nursing Facility Program.

(8) Affiliate--With respect to a:

(A) partnership, each partner thereof;

(B) corporation, each officer, director, principal stockholder, and subsidiary; and each person with a disclosable interest;

(C) natural person, which includes each:

(i) person's spouse;

(ii) partnership and each partner thereof of which said person or any affiliate of said person is a partner; and

(iii) corporation in which said person is an officer, director, principal stockholder, or person with a disclosable interest.

(9) Agent--An adult to whom authority to make health care decisions is delegated under a durable power of attorney for health care.

(10) Applicant--A person or governmental unit, as those terms are defined in the Texas Health and Safety Code, Chapter 242, applying for a license under that chapter.

(11) APA--The Administrative Procedure Act, Texas Government Code, Chapter 2001.

(12) Attending physician--A physician, currently licensed by the Texas Medical Board, who is designated by the resident or responsible party as having primary responsibility for the treatment and care of the resident.

(13) Authorized electronic monitoring--The placement of an electronic monitoring device in a resident's room and using the device to make tapes or recordings after making a request to the facility to allow electronic monitoring.

(14) Barrier precautions--Precautions including the use of gloves, masks, gowns, resuscitation equipment, eye protectors, aprons, faceshields, and protective clothing for purposes of infection control.

(15) Care and treatment--Services required to maximize resident independence, personal choice, participation, health, self-care, psychosocial functioning and reasonable safety, all consistent with the preferences of the resident.

(16) Certification--The determination by DADS that a nursing facility meets all the requirements of the Medicaid and/or Medicare programs.

(17) CFR--Code of Federal Regulations.

(18) CMS--Centers for Medicare & Medicaid Services, formerly the Health Care Financing Administration (HCFA).

(19) Complaint--Any allegation received by DADS other than an incident reported by the facility. Such allegations include, but are not limited to, abuse, neglect, exploitation, or violation of state or federal standards.

(20) Completion date--The date an RN assessment coordinator signs an MDS assessment as complete.

(21) Comprehensive assessment--An interdisciplinary description of a resident's needs and capabilities including daily life functions and significant impairments of functional capacity, as described in §19.801(2) of this chapter (relating to Resident Assessment).

(22) Comprehensive care plan--A plan of care prepared by an interdisciplinary team that includes measurable short-term and long-term objectives and timetables to meet the resident's needs developed for each resident after admission. The plan addresses at least the following needs: medical, nursing, rehabilitative, psychosocial, dietary, activity, and resident's rights. The plan includes strategies developed by the team, as described in §19.802(b)(2) of this chapter(relating to Comprehensive Care Plans), consistent with the physician's prescribed plan of care, to assist the resident in eliminating, managing, or alleviating health or psychosocial problems identified through assessment. Planning includes:

(A) goal setting;

(B) establishing priorities for management of care;

(C) making decisions about specific measures to be used to resolve the resident's problems; and/or

(D) assisting in the development of appropriate coping mechanisms.

(23) Controlled substance--A drug, substance, or immediate precursor as defined in the Texas Controlled Substance Act, Texas Health and Safety Code, Chapter 481, and/or the Federal Controlled Substance Act of 1970, Public Law 91-513.

(24) Controlling person--A person with the ability, acting alone or in concert with others, to directly or indirectly, influence, direct, or cause the direction of the management, expenditure of money, or policies of a nursing facility or other person. A controlling person does not include a person, such as an employee, lender, secured creditor, or landlord, who does not exercise any influence or control, whether formal or actual, over the operation of a facility. A controlling person includes:

(A) a management company, landlord, or other business entity that operates or contracts with others for the operation of a nursing facility;

(B) any person who is a controlling person of a management company or other business entity that operates a nursing facility or that contracts with another person for the operation of a nursing facility;

(C) an officer or director of a publicly traded corporation that is, or that controls, a facility, management company, or other business entity described in subparagraph (A) of this paragraph but does not include a shareholder or lender of the publicly traded corporation; and

(D) any other individual who, because of a personal, familial, or other relationship with the owner, manager, landlord, tenant, or provider of a nursing facility, is in a position of actual control or authority with respect to the nursing facility, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the facility.

(25) Covert electronic monitoring--The placement and use of an electronic monitoring device that is not open and obvious, and the facility and DADS have not been informed about the device by the resident, by a person who placed the device in the room, or by a person who uses the device.

(26) DADS--The Department of Aging and Disability Services.

(27) Dangerous drugs--Any drug as defined in the Texas Health and Safety Code, Chapter 483.

(28) Dentist--A practitioner licensed by the Texas State Board of Dental Examiners.

(29) Department--Department of Aging and Disability Services.

(30) DHS--Formerly, this term referred to the Texas Department of Human Services; it now refers to DADS, unless the context concerns an administrative hearing. Administrative hearings were formerly the responsibility of DHS; they now are the responsibility of the Texas Health and Human Services Commission (HHSC).

(31) Dietitian--A qualified dietitian is one who is qualified based upon either:

(A) registration by the Commission on Dietetic Registration of the Academy of Nutrition and Dietetics; or

(B) licensure, or provisional licensure, by the Texas State Board of Examiners of Dietitians. These individuals must have one year of supervisory experience in dietetic service of a health care facility.

(32) Direct care by licensed nurses--Direct care consonant with the physician's planned regimen of total resident care includes:

(A) assessment of the resident's health care status;

(B) planning for the resident's care;

(C) assignment of duties to achieve the resident's care;

(D) nursing intervention; and

(E) evaluation and change of approaches as necessary.

(33) Distinct part--That portion of a facility certified to participate in the Medicaid Nursing Facility program.

(34) Drug (also referred to as medication)--Any of the following:

(A) any substance recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them;

(B) any substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man;

(C) any substance (other than food) intended to affect the structure or any function of the body of man; and

(D) any substance intended for use as a component of any substance specified in subparagraphs (A) - (C) of this paragraph. It does not include devices or their components, parts, or accessories.

(35) Electronic monitoring device--Video surveillance cameras and audio devices installed in a resident's room, designed to acquire communications or other sounds that occur in the room. An electronic, mechanical, or other device used specifically for the nonconsensual interception of wire or electronic communication is excluded from this definition.

(36) Emergency--A sudden change in a resident's condition requiring immediate medical intervention.

(37) Exploitation--The illegal or improper act or process of a caretaker using the resources of an elderly or disabled person for monetary or personal benefit, profit, or gain.

(38) Exposure (infections)--The direct contact of blood or other potentially infectious materials of one person with the skin or mucous membranes of another person. Other potentially infectious materials include the following human body fluids: semen, vaginal secretions, cerebrospinal fluid, peritoneal fluid, amniotic fluid, saliva in dental procedures, and body fluid that is visibly contaminated with blood, and all body fluids when it is difficult or impossible to differentiate between body fluids.

(39) Facility--Unless otherwise indicated, a facility is an institution that provides organized and structured nursing care and service and is subject to licensure under Texas Health and Safety Code, Chapter 242.

(A) For Medicaid, a facility is a nursing facility which meets the requirements of §1919(a) - (d) of the Social Security Act. A facility may not include any institution that is for the care and treatment of mental diseases except for services furnished to individuals age 65 and over and who are eligible as defined in §19.2500 of this chapter (relating to Preadmission Screening and Resident Review (PASARR)).

(B) For Medicare and Medicaid purposes (including eligibility, coverage, certification, and payment), the "facility" is always the entity which participates in the program, whether that entity is comprised of all of, or a distinct part of, a larger institution.

(C) "Facility" is also referred to as a nursing home or nursing facility. Depending on context, these terms are used to represent the management, administrator, or other persons or groups involved in the provision of care of the resident; or to represent the physical building, which may consist of one or more floors or one or more units, or which may be a distinct part of a licensed hospital.

(40) Family council--A group of family members, friends, or legal guardians of residents, who organize and meet privately or openly.

(41) Family representative--An individual appointed by the resident to represent the resident and other family members, by formal or informal arrangement.

(42) Fiduciary agent--An individual who holds in trust another's monies.

(43) Free choice--Unrestricted right to choose a qualified provider of services.

(44) Goals--Long-term: general statements of desired outcomes. Short-term: measurable time-limited, expected results that provide the means to evaluate the resident's progress toward achieving long-term goals.

(45) Governmental unit--A state or a political subdivision of the state, including a county or municipality.

(46) HCFA--Health Care Financing Administration, now the Centers for Medicare & Medicaid Services (CMS).

(47) Health care provider--An individual, including a physician, or facility licensed, certified, or otherwise authorized to administer health care, in the ordinary course of business or professional practice.

(48) Hearing--A contested case hearing held in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001, and the formal hearing procedures in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act).

(49) HIV--Human Immunodeficiency Virus.

(50) Incident--An abnormal event, including accidents or injury to staff or residents, which is documented in facility reports. An occurrence in which a resident may have been subject to abuse, neglect, or exploitation must also be reported to DADS.

(51) Infection control--A program designed to prevent the transmission of disease and infection in order to provide a safe and sanitary environment.

(52) Inspection--Any on-site visit to or survey of an institution by DADS for the purpose of licensing, monitoring, complaint investigation, architectural review, or similar purpose.

(53) Interdisciplinary care plan--See the definition of "comprehensive care plan."

(54) IV--Intravenous.

(55) Legend drug or prescription drug--Any drug that requires a written or telephonic order of a practitioner before it may be dispensed by a pharmacist, or that may be delivered to a particular resident by a practitioner in the course of the practitioner's practice.

(56) Licensed health professional--A physician; physician assistant; nurse practitioner; physical, speech, or occupational therapist; pharmacist; physical or occupational therapy assistant; registered professional nurse; licensed vocational nurse; licensed dietitian; or licensed social worker.

(57) Licensed nursing home (facility) administrator--A person currently licensed by DADS in accordance with Chapter 18 of this title (relating to Nursing Facility Administrators).

(58) Licensed vocational nurse (LVN)--A nurse who is currently licensed by the Texas Board of Nursing as a licensed vocational nurse.

(59) Life Safety Code (also referred to as the Code or NFPA 101)--The Code for Safety to Life from Fire in Buildings and Structures, Standard 101, of the National Fire Protection Association(NFPA).

(60) Life safety features--Fire safety components required by the Life Safety Code, including, but not limited to, building construction, fire alarm systems, smoke detection systems, interior finishes, sizes and thicknesses of doors, exits, emergency electrical systems, and sprinkler systems.

(61) Life support--Use of any technique, therapy, or device to assist in sustaining life. (See §19.419 of this chapter (relating to Advance Directives)).

(62) Local authorities--Persons, including, but not limited to, local health authority, fire marshal, and building inspector, who may be authorized by state law, county order, or municipal ordinance to perform certain inspections or certifications.

(63) Local health authority--The physician appointed by the governing body of a municipality or the commissioner's court of the county to administer state and local laws relating to public health in the municipality's or county's jurisdiction as defined in Texas Health and Safety Code, §121.021.

(64) Long-term care-regulatory--DADS' Regulatory Services Division, which is responsible for surveying nursing facilities to

determine compliance with regulations for licensure and certification for Title XIX participation.

(65) Manager--A person, other than a licensed nursing home administrator, having a contractual relationship to provide management services to a facility.

(66) Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of resident services. Management services do not include contracts solely for maintenance, laundry, or food service.

(67) MDS--Minimum data set. See Resident Assessment Instrument (RAI).

(68) MDS nurse reviewer--A registered nurse employed by HHSC to monitor the accuracy of the MDS assessment submitted by a Medicaid-certified nursing facility.

(69) Medicaid applicant--A person who requests the determination of eligibility to become a Medicaid recipient.

(70) Medicaid nursing facility vendor payment system--Electronic billing and payment system for reimbursement to nursing facilities for services provided to eligible Medicaid recipients.

(71) Medicaid recipient--A person who meets the eligibility requirements of the Title XIX Medicaid program, is eligible for nursing facility services, and resides in a Medicaid-participating facility.

(72) Medical director--A physician licensed by the Texas Medical Board, who is engaged by the nursing home to assist in and advise regarding the provision of nursing and health care.

(73) Medical necessity (MN)--The determination that a recipient requires the services of licensed nurses in an institutional setting to carry out the physician's planned regimen for total care. A recipient's need for custodial care in a 24-hour institutional setting does not constitute a medical need. A group of health care professionals employed or contracted by the state Medicaid claims administrator contracted with HHSC makes individual determinations of medical necessity regarding nursing facility care. These health care professionals consist of physicians and registered nurses.

(74) Medical power of attorney--The legal document that designates an agent to make treatment decisions if the individual designator becomes incapable.

(75) Medical-social care plan--See Interdisciplinary Care Plan.

(76) Medically related condition--An organic, debilitating disease or health disorder that requires services provided in a nursing facility, under the supervision of licensed nurses.

(77) Medication aide--A person who holds a current permit issued under the Medication Aide Training Program as described in Chapter 95 of this title (relating to Medication Aides--Program Requirements) and acts under the authority of a person who holds a current license under state law which authorizes the licensee to administer medication.

(78) Misappropriation of funds--The taking, secretion, misapplication, deprivation, transfer, or attempted transfer to any person not entitled to receive any property, real or personal, or anything of value belonging to or under the legal control of a resident without the effective consent of the resident or other appropriate legal authority, or the taking of any action contrary to any duty imposed by federal or state law prescribing conduct relating to the custody or disposition of property of a resident.

(79) Neglect--A deprivation of life's necessities of food, water, or shelter, or a failure of an individual to provide services, treatment, or care to a resident which causes or could cause mental or physical injury, or harm or death to the resident.

(80) NHIC--Formerly, this term referred to the National Heritage Insurance Corporation. It now refers to the state Medicaid claims administrator.

(81) Nonnursing personnel--Persons not assigned to give direct personal care to residents; including administrators, secretaries, activities directors, bookkeepers, cooks, janitors, maids, laundry workers, and yard maintenance workers.

(82) Nurse aide--An individual who provides nursing or nursing-related services to residents in a facility under the supervision of a licensed nurse. This definition does not include an individual who is a licensed health professional, a registered dietitian, or someone who volunteers such services without pay. A nurse aide is not authorized to provide nursing and/or nursing-related services for which a license or registration is required under state law. Nurse aides do not include those individuals who furnish services to residents only as paid feeding assistants.

(83) Nurse aide trainee--An individual who is attending a program teaching nurse aide skills.

(84) Nurse practitioner--A person licensed by the Texas Board of Nursing as a registered professional nurse, authorized by the Texas Board of Nursing as an advanced practice nurse in the role of nurse practitioner.

(85) Nursing assessment--See definition of "comprehensive assessment" and "comprehensive care plan."

(86) Nursing care--Services provided by nursing personnel which include, but are not limited to, observation; promotion and maintenance of health; prevention of illness and disability; management of health care during acute and chronic phases of illness; guidance and counseling of individuals and families; and referral to physicians, other health care providers, and community resources when appropriate.

(87) Nursing facility/home--An institution that provides organized and structured nursing care and service, and is subject to licensure under Texas Health and Safety Code, Chapter 242. The nursing facility may also be certified to participate in the Medicaid Title XIX program. Depending on context, these terms are used to represent the management, administrator, or other persons or groups involved in the provision of care to the residents; or to represent the physical building, which may consist of one or more floors or one or more units, or which may be a distinct part of a licensed hospital.

(88) Nursing facility/home administrator--See the definition of "licensed nursing home (facility) administrator."

(89) Nursing personnel--Persons assigned to give direct personal and nursing services to residents, including registered nurses, licensed vocational nurses, nurse aides, orderlies, and medication aides. Unlicensed personnel function under the authority of licensed personnel.

(90) Objectives--See definition of "goals."

(91) OBRA--Omnibus Budget Reconciliation Act of 1987, which includes provisions relating to nursing home reform, as amended.

(92) Ombudsman--An advocate who is a certified representative, staff member, or volunteer of the DADS Office of the State Long Term Care Ombudsman.

(93) Optometrist--An individual with the profession of examining the eyes for defects of refraction and prescribing lenses for correction who is licensed by the Texas Optometry Board.

(94) Paid feeding assistant--An individual who meets the requirements of §19.1113 of this chapter (relating to Paid Feeding Assistants) and who is paid to feed residents by a facility or who is used under an arrangement with another agency or organization.

(95) PASARR--Preadmission Screening and Resident Review.

(96) Palliative Plan of Care--Appropriate medical and nursing care for residents with advanced and progressive diseases for whom the focus of care is controlling pain and symptoms while maintaining optimum quality of life.

(97) Patient care-related electrical appliance--An electrical appliance that is intended to be used for diagnostic, therapeutic, or monitoring purposes in a patient care area, as defined in Standard 99 of the National Fire Protection Association.

(98) Person--An individual, firm, partnership, corporation, association, joint stock company, limited partnership, limited liability company, or any other legal entity, including a legal successor of those entities.

(99) Person with a disclosable interest--A person with a disclosable interest is any person who owns at least a 5.0% interest in any corporation, partnership, or other business entity that is required to be licensed under Texas Health and Safety Code, Chapter 242. A person with a disclosable interest does not include a bank, savings and loan, savings bank, trust company, building and loan association, credit union, individual loan and thrift company, investment banking firm, or insurance company, unless these entities participate in the management of the facility.

(100) Pharmacist--An individual, licensed by the Texas State Board of Pharmacy to practice pharmacy, who prepares and dispenses medications prescribed by a physician, dentist, or podiatrist.

(101) Physical restraint--See Restraints (physical).

(102) Physician--A doctor of medicine or osteopathy currently licensed by the Texas Medical Board.

(103) Physician assistant (PA)--

(A) A graduate of a physician assistant training program who is accredited by the Committee on Allied Health Education and Accreditation of the Council on Medical Education of the American Medical Association;

(B) A person who has passed the examination given by the National Commission on Certification of Physician Assistants. According to federal requirements (42 CFR §491.2) a physician assistant is a person who meets the applicable state requirements governing the qualifications for assistant to primary care physicians, and who meets at least one of the following conditions:

(i) is currently certified by the National Commission on Certification of Physician Assistants to assist primary care physicians; or

(ii) has satisfactorily completed a program for preparing physician assistants that:

(I) was at least one academic year in length;

(II) consisted of supervised clinical practice and at least four months (in the aggregate) of classroom instruction directed toward preparing students to deliver health care; and

(III) was accredited by the American Medical Association's Committee on Allied Health Education and Accreditation; or

(C) A person who has satisfactorily completed a formal educational program for preparing physician assistants who does not meet the requirements of paragraph (d)(2), 42 CFR §491.2, and has been assisting primary care physicians for a total of 12 months during the 18-month period immediately preceding July 14, 1978.

(104) Podiatrist--A practitioner whose profession encompasses the care and treatment of feet who is licensed by the Texas State Board of Podiatric Medical Examiners.

(105) Poison--Any substance that federal or state regulations require the manufacturer to label as a poison and is to be used externally by the consumer from the original manufacturer's container. Drugs to be taken internally that contain the manufacturer's poison label, but are dispensed by a pharmacist only by or on the prescription order of a physician, are not considered a poison, unless regulations specifically require poison labeling by the pharmacist.

(106) Practitioner--A physician, podiatrist, dentist, or an advanced practice nurse or physician assistant to whom a physician has delegated authority to sign a prescription order, when relating to pharmacy services.

(107) PRN (pro re nata)--As needed.

(108) Provider--The individual or legal business entity that is contractually responsible for providing Medicaid services under an agreement with DADS.

(109) Psychoactive drugs--Drugs prescribed to control mood, mental status, or behavior.

(110) Qualified surveyor--An employee of DADS who has completed state and federal training on the survey process and passed a federal standardized exam.

