TEXAS REGISTER

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Thomas Huizar

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Open Meetings

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

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

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

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

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

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

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

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

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

THE ATTORNEY GENERAL

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

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

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

Requests for Opinions

RQ-1091-GA

Requestor:

The Honorable Joe Deshotel

Chair, Committee on Business and Industry

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether a school district board of trustees can appoint a single-member district trustee to an at-large position as the district transitions from single-member districts to a hybrid of single-member districts and at-large positions (RQ-1091-GA)

Briefs requested by November 16, 2012

RQ-1092-GA

Requestor:

The Honorable Barbara Cargill

Chair, State Board of Education

Texas Education Agency

1701 North Congress

Austin, Texas 78701

Re: Whether certain investment decisions for the Permanent School Fund must be made using competitive processes under the State Purchasing and General Services Act (RQ-1092-GA)

Briefs requested by November 19, 2012

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

TRD-201205494
Katherine Cary
General Counsel
Office of the Attorney General
Filed: October 22, 2012

♦ ♦ ♦

TEXAS ETHICS COMMISSION

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

Advisory Opinion Requests

AOR-573. The Texas Ethics Commission has been asked to consider whether a legislator may solicit contributions to a non-profit organization for which the legislator serves as executive director.

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

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

TRD-201205414
Natalia Luna Ashley
Special Counsel
Texas Ethics Commission
Filed: October 18, 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 7. BANKING AND SECURITIES

PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 82. ADMINISTRATION

7 TAC §82.4

The Finance Commission of Texas (commission) proposes new 7 TAC §82.4, concerning Consumer Complaint Process.

In general, the purpose of the new rule is to clarify the applicability of Texas Finance Code, §14.062, Consumer Information and Complaints. This procedural rule clarifies how the agency implements the referenced statutory provision during the complaint process. Proposed new §82.4 places into regulation the agency's existing policy by identifying which parties receive the policies and procedures relating to complaint investigation and resolution after the agency has received a consumer complaint. This rule is a result of an audit finding.

Subsection (a) of proposed §82.4 provides the general purpose of the rule as stated in the first sentence of the preceding paragraph. Subsection (b) outlines the definitions used in the rule, with paragraph (1) adopting the general words and terms as defined in §82.2 of the same title.

Section 82.4(b)(2) defines the phrase "person filing the complaint" under Texas Finance Code, §14.062(b) and (c) to mean "an individual who has sought or is seeking to obtain goods, services, or financing from a commercial entity." These statutory provisions relate to when the OCCC is to provide a copy of the agency's policies and procedures regarding complaint investigation and resolution (statutory subsection (b)) and notification of the status of the complaint investigation (statutory subsection (c)). At times, the agency receives complaints from a department, agency, or instrumentality of Texas or another state, or from a federal governmental body. The agency believes that it would not be an efficient use of government resources to provide the statutory notices under §14.062(b) and (c) to such entities. Thus, the proposed rule clarifies that individual consumers who have either done business with or are seeking to enter into a business relationship with a commercial entity are the intended "person[s] filing the complaint" to receive these notices.

Subsection (c) of proposed §82.4 provides further clarification relating to which parties receive the OCCC's complaint policies and procedures. When the OCCC receives complaints from other state and federal governmental bodies, sometimes a compliance issue is raised without a connection to an individual consumer. In those situations, the OCCC may add a notation of the issue to the next scheduled examination, set an earlier examination, or open an investigation of the issue. In order to properly address these broad or systemic types of complaints, the OCCC does not notify the licensee in advance of the investigation or examination (except as required by law for motor vehicle sales finance examinations