(111) Quality assessment and assurance committee--A group of health care professionals in a facility who develop and implement appropriate action to identify and rectify substandard care and deficient facility practice.

(112) Quality-of-care monitor--A registered nurse, pharmacist, or dietitian employed by DADS who is trained and experienced in long-term care facility regulation, standards of practice in long-term care, and evaluation of resident care, and functions independently of DADS' Regulatory Services Division.

(113) Recipient--Any individual residing in a Medicaid certified facility or a Medicaid certified distinct part of a facility whose daily vendor rate is paid by Medicaid.

(114) Registered nurse (RN)--An individual currently licensed by the Texas Board of Nursing as a Registered Nurse in the State of Texas.

(115) Reimbursement methodology--The method by which HHSC determines nursing facility per diem rates.

(116) Remodeling--The construction, removal, or relocation of walls and partitions, the construction of foundations, floors, or ceiling-roof assemblies, the expanding or altering of safety systems (including, but not limited to, sprinkler, fire alarm, and emergency systems) or the conversion of space in a facility to a different use.

(117) Renovation--The restoration to a former better state by cleaning, repairing, or rebuilding, including, but not limited to, routine maintenance, repairs, equipment replacement, painting.

(118) Representative payee--A person designated by the Social Security Administration to receive and disburse benefits, act in the best interest of the beneficiary, and ensure that benefits will be used according to the beneficiary's needs.

(119) Resident--Any individual residing in a nursing facility.

(120) Resident assessment instrument (RAI)--An assessment tool used to conduct comprehensive, accurate, standardized, and reproducible assessments of each resident's functional capacity as specified by the Secretary of the U.S. Department of Health and Human Services. At a minimum, this instrument must consist of the Minimum Data Set (MDS) core elements as specified by the Centers for Medicare & Medicaid Services (CMS); utilization guidelines; and Resident Assessment Protocols (RAPS).

(121) Resident group--A group or council of residents who meet regularly to:

(A) discuss and offer suggestions about the facility policies and procedures affecting residents' care, treatment, and quality of life;

(B) plan resident activities;

(C) participate in educational activities; or

(D) for any other purpose.

(122) Responsible party--An individual authorized by the resident to act for him as an official delegate or agent. Responsible party is usually a family member or relative, but may be a legal guardian or other individual. Authorization may be in writing or may be given orally.

(123) Restraint hold--

(A) A manual method, except for physical guidance or prompting of brief duration, used to restrict:

(i) free movement or normal functioning of all or a portion of a resident's body; or

(ii) normal access by a resident to a portion of the resident's body.

(B) Physical guidance or prompting of brief duration becomes a restraint if the resident resists the guidance or prompting.

(124) Restraints (chemical)--Psychoactive drugs administered for the purposes of discipline, or convenience, and not required to treat the resident's medical symptoms.

(125) Restraints (physical)--Any manual method, or physical or mechanical device, material or equipment attached, or adjacent to the resident's body, that the individual cannot remove easily which restricts freedom of movement or normal access to one's body. The term includes a restraint hold.

(126) RN assessment coordinator--A registered nurse who signs and certifies a comprehensive assessment of a resident's needs, using the RAI, including the MDS, as specified by DADS.

(127) RUG--Resource Utilization Group. A categorization method, consisting of 34 categories based on the MDS, that is used to determine a recipient's service and care requirements and to determine the daily rate DADS pays a nursing facility for services provided to the recipient.

(128) Seclusion--See the definition of "involuntary seclusion" in paragraph (1)(A) of this section.

(129) Secretary--Secretary of the U.S. Department of Health and Human Services.

(130) Services required on a regular basis--Services which are provided at fixed or recurring intervals and are needed so frequently that it would be impractical to provide the services in a home or family setting. Services required on a regular basis include continuous or periodic nursing observation, assessment, and intervention in all areas of resident care.

(131) SNF--A skilled nursing facility or distinct part of a facility that participates in the Medicare program. SNF requirements apply when a certified facility is billing Medicare for a resident's per diem rate.

(132) Social Security Administration--Federal agency for administration of social security benefits. Local social security administration offices take applications for Medicare, assist beneficiaries file claims, and provide information about the Medicare program.

(133) Social worker--A qualified social worker is an individual who is licensed, or provisionally licensed, by the Texas State Board of Social Work Examiners as prescribed by the Texas Occupations Code, Chapter 505, and who has at least:

(A) a bachelor's degree in social work; or

(B) similar professional qualifications, which include a minimum educational requirement of a bachelor's degree and one year experience met by employment providing social services in a health care setting.

(134) Standards--The minimum conditions, requirements, and criteria established in this chapter with which an institution must comply to be licensed under this chapter.

(135) State Medicaid claims administrator--The entity under contract with HHSC to process Medicaid claims in Texas.

(136) State plan--A formal plan for the medical assistance program, submitted to CMS, in which the State of Texas agrees to administer the program in accordance with the provisions of the State Plan, the requirements of Titles XVIII and XIX, and all applicable federal regulations and other official issuances of the U.S. Department of Health and Human Services.

(137) State survey agency--DADS is the agency, which through contractual agreement with CMS is responsible for Title XIX (Medicaid) survey and certification of nursing facilities.

(138) Supervising physician--A physician who assumes responsibility and legal liability for services rendered by a physician assistant (PA) and has been approved by the Texas Medical Board to supervise services rendered by specific PAs. A supervising physician may also be a physician who provides general supervision of a nurse practitioner providing services in a nursing facility.

(139) Supervision--General supervision, unless otherwise identified.

(140) Supervision (direct)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within his sphere of competence. If the person being supervised does not meet assistant-level qualifications specified in this chapter and in federal regulations, the supervisor must be on the premises and directly supervising.

(141) Supervision (general)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or

activity within his sphere of competence. The person being supervised must have access to the licensed and/or qualified person providing the supervision.

(142) Supervision (intermittent)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within his sphere of competence, with initial direction and periodic inspection of the actual act of accomplishing the function or activity. The person being supervised must have access to the licensed and/or qualified person providing the supervision.

(143) *Texas Register*--A publication of the Texas Register Publications Section of the Office of the Secretary of State that contains emergency, proposed, withdrawn, and adopted rules issued by Texas state agencies. The *Texas Register* was established by the Administrative Procedure and Texas Register Act of 1975.

(144) Therapeutic diet--A diet ordered by a physician as part of treatment for a disease or clinical condition, in order to eliminate, decrease, or increase certain substances in the diet or to provide food which has been altered to make it easier for the resident to eat.

(145) Therapy week--A seven-day period beginning the first day rehabilitation therapy or restorative nursing care is given. All subsequent therapy weeks for a particular individual will begin on that day of the week.

(146) Threatened violation--A situation that, unless immediate steps are taken to correct, may cause injury or harm to a resident's health and safety.

(147) Title II--Federal Old-Age, Survivors, and Disability Insurance Benefits of the Social Security Act.

(148) Title XVI--Supplemental Security Income (SSI) of the Social Security Act.

(149) Title XVIII--Medicare provisions of the Social Security Act.

(150) Title XIX--Medicaid provisions of the Social Security Act.

(151) Total health status--Includes functional status, medical care, nursing care, nutritional status, rehabilitation and restorative potential, activities potential, cognitive status, oral health status, psychosocial status, and sensory and physical impairments.

(152) UAR--HHSC's Utilization and Assessment Review Section.

(153) Uniform data set--See Resident Assessment Instrument (RAI).

(154) Universal precautions--The use of barrier and other precautions by long-term care facility employees and/or contract agents to prevent the spread of blood-borne diseases.

(155) Vaccine preventable diseases--The diseases included in the most current recommendations of the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention.

(156) Vendor payment--Payment made by DADS on a daily-rate basis for services delivered to recipients in Medicaid-certified nursing facilities. Vendor payment is based on the nursing facility's approved-to-pay claim processed by the state Medicaid claims administrator. The Nursing Facility Billing Statement, subject to adjustments and corrections, is prepared from information submitted by the nursing facility, which is currently on file in the computer system as of the billing date. Vendor payment is made at periodic intervals, but not less than once per month for services rendered during the previous billing cycle.

(157) Working day--Any 24-hour period, Monday through Friday, excluding state and federal holidays.

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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Kenneth L. Owens
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Department of Aging and Disability Services
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SUBCHAPTER Q. INFECTION CONTROL

40 TAC §19.1601

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

§19.1601. Infection Control.

(a) Infection Control Program. The facility must establish and maintain an infection control program designed to provide a safe, sanitary, and comfortable environment and to help prevent the development and transmission of disease and infection, including influenza, pneumococcal pneumonia, and tuberculosis. Under the program, the facility must:

(1) investigate, control, and prevent infections in the facility;

(2) decide what procedures, such as isolation, should be applied to an individual resident; and

(3) maintain a record of incidents and corrective actions related to infections.

(b) Preventing spread of infection.

(1) If the facility determines in accordance with its infection control program, that a resident needs isolation to prevent the spread of infection, the facility must isolate the resident. Residents with communicable disease must be provided acceptable accommodations according to current practices and policies for infection control. See §19.1(b)(4)(I) of this title (relating to Basis and Scope) for information concerning the Centers for Disease Control and Prevention (CDC) guidelines.

(2) The facility must prohibit employees with a communicable disease or infected skin lesions from direct contact with residents or their food, if direct contact will transmit the disease.

(3) The facility must require staff to wash their hands after each direct resident contact for which handwashing is indicated by accepted professional practice.

(4) The name of any resident with a reportable disease as specified in Title 25, Chapter 97, Subchapter A (relating to Control of Communicable Diseases) must be reported immediately to the city health officer, county health officer, or health unit director having jurisdiction, and appropriate infection control procedures must be implemented as directed by the local health authority.

(c) Communicable Diseases. The facility must have and implement written policies for the control of communicable diseases in employees and residents and must maintain evidence of compliance with local and state health codes and ordinances regarding employee and resident health status.

(d) Tuberculosis.

(1) The facility must conduct and document an annual review that assesses the facility's current risk classification according to the current CDC Guidelines for Preventing the Transmission of Mycobacterium Tuberculosis in Health Care Settings.

(2) The facility must screen all employees before providing services in the facility, according to CDC guidelines. The facility must require all persons providing services under an outside resource contract to provide evidence of a current tuberculosis screening prior to providing services in the facility. The facility must document or keep a copy of the evidence provided.

(3) If the facility determines or suspects that an employee or person providing services under an outside resource contract has been exposed to or has a positive screening for a communicable disease, the facility must respond according to the current CDC guidelines and keep documentation of the action taken.

(4) If the facility determines that an employee or a person providing services under an outside resource contract has been exposed to a communicable disease, the facility must conduct and document a reassessment of the risk classification. The facility must conduct and document subsequent screening based upon the reassessed risk classification.

(5) The facility must screen all residents at admission in accordance with the attending physician's recommendations and current CDC guidelines. If the facility determines or suspects that a resident has been exposed to a communicable disease or has a positive screening, the facility must respond according to the current CDC guidelines and attending physician's recommendations, and keep documentation of the response.

(e) Vaccinations.

(1) Effective September 1, 2012, a facility must develop and implement a policy to protect a resident from vaccine preventable diseases in accordance with Texas Health and Safety Code, Chapter 224.

(A) The policy must:

(i) require an employee, contractor, or other individual with privileges providing direct care to a resident to receive vaccines for the vaccine preventable diseases specified by the facility based on the level of risk the employee, contractor, or other individual presents to residents by the employee's, contractor's, or other individual's routine and direct exposure to residents;

(ii) specify the vaccines an employee, contractor, or other individual with privileges to provide direct resident care is required to receive in accordance with clause (i) of this subparagraph;

(iii) include procedures for the facility to verify that an employee, contractor, or other individual with privileges to provide direct resident care has complied with the policy;

(iv) include procedures for the facility to exempt an employee, contractor, or other individual with privileges to provide direct resident care from the required vaccines for the medical conditions identified as contraindications or precautions by the CDC;

(v) for an employee, contractor, or other individual with privileges to provide direct resident care who is exempt from the required vaccines, include procedures the employee, contractor, or other individual must follow to protect residents from exposure to vaccine preventable diseases, such as the use of protective equipment, such as gloves and masks, based on the level of risk the employee, contractor, or other individual presents to residents by the employee's, contractor's, or other individual's routine and direct exposure to residents;

(vi) prohibit discrimination or retaliatory action against an employee, contractor, or other individual with privileges to provide direct resident care who is exempt from the required vaccines for the medical conditions identified as contraindications or precautions by the CDC, except that required use of protective medical equipment, such as gloves and masks, may not be considered retaliatory action;

(vii) require the facility to maintain a written or electronic record of each employee's, contractor's, or other individual's compliance with or exemption from the policy; and

(viii) include disciplinary actions the facility may take against an employee, contractor, or other individual with privileges to provide direct resident care who fails to comply with the policy.

(B) The policy may:

(i) include procedures for an employee, contractor, or other individual with privileges to provide direct resident care to be exempt from the required vaccines based on reasons of conscience, including a religious beliefs; and

(ii) prohibit an employee, contractor, or other individual with privileges to provide direct resident care who is exempt from the required vaccines from having contact with residents during a public health disaster, as defined in Texas Health and Safety Code, §81.003 (relating to Definitions).

(2) A facility must offer vaccinations to residents in accordance with an immunization schedule adopted by the Advisory Committee on Immunization Practices of the CDC.

(A) Pneumococcal vaccinations for residents. The facility must offer pneumococcal vaccination to a resident 65 years of age or older who has not received the vaccination and to a resident younger than 65 years of age, who has not received the vaccination but is a candidate for it because of chronic illness. A pneumococcal vaccination must be offered to a current resident of a facility and to a new resident at the time of admission. A vaccination must be completed unless a physician has indicated that the vaccination is medically contraindicated or the resident refuses the vaccination.

(i) The facility must develop and implement policies and procedures to ensure that the resident or resident's legal representative receives education regarding the benefits and potential side effects of the pneumococcal vaccination. When a pneumococcal vaccination

is offered, the facility must show in the resident medical record that this was provided.

(ii) Based on an assessment and practitioner recommendation, a second pneumococcal vaccination may be given five years after the first pneumococcal vaccination, unless medically contraindicated or the resident or the resident's legal representative refuses the second vaccination.

(B) Influenza vaccinations for residents and employees. The facility must offer influenza vaccinations to residents and employees in contact with residents, unless the vaccination is medically contraindicated by a physician or the employee or resident has refused the vaccination.

(i) Influenza vaccinations for all residents and employees in contact with residents must be completed by November 30 of each year. Employees hired or residents admitted after this date and during the influenza season (through March of each year) must receive influenza vaccinations, unless medically contraindicated by a physician or the employee, the resident, or the resident's legal representative refuses the vaccination.

(ii) The facility must develop and implement policies and procedures that ensure that the resident or resident's legal representative receives education regarding the benefits and potential side effects of the influenza vaccination. When an influenza vaccination is offered, the facility must show in the resident medical record that this education was provided.

(C) Hepatitis B vaccinations for employees. The facility must develop a method to identify employees at risk of directly contacting blood or potentially infectious materials. The facility must offer an employee identified as being at risk of directly contacting blood or potentially infectious materials a hepatitis B vaccine within 10 days of employment. If the employee initially declines the hepatitis B vaccination but at a later date, while still at risk of directly contacting blood or potentially infectious materials, decides to accept the vaccination, the facility must make the vaccination available within 10 days after the employee decides to accept that vaccination.

(D) Documentation of receipt, refusal, or contraindication of vaccination.

(i) Except as provided in clause (ii) of this subparagraph, the medical record for each resident must show the date of the receipt or refusal of the annual influenza vaccination and the pneumococcal vaccination.

(ii) If a resident does not receive or refuse a vaccination, the resident's medical record must show the resident did not receive the annual influenza vaccination or the pneumococcal vaccination due to a medical contraindication.

(f) Linens. Personnel must handle, store, process, and transport linens so as to prevent the spread of infection and in accordance with §19.325 of this chapter (relating to Linen).

(g) The Quality Assessment and Assurance Committee as described in §19.1917 of this chapter (relating to Quality Assessment and Assurance) will monitor the infection control 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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TRD-201202379

Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-4162

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CHAPTER 90. INTERMEDIATE CARE FACILITIES FOR PERSONS WITH AN INTELLECTUAL DISABILITY OR RELATED CONDITIONS

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §90.3, Definitions, and §90.42, Standards for Facilities Serving Persons with an Intellectual Disability or Related Conditions; new §90.43, Administration of Medication; and new §90.329, Vaccine Preventable Disease, in Chapter 90, Intermediate Care Facilities for Persons with an Intellectual Disability or Related Conditions. The amendment to §90.42 and new §90.43 are adopted with changes to the proposed text published in the April 6, 2012, issue of the *Texas Register* (37 TexReg 2359). The amendments to §90.3 and new §90.329 are adopted without changes to the proposed text.

The amendments and new sections are adopted to implement provisions of Senate Bill (SB) 1857, 82nd Legislature, Regular Session, 2011, which added Human Resources Code, Chapter 161, Subchapter D-1, allowing administration of medication to a resident of an intermediate care facility by an unlicensed person under certain circumstances. DADS also initiated these changes in response to provisions of SB 7, 82nd Legislature, First Called Session, 2011, which added Texas Health and Safety Code, Chapter 224, and requires facilities to develop and implement a policy to protect residents from vaccine preventable diseases.

A change was made to the text of §90.42(e)(7)(B) to clarify that a self-administration of medication training program may be conducted by a person who holds a license that authorizes a person to administer medication, a person to whom a registered nurse (RN) has delegated the administration of medication, or an unlicensed person who administers medication in accordance with Texas Human Resources Code, Chapter 161, Subchapter D-1.

DADS received written comments from EduCare/ResCare; Private Providers Association of Texas; Morning Light, Inc., of Texas; Midland Association for Retarded Citizens; and Special Texas Homes, Inc. A summary of the comments and the responses follows.

Comment: Concerning §90.43, relating to administration of medication, four commenters questioned the regulatory flexibility analysis, stating that it does not reflect the cost of RN hours needed to fulfill the requirements of Chapter 161, Subchapter D-1, of the Texas Human Resources Code.

Response: The agency responds that SB 1857, which allows unlicensed personnel to administer medication under certain circumstances, requires a facility to incur costs when an RN assesses individuals receiving medication and unlicensed personnel administering the medication. However, these costs will be offset over time because the unlicensed personnel can administer medication without RN delegation. Without the provisions of SB 1857, facilities may incur greater cost for RN involvement in

medication administration to comply with existing law governing the practice of professional nursing in Texas. The rule was not changed in response to this comment.

Comment: Concerning §90.43 and the projected effective date of June 1, 2012, two commenters stated that the projected effective date presents numerous compliance challenges.

Response: The agency responds that the effective date for §90.43 has been changed to September 1, 2012.

Comment: Concerning §90.329, relating to vaccine preventable diseases, four commenters questioned the regulatory flexibility analysis, stating that it does not reflect costs related to the new vaccine preventable disease requirements in Texas Health and Safety Code, Chapter 224.

Response: The Texas Legislature has determined that a facility vaccine preventable disease policy is necessary to protect resident health and welfare. The rule does not require a facility to pay for vaccines administered to employees or other costs associated with vaccine administration. The costs to verify that employees are in compliance with the facility policy can be covered with existing resources and systems. The rule was not changed in response to this comment.

Comment: Concerning §90.329 and the effective date of June 1, 2012, one commenter was concerned that the effective date presents compliance challenges.

Response: The agency responds that although the effective date of §90.329 is June 1, 2012, facilities have until September 1, 2012, to implement the rule requirements. The rule was not changed in response to this comment.

SUBCHAPTER A. INTRODUCTION

40 TAC §90.3

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Health and Safety Code, Chapter 252, which authorizes DADS to license and regulate intermediate care facilities for persons with an intellectual disability or related conditions; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

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 C. STANDARDS FOR LICENSURE

40 TAC §90.42, §90.43

The amendment and new section are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Health and Safety Code, Chapter 252, which authorizes DADS to license and regulate intermediate care facilities for persons with an intellectual disability or related conditions; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

§90.42. Standards for Facilities Serving Persons with an Intellectual Disability or Related Conditions.

(a) Purpose. The purpose of this section is to promote the public health, safety, and welfare by providing for the development, establishment, and enforcement of standards:

(1) for the habilitation of persons based on an active treatment program in institutions defined and covered in this section; and

(2) for the establishment, construction, maintenance, and operation of such institutions that view an intellectual disability and other developmental disabilities within the context of a developmental model in accordance with the principle of normalization.

(b) Philosophy. Facilities regulated by the standards in this section are known as facilities for persons with an intellectual disability and related conditions in Texas (ICF/ID). Persons in these facilities have the same civil rights, equal liberties, and due process of law as other individuals, plus the right to receive active treatment and habilitation. Facilities shall provide and promote services that enhance the development of such individuals, maximize their achievement through an interdisciplinary approach based on developmental principles, and create an environment, to the extent possible, that is normalized and normalizing.

(c) Standards. Each facility serving persons with an intellectual disability or related conditions shall comply with regulations promulgated by the United States Department of Health and Human Services in Title 42, Code of Federal Regulations (CFR), Part 483, Subpart I, §§483.400 - 483.480, titled, "Conditions of Participation for Intermediate Care Facilities for the Mentally Retarded." Additionally, DADS adopts by reference the federal regulations governing conditions of participation for the ICF/ID program as specified in 42 CFR, Part 483, Subpart I, §§483.410, 483.420, 483.430, 483.440, 483.450, 483.460, 483.470, and 483.480 as licensing standards.

(d) Precertification training conference for new providers of service. Each new provider must attend the precertification/prelicensure training conference prior to licensing by DADS. The purpose of the training is to assure that providers of services are familiar with the licensing requirements and to facilitate the delivery of quality services to residents in facilities serving persons with an intellectual disability or related conditions.

(1) A new provider is an entity which has not had at least one year of administering services in a facility serving persons with an intellectual disability or related conditions in Texas. All new providers must attend a precertification training conference prior to the life safety code survey.

(2) Each new provider must designate at least one individual who will be involved with the direct management of the facility to attend the training conference prior to a health survey being scheduled.

(3) Each new provider will be given a training schedule. DADS will schedule training sessions, and the date, time, and location of the training will be indicated on the schedule.

(e) Additional requirements.

(1) A facility must develop and implement policies and procedures for reporting abuse, neglect, and exploitation to the Department of Family and Protective Services and reporting other incidents to DADS.

(2) In the area of cardiopulmonary resuscitation (CPR), the following apply:

(A) At least one staff person per shift and on duty must be trained by a CPR instructor certified by an organization such as the American Heart Association or the Red Cross.

(B) The facility must ensure that staff maintain their certification as recommended by such organizations.

(3) In the area of behavior management, seclusion of residents may not be used.

(4) In the area of physical restraints, the following apply:

(A) A facility must not use restraint:

(i) in a manner that:

(I) obstructs the resident's airway, including the placement of anything in, on, or over the resident's mouth or nose;

(II) impairs the resident's breathing by putting pressure on the resident's torso;

(III) interferes with the resident's ability to communicate;

(IV) extends muscle groups away from each other;

(V) uses hyperextension of joints; or

(VI) uses pressure points or pain;

(ii) for disciplinary purposes, that is, as retaliation or retribution;

(iii) for the convenience of staff or other residents; or

(iv) as a substitute for effective treatment or habilitation.

(B) A facility may use restraint:

(i) in a behavioral emergency;

(ii) as an intervention in a behavior therapy program that addresses inappropriate behavior exhibited voluntarily by a resident;

(iii) during a medical or dental procedure if necessary to protect the resident or others and as a follow-up after a medical or dental procedure or following an injury to promote the healing of wounds;

(iv) to protect the resident from involuntary self-injury; and

(v) to provide postural support to the resident or to assist the resident in obtaining and maintaining normative bodily functioning.

(C) In order to decrease the frequency of the use of restraint and to minimize the risk of harm to a resident, a facility must ensure that the interdisciplinary team:

(i) with the participation of a physician, identifies:

(I) the resident's known physical or medical conditions that might constitute a risk to the resident during the use of restraint;

(II) the resident's ability to communicate; and

(III) other factors that must be taken into account if the use of restraint is considered, including the resident's:

(-a-) cognitive functioning level;

(-b-) height;

(-c-) weight;

(-d-) emotional condition (including whether the resident has a history of having been physically or sexually abused); and

(-e-) age;

(ii) documents the conditions and factors identified in accordance with clause (i) of this subparagraph, and, as applicable, limitations on specific restraint techniques or mechanical restraint devices in the resident's record; and

(iii) reviews and updates with a physician, registered nurse, or licensed vocational nurse, at least annually or when a condition or factor documented in accordance with clause (ii) of this subparagraph changes significantly, information in the resident's record related to the identified condition, factor, or limitation.

(D) If a facility restrains a resident as provided in subparagraph (B) of this paragraph, the facility must:

(i) take into account the conditions, factors, and limitations on specific restraint techniques or mechanical restraint devices documented in accordance with subparagraph (C)(ii) and (iii) of this paragraph;

(ii) use the minimal amount of force or pressure that is reasonable and necessary to ensure the safety of the resident and others;

(iii) safeguard the resident's dignity, privacy, and well-being; and

(iv) not secure the resident to a stationary object while the resident is in a standing position.

(E) If a facility uses restraint in a circumstance described in subparagraph (B)(i) or (ii) of this paragraph:

(i) the facility may use only a personal hold in which the resident's limbs are held close to the body to limit or prevent movement and that does not violate the provisions of subparagraph (A)(i) of this paragraph; and

(ii) if a resident rolls into a prone or supine position during restraint, the facility must transition the resident to a side, sitting, or standing position as soon as possible. The facility may only use a prone or supine hold:

(I) as a transitional hold, and only for the shortest period of time necessary to ensure the protection of the resident or others;

(II) as a last resort, when other less restrictive interventions have proven to be ineffective; and

(III) except in a small facility, when an observer who is trained to identify risks associated with positional, compression, or restraint asphyxiation, and with prone and supine holds is ensuring that the resident's breathing is not impaired.

(F) A facility must release a resident from restraint:

(i) as soon as the resident no longer poses a risk of imminent physical harm to the resident or others; or

(ii) if the resident in restraint experiences a medical emergency, as soon as possible as indicated by the medical emergency.

(G) If a facility restrains a resident as provided in subparagraph (B)(i) of this paragraph, the facility must obtain a physician's order authorizing the restraint by the end of the first business day after the use of restraint.

(H) A facility must ensure that each resident and the resident's legally authorized representative are notified of the DADS rules and the facility's policies related to restraint and seclusion.

(I) A facility may adopt policies that allow less use of restraint than allowed by the rules of this chapter.

(5) In the area of pharmacy services, the following applies.

(A) All pharmacy services must comply with the Texas State Board of Pharmacy requirements, the Texas Pharmacy Act, and rules adopted thereunder, the Texas Controlled Substances Act, and Health and Safety Code, Chapter 483 (relating to Dangerous Drugs).

(B) All medications must be ordered in writing by a physician, dentist, or podiatrist. Verbal orders may be taken only by a licensed nurse, pharmacist, or another physician, and must be immediately transcribed and signed by the individual taking the order. Verbal orders must be signed by the physician, dentist, or podiatrist within seven working days.

(C) The facility, with input from the consultant pharmacist and physician, must develop and implement policies and procedures regarding automatic stop orders for medications. These procedures must be utilized when the order for a medication does not specify the number of doses to be given or the time for discontinuance or re-order.

(6) Specialized nutrition support (delivery of parenteral nutrients and enteral feedings by nasogastric, gastrostomy, or jejunostomy tubes, etc.) must be given in accordance with physician's orders by a registered or licensed nurse. Proper technique must be utilized when giving nutritional support.

(7) In the area of self-administration of medication and emergency medication kits, the following apply.

(A) Residents who have demonstrated the competency for self-administration of medications must have access to and maintain their own medications. They must have an individual storage space that permits them to store their medications under lock and key.

(B) Residents may participate in a self-administration of medication training program if the interdisciplinary team determines that self-administration of medications is an appropriate objective. Residents participating in a self-administration of medication training program must have training in coordination with and as part of the resident's total active treatment program. The resident's training plan must be evaluated as necessary by a licensed nurse. The supervision and implementation of a self-administration of medication training program may be conducted by personnel described in §90.43(a)(1), (3), and (4) of this subchapter (relating to Administration of Medication).

(C) A facility may maintain a supply of controlled substances in an emergency medication kit for a resident's emergency medication needs, as outlined under §90.324 and §90.325 of this chapter (relating to Emergency Medication Kit and Controlled Substances).

(8) In the area of communicable diseases, the facility must have written policies and procedures for the control of communicable diseases in employees and residents. When any reportable communicable disease becomes evident, the facility must report in accordance with Communicable Disease and Prevention Act, Health and Safety Code, Chapter 81, or as specified in 25 TAC §§97.1 - 97.13 (relating to Control of Communicable Diseases) and 25 TAC §§97.131 - 97.136 (relating to Sexually Transmitted Diseases Including Acquired Immunodeficiency Syndrome (AIDS) and Human Immunodeficiency Virus (HIV)) and in the publication titled, "Reportable Diseases in Texas," Publication 6-101a (Revised 1987). The local health authority should be contacted to assist the facility in determining the transmissibility of the disease and, in the case of employees, the ability of the employee to continue performing his duties. The facility must have written policies and procedures for infection control, which include implementation of universal precautions as recommended by the Centers for Disease Control and Prevention (CDC).

(9) In the area of water activities, the facility must assure the safety of all individuals who participate in facility-sponsored events. For the purpose of this section, a water activity is defined as an activity which occurs in or on water that is knee deep or deeper on the majority of individuals participating in the event. To assure the safety of all individuals who participate, the requirements in subparagraphs (A) - (F) of this paragraph apply.

(A) The facility must develop a policy statement regarding the water sites utilized by the facility. Water sites include, but are not limited to, lakes, amusement parks, and pools.

(B) A minimum of one staff person with demonstrated proficiency in cardiopulmonary resuscitation (CPR) must be on duty and at the site when individuals are involved in water activities.

(C) A minimum of one person with demonstrated proficiency in water life saving skills must be on duty and at the site when activities take place in or on water that is deep enough to require swimming for life saving retrieval. This person must maintain supervision of the activity for its duration.

(D) A sufficient number of staff or a combination of staff and volunteers must be available to meet the safety requirements of the group and/or specific individuals.

(E) Each individual's program plan must address each person's needs for safety when participating in water activities including, but not necessarily limited to, medical conditions; physical disabilities and/or behavioral needs which could pose a threat to safety; the ability to follow directions and instructions pertaining to water safety; the ability to swim independently; and, when called for, special precautions.

(F) If the interdisciplinary team recommends the use of a flotation device as a precaution for any individual to engage in water activities, it must be identified and precautions outlined in the individual program plan. The device must be approved by the United States

Coast Guard or be a specialized therapy flotation device utilized in the individual's therapy program.

(10) In the area of communication, a facility may not prohibit a resident or employee from communicating in the person's native language with another resident or employee for the purpose of acquiring or providing care, training, or treatment.

(11) In the area of physical exams, a facility shall ensure that a resident is given at least one physical exam on a yearly basis by:

(A) a person licensed to practice medicine in accordance with Texas Occupations Code, Chapter 155 (relating to License to Practice Medicine);

(B) a person licensed as a physician assistant in accordance with Texas Occupations Code, Chapter 204 (relating to Physician Assistants); or

(C) a person licensed to practice professional nursing in accordance with Texas Occupations Code, Chapter 301 (relating to Nurses), and authorized by the Texas Board of Nursing to practice as an advanced practice nurse.

§90.43. Administration of Medication.

(a) Administration of medication to a resident of a facility may be performed only by:

(1) a person who holds a license under state law that authorizes the person to administer medication;

(2) in a facility, as defined in §95.101 of this title (relating to Introduction):

(A) a person who holds a permit issued under Texas Health and Safety Code §242.610 and acts under the authority of a person described in paragraph (1) of this subsection; or

(B) a person who is exempt from licensure or permit requirements in accordance with Texas Health and Safety Code §242.607;

(3) a person to whom a registered nurse has delegated the administration of medication under 22 TAC Chapter 224 or 225 (relating to Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments and RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions); or

(4) in a facility with a licensed or certified capacity of less than 14 residents, an unlicensed person who administers medication in accordance with Texas Human Resource Code, Chapter 161, Subchapter D-1.

(b) A person may perform administration of medication in accordance with subsection (a)(4) of this section without the requirement that a registered nurse delegate or oversee each administration if:

(1) the medication is:

(A) an oral medication;

(B) a topical medication; or

(C) a metered dose inhaler;

(2) the medication is administered to the resident for a stable or predictable condition;

(3) the resident has been personally assessed by a registered nurse initially and in response to significant changes in the resident's health status, and the registered nurse has determined that the resident's health status permits the administration of medication by an unlicensed person; and

(4) the unlicensed person has been:

(A) trained by a registered nurse or licensed vocational nurse under the direction of a registered nurse regarding proper administration of medication; or

(B) determined to be competent by a registered nurse or licensed vocational nurse under the direction of a registered nurse regarding proper administration of medication, including through a demonstration of proper technique by the unlicensed person.

(c) A registered nurse or a licensed vocational nurse under the supervision of a registered nurse must review the administration of medication to a resident by a person described in subsection (a)(4) of this section at least annually and after any significant change in the resident's condition.

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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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-4466

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SUBCHAPTER L. PROVISIONS APPLICABLE TO FACILITIES GENERALLY

40 TAC §90.329

The new section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Health and Safety Code, Chapter 252, which authorizes DADS to license and regulate intermediate care facilities for persons with an intellectual disability or related conditions; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

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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CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to Subchapter A, §92.2, concerning definitions; Subchapter C, §92.41, concerning standards for type A and type B assisted living facilities; and Subchapter H, Division 9, §92.551, concerning administrative penalties, in Chapter 92, Licensing Standards for Assisted Living Facilities. The amendment to §92.551 is adopted with changes to the proposed text published in the April 6, 2012, issue of the *Texas Register* (37 TexReg 2366). The amendments to §92.2 and §92.41 are adopted without changes to the proposed text.

The amendments are adopted to implement House Bill (HB) 2109, 82nd Legislature, Regular Session, 2011, and Senate Bill (SB) 7, Article 8, 82nd Legislature, First Called Session, 2011. HB 2109 amends Texas Health and Safety Code, §247.066 and §247.068, regarding assisted living facilities. A resident of an assisted living facility may be considered inappropriately placed due to a change in the types of services the resident needs or a change in the resident's evacuation capability. HB 2109 allows an assisted living facility to proactively submit documents to DADS for a waiver of the requirement to discharge an inappropriately placed resident instead of waiting for DADS to make the initial determination. HB 2109 also authorizes DADS to take action when a facility has not discharged a resident when required to do so and prohibits DADS staff from retaliating against an assisted living facility for complaints about or disagreements with a DADS employee. Additionally, HB 2109 requires facility supervisors and other staff, as appropriate, to complete training regarding aging in place and retaliation.

SB 7, Article 8, requires a facility to develop policies to ensure that employees are immunized against vaccine preventable diseases. The amendment adds the requirement for a facility to develop and implement these policies and adds a definition for "vaccine preventable diseases."

A minor change was made to the Administrative Penalty Schedule of §92.551(d) to delete references to Type E Facilities, which were eliminated in 2010.

DADS received written comments from the Texas Assisted Living Association. A summary of the comments and the responses follows.

Comment: The commenter stated that the proposed rules do not provide analysis on the cost of any required vaccines and that, depending on the vaccines required, the cost for the vaccination must be incurred by the facility or the individual worker. The commenter requested that the rules acknowledge the cost implications of vaccines.

Response: The Texas Legislature has determined that a facility vaccine preventable disease policy is necessary to protect resident health and welfare. The rule does not require a facility to pay for vaccine administration to employees or other costs associated with vaccine administration. No changes were made in response to this comment.

Comment: The commenter stated that the proposed rules did not provide an analysis on the cost of any potential liability to a facility if an employee incurs an adverse reaction from the vaccination and that this could be considered a cost to the small business owner.

Response: The Texas Legislature has determined that a facility vaccine preventable disease policy is necessary to protect resident health and welfare. The rule does not require a facility to pay for vaccine administration to employees or other costs associated with vaccine administration. No changes were made in response to this comment.

Comment: The commenter stated that House Bill 2109, 82nd Legislature, 2011, Regular Session intended that both assisting living facilities and DADS staff receive annual joint training so both the facility staff and DADS staff are clear on the policies and procedures relating to aging in place. The commenter requested that the rule include a requirement that, in addition to the assisted living facility manager, DADS staff must also complete this annual requirement and keep appropriate documentation.

Response: Procedures are in place to ensure that DADS Regulatory staff complete the training requirement. It is not necessary for DADS to put this requirement in rule. No changes were made in response to this comment.

Comment: The commenter stated that the proposed rules modify Chapter 92 to include a provision that requires a facility to retain various forms from the Fire Marshal, State Fire Marshal and local fire suppression authority. The commenter also stated that there is not a provision for how a facility can obtain a timely license renewal if there are extenuating circumstances that inhibit obtaining the required signature and requested that the proposed rules allow for this by providing for an extension or issuance of a temporary license for renewal so the issue can be resolved.

Response: The process of obtaining the documentation for an evacuation waiver was not changed in the proposed rules, except for the changes required by HB 2109 that allow a facility to proactively begin the process without waiting for DADS to conduct an onsite visit. The proposed rules do not affect the license renewal process. Section 92.41(f) outlines the steps a facility takes when requesting an evacuation waiver or acknowledging that a resident may need additional services in order to age in place. The proposed rules do not amend any of the documentation a facility needs to submit to DADS. No changes were made in response to this comment.

SUBCHAPTER A. INTRODUCTION

40 TAC §92.2

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. STANDARDS FOR LICENSURE

40 TAC §92.41

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER H. ENFORCEMENT
DIVISION 9. ADMINISTRATIVE PENALTIES

40 TAC §92.551

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

§92.551. Administrative Penalties.

(a) Assessment of an administrative penalty. DADS may assess an administrative penalty if a license holder:

(1) violates:

(A) Texas Health and Safety Code, Chapter 247;

(B) a rule, standard, or order adopted under Texas Health and Safety Code, Chapter 247; or

(C) a term of a license issued under Texas Health and Safety Code, Chapter 247;

(2) makes a false statement of material fact that the license holder knows or should know is false:

(A) on an application for issuance or renewal of a license;

(B) in an attachment to the application; or

(C) with respect to a matter under investigation by DADS;

(3) refuses to allow a DADS representative to inspect:

(A) a book, record, or file that a facility must maintain; or

(B) any portion of the premises of a facility;

(4) willfully interferes with the work of a DADS representative or the enforcement of this chapter;

(5) willfully interferes with a DADS representative preserving evidence of a violation of Texas Health and Safety Code, Chapter 247; a rule, standard, or order adopted under Texas Health and Safety Code, Chapter 247; or a term of a license issued under Texas Health and Safety Code, Chapter 247;

(6) fails to pay an administrative penalty not later than the 30th calendar day after the penalty assessment becomes final; or

(7) fails to notify DADS of a change of ownership before the effective date of the change of ownership.

(b) Criteria for assessing an administrative penalty. DADS considers the following in determining the amount of an administrative penalty:

(1) the gradations of penalties established in subsection (d) of this section;

(2) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the situation, and the hazard or potential hazard created by the situation to the health or safety of the public;

(3) the history of previous violations;

(4) deterrence of future violations;

(5) the license holder's efforts to correct the violation;

(6) the size of the facility and of the business entity that owns the facility; and

(7) any other matter that justice may require.

(c) Late payment of an administrative penalty. A license holder must pay an administrative penalty within 30 calendar days after the penalty assessment becomes final. If a license holder fails to timely pay the administrative penalty, DADS may assess an admin-

istrative penalty under subsection (a)(6) of this section, which is in addition to the penalty that was previously assessed and not timely paid.

(d) Administrative penalty schedule. DADS uses the schedule of appropriate and graduated administrative penalties in this subsection to determine which violations warrant an administrative penalty.
Figure: 40 TAC §92.551(d)

(e) Administrative penalty assessed against a resident. DADS does not assess an administrative penalty against a resident, unless the resident is also an employee of the facility or a controlling person.

(f) Proposal of administrative penalties.

(1) DADS issues a preliminary report stating the facts on which DADS concludes that a violation has occurred after DADS has:

(A) examined the possible violation and facts surrounding the possible violation; and

(B) concluded that a violation has occurred.

(2) DADS may recommend in the preliminary report the assessment of an administrative penalty for each violation and the amount of the administrative penalty.

(3) DADS provides a written notice of the preliminary report to the license holder not later than 10 calendar days after the date on which the preliminary report is issued. The written notice includes:

(A) a brief summary of the violation;

(B) the amount of the recommended administrative penalty;

(C) a statement of whether the violation is subject to correction in accordance with subsection (g) of this section and, if the violation is subject to correction, a statement of:

(i) the date on which the license holder must file with DADS a plan of correction for approval by DADS; and

(ii) the date on which the license holder must complete the plan of correction to avoid assessment of the administrative penalty; and

(D) a statement that the license holder has a right to an administrative hearing on the occurrence of the violation, the amount of the penalty, or both.

(4) Not later than 20 calendar days after the date on which a license holder receives a written notice of the preliminary report, the license holder may:

(A) give DADS written consent to the preliminary report, including the recommended administrative penalty; or

(B) make a written request to the Texas Health and Human Services Commission (HHSC) for an administrative hearing.

(5) If a violation is subject to correction under subsection (g) of this section, the license holder must submit a plan of correction to DADS for approval not later than 10 calendar days after the date on which the license holder receives the written notice described in paragraph (3) of this subsection.

(6) If a violation is subject to correction under subsection (g) of this section, and after the license holder reports to DADS that the violation has been corrected, DADS inspects the correction or takes any other step necessary to confirm the correction and notifies the facility that:

(A) the correction is satisfactory and DADS will not assess an administrative penalty; or

(B) the correction is not satisfactory and a penalty is recommended.

(7) Not later than 20 calendar days after the date on which a license holder receives a notice under paragraph (6)(B) of this subsection (notice that the correction is not satisfactory and recommendation of a penalty), the license holder may:

(A) give DADS written consent to DADS' report, including the recommended administrative penalty; or

(B) make a written request to HHSC for an administrative hearing.

(8) If a license holder consents to the recommended administrative penalty or does not timely respond to a notice sent under paragraph (3) of this subsection (written notice of the preliminary report) or paragraph (6)(B) of this subsection (notice that the correction is not satisfactory and recommendation of a penalty):

(A) the commissioner or the commissioner's designee assesses the recommended administrative penalty;

(B) DADS gives written notice of the decision to the license holder; and

(C) the license holder must pay the penalty not later than 30 calendar days after the written notice given in subparagraph (B) of this paragraph.

(g) Opportunity to correct.

(1) A license holder has an opportunity to correct a violation, except a violation described in paragraph (2) of this subsection, and to avoid paying an administrative penalty, if the license holder corrects the violation not later than 45 calendar days after the date the facility receives the written notice described in subsection (f)(3) of this section.

(2) A license holder does not have an opportunity to correct a violation:

(A) that DADS determines results in serious harm to or death of a resident;

(B) described by subsection (a)(2) - (7) of this section;

(C) related to advance directives as described in §92.41(g);

(D) that is the second or subsequent violation of:

(i) a right of the same resident under §92.125 of this chapter (relating to Advance Directives); or

(ii) the same right of all residents under §92.125 of this chapter; or

(E) a violation that is written because of an inappropriately placed resident, except as described in §92.41(f) of this chapter (relating to Inappropriate Placement).

(3) Maintenance of violation correction.

(A) A license holder that corrects a violation must maintain the correction. If the license holder fails to maintain the correction until at least the first anniversary of the date the correction was made, DADS may assess and collect an administrative penalty for the subsequent violation.

(B) An administrative penalty assessed under this paragraph is equal to three times the amount of the original administrative penalty that was assessed but not collected.

(C) DADS is not required to offer the license holder an opportunity to correct the subsequent violation.

(h) Hearing on an administrative penalty. If a license holder timely requests an administrative hearing as described in subsection (f)(3) or (f)(7) of this section, the administrative hearing is held in accordance with HHSC rules at 1 TAC Chapter 357, Subchapter I (relating to Hearings under the Administrative Procedure Act).

(i) DADS may charge interest on an administrative penalty. The interest begins the day after the date the penalty becomes due and ends on the date the penalty is paid in accordance with Texas Health and Safety Code, §247.0455(e).

(j) Amelioration of a violation.

(1) In lieu of demanding payment of an administrative penalty, the commissioner may allow a license holder to use, under DADS' supervision, any portion of the administrative penalty to ameliorate the violation or to improve services, other than administrative services, in the facility affected by the violation. Amelioration is an alternate form of payment of an administrative penalty, not an appeal, and does not remove a violation or an assessed administrative penalty from a facility's history.

(2) A license holder cannot ameliorate a violation that DADS determines constitutes immediate jeopardy to the health or safety of a resident.

(3) DADS offers amelioration to a license holder not later than 10 calendar days after the date a license holder receives a final notification of the recommended assessment of an administrative penalty that is sent to the license holder after an informal dispute resolution process but before an administrative hearing.

(4) A license holder to whom amelioration has been offered must:

(A) submit a plan for amelioration not later than 45 calendar days after the date the license holder receives the offer of amelioration from DADS; and

(B) agree to waive the license holder's right to an administrative hearing if DADS approves the plan for amelioration.

(5) A license holder's plan for amelioration must:

(A) propose changes to the management or operation of the facility that will improve services to or quality of care of residents;

(B) identify, through measurable outcomes, the ways in which and the extent to which the proposed changes will improve services to or quality of care of residents;

(C) establish clear goals to be achieved through the proposed changes;

(D) establish a time line for implementing the proposed changes; and

(E) identify specific actions the license holder will take to implement the proposed changes.

(6) A license holder's plan for amelioration may include proposed changes to:

(A) improve staff recruitment and retention;

(B) offer or improve dental services for residents; and

(C) improve the overall quality of life for residents.

(7) DADS may require that an amelioration plan propose changes that would result in conditions that exceed the requirements of this chapter.

(8) DADS approves or denies a license holder's amelioration plan not later than 45 calendar days after the date DADS receives the plan. If DADS approves the amelioration plan, any pending request the license holder has submitted for an administrative hearing must be withdrawn by the license holder.

(9) DADS does not offer amelioration to a license holder:

(A) more than three times in a two-year period; or

(B) more than one time in a two-year period for the same or a similar violation.

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 May 11, 2012.

TRD-201202382
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: June 1, 2012
Proposal publication date: April 6, 2012
For further information, please call: (512) 438-4162

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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.

Adopted Rule Reviews

Texas Department of Agriculture

Title 4, Part 1

The Texas Department of Agriculture (the department) adopts the review of Texas Administrative Code, Title 4, Part 1, Chapter 8, concerning Agricultural Hazard Communication Regulations, Chapter 13, concerning Grain Warehouse, Chapter 14, concerning Perishable Commodities Handling and Marketing Program, Chapter 15, concerning Egg Law, and Chapter 21, concerning Citrus, and re-adopts all sections in Chapters 8, 13, 14, 15, and 21. The Notice of Intent to Review was published in the March 30, 2012, issue of the *Texas Register* (37 TexReg 2229). No comments were received on the proposed rule review.

Section 2001.039 requires state agencies to review and consider for re-adoption each of their rules every four years. The review must include an assessment of whether the original justification for the rules continues to exist.

The assessment by the department of Chapters 8, 13, 14, 15, and 21 indicates that the reason for re-adopting without changes all sections in Chapters 8, 13, 14, 15, and 21 continues to exist.

TRD-201202373
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: May 11, 2012

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The Texas Department of Agriculture (the department) adopts the review of Texas Administrative Code, Title 4, Part 1, Chapter 18, concerning Organic Standards and Certification, and re-adopts all sections in Chapter 18, with amendments proposed to the chapter in the department's Notice of Intent to Review. The Notice of Intent to Review was published in the April 6, 2012, issue of the *Texas Register* (37 TexReg 2437). No comments were received on the proposed rule review.

As part of the review process, the department proposed amendments to Chapter 18, §18.700, concerning Complaints, and §18.705, concerning Registration. The proposal was published in the proposed rule section of the March 30, 2012, issue of the *Texas Register* (37 TexReg 2135). No comments were received on the proposal. Those amendments are adopted without changes elsewhere in this issue.

Section 2001.039 requires state agencies to review and consider for re-adoption each of their rules every four years. The review must include an assessment of whether the original justification for the rules continues to exist.

The assessment by the department of Chapter 18 indicates that, with the exception of the amendments to §18.700 and §18.705, the reason for re-adopting without changes all remaining sections in Chapter 18 continues to exist.

TRD-201202372
Dolores Alvarado Hibbs
General Counsel
Texas Department of Agriculture
Filed: May 11, 2012

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Texas Historical Commission

Title 13, Part 2

The Texas Historical Commission (THC) adopts the review of Texas Administrative Code, Title 13, Part 2, Chapter 19, relating to the Texas Main Street Program. This review was completed pursuant to Texas Government Code §2001.039. The THC has assessed whether the reason(s) for adopting or re-adopting this chapter continues to exist. Each section of Chapter 19 was reviewed to determine whether it was obsolete, reflected current legal and policy considerations, reflected current general provisions in the governance of the THC, and/or whether it was in compliance with Chapter 2001 of the Texas Government Code (Administrative Procedure Act). The THC proposed the review of 13 TAC Chapter 19 in the March 2, 2012, issue of the *Texas Register* (37 TexReg 1517).

Relating to the review of 13 TAC Chapter 19, the THC finds the reasons for adopting Chapter 19 continue to exist and readopts the rules. The THC received no comments related to the review of Chapter 19. At a later date, the THC plans to propose revisions to clarify language in the administration of the program.

This concludes the review of 13 TAC Chapter 19.

TRD-201202430
Mark Wolfe
Executive Director
Texas Historical Commission
Filed: May 15, 2012

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Texas Board of Physical Therapy Examiners

Title 22, Part 16

The Texas Board of Physical Therapy Examiners (Board) adopts the rule review of the following chapters, pursuant to the Texas Government Code, §2001.039.

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 346. Practice Settings for Physical Therapy.

Chapter 347. Registration of Physical Therapy Facilities.

Elsewhere in this issue of the *Texas Register,* the Board concurrently adopts amendments to the following:

§329.1. General Licensure Requirements and Procedures.

§329.5. Licensing Procedures for Foreign-Trained Applicants.

§337.1. License and Renewal Certificate.

§341.1. Requirements for Renewal.

§347.5. Requirements for Registered Facilities.

§347.8. Change in Facility Ownership.

§347.9. Renewal of Registration.

§347.12. Restoration of Registration.

Additionally, the Board plans to propose changes to the following rules, after review by the Executive Council of Physical Therapy and Occupational Therapy Examiners:

§329.2. License by Examination.

§337.2. Consumer Information Sign.

§341.8. Inactive Status.

The proposed review was published in the February 24, 2012, issue of the *Texas Register* (37 TexReg 1366).

No comments were received regarding adoption of the review.

The agency's reason for adopting the rules contained in these chapters continues to exist.

This concludes the review of Chapters 321 - 323, 325, 327, 329, 335, 337, 339, 341 - 344, 346, and 347 by the Texas Board of Physical Therapy Examiners.

TRD-201202356
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Filed: May 9, 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: 40 TAC §92.551(d)

ADMINISTRATIVE PENALTY SCHEDULE	SMALL FACILITY (4-16 beds)		LARGE FACILITY (17+ beds)	
	Business entity owns one facility	Business entity owns multiple facilities	Business entity owns one facility	Business entity owns multiple facilities
§92.3. Types of Assisted Living Facilities	$300	$450	$500	$650
§92.4. License Fees	$300	$400	$500	$600
§92.11. Criteria for Licensing	$300	$450	$500	$650
§92.16. Change of Ownership	$300	$400	$500	$600
§92.18. Increase in Capacity	$300	$400	$500	$600
§92.41. Standards for Type A and Type B Assisted Living Facilities				
(a) employees	$350	$550	$750	$950
(b) social services	$200	$300	$400	$500
(c) resident assessment	$400	$550	$600	$750
(d) resident policies	$250	$350	$450	$550
(e) admission policies	$300	$400	$500	$600
(f) inappropriate placement in Type A or Type B facilities	$700	$800	$900	$1,000
(g) advance directives	$500	$500	$500	$500
(h) resident records	$200	$300	$400	$500
(i) personnel records	$200	$300	$400	$500
(j) medications	$400	$500	$600	$700
(k) accident, injury, or acute illness	$400	$500	$600	$700
(l) resident finances	$200	$300	$400	$500
(m) food and nutrition services	$400	$550	$700	$850
(n) infection control	$400	$550	$700	$850
(o) access to residents	$150	$200	$250	$300
(p) restraints	$700	$800	$900	$1,000
(q) accreditation status	$700	$800	$900	$1,000
§92.51. Licensure of Facilities for Persons with Alzheimer's Disease	$200	$300	$400	$500
§92.53. Standards for Certified Alzheimer's Assisted Living Facilities	$400	$500	$600	$700
§92.54. Advertisements, Solicitations, and Promotional Material	$250	$350	$450	$550
§92.61. Facility Construction-Introduction and Application	$300	$400	$500	$600
§92.62. General Requirements	$350	$450	$550	$650

ADMINISTRATIVE PENALTY SCHEDULE	SMALL FACILITY (4-16 beds)		LARGE FACILITY (17+ beds)	
	Business entity owns one facility	Business entity owns multiple facilities	Business entity owns one facility	Business entity owns multiple facilities
§92.81. Inspections and Surveys	$300	$400	$500	$600
§92.82. Determinations and Actions Pursuant to Inspections	$200	$300	$400	$500
§92.102. Abuse, Neglect, Exploitation Reportable to DADS by Facilities	$700	$800	$900	$1,000
§92.123. Investigation of Facility Employees	$450	$550	$650	$750
§92.125. Resident's Bill of Rights and Provider Bill of Rights				
(a) resident's bill of rights	--	--	--	--
(1) post and provide copy of bill	$100	$150	$200	$250
(2) right to exercise civil rights	$150	$200	$250	$300
(3) each resident has the right to:	--	--	--	--
(A) be free from physical, mental abuse, corporal punishment, physical, chemical restraints for discipline/convenience	$700	$800	$900	$1,000
(B) participate in activities	$150	$200	$250	$300
(C) religion of choice	$150	$200	$250	$300
(D) if MR, participate in behavior modification with guardian consent	$150	$200	$250	$300
(E)(i)-(iii) be treated with respect, consideration, dignity	$200	$250	$300	$350
(F) safe, decent living environment	$100	$150	$200	$250
(G) communicate in native language	$100	$150	$200	$250
(H) complain about care, treatment	$200	$250	$300	$350
(I) receive and send mail	$100	$150	$200	$250
(J) unrestricted communication	$150	$200	$250	$300
(K) make community contacts	$100	$150	$200	$250
(L) manage financial affairs	$100	$150	$200	$250
(M)(i)-(ii) access resident records	$100	$150	$200	$250
(N) choose physician and be informed about treatment and care	$100	$150	$200	$250

ADMINISTRATIVE PENALTY SCHEDULE	SMALL FACILITY (4-16 beds)		LARGE FACILITY (17+ beds)	
	Business entity owns one facility	Business entity owns multiple facilities	Business entity owns one facility	Business entity owns multiple facilities
(O) help develop individual service plan	$100	$150	$200	$250
(P)(i)-(ii) opportunity to refuse medical treatment or services	$100	$150	$200	$250
(Q) unaccompanied access to telephone	$100	$150	$200	$250
(R) privacy	$100	$150	$200	$250
(S) retain and use personal possessions	$100	$150	$200	$250
(T) determine personal preference in dress, hair style, personal effects	$100	$150	$200	$250
(U) retain and use personal property	$100	$150	$200	$250
(V) refuse to perform services	$100	$150	$200	$250
(W)(i)-(ii) be informed about Medicare, Medicaid, and covered items/services	$100	$150	$200	$250
(X)(i)-(v) not be transferred/discharged except under specific conditions	$300	$350	$400	$450
(Y)(i)-(v) not be transferred/discharged except in an emergency without specific written notice	$300	$350	$400	$450
(Z) leave facility temporarily or permanently	$100	$150	$200	$250
(AA) access the Ombudsman program	$100	$150	$200	$250
(BB) execute an advance directive or designate a guardian for decisions	$200	$250	$300	$350
§92.127. Required Posting	$250	$350	$450	$550
§92.129. Authorized Electronic Monitoring (AEM)	$100	$150	$200	$250
§§92.351-92.374. Emergency License Suspension and Closing Order	$150	$250	$350	$450
§§92.551-92.595. Administrative Penalties	$400	$500	$600	$700

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Office of 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 05/21/12 - 05/27/12 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 05/21/12 - 05/27/12 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-201202416
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: May 15, 2012

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Credit Union Department

Application for a Merger or Consolidation

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 First Priority Credit Union (Abilene) seeking approval to merge with Abilene Telco Federal Credit Union (Abilene), with First Priority Credit Union being the surviving 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. 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-201202437
Harold E. Feeney
Commissioner
Credit Union Department
Filed: May 16, 2012

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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 Beaumont Community Credit Union, Beaumont, 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-201202435
Harold E. Feeney
Commissioner
Credit Union Department
Filed: May 16, 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 - Denied

Texell Credit Union (#3), Temple, Texas - See *Texas Register* issue dated January 27, 2012.

Application to Expand Field of Membership - Approved

First Service Credit Union, Houston, Texas - See *Texas Register* issue dated February 24, 2012.

Texas Bay Area Credit Union, Pasadena, Texas - See *Texas Register* issue dated February 24, 2012.

TRD-201202436
Harold E. Feeney
Commissioner
Credit Union Department
Filed: May 16, 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 June 25, 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 require-

ments 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 June 25, 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: BERKELEY FIRST CITY, L.P. dba 1700 Pacific; DOCKET NUMBER: 2011-2215-PST-E; IDENTIFIER: RN102398898; 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 timely renew a previously issued TCEQ delivery certificate by submitting a properly completed underground storage tank (UST) registration and self-certification form within 30 days of 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; and 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the petroleum UST; PENALTY: $7,437; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Chemical Specialties, Incorporated dba Mineral Research and Development, A Division of Chemical Specialties, Incorporated; DOCKET NUMBER: 2012-0165-IWD-E; IDENTIFIER: RN101502128; LOCATION: Freeport, Brazoria County; TYPE OF FACILITY: inorganic chemical plant with an associated wastewater treatment facility; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0001878000, Effluent Limitations and Monitoring Requirements Number 1 for Outfall Number 001, by failing to comply with permitted effluent limits; PENALTY: $3,140; ENFORCEMENT COORDINATOR: Stephen Thompson, (512) 239-2558; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: City of Fort Worth; DOCKET NUMBER: 2011-2033-PST-E; IDENTIFIER: RN101444487; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: aircraft refueling; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(b) and (c)(1), by failing to monitor 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 proper release detection for the suction piping associated with the UST system; 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; and 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3467(a), by failing to make available to a common carrier, a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; PENALTY: $8,000; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(4) COMPANY: City of Huntsville; DOCKET NUMBER: 2012-0202-MWD-E; IDENTIFIER: RN101612471; LOCATION: Huntsville, Walker County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TWC, §26.121(a); Texas Pollutant Discharge Elimination System Number WQ0010781003, Permit Conditions 2.g. and 30 TAC §305.125(5), by failing to prevent unauthorized discharges from the collection system; PENALTY: $2,600; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5886; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: City of Magnolia; DOCKET NUMBER: 2012-0055-MWD-E; IDENTIFIER: RN101919769; LOCATION: Magnolia, Montgomery County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(17) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0014903001, Sludge Provisions, by failing to timely submit the annual sludge report for the monitoring period ending July 31, 2011; and 30 TAC §305.125(5) and TPDES Permit Number WQ0014903001, Operational Requirement Number 1, by failing to ensure that the facility and all of its systems of collection, treatment, and disposal are properly operated and maintained; PENALTY: $1,773; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5886; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(6) COMPANY: Comfort Country Store, Incorporated; DOCKET NUMBER: 2012-0205-PST-E; IDENTIFIER: RN103959391; LOCATION: Comfort, Kendall 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: David Carney, (512) 239-2583; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(7) COMPANY: Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints; DOCKET NUMBER: 2012-0219-PST-E; IDENTIFIER: RN100731199; LOCATION: Carrollton, Dallas County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.50(b)(2)(B)(i)(I) and TWC, §26.3475(b), by failing to provide release detection for the suction piping associated with the underground storage tank; PENALTY: $1,875; ENFORCEMENT COORDINATOR: Thomas Greimel, (512) 239-5690; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: Debbie Block dba Houseman Park; DOCKET NUMBER: 2012-0414-MLM-E; IDENTIFIER: RN101193571; LOCATION: Vidor, Orange County; TYPE OF FACILITY: public water supply and potable water; RULE VIOLATED: 30 TAC §290.46(m)(1)(B), by failing to inspect the facility's 3,000 gallon pressure tank annually; 30 TAC §290.41(c)(3)(N), by failing to provide the well with a flow measuring device to measure production yields and provide for the accumulation of water production data; 30 TAC §290.39(j)(1)(A) and Texas Health and Safety Code, §341.0351, by failing to notify the executive director prior to making any significant change or addition where the change in the existing distribution system results in an increase or decrease in production, treatment, storage, or pressure maintenance capacity; 30 TAC §290.51(b) and TWC, §5.702, by failing to pay all annual Public Health Service fees, for fiscal years 2007 - 2012, including any associated late fees and penalties, for TCEQ Financial Administration Account Numbers

91810023, 91810178, 91810018, 91810025, 91810062, 91810034, and 91810083; and 30 TAC §291.93(3)(A) and TWC, §13.139(d), by failing to provide a written planning report for a utility possessing a Certificate of Convenience and Necessity that has reached or exceeded 85% of all or part of its capacity; PENALTY: $279; ENFORCEMENT COORDINATOR: Andrea Linson, (512) 239-1482; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(9) COMPANY: F.T. WOODS CONSTRUCTION SERVICES, INCORPORATED; DOCKET NUMBER: 2011-2354-PST-E; IDENTIFIER: RN105058721; LOCATION: Georgetown, Williamson County; TYPE OF FACILITY: fleet refueling; RULE VIOLATED: 30 TAC §334.7(a)(1), §334.8(c)(4)(A)(vi)(II) and (vii) and (5)(B)(ii), by failing to obtain an underground storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form no later than 30 days after the respondent began operating the facility; 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; 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 by failing to provide release detection for the piping associated with the UST; PENALTY: $8,895; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5886; REGIONAL OFFICE: 12100 Park 35 Circle, Building A, Austin, Texas 78753-1808, (512) 339-2929.

(10) COMPANY: GSC ENTERPRISES, INCORPORATED dba Grocery Supply; DOCKET NUMBER: 2012-0090-PST-E; IDENTIFIER: RN103011987; LOCATION: Sulphur Springs, Hopkins County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide proper release detection for the product piping associated with the underground storage tank system; PENALTY: $3,880; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(11) COMPANY: IMRAN INVESTMENTS, INCORPORATED dba Pay & Save; DOCKET NUMBER: 2012-0127-PST-E; IDENTIFIER: RN102236866; LOCATION: Dickinson, Galveston 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 §115.248(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; 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 §115.242(3) and THSC, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition, as specified by the manufacturer and/or any applicable California Air Resources Board Executive Order, and free of defects that would impair the effectiveness of the system; PENALTY: $5,306; ENFORCEMENT COORDINATOR: Clinton Sims, (512) 239-6933; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(12) COMPANY: JACINTO ENTERPRISES, INCORPORATED dba Siesta Grocery; DOCKET NUMBER: 2011-2203-PST-E; IDENTIFIER: RN102957941; LOCATION: Eagle Pass, Maverick 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 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 proper release detection for the pressurized piping associated with the UST system; PENALTY: $2,180; ENFORCEMENT COORDINATOR: Jeremy Escobar, (361) 825-3422; REGIONAL OFFICE: 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(13) COMPANY: Jacob Dyck Wieler dba Hefty Trailer Manufacturing and Sales; DOCKET NUMBER: 2011-2306-AIR-E; IDENTIFIER: RN106108384; LOCATION: Petty, Lamar County; TYPE OF FACILITY: trailer manufacturing and coating plant; RULE VIOLATED: 30 TAC §116.110(a) and Texas Health and Safety Code, §382.085(b) and §382.0518(a), by failing to obtain authorization prior to beginning surface coating operations; PENALTY: $3,150; ENFORCEMENT COORDINATOR: Amancio R. Gutierrez, (512) 239-3921; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(14) COMPANY: Jiva Corporation, Incorporated dba Primo Food Mart; DOCKET NUMBER: 2012-0262-PST-E; IDENTIFIER: RN102782356; 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 tank for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $1,975; ENFORCEMENT COORDINATOR: Rebecca Johnson, (361) 825-3423; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(15) COMPANY: LTT & HK INVESTMENTS, L.L.P. dba Dry Clean Super Center; DOCKET NUMBER: 2012-0052-DCL-E; IDENTIFIER: RN103962510; LOCATION: Cypress, Harris County; TYPE OF FACILITY: dry cleaner; RULE VIOLATED: 30 TAC §337.11(e) and Texas Health and Safety Code, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form to the TCEQ for a dry cleaning facility; 30 TAC §337.20(e)(3)(A), by failing to install a dike or other secondary containment structure around each dry cleaning unit and around each storage area for dry cleaning solvents, dry cleaning waste, or dry cleaning wastewater; and 30 TAC §337.20(e)(6)(B), by failing to maintain weekly inspection logs of each secondary containment structure at the facility to ensure that it has not been damaged; PENALTY: $3,775; ENFORCEMENT COORDINATOR: Philip Aldridge, (512) 239-0855; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(16) COMPANY: MAKARA ENTERPRISE, L.P. dba T & M Commerce Beer & Wine; DOCKET NUMBER: 2011-1277-PST-E; IDENTIFIER: RN102717980; LOCATION: Commerce, Hunt 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: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(17) COMPANY: MANILA CORPORATION dba Best Food Market 3; DOCKET NUMBER: 2012-0430-PST-E; IDENTIFIER: RN102795028; LOCATION: Houston, Harris 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 §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $4,500; ENFORCEMENT COORDINATOR: Steven Van Landingham, (512) 239-5717; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: Mukhi Petroleum LLC dba C Store Sub Express; DOCKET NUMBER: 2012-0117-PST-E; IDENTIFIER: RN102014354; LOCATION: Fort Worth, 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 tank for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,750; ENFORCEMENT COORDINATOR: Philip Aldridge, (512) 239-0855; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(19) COMPANY: NEW SARR CORPORATION dba J's Q MART; DOCKET NUMBER: 2010-1890-PST-E; IDENTIFIER: RN101552917; LOCATION: Hurst, Tarrant County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.49(c)(2)(C) and (4) and TWC, §26.3475(d), by failing to inspect the impressed current cathodic protection system at least once every 60 days to ensure that the rectifier and other system components are operating properly and by failing to have the cathodic protection system inspected and tested for operability and adequacy of protection at a frequency of at least once every three years; 30 TAC §334.50(b) and TWC, §26.3475(c)(1), by failing to provide proper release detection for the pressurized piping associated with the underground storage tanks (USTs); 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.50(b)(2)(A)(i)(III) and TWC, §26.3475(a), by failing to test the line leak detectors at least once per year for performance and operational reliability; 30 TAC §334.50(d)(1)(B)(ii) and TWC, §26.3475(c)(1), by failing to conduct reconciliation of inventory control at least once each month, sufficiently accurate to detect a release which equals or exceeds the sum of 1.0% of the total substance flow-through for the month plus 130 gallons; 30 TAC §334.50(d)(1)(B)(iii)(I) and TWC, §26.3475(c)(1), by failing to conduct inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; 30 TAC §334.42(i), by failing to inspect all sumps, manways, overspill containers or catchment basins associated with a UST system at least once every 60 days to assure that their sides, bottoms, and any penetration points are maintained liquid-tight, and free of liquid or debris; 30 TAC §115.244(1) and Texas Health and Safety Code (THSC), §382.085(b), by failing to conduct daily inspections of the Stage II vapor recovery system; and 30 TAC §115.246(1) and THSC, §382.085(b), by failing to maintain a copy of the California Air Resources Board Executive Order for the Stage II vapor recovery system and any related components installed at the station; PENALTY: $9,197; ENFORCEMENT COORDINATOR: Brianna Carlson, (956) 430-6021; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(20) COMPANY: Pecan Plantation Owners Association, Incorporated; DOCKET NUMBER: 2012-0144-WR-E; IDENTIFIER: RN106282841; LOCATION: Granbury, Hood County; TYPE OF FACILITY: golf course; RULE VIOLATED: TWC, §11.121 and 30 TAC §297.11, by failing to obtain authorization prior to impounding, diverting, or using state water; PENALTY: $250; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5886; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(21) COMPANY: Ray Rocha dba Paradise Point RV Marina; DOCKET NUMBER: 2011-2038-PST-E; IDENTIFIER: RN101910032; LOCATION: Hemphill, Sabine County; TYPE OF FACILITY: retail convenience; 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 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; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the petroleum UST; 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 by failing to provide release detection for the piping associated with the UST; 30 TAC §334.10(b), by failing to maintain UST records and making them immediately available for inspection upon request by agency personnel; and 30 TAC §334.49(a)(1) and TWC, §26.3475(d), by failing to provide proper corrosion protection for the UST system; PENALTY: $12,714; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(22) COMPANY: Roman C-Store, Incorporated dba Red Mart; DOCKET NUMBER: 2011-2131-PST-E; IDENTIFIER: RN102488202; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: convenience store with retail gasoline sales; RULE VIOLATED: TWC, §26.3475(d) and 30 TAC §334.49(a)(1), by failing to provide corrosion protection for the underground storage tank (UST) system; and 30 TAC §334.10(b)(1)(B), by failing to maintain UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $2,945; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(23) COMPANY: SAHAR ENTERPRISES, INCORPORATED dba Amber Food Mart; DOCKET NUMBER: 2012-0161-PST-E; IDENTIFIER: RN102965191; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide proper release detection for the piping associated with the underground storage tanks; PENALTY: $4,179; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(24) COMPANY: Samira Incorporated dba Rajs Mart; DOCKET NUMBER: 2011-2294-PST-E; IDENTIFIER: RN102059326; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once per month (not to exceed 35 days between each monitoring) and by failing to provide proper release detection for the piping associated with the UST system; PENALTY: $2,679; ENFORCEMENT COORDINATOR: David Carney, (512) 239-2583;

REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(25) COMPANY: SIRA C-STORE, INCORPORATED dba Houston C Store; DOCKET NUMBER: 2011-1496-PST-E; IDENTIFIER: RN100889047; 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 tank for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,250; ENFORCEMENT COORDINATOR: Andrea Park, (512) 239-4575; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(26) COMPANY: Texas Community Bank National Association; DOCKET NUMBER: 2012-0238-EAQ-E; IDENTIFIER: RN104476221; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: residential development; RULE VIOLATED: 30 TAC §213.4(k) and Edwards Aquifer Plan Number 2268.00, Standard Conditions 15, by failing to maintain the approved best management practices and measures to prevent pollutants from entering sensitive features located within the Edwards Aquifer Recharge Zone; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Jeremy Escobar, (361) 825-3422; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(27) COMPANY: UHS of Texoma, Incorporated; DOCKET NUMBER: 2012-0031-PST-E; IDENTIFIER: RN100571397; LOCATION: Denison, Grayson County; TYPE OF FACILITY: property with an underground storage tank (UST); RULE VIOLATED: 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 by failing to provide release detection for the piping associated with the UST; PENALTY: $2,250; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(28) COMPANY: Union Carbide Corporation; DOCKET NUMBER: 2011-2024-AIR-E; IDENTIFIER: RN100219351; LOCATION: Texas City, Galveston County; TYPE OF FACILITY: petroleum manufacturing; RULE VIOLATED: 30 TAC §122.143(4), Texas Health and Safety Code, §382.085(b), and Federal Operating Permit Number O1921, Special Terms and Conditions Number 11, and Standard Exemption Number 8, by failing to prevent unauthorized emissions; PENALTY: $11,550; Supplemental Environmental Project offset amount of $4,620 applied to Houston - Galveston Area Emission Reduction Credit Organization's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3553; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(29) COMPANY: Vance Jackson Retail, LLC dba Big Star Food Mart; DOCKET NUMBER: 2011-2053-PST-E; IDENTIFIER: RN102352788; LOCATION: San Antonio, Bexar 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; 30 TAC §334.50(b)(1)(A) and (2), and TWC, §26.3475(a) and (c)(1), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and by failing to provide proper release detection for the piping associated with the USTs; and 30 TAC §334.10(b), by failing to maintain UST records and making them immediately available for inspection upon request by agency personnel; PENALTY: $9,729; ENFORCEMENT COORDINATOR: Lanae Foard, (512) 239-2554; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(30) COMPANY: Victron Stores, L.P. dba Mikes Mini Market; DOCKET NUMBER: 2012-0025-PST-E; IDENTIFIER: RN101569770; LOCATION: Glenn Heights, Ellis County; TYPE OF FACILITY: convenience store with retail gasoline sales; RULE VIOLATED: TWC, §26.3475(d) and 30 TAC §334.49(a)(1), by failing provide proper corrosion protection for the underground storage tank system; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-201202415
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 15, 2012

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Enforcement Orders

An agreed order was entered regarding PETROPARK FUEL & FOOD INC. dba Petropark Food Mart, Docket No. 2011-0372-PST-E on April 26, 2012 assessing $4,500 in administrative penalties with $900 deferred.

Information concerning any aspect of this order may be obtained by contacting Bridget Lee, Enforcement Coordinator at (512) 239-2565, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding S.S.G. FUEL SERVICE, INC. dba King Shell, Docket No. 2011-1026-PST-E on April 26, 2012 assessing $6,500 in administrative penalties with $1,300 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Meyer, Enforcement Coordinator at (512) 239-4492, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding WEST CHIMNEY ENTERPRISES, INC dba Westheimer & Chimney Rock Chevron, Docket No. 2011-1075-PST-E on April 26, 2012 assessing $4,629 in administrative penalties with $925 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 SKSB Corporation dba Hill Town Beverage 2, Docket No. 2011-1079-PST-E on April 26, 2012 assessing $3,850 in administrative penalties with $770 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 Sam's East, Inc. dba Sam's Club 8210, Docket No. 2011-1150-PST-E on April 26, 2012 assessing $750 in administrative penalties with $150 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 ZNY Enterprises, Inc. dba ZNY Mart, Docket No. 2011-1176-PST-E on April 26, 2012 assessing $3,570 in administrative penalties with $714 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 BUENA VISTA WATER SUPPLY CORPORATION, Docket No. 2011-1245-PWS-E on April 26, 2012 assessing $4,289 in administrative penalties with $857 deferred.

Information concerning any aspect of this order may be obtained by contacting Bridget Lee, Enforcement Coordinator at (512) 239-2565, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BUSHRA CORPORATION dba Tiger Mart 5, Docket No. 2011-1304-PST-E on April 26, 2012 assessing $4,250 in administrative penalties with $850 deferred.

Information concerning any aspect of this order may be obtained by contacting Bridget Lee, Enforcement Coordinator at (512) 239-2565, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TEXAS AUTO SALVAGE, INC., Docket No. 2011-1349-IHW-E on April 26, 2012 assessing $3,570 in administrative penalties with $714 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 MAHESH INVESTMENTS-LAKE FORK, L.L.C., Docket No. 2011-1376-MWD-E on April 26, 2012 assessing $570 in administrative penalties with $114 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 Doyle W. Foster dba Weir Country Store, Docket No. 2011-1384-PST-E on April 26, 2012 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Theresa Stephens, 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 City of Levelland, Docket No. 2011-1411-MSW-E on April 26, 2012 assessing $2,950 in administrative penalties with $590 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Meyer, Enforcement Coordinator at (512) 239-4492, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Warren Water Supply Corporation, Docket No. 2011-1428-PWS-E on April 26, 2012 assessing $2,075 in administrative penalties with $415 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 Bahram Solhjou, Docket No. 2011-1430-MWD-E on April 26, 2012 assessing $3,528 in administrative penalties with $705 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 REEYAN BUSINESS, INC. dba Country Food Mart, Docket No. 2011-1439-PST-E on April 26, 2012 assessing $4,000 in administrative penalties with $800 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Eola Water Supply Corporation, Docket No. 2011-1451-MLM-E on April 26, 2012 assessing $2,225 in administrative penalties with $445 deferred.

Information concerning any aspect of this order may be obtained by contacting Andrea Linson, 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 Hudson Products Corporation, Docket No. 2011-1480-AIR-E on April 26, 2012 assessing $5,180 in administrative penalties with $1,036 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Podlipny, Enforcement Coordinator at (512) 239-2603, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Lone Star Ready-Mix, LP, Docket No. 2011-1489-MLM-E on April 26, 2012 assessing $4,900 in administrative penalties with $980 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 DJ GROUP, LLC dba Handi Stop 105 Docket No. 2011-1504-PST-E on April 26, 2012 assessing $2,175 in administrative penalties with $435 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 Tarrant County, Docket No. 2011-1514-AIR-E on April 26, 2012 assessing $6,000 in administrative penalties with $1,200 deferred.

Information concerning any aspect of this order may be obtained by contacting Raymond Marlow, P.G., Enforcement Coordinator at (409) 899-8785, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Roy Wayne Smith dba Smiths First and Last Chance Tire Repair, Docket No. 2011-1559-MSW-E on April 26, 2012 assessing $2,750 in administrative penalties with $550 deferred.

Information concerning any aspect of this order may be obtained by contacting Wallace Myers, Enforcement Coordinator at (512) 239-6580, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Creekbend Retailers, LLC dba Welcome Food Mart, Docket No. 2011-1574-PST-E on April 26, 2012 assessing $2,550 in administrative penalties with $510 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding JAI SHREE OM CORPORATION dba Scotties Van, Docket No. 2011-1578-PST-E on April 26, 2012 assessing $4,500 in administrative penalties with $900 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 ADDISON ENTERPRISES INC. dba Atwell 66, Docket No. 2011-1579-PST-E on April 26, 2012 assessing $3,100 in administrative penalties with $620 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 Blinn College, Docket No. 2011-1592-PST-E on April 26, 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 John Theodosiou dba Clay Road Texaco, Docket No. 2011-1603-PST-E on April 26, 2012 assessing $5,208 in administrative penalties with $1,041 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding D.N.D. CORPORATION dba Quick Stop Food Mart, Docket No. 2011-1632-PST-E on April 26, 2012 assessing $3,500 in administrative penalties with $700 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 Nueces County Water Control and Improvement District No. 3, Docket No. 2011-1645-MLM-E on April 26, 2012 assessing $3,503 in administrative penalties with $700 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 WE-2 ENTERPRISES INC. dba Super Stop, Docket No. 2011-1661-PST-E on April 26, 2012 assessing $2,600 in administrative penalties with $520 deferred.

Information concerning any aspect of this order may be obtained by contacting Theresa Stephens, 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 E.Z. GOOD INC. dba 7 Days Food Store, Docket No. 2011-1690-PST-E on April 26, 2012 assessing $2,629 in administrative penalties with $525 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 BFI WASTE SERVICES OF TEXAS, LP, Docket No. 2011-1698-PST-E on April 26, 2012 assessing $4,738 in administrative penalties with $947 deferred.

Information concerning any aspect of this order may be obtained by contacting Michael Meyer, Enforcement Coordinator at (512) 239-4492, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Crosstex North Texas Gathering, L.P., Docket No. 2011-1727-AIR-E on April 26, 2012 assessing $6,475 in administrative penalties with $1,295 deferred.

Information concerning any aspect of this order may be obtained by contacting Roshondra Lowe, Enforcement Coordinator at (713) 767-3553, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding INEOS Styrenics LLC, Docket No. 2011-1775-AIR-E on April 26, 2012 assessing $4,966 in administrative penalties with $993 deferred.

Information concerning any aspect of this order may be obtained by contacting Heather Podlipny, Enforcement Coordinator at (512) 239-2603, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding GRANDE BUTANE COMPANY, INC., Docket No. 2011-1784-MSW-E on April 26, 2012 assessing $3,750 in administrative penalties with $750 deferred.

Information concerning any aspect of this order may be obtained by contacting Theresa Stephens, 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 NEUTZE PROPERTIES, LTD. dba Peter Rabbits Fast Foods 109, Docket No. 2011-1827-PST-E on April 26, 2012 assessing $2,500 in administrative penalties with $500 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 Texas A&M University, Docket No. 2011-1832-MWD-E on April 26, 2012 assessing $2,403 in administrative penalties with $480 deferred.

Information concerning any aspect of this order may be obtained by contacting Jill Russell, Enforcement Coordinator at (512) 239-4564, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding JATIN ENTERPRISES, INC. dba Kwik N Easy Food Store, Docket No. 2011-1908-PST-E on April 26, 2012 assessing $5,027 in administrative penalties with $1,005 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 GARY W. PURSER CONSTRUCTION, LTD., Docket No. 2011-1931-WQ-E on April 26, 2012 assessing $2,500 in administrative penalties with $500 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 The Bitter Creek Water Supply Corporation, Docket No. 2011-2025-PWS-E on April 26, 2012 assessing $272 in administrative penalties with $54 deferred.

Information concerning any aspect of this order may be obtained by contacting Stephen Thompson, Enforcement Coordinator at (512) 239-2558, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding BENIKS CORPORATION dba Arapaho Fina, Docket No. 2011-2081-PST-E on April 26, 2012 assessing $1,625 in administrative penalties with $325 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.

TRD-201202443
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 16, 2012

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Notice of Correction to Agreed Order Number 19

In the May 4, 2012, issue of the *Texas Register* (37 TexReg 3445), the Texas Commission on Environmental Quality (commission) published a notice of an Agreed Order Number, specifically item Number 19. The reference to Motiva Enterprises LLC has been revised. The reference now includes a Supplemental Environmental Project offset amount of $4,025 applied to Southeast Texas Regional Planning Commission - West Port Arthur Home Energy Efficiency Program.

For questions concerning this error, please contact Debra Barber at (512) 239-0412.

TRD-201202414
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 15, 2012

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **June 25, 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 A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on June 25, 2012.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, TWC, §7.075 provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: Alief Petroleum, LP d/b/a Market Shell; DOCKET NUMBER: 2011-1969-PST-E; TCEQ ID NUMBER: RN102381928; LOCATION: 11037 Market Street Road, Jacinto City, Harris County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); TWC, §26.3475(a) and 30 TAC §334.50(b)(2), by failing to provide proper release detection for the product piping associated with the UST system; and 30 TAC §334.10(b), by failing to maintain legible copies of all required records pertaining to the UST system and make them available for inspection by agency personnel; PENALTY: $3,699; STAFF ATTORNEY: Joel Cordero, Litigation Division, MC 175, (512) 239-0672; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(2) COMPANY: Effective Environmental, Inc.; DOCKET NUMBER: 2011-0348-MLM-E; TCEQ ID NUMBER: RN100567841; LOCATION: 1809 Jester Drive, Corsicana, Navarro County; TYPE OF FACILITY: solvent recycling facility; RULES VIOLATED: 30 TAC §330.9(a), by failing to obtain authorization prior to allowing or permitting any activity of storage of any municipal solid waste (MSW); 30 TAC §335.69(a)(2) and 40 Code of Federal Regulations (CFR) §262.34(a)(2), by failing to clearly mark accumulation start dates on each waste container; 30 TAC §335.69(a)(4)(A) and 40 CFR §265.52 and §265.53, by failing to maintain a compliant copy of the contingency plan and emergency procedures at the facility and make it available for inspection upon request by agency personnel; 30 TAC §335.6(c), by failing to update the facility's Notice of Registration; and 30 TAC §281.25(a)(4) and 40 CFR §122.26(a)(1)(ii), by failing to obtain authorization for storm water discharges associated with industrial activity; PENALTY: $16,375, Supplemental Environmental Project offset amount of $8,187 applied to Texas Association of Resource Conservation and Development Areas, Inc. - Water or Wastewater Treatment Assistance; STAFF ATTORNEY: Tammy Mitchell, Litigation Division, MC 175, (512) 239-0736; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: JARRATT DIRT WORK AND PAVING, INC., MID-TEX OF MIDLAND, INC., and Nathan W. Moon; DOCKET

NUMBER: 2011-1546-MSW-E; TCEQ ID NUMBER: RN106186638; LOCATION: Farm-to-Market Road 1216, 2.25 miles northeast of the intersection of Highway 285 and Farm-to-Market Road 1216, Pecos County; TYPE OF FACILITY: property involving the management and/or disposal of municipal solid waste (MSW); RULES VIOLATED: 3o TAC §330.7 and §330.15(c), by failing to prevent the unauthorized disposal of MSW; PENALTY: $1,000; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Midland Regional Office, 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5406, (432) 570-1359.

(4) COMPANY: JIND INTERESTS LLC d/b/a Yours Citgo Mart; DOCKET NUMBER: 2011-1870-PST-E; TCEQ ID NUMBER: RN105171110; LOCATION: 4430 West Orem Drive, Houston, Harris County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.7(d)(3) and §334.8(c)(4)(A)(vii) and (C), by failing to renew the UST delivery certificate and notify the agency of any change or additional information regarding the UST system within 30 days after change in ownership of the facility; 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 regulated substance into the USTs; 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of the petroleum USTs; and 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the 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 pressurized piping associated with the USTs; PENALTY: $11,715; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(5) COMPANY: Robert R. O'Neal; DOCKET NUMBER: 2011-1716-PWS-E; TCEQ ID NUMBER: RN101217412; LOCATION: 8684 Louetta Road, Houston, Harris County; TYPE OF FACILITY: public water system; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B), by failing to collect routine distribution water samples for coliform analysis for the months of December 2010 and January - July 2011 and by failing to provide notification of the failure to collect routine samples for the months of December 2010 and January - April 2011; PENALTY: $2,442; STAFF ATTORNEY: Sharesa Y. Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(6) COMPANY: TEXAS BLUE STAR ENTERPRISES, INC. d/b/a Howard Food Mart; DOCKET NUMBER: 2011-1939-PST-E; TCEQ ID NUMBER: RN102369691; LOCATION: 8003 Howard Drive, Houston, Harris County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $5,100; STAFF ATTORNEY: Joel Cordero, Litigation Division, MC 175, (512) 239-0672; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(7) COMPANY: TRISTAR CONVENIENCE STORES, INC. DBA Handi Stop 62; DOCKET NUMBER: 2011-0978-PST-E; TCEQ ID NUMBER: RN102448321; LOCATION: 6275 West Airport Boulevard, Houston, Harris County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §37.815(a) and (b), by failing to demonstrate acceptable financial assurance for taking corrective action and compensating third parties for bodily injury and property damage caused by accidental releases arising from the operation of petroleum USTs; TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); 30 TAC §334.72, by failing to report a suspected release to the TCEQ within 24 hours of discovery; 30 TAC §334.74, by failing to investigate a suspected release within 30 days of discovery; 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: $30,780; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-201202418
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 15, 2012

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075 this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **June 25, 2012.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on June 25, 2012.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Construction Waste Recycler of Texas L.L.C.; DOCKET NUMBER: 2011-1095-MSW-E; TCEQ ID NUMBER: RN106155161; LOCATION: 12027 Buckner Road, Austin, Travis County; TYPE OF FACILITY: recycling facility; RULES VIOLATED: 30 TAC §328.5(b), by failing to provide to the executive director a completed Notice of Intent to operate a recycling facility prior to the commencement of new operations; PENALTY: $3,000; STAFF ATTORNEY: Jeff Huhn, Litigation Division, MC R-13, (210) 403-4023; REGIONAL OFFICE: Austin Regional Office, Post Office Box 13087, MC R-11, Austin, Texas 78711, (512) 339-2929.

(2) COMPANY: Gordon Dean Rogers; DOCKET NUMBER: 2011-0786-MWD-E; TCEQ ID NUMBER: RN101611390; LOCATION: approximately 500 feet southeast of the intersection of State Highway 147 and Farm-to-Market Road 3123, and approximately 5.9 miles northeast of the intersection of State Highway 63 and State Highway 147, Angelina County; TYPE OF FACILITY: wastewater treatment plant; RULES VIOLATED: 30 TAC §305.125(1) and (17), and §319.7(d), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0014693001, Monitoring and Reporting Requirements Number 1, by failing to submit monitoring results at the intervals specified in the permit; 30 TAC §30.350(d) and §305.125(1), and TPDES Permit Number WQ0014693001, Other Requirements Number 1, by failing to employ or contract a wastewater treatment facility operator holding the appropriate level of license; 30 TAC §305.125(1) and (5), and TPDES Permit Number WQ0014693001, Operational Requirements Number 1, by failing to properly operate and maintain all facilities and systems of treatment and control; 30 TAC §305.125(1) and (11)(a) and §319.4, and TPDES Permit Number WQ0014693001, Monitoring and Reporting Requirements Number 3.a., by failing to collect and analyze samples for chlorine residual, pH, and dissolved oxygen for the monitoring periods ending June 30, 2010 - May 31, 2011; 30 TAC §305.125(1) and TPDES Permit Number WQ0014693001, Monitoring and Reporting Requirements Number 3.b., by failing to have sludge records, for at least a five year period, available for review; 30 TAC §305.125(1) and (5), and TPDES Permit Number WQ0014693001, Operational Requirements Number 1, by failing to properly operate and maintain all facilities and systems of treatment and control; and 30 TAC §305.125(1) and §319.11(d), and TPDES Permit Number WQ0014693001, Monitoring and Reporting Requirements Number 1, by failing to provide accurate flow measurements that conform to those prescribed in the Water Measurements Manual, United States Department of the Interior Bureau of Reclamation, Washington D.C., or methods that are equivalent as provided by the executive director; PENALTY: $46,274; STAFF ATTORNEY: Xavier Guerra, Litigation Division, MC R-13, (210) 403-4016; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(3) COMPANY: James Barnes; DOCKET NUMBER: 2011-2039-MSW-E; TCEQ ID NUMBER: RN105777693; LOCATION: approximately 2,500 feet (0.47 miles) southeast of the intersection of County Roads 332 and 336 (Reeves County Appraisal District ID Number R000013422), Pecos, Reeves County; TYPE OF FACILITY: unauthorized tire storage site; RULES VIOLATED: 30 TAC §328.60(a), by failing to obtain a scrap tire storage site registration prior to storing more than 500 used or scrap tires (or weight equivalent tire pieces or any combination thereof) on the ground or 2,000 used or scrap tires (or weight equivalent tire pieces or any combination thereof) in enclosed and lockable containers; PENALTY: $7,875; STAFF ATTORNEY: Phillip Goodwin, Litigation Division, MC 175, (512) 239-0675; REGIONAL OFFICE: Midland Regional Office, 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5406, (432) 570-1359.

(4) COMPANY: Marcial Hernandez; DOCKET NUMBER: 2011-2064-LII-E; TCEQ ID NUMBER: RN106238207; LOCATION: 2026 Harland Drive, Houston, Harris County; TYPE OF FACILITY: landscaping business; RULES VIOLATED: TWC, §37.003, Texas Occupational Code, §1903.251, and 30 TAC §30.5(a) and §344.30(a)(1), by failing to obtain an irrigator license prior to installing an irrigation system; PENALTY: $745; STAFF ATTORNEY: Mike Fishburn, Litigation Division, MC 175, (512) 239-0635; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(5) COMPANY: Marine Quest - Hidden Cove, L.P.; DOCKET NUMBER: 2011-1955-MWD-E; TCEQ ID NUMBER: RN102094950; LOCATION: approximately 1.75 miles south of Farm-to-Market Road 720 and approximately three miles west of Farm-to-Market Road 423, Denton County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0013785001, Effluent Limitations and Monitoring Requirements Numbers 1 and 2, by failing to comply with permitted effluent limitations; 30 TAC §305.125(1) and (17) and TPDES Permit Number WQ0013785001, Sludge Provisions, by failing to timely submit the annual sludge report for the monitoring period ending July 31, 2010, by September 1, 2010; and 30 TAC §305.125(1) and (17) and TPDES Permit Number WQ0013785001, Monitoring and Reporting Requirements Number 1, by failing to submit results at the intervals specified in the permit; PENALTY: $8,484; STAFF ATTORNEY: Rudy Calderon, Litigation Division, MC 175, (512) 239-0205; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Preston Julian; DOCKET NUMBER: 2011-0559-PST-E; TCEQ ID NUMBER: RN102046133; LOCATION: 3333 Raleigh Street, Houston, Harris County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, a UST system for which any applicable component of the system is not brought into timely compliance with the upgrade requirements; PENALTY: $5,250; STAFF ATTORNEY: Sharesa Y. Alexander, Litigation Division, MC 175, (512) 239-3503; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-201202419
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 15, 2012

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Notice of Opportunity to Comment on Shutdown/Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Shutdown/Default Orders (S/DOs). Texas Water Code (TWC), §26.3475 authorizes the commission to order the shutdown of any underground storage tank (UST) system found to be noncompliant with release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection regulations of the commission, until such time as the owner/operator brings the UST system into compliance with those regulations. The commission proposes a Shutdown Order after the owner or operator of a UST facility fails to perform required corrective actions within 30 days after receiving notice of the release detection, spill and overfill prevention, and/or, after December 22, 1998, cathodic protection violations documented at the facility. The

commission proposes a Default Order when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; and the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. In accordance with TWC, §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **June 25, 2012.** The commission will consider any written comments received and the commission may withdraw or withhold approval of a S/DO if a comment discloses facts or considerations that indicate that consent to the proposed S/DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed S/DO is not required to be published if those changes are made in response to written comments.

Copies of each of the proposed S/DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the S/DO shall be sent to the attorney designated for the S/DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on June 25, 2012.** Written comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission attorneys are available to discuss the S/DOs and/or the comment procedure at the listed phone numbers; however, comments on the S/DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Sky Business, Inc. d/b/a Bryan Drive In; DOCKET NUMBER: 2011-1925-PST-E; TCEQ ID NUMBER: RN102274537; LOCATION: 1501 Groesbeck Street, Bryan, Brazos County; TYPE OF FACILITY: UST system and a convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued UST delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; TWC, §26.3467(a) and 30 TAC §334.8(c)(5)(A)(i), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the USTs; and TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $9,211; STAFF ATTORNEY: Anna Treadwell, Litigation Division, MC 175, (512) 239-0974; REGIONAL OFFICE: Waco Regional Office, 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(2) COMPANY: TRISTAR CONVENIENCE STORE, INC. DBA Handi Stop 75; DOCKET NUMBER: 2011-1241-PST-E; TCEQ ID NUMBER: RN102446218; LOCATION: 3543 Oak Forest Drive, Houston, Harris County; TYPE OF FACILITY: UST system and a convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(a) and (c)(1) and 30 TAC §334.50(b)(1)(A) and (2), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring), and by failing to provide release detection for the piping associated with the UST system; PENALTY: $2,679; STAFF ATTORNEY: Jim Sallans, Litigation Division, MC 175, (512) 239-2053; REGIONAL OFFICE: Houston Regional Office, 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-201202420
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: May 15, 2012

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Notice of Receipt of Application and Intent to Obtain a Municipal Solid Waste Permit Amendment

Permit No. 363A

APPLICATION. City of Amherst Landfill, P.O. Box 518, Amherst, Lamb County, Texas 79312, a municipal solid waste landfill, has applied to the Texas Commission on Environmental Quality (TCEQ) for a Type IV Arid Exempt (AE) permit major amendment to authorize a landfill height increase. The facility is located approximately 0.4 miles east of Amherst and 0.3 miles north of Farm to Market Road 37, in Amherst, Lamb County, Texas 79312. The TCEQ received the application on March 12, 2012. The permit application is available for viewing and copying at Amherst City Hall, 1011 Main Street, Amherst, Lamb County, Texas 79312. The following link to an electronic map of the site or facility's general location is provided as a public courtesy and is not part of the application or notice: http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=34.013611&lng=-102.401111&zoom=13&type=r. For exact location, refer to application.

ADDITIONAL NOTICE. TCEQ's Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments. Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director's decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director's decision and for requesting a contested case hearing. A person who may be affected by the facility is entitled to request a contested case hearing from the commission. A contested case hearing is a legal proceeding similar to a civil trial in state district court.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, address, phone number; applicant's name and permit number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected

by the facility in a way not common to the general public; and the statement "[I/we] request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose. Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. The Commission will only grant a contested case hearing on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised in timely filed comments that were not subsequently withdrawn.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. To be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION. All public comments and requests must be submitted either electronically at www.tceq.texas.gov/about/comments.html or in writing to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087. If you choose to communicate with the TCEQ electronically, please be aware that your email address, like your physical mailing address, will become part of the agency's public record. For more information about this permit application or the permitting process, please call the TCEQ's Public Education Program, toll free, at 1-800-687-4040. Si desea información en español, puede llamar al 1-800-687-4040. Further information may also be obtained from City of Amherst Landfill at the address stated above or by calling Travis M. McCoy, P.E., Consultant, Parkhill, Smith, & Cooper, Inc., at (806) 473-2200.

TRD-201202441
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 16, 2012

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Notice of Receipt of Application and Intent to Obtain a Municipal Solid Waste Permit Amendment

Proposed Permit No. 358B

APPLICATION. City of Arlington, City Hall, 101 West Abram Street 2nd Floor, Arlington, Tarrant County, Texas 76010-7102, has applied to the Texas Commission on Environmental Quality (TCEQ) for a Type I MSW permit major amendment to authorize the lateral and vertical expansion of the landfill. The facility is located at 800 Mosier Valley Road, Arlington, Tarrant County, Texas 76040. The TCEQ received the application on March 20, 2012. The permit application is available for viewing and copying at the Arlington Public Library, 1905 Brown Boulevard, Arlington, Tarrant County, Texas 76006-4605. The following link to an electronic map of the site or facility's general location is provided as a public courtesy and is not part of the application or notice: http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=32.8&lng=-97.108333&zoom=13&type=r. For exact location, refer to application.

ADDITIONAL NOTICE. TCEQ's Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments. Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director's decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director's decision and for requesting a contested case hearing. A person who may be affected by the facility is entitled to request a contested case hearing from the commission. A contested case hearing is a legal proceeding similar to a civil trial in state district court.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, address, phone number; applicant's name and permit number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; and the statement "I/we request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose. Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. The Commission will only grant a contested case hearing on disputed issues of fact that are relevant and material to the Commission's decision on the application. Further, the Commission will only grant a hearing on issues that were raised in timely filed comments that were not subsequently withdrawn.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this application to re-

ceive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. To be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION. All public comments and requests must be submitted either electronically at www.tceq.texas.gov/about/comments.html or in writing to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087. If you choose to communicate with the TCEQ electronically, please be aware that your email address, like your physical mailing address, will become part of the agency's public record. For more information about this permit application or the permitting process, please call the TCEQ's Public Education Program, Toll Free, at 1-800-687-4040. Si desea información en español, puede llamar al 1-800-687-4040. Further information may also be obtained from the City of Arlington, by calling Mr. Steve Cooke, Assistant Director, at (817) 459-6564.

TRD-201202440
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 16, 2012

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Notice of Water Quality Applications

The following notices were issued on May 4, 2012 through May 11, 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

EXXONMOBIL OIL CORPORATION which operates the Mobil Chemical Beaumont Chemical Plant (BMCP), a petrochemical plant manufacturing olefins, aromatics, specialty organic chemicals, and inorganic catalytic preparations, has applied for a major amendment to TPDES Permit No. WQ0000462000 to authorize an increase in the total zinc limits for Outfall 001, based on site-specific aquatic life criteria developed using the water effect ratio (WER) procedure; removal of total zinc daily average limit; replace the limits for total suspended solids at Outfall 001 with a monitor only requirement; add waste streams to the list of utility and miscellaneous wastewaters in Other Requirements, Item 6 (demineralized water, wastewaters from water treatment processes, clarification, demineralization, reverse osmosis and laboratory wastewater); removal of the prohibition on wastewater discharge; change street name in the facility address from Gulf States Utility Road to Gulf States Road; determine if a limit for oil and grease for Outfall 001 was inadvertently omitted; update the facility description; change the due date for discharge monitoring reports from the 20th of the month to the 25th; change the description of Outfall 001 monitoring location on page 2b to reflect the name of facility. The application also includes the results of the review by the EPA of the final WER study for zinc for the Neches River Tidal in Segment No. 0601 of the Neches River Basin. EPA's review of final WER study indicates that the statewide water quality criteria for zinc may be adjusted to account for site-specific physical and chemical interactions which mitigate the toxicity of zinc to aquatic organisms. The zinc WER of 2.89 was approved by the EPA on July 7, 2010. The current permit authorizes the discharge of stormwater and utility/miscellaneous wastewaters commingled with deminimus (minimal) quantities of process wastewater on an intermittent and flow variable basis via Outfall 001. The facility is located at 2775 Gulf States Road, in the City of Beaumont, Jefferson County, Texas 77701.

SAN ANGELO PACKING COMPANY INC AND THE ESTATE OF JIMMY STOKES which operates a meat packing plant, has applied for a renewal of TCEQ Permit No. WQ0003901000, which authorizes the disposal of process wastewater, utility wastewater, and storm water at a daily average flow not exceed 150,000 gallons per day via irrigation of 208 acres. This permit will not authorize a discharge of pollutants into water in the State. The facility and land application site are located at 1809 North Bell Street, on the Atchison Topeka & Santa Fe Railway; 5,000 feet east and 4,000 feet south of the intersection of Armstrong Road and 50th Street in the City of San Angelo, Tom Green County, Texas.

ANGELINA COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO 3 has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0015021001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 60,000 gallons per day. The facility was previously permitted under TPDES Permit No. WQ0014201001 which expired August 1, 2011. The facility is located at 500 Trinity Trail, off County Road 116, 4.5 miles east-northeast of the Redland Community in Angelina County, Texas 75901.

CITY OF HOUSTON has applied for a renewal of TPDES Permit No. WQ0010495119 which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 23,100,000 gallons per day. The facility is located at 9400 White Chapel Lane on the southeast side of U.S. Highway 59 South and 0.5 mile south of Bissonett Road, between White Chapel Lane and Keegans Bayou in Harris County, Texas 77074.

WEATHERFORD FARMS INC which operates a wholesale greenhouse, has applied for a renewal of TPDES Permit No. WQ0003060000, which authorizes the discharge of greenhouse wastewater and stormwater at a daily average dry weather flow of 36,000 gallons per day. The facility is located on the east side of Murphy Road and approximately 1.4 miles south of the Southwest Freeway (U.S. Highway 59), in the City of Stafford, Fort Bend County, Texas 77477.

CARGILL TURKEY PRODUCTION LLC which operates the Cargill Foods Temple Feed Mill, a poultry feed production facility, has applied for a renewal of Texas Land Application Permit No. WQ0004387000, which authorizes the disposal of boiler blowdown, water softener regeneration water, air scrubber makeup water, air compressor blowdown, and truck wash water by evaporation and irrigation. The draft permit authorizes the disposal of boiler blowdown, water softener regeneration water, air scrubber makeup water, and air compressor blowdown by evaporation and irrigation. The application rate shall not exceed 0.17 acre-feet per acre irrigated per year (acre-feet/acre/year) on an irrigation area divided into three 33-acre fields, with alternating irrigation occurring on one 33-acre field per year. This permit will not authorize a discharge of pollutants into water in the State. The facility and disposal site are located at 251 Berger Road, approximately 2,000 feet southeast of the intersection of Interstate Highway 35 and Berger Road, adjacent to and east of the railroad tracks, approximately 4.6 miles north of the City of Temple, Bell County, Texas 76501.

BRIGGS ORGANIC LAND MANAGEMENT LLC has applied for a major amendment to TCEQ Permit No.WQ0000447000. The proposed amendment requests to increase the sludge application

rate from 6.44 dry tons/acre/year for sewage sludge and 1.6 dry tons/acre/year for water treatment plant sludge to a rate not to exceed 11.26 dry tons/acre/year for both. The current permit authorizes the land application of sewage sludge, water treatment plant sludge, and domestic septage for beneficial use on 47 acres. This permit will not authorize a discharge of pollutants into waters in the State. The sludge and domestic septage land application site is located on the northwest side of the intersection of State Highway 183 and County Road 210, approximately 1,500 feet south of Briggs, in Burnet County, Texas 78608.

CITY OF JACINTO CITY has applied for a renewal of TPDES Permit No. WQ0010195001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,640,000 gallons per day. The facility is located at 12202 Market Street just southeast of the Market Street Bridge over Hunting Bayou in Harris County, Texas 77029.

US ARMY CORPS OF ENGINEERS has applied for a major amendment to TCEQ Permit No. WQ0012253001, to authorize an increase in the daily average flow from 1,400 gallons per day to 4,400 gallons per day, and to increase the surface irrigation area from 0.53 acres of non-public access rangeland to 1.5 acres of non-public access rangeland. The current permit authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 1,400 gallons per day via surface irrigation. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located in the Yegua Creek Park which is on the southeastern side of Somerville Lake and is east of Road F in the Park and approximately 650 feet due south of Park Roads F and J in Washington County, Texas 77835.

STEPHEN JOEL FRIEDMAN has applied for a renewal of TPDES Permit No. WQ0013778001, 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 5930 State Highway 6 North near Langham Creek and approximately 0.75 mile west of Addicks Satsuma Road in Harris County, Texas 77084.

COLE CREEK BUSINESS PARK ASSOCIATION INC has applied for a renewal of TPDES Permit No. WQ0013996001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 49,800 gallons per day. The facility is located approximately 0.2 mile northwest of the intersection of Fairbanks-North Houston Road and West Little York Road and approximately 0.65 mile northwest of the intersection of U.S. Highway 290 and Fairbanks-North Houston Road in Harris County, Texas 77040.

MANVEL UTILITIES LIMITED PARTNERSHIP has applied for a major amendment to TPDES Permit No. WQ0014188001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 75,000 gallons per day to a daily average flow not to exceed 99,000 gallons per day. The draft permit authorizes a reduced Interim phase discharge of treated domestic wastewater at a daily average flow not to exceed 29,000 gallons per day. The facility is located approximately 0.75 mile northwest of the intersection of Del Bello Road and County Road 90 in Manvel in Brazoria County, Texas 77578.

DOUBLE DIAMOND UTILITIES CO has applied for a renewal of TPDES Permit No. WQ0014373001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 49,500 gallons per day. The facility is located at 1500 Retreat Boulevard, approximately 0.8 mile southeast of the intersection of Retreat Boulevard and Farm-to-Market Road 1434, approximately 10 miles southwest of downtown Cleburne in Johnson County, Texas 76033.

EAST MONTGOMERY COUNTY MUNICIPAL UTILITY DISTRICT NO 3 has applied for a renewal of TPDES Permit No. WQ0014379001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 80,000 gallons per day. The facility is located at 21399 Gene Campbell Boulevard, approximately 1,000 feet west of and 1,100 feet north of the intersection of Nichols Lane and Gene Campbell Boulevard in Montgomery County, Texas 77357.

BFH MINING LTD has applied for a renewal of TPDES Permit No. WQ0014758001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 60,000 gallons per day. The facility will be located approximately 1.25 miles southwest of the intersection of Farm-to-Market Road 1463 and Fulshear Katy Road in Fort Bend County, Texas 77441.

The following do not require publication in a newspaper. Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, at the address provided in the information section above, WITHIN 30 DAYS OF THE ISSUED DATE OF THE NOTICE.

THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ) has initiated a minor amendment of the Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004636000 issued to Cemex Construction Materials South, LLC to include special provisions that require the permittee to adhere to the closure regulations stated in the 30 Texas Administrative Code Chapter 312 rules. The existing permit authorizes the disposal of wastewater and water treatment plant sludge on approximately 219.74 acres of land used as monofill facility. This permit will not authorize a discharge of pollutants into waters in the State. The sludge disposal site is located approximately 30 miles east of the City of El Paso, approximately 5-1/4 miles northeast of the intersection of Hueco Ranch Road and U.S. Highway 62/180 in Hudspeth County, Texas 79938.

TRINITY BAY CONSERVATION DISTRICT has applied for a minor amendment to the Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0010851001 to authorize the addition of a new disinfection system to the treatment facilities. The existing permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,980,000 gallons per day. The facility is located approximately 1.2 miles southeast of the intersection of State Highway 124 and Farm-to-Market Road 1406, approximately 0.7 mile east of State Highway 124 on Buccaneer Drive in the City of Winnie in Chambers County, Texas 77514.

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-201202439
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 16, 2012

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Notice of Water Rights Applications

Notices issued April 20, 2012 through May 10, 2012.

APPLICATION NO. 12670; PPG Industries, Inc., 7400 Central Freeway North, Wichita Falls, Texas 76305-6656, Applicant, has applied for a Water Use Permit to maintain an existing dam and reservoir on an unnamed tributary of East Fork Pond Creek, Red River Basin for

recreational purposes in Wichita County, Texas. The application and partial fees were received on January 7, 2011, and additional information and fees were received on March 28, 29, and 31, 2011.The application was declared administratively complete and filed with the Office of the Chief Clerk on April 8, 2011. The Texas Commission on Environmental Quality (TCEQ) Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if granted, would contain special conditions, including but not limited to, requiring the permittee to pass inflows of state water required to satisfy senior water rights. The application and Executive Director's draft permit are available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Building F, Austin, Texas 78753. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 12729; Two Bobcats, LLC, 701 South Taylor, LB103, Amarillo, Texas 79101, Applicant, has applied for a water use permit to maintain an existing oversized dam and reservoir on Hornica Creek, Red River Basin for domestic, livestock, and wildlife purposes in Motley County. The application and partial fees were received on July 26, 2011. Additional information and fees were received on September 19 and October 18. The application was declared administratively complete and filed with the Office of the Chief Clerk on October 21, 2011. The TCEQ Executive Director has completed the technical review of the application and prepared a draft permit. The draft permit, if granted, would contain a special condition that the Permittee shall pass inflows of State water should they be required to satisfy senior water rights. The application, technical memoranda, and Executive Director's draft permit are available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Building F, Austin, Texas 78753. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 19-2176B; James A. Radke and Lori Kay Radke, 106 Mallard Avenue, Storm Lake, Iowa 50588, Applicants, seek to amend their portion of Certificate of Adjudication No. 19-2176 to add mining use and a place of use for mining purposes, being Wilson and Karnes Counties within the San Antonio River Basin. The application and partial fees were received on March 24, 2011. Additional information and fees were received on June 27, October 26, and November 1, 2011. The application was declared administratively complete and filed with the Office of the Chief Clerk on January 25, 2012. The Executive Director has completed the technical review of the application and prepared a draft order and amendment. The draft amendment, if granted, would include special conditions including, but not limited to, conservation plan requirements. The application, technical memoranda, and Executive Director's draft order and amendment are available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Building F, Austin, Texas 78753. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, by May 15, 2012.

APPLICATION NO. 12-3711; White River Municipal Water District, 2880 FM 2794, Spur, Texas 79370, Applicant, seeks an extension of time to begin and complete construction of a reservoir located on the North Fork Double Mountain Fork Brazos River, Brazos River Basin, in Garza County. The application and partial fees were received on December 9, 2011. Additional information and fees were received on March 26, 2012. The application was declared administratively complete and filed with the Office of the Chief Clerk on April 4, 2012. The Executive Director has determined the applicant has shown due diligence and justification for delay. In the event a hearing is held on this application, the Commission shall also consider whether the appropriation shall be forfeited for failure to demonstrate sufficient due diligence and justification for delay. The Executive Director has completed the technical review of the application and prepared a draft Order. The draft Order, if granted, would authorize the extension of time to begin and complete construction. The application and Executive Director's draft Order are available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Building F, Austin, Texas 78753. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 18-3844A; The City of Victoria, 105 W. Juan Linn, Victoria, Texas 77901, Applicant, seeks to amend Certificate of Adjudication No. 18-3844 to add uses; add a place of use; request an exempt interbasin transfer; add a diversion point on the Guadalupe River, Guadalupe River Basin; and to allow storage of the authorized 608 acre-feet of water in the off-channel reservoirs that are authorized by Water Use Permit No. 5466. More information on the application and how to participate in the permitting process is given below. The application was received on June 22, 2009. Additional information and fees were received on May 17, 2009, February 2, and June 14, 2010, and January 17, April 27, and July 19, 2011. The application was declared administratively complete and filed with the Office of the Chief Clerk on July 22, 2011. The Executive Director has completed the technical review of the application and prepared a draft amendment. The draft amendment, if granted, would include special conditions, including streamflow restrictions. The application, technical memoranda, and Executive Director's draft amendment are available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Building F, Austin, Texas 78753. Written public comments and requests for a public meeting should be submitted to the Office of the Chief Clerk, at the address provided in the information section below by May 30, 2012.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.texas.gov/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC

105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.texas.gov. Si desea información en español, puede llamar al 1-800-687-4040.

TRD-201202442
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: May 16, 2012

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Texas Department of Insurance

Company Licensing

Application to do business in the State of Texas by LUXOR DENTAL PLANS, INC., a domestic Health Maintenance Organization. The home office is in Houston, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, MC 305-2C, Austin, Texas 78701.

TRD-201202444
Sara Waitt
General Counsel
Texas Department of Insurance
Filed: May 16, 2012

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Texas Department of Licensing and Regulation

Public Notice - Revised Enforcement Plan

The Texas Commission of Licensing and Regulation (Commission) provides this public notice that at its regularly scheduled meeting held March 7, 2012, the Commission adopted the Texas Department of Licensing and Regulation's (Department) revised enforcement plan, which was established in compliance with Texas Occupations Code, §51.302(c).

The enforcement plan gives all license holders notice of the specific ranges of penalties and license sanctions that apply to specific alleged violations of the statutes and rules enforced by the Department. The enforcement plan also presents the criteria that are considered by the Department's enforcement staff in determining the amount of a proposed administrative penalty or the magnitude of a proposed sanction.

The enforcement plan is revised to update penalty matrices for the For-Profit Legal Service Contract Companies, Temporary Common Worker Employers, and Weather Modification programs. House Bill 2310, Acts of the 81st Legislature, amended Texas Occupations Code, Chapter 51, the Department's enabling statute, which required changes to 16 Texas Administrative Code Chapter 60, Procedural Rules of the Commission and the Department. One of the changes in the rules was to renumber the rule regarding the denial, suspension, or revocation of a license if it was obtained by falsifying a license application, which is a Class D violation referenced in the Enforcement Plan. The penalty matrices for the For-Profit Legal Service Contract Companies, Temporary Common Worker Employers, and Weather Modification programs have been updated to reflect this change.

A copy of the revised enforcement plan is posted on the Department's website and may be downloaded at www.license.state.tx.us. You may also contact the Enforcement Division at (512) 539-5600 or by e-mail at enforcement@license.state.tx.us to obtain a copy of the revised plan.

TRD-201202364
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: May 10, 2012

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Texas Low-Level Radioactive Waste Disposal Compact Commission

Notice of Receipt of Applications for Import of Waste and Import Agreements

Please take notice pursuant to Texas Low-Level Radioactive Waste Disposal Compact Commission rule, 31 TAC §675.23, that the Compact Commission has received applications for and proposed agreements for import from:

Bionomics

Tennessee Valley Authority - 1

Tennessee Valley Authority - 2

Pacific Gas & Electric

PerkinElmer

Nebraska Public Power District

Exelon

Ecology Services Inc.

The applications are being placed on the Compact Commission web site, www.tllrwdcc.org, where they will be available for inspection and copying.

Comments on the applications are due to be received within twenty-five (25) days or by June 10, 2012. Comments should be mailed to:

Texas Low-Level Radioactive Waste Disposal Compact Commission

3616 Far West Blvd. Suite 117, #294

Austin, Texas 78731

Comments may also be submitted via email to: Administration@tllrwdcc.org.

TRD-201202401
Robert Wilson
Chairman
Texas Low-Level Radioactive Waste Disposal Compact Commission
Filed: May 14, 2012

♦ ♦ ♦

Public Utility Commission of Texas

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 May 9, 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 Onvoy, Inc. d/b/a Onvoy Voice Services for a Service Provider Certificate of Operating Authority, Docket Number 40380.

Applicant intends to provide data, facilities-based, and resale telecommunications services.

Applicant proposes the geographic area of the entire state of Texas.

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 June 1, 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 40380.

TRD-201202386
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 11, 2012

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Notice of Application for Service Area Exception

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on May 10, 2012, for an amendment to certificated service area for a service area exception within Montgomery County, Texas.

Docket Style and Number: Application of Sam Houston Electric Cooperative, Inc. to Amend a Certificate of Convenience and Necessity for Electric Service Area Exception within Montgomery County. Docket Number 40382.

The Application: Sam Houston Electric Cooperative, Inc. filed an application for a service area boundary exception to allow Sam Houston to provide service to a specific customer located within the certificated service area of Entergy Texas, Inc. (ETI). ETI has provided an affidavit of relinquishment for the proposed change.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than June 4, 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 40382.

TRD-201202387
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 11, 2012

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Notice of Intent to Implement a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of Lipan Telephone Company (Lipan Telephone) application filed with the Public Utility Commission of Texas (commission) on May 10, 2012, for approval of a minor rate change pursuant to P.U.C. Substantive Rule §26.171.

Tariff Control Title and Number: Notice of Lipan Telephone Company to Implement a Minor Rate Change Pursuant to Substantive Rule §26.171, Tariff Control Number 40384.

The Application: Lipan Telephone filed an application for revisions to its Local Exchange Tariff and Long Distance Telecommunications Service Tariff to bundle the residential and business rates for Local Exchange Access Line Service and Tone Dialing Service. The proposed effective date for the proposed rate changes is June 1, 2012. The estimated annual revenue increase recognized by Lipan Telephone is $52,963 or less than 4.72% of Lipan Telephone's gross annual intrastate revenues. Lipan Telephone has 1,338 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by 5% of the affected local service customers to which this application applies by May 23, 2012, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by May 23, 2012. Requests to intervene should be filed with the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission at (512) 936-7120 or toll-free 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Tariff Control Number 40384.

TRD-201202388
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 11, 2012

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Notice of Intent to Implement a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of Ganado Telephone Company, Inc.'s (Ganado Telephone or the applicant) application filed with the Public Utility Commission of Texas (commission) on May 11, 2012, for approval of a minor rate change pursuant to P.U.C. Substantive Rule §26.171.

Tariff Control Title and Number: Notice of Ganado Telephone Company, Inc. for Approval of a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171, Tariff Control Number 40389.

The Application: Ganado Telephone filed an application to implement an increase to the monthly Residential, Business and Pay Telephone Local Exchange Access Line Service rates. The proposed effective date for the proposed rate changes is June 1, 2012. The estimated annual revenue increase recognized by the applicant is $38,776 or less than 2.07% of the applicant's gross annual intrastate revenues. Ganado Telephone has 2,059 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by 5% of the affected local service customers to which this application applies by May 31, 2012, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by May 31, 2012. Requests to intervene should be filed with the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission at (512) 936-7120 or toll-free 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the com-

mission at (512) 936-7136. All correspondence should refer to Tariff Control Number 40389.

TRD-201202422
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 15, 2012

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Notice of Intent to Implement a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of Lake Livingston Telephone Company's (Lake Livingston or the applicant) application filed with the Public Utility Commission of Texas (commission) on May 11, 2012, for approval of a minor rate change pursuant to P.U.C. Substantive Rule §26.171.

Tariff Control Title and Number: Notice of Lake Livingston Telephone Company for Approval of a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171, Tariff Control Number 40390.

The Application: Lake Livingston filed an application to implement an increase to the monthly Residential, Business, Rotary, Key PBX and Pay Telephone Local Exchange Access Line Service rates in its Memorial Point Exchange. The proposed effective date for the proposed rate changes is June 1, 2012. The estimated annual revenue increase recognized by the applicant is $29,621 or less than 5% of Lake Livingston's gross annual intrastate revenues. Lake Livingston has 747 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by 5% of the affected local service customers to which this application applies by May 31, 2012, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by May 31, 2012. Requests to intervene should be filed with the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission at (512) 936-7120 or toll-free 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Tariff Control Number 40390.

TRD-201202423
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 15, 2012

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Notice of Intent to Implement a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of La Ward Telephone Exchange, Inc.'s (La Ward or the applicant) application filed with the Public Utility Commission of Texas (commission) on May 11, 2012, for approval of a minor rate change pursuant to P.U.C. Substantive Rule §26.171.

Tariff Control Title and Number: Notice of La Ward Telephone Exchange, Inc. for Approval of a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171, Tariff Control Number 40391.

The Application: La Ward filed an application to implement an increase to the monthly Residential, Business, Business DID/DOD and Pay Telephone Local Exchange Access Line Service rates. The proposed effective date for the proposed rate changes is June 1, 2012. The estimated annual revenue does not increase the applicant's gross annual intrastate revenues. La Ward has 776 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by 5% of the affected local service customers to which this application applies by May 31, 2012, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by May 31, 2012. Requests to intervene should be filed with the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission at (512) 936-7120 or toll-free 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Tariff Control Number 40391.

TRD-201202424
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 15, 2012

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Notice of Intent to Implement a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of Eastex Telephone Cooperative, Inc.'s (Eastex Telephone or the applicant) application filed with the Public Utility Commission of Texas (commission) on May 11, 2012, for approval of a minor rate change pursuant to P.U.C. Substantive Rule §26.171.

Tariff Control Title and Number: Notice of Eastex Telephone Cooperative, Inc. for Approval of a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171, Tariff Control Number 40392.

The Application: Eastex Telephone filed an application to implement an increase to the rates associated with certain residential and business services, as well as the service charge associated with returned checks. The proposed effective date for the proposed rate change is June 1, 2012. The estimated annual revenue increase recognized by the applicant is $577,188 or less than 4.38% of the applicant's gross annual intrastate revenues. Eastex Telephone has 21,849 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by 5% of the affected local service customers to which this application applies by May 31, 2012, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by May 31, 2012. Requests to intervene should be filed with the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission at (512) 936-7120 or toll-free 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Tariff Control Number 40392.

TRD-201202425
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 15, 2012

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Notice of Intent to Implement a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of Southwest Texas Telephone Company's (Southwest Texas or the applicant) application filed with the Public Utility Commission of Texas (commission) on May 14, 2012, for approval of a minor rate change pursuant to P.U.C. Substantive Rule §26.171.

Tariff Control Title and Number: Notice of Southwest Texas Telephone Company for Approval of a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171 and Public Utility Regulatory Act, Chapter 53, Subchapter G, Tariff Control Number 40394.

The Application: Southwest Texas filed an application to increase the monthly Residential Access Line Service rates. The proposed effective date for the proposed rate changes is June 1, 2012. The estimated annual revenue increase recognized by the applicant is $37,092 or less than 5% of Southwest Texas' gross annual intrastate revenues. Applicant has 3,091 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by 5% of the affected local service customers to which this application applies by May 31, 2012, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by May 31, 2012. Requests to intervene should be filed with the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission at (512) 936-7120 or toll-free at 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Tariff Control Number 40394.

TRD-201202438
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: May 16, 2012

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Texas Department of Transportation

Aviation Division - Request for Proposal for Professional Engineering Services

Victoria County, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional services firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional services as described below:

Airport Sponsor: Victoria County, Victoria Regional Airport.

TxDOT CSJ No.: 1213VICTR.

Scope: Perform a Wildlife Hazard Assessment (WHA) by a qualified Wildlife Damage Management Biologist meeting the requirements established by FAA Advisory Circular AC 150/5200-36, latest edition. The assessment will include, but is not limited to, an analysis of the events prompting the assessment, identifying wildlife species observed and their numbers, locations, local movements, and daily and seasonal occurrences; identification and location of features on or near the airport that attract wildlife; a description of wildlife hazards to aircraft operations; and recommended actions for reducing wildlife hazards to aircraft operations.

There is no DBE goal. TxDOT Project Manager is Molly Lamrouex.

Interested firms shall utilize the Form AVN-551, titled "Aviation Planning Services Proposal." The form may be requested from TxDOT, Aviation Division, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT website at http://www.txdot.gov/business/projects/aviation.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. A prime provider may only submit one proposal. If a prime provider submits more than one proposal, that provider will be disqualified. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-551, firms are encouraged to download Form AVN-551 from the TxDOT website as addressed above. Utilization of Form AVN-551 from a previous download may not be the exact same format. Form AVN-551 is a PDF Template.

Please note:

Five completed, unfolded copies of Form AVN-551 **must be received** by TxDOT, Aviation Division at 150 East Riverside Drive, 5th Floor, South Tower, Austin, Texas 78704 no later than June 20, 2012, 4:00 p.m. Electronic facsimiles or forms sent by email will not be accepted. Please mark the envelope of the forms to the attention of Sheri Quinlan.

The consultant selection committee will be composed of local government members and one Aviation Division staff member. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The evaluation criteria for airport planning projects can be found at http://www.txdot.gov/business/projects/aviation.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Sheri Quinlan, Grant Manager, or Molly Lamrouex, Project Manager, for technical questions at 1-800-68-PILOT (74568).

TRD-201202431
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: May 15, 2012

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Aviation Division - Request for Proposal for Professional Engineering Services

The City of Galveston, through its agent the Texas Department of Transportation (TxDOT), intends to engage an aviation professional services firm for services pursuant to Government Code, Chapter 2254, Subchapter A. TxDOT Aviation Division will solicit and receive proposals for professional services as described below:

Airport Sponsor: City of Galveston, Scholes International Airport at Galveston.

TxDOT CSJ No.: 1212GALVN.

Scope: Prepare a business plan which includes, but is not limited to, information regarding existing and future conditions, proposed facility development to meet existing and future demand, constraints to develop, anticipated capital needs, financial considerations, management structure and options, as well as terminal area plan update. The Airport Business Plan should be tailored to the individual needs of the airport.

There is no DBE goal. TxDOT Project Manager is Michelle Hannah.

Interested firms shall utilize the Form AVN-551, titled "Aviation Planning Services Proposal." The form may be requested from TxDOT, Aviation Division, phone number, 1-800-68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT website at http://www.txdot.gov/business/projects/aviation.htm. The form may not be altered in any way. All printing must be in black on white paper, except for the optional illustration page. Firms must carefully follow the instructions provided on each page of the form. Proposals may not exceed the number of pages in the proposal format. The proposal format consists of seven pages of data plus two optional pages consisting of an illustration page and a proposal summary page. A prime provider may only submit one proposal. If a prime provider submits more than one proposal, that provider will be disqualified. Proposals shall be stapled but not bound in any other fashion. PROPOSALS WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

ATTENTION: To ensure utilization of the latest version of Form AVN-551, firms are encouraged to download Form AVN-551 from the TxDOT website as addressed above. Utilization of Form AVN-551 from a previous download may not be the exact same format. Form AVN-551 is a PDF Template.

Please note:

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The consultant selection committee will be composed of local government members. The final selection by the committee will generally be made following the completion of review of proposals. The committee will review all proposals and rate and rank each. The evaluation criteria for airport planning projects can be found at http://www.txdot.gov/business/projects/aviation.htm. All firms will be notified and the top rated firm will be contacted to begin fee negotiations. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

If there are any procedural questions, please contact Sheri Quinlan, Grant Manager, or Michelle Hannah, Project Manager, for technical questions at 1-800-68-PILOT (74568).

TRD-201202432

Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: May 15, 2012

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Texas Water Development Board

Request for Statements of Qualifications for Water Research Study Priority Topics

The Texas Water Development Board (TWDB) requests the submission of Statements of Qualifications from interested applicants leading to the possible award of contracts for state fiscal year 2012 to conduct water research on three priority topics. The total amount of the grants awarded by the board shall not exceed $300,000 from the Research and Planning Fund. Rules governing the Research and Planning Fund (31 TAC Chapter 355) are available upon request from the board, or may be found at the Secretary of State's Internet address: http://www.sos.state.tx.us/tac/; then sequentially select, "View the Current *Texas Administrative Code,"* "Title 31," "Part 10," "Chapter 355," and "Subchapter A." Guidelines for responding to this request for Statements of Qualifications, which include an application form and detailed information on the research topic, will be available at the board's website at: http://www.twdb.texas.gov/about/contract_admin/RFQ/, or will be provided upon request.

Description of the Research Objectives and Purpose

Statements of Qualifications are requested for the following three priority research topics.

1. Determining Cost Benefit and Demand Savings of Municipal Water Conservation Efforts (not to exceed $100,000)

As the state's population and economy continues to grow and drought occurs more frequently, municipal water conservation efforts become critical to sustaining our needs. Regional water planning groups are actively identifying and incorporating municipal water conservation as a key strategy to meet future needs. The 2012 State Water Plan highlights water conservation as a significant strategy to meet the state's future water supply needs.

One of the main issues challenging our state's water planning efforts on both a regional level and an individual water provider level is the ability to quantify water conservation savings. For many water providers, large and small, having the tools to measure savings and perform cost benefit analyses allows for improved conservation planning. This type of data also enables providers to perform evaluations of their overall conservation programs and existing conservation measures. Provided with proper and effective tools, municipalities will be able to provide more accurate measurements of water savings. This will assist them in measuring the implementation of their water conservation plans.

Because of the increasingly important role that municipal water conservation will have, there is an increasing focus on the ability to determine revenue impacts and demand savings achieved by municipal conservation efforts. A recent research study funded by the TWDB *(Water Conservation Savings Quantification Study, BBC Research & Consulting)* produced findings and recommendations related to quantifying water conservation savings. The report recommended the following two approaches for quantifying water conservation savings:

Estimate overall statewide and regional water conservation savings through the development and use of a "top down" econometric statistical model that incorporates existing data and attempts to control for fixed and random variables.

This completed research study also emphasizes that water providers have a strong desire for desktop tools that provide a consistent and confident measure of actual water savings.

The proposed new research is not duplicative of previous research studies but rather would build upon the previous studies that have identified the need for such a tool and have preliminarily identified key elements and characteristics of an ideal desktop quantification tool.

The goal of this research is to assist municipal water providers in their conservation planning and implementation efforts through the use of a desktop tool. This research will allow for a provider to evaluate and measure the impacts and savings resulting from the implementation of their water conservation strategies, measures, and best management practices.

The desktop tool should assist a water supply provider in the following areas:

planning for future water supply and infrastructure (water and wastewater) needs;

evaluating cost-efficiency and water-savings effectiveness among various conservation measures and programs;

tracking effectiveness and water savings over time; and

establishing a practice of using consistent methodology in fulfilling reporting.

Common questions for which this research should provide answers:

"How much water is being saved by individual conservation measures?"

"Which conservation measures or best management practices are the most cost effective?"

"What are the cost benefit impacts on revenue?"

Deliverables should include the report containing the desktop tool that can be reproduced by printing and also be available via website in accessible format. In addition, all spreadsheets and worksheets contained in the report should be in an unlocked version if a utility chooses to modify the forms to match specific local conditions.

2. A Manual to Assist Utilities in Reducing Water Loss (not to exceed $100,000)

Addressing water loss is one way a utility can achieve water conservation goals specified in the 2012 State Water Plan or its water conservation plan, especially if that water loss represents the real loss of water. Addressing water loss, real or apparent, is also a way for a utility to maximize income while saving water. Certain utilities are required to submit water loss reports to the TWDB every five years and some are required to submit annual reports. While the American Water Works Association and the International Water Association have developed water loss audit guidelines and the TWDB has a water loss audit manual and an on-line audit worksheet, there is not a manual that provides strategies for how to interpret and verify water loss reports and describes cost effective approaches to verify and ultimately reduce water loss and real water savings due to reducing water loss.

The research study will result in the completion of a manual and other information that can be used by all sizes of retail water providers to further define their actual water losses and the cause of the loss and then suggest practical cost-effective solutions to address the water losses.

Questions that the study should provide guidance on are:

How can the utility determine the correct amount of water usage and water loss contained in the TWDB water loss audit worksheet?

Are there appropriate "rule of thumb" estimates for data that the utility cannot measure?

How can the utility prioritize which form of loss to address first or to postpone?

How can the utility calculate the benefit/cost ratio of the options to reducing water loss on their system?

The study should include collecting comments, information and responses from a cross section of retail water providers as input to the development of the manual.

Deliverables should include the manual that can be reproduced by printing and also be available via website in accessible format. In addition, all spreadsheets and worksheets contained in the manual should be in unlocked version if a utility chooses to modify the forms to match specific local conditions.

3. Evaluating the potential for direct potable reuse in Texas (not to exceed $100,000)

Potable reclaimed water projects have historically played an important role in meeting water needs in Texas. Until recently, these projects involved indirect reuse, that is, the use of reclaimed water that is discharged to a stream or reservoir and diverted downstream for subsequent treatment and use. The Texas Commission on Environmental Quality has recently approved a project to provide advanced treatment (including microfiltration, reverse osmosis, and advanced oxidation) to effluent from the City of Big Spring's wastewater treatment plant. This advanced-treated water will then be blended with other raw water supplies and delivered directly to water treatment facilities. Approval of this project and drought conditions have peaked the interest in the water supply community about the viability of and risks associated with implementing direct potable reuse projects (projects for which advanced-treated reclaimed water is delivered directly to an entity's raw or treated potable delivery systems without the use of an environmental buffer) or indirect potable reuse projects that limit the use of an environmental buffer to shorten detention times and use larger percent blends of reclaimed water.

In general, the consensus among experts is that potable reuse is a viable and safe water management strategy, if implemented with sufficient barriers, monitoring protocols, and operational controls. However, much of the research and nearly all of the experience to date has focused on implementation of indirect potable reuse projects with significant environmental barriers.

The proposed project would examine the range and incidence of contaminants of concern for potable reuse in Texas; benchmark water quality goals and treatment strategies for potable reuse projects; identify potential treatment performance indicators; and summarize characteristics (such as costs, energy requirements, residual disposal issues, advantages, and disadvantages) of each treatment strategy for a range of potable reuse implementation scenarios. The end result would be a guidance document summarizing water quality goals and recommended treatment approaches for potable reuse in Texas.

The following questions will be answered by this research:

What water quality constituents should be measured to assess the suitability of reclaimed water for potable use in Texas?

What are reasonable target levels for these constituents?

How many and what kinds of treatment barriers are appropriate for potable reuse projects in Texas?

How many and what types of multiple barriers are appropriate for potable reuse projects?

What treatment process trains can be used to meet the target levels (question 2)?

Which treatment trains provide the best overall balance between protection of human health, product water quality, energy consumption, cost and secondary (energy, environmental) impacts?

This study will benefit water and wastewater utilities throughout the state, as well as elsewhere in the U.S. and abroad. The information developed will help utilities make critical decisions about steps they should take to protect the public, evaluation of the cost and feasibility of implementation, and ultimately whether a potable reuse project is appropriate for their utility.

Deadline for Submittal, Review Criteria and Contact Person for Additional Information

Historically Underutilized Businesses (HUBs) are encouraged to submit Statements of Qualifications and/or participate as subcontractors in the water research program. As instructed at Texas Government Code §2161.252 and 34 TAC §20.14, if the anticipated cost of the study is to exceed $100,000, the applicant must complete a HUB Subcontracting Plan according to: http://www.window.state.tx.us/procurement/prog/hub/hub-subcontracting-plan/.

All applicants must obtain the board's guidelines for responding to the Statements of Qualifications. The guidelines are available at http://www.twdb.texas.gov/about/contract_admin/RFQ/.

Six double-sided, double-spaced copies and one CD with a copy of the application in pdf format of a completed Statement of Qualifications must be filed with the board prior to 12:00 p.m. on Friday, July 13, 2012.

Statements of Qualifications 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; or by mail to David Carter, Texas Water Development Board, P.O. Box 13231-Capitol Station, Austin, Texas 78711-3231.

TRD-201202433
Kenneth Petersen
General Counsel
Texas Water Development Board
Filed: May 15, 2012

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)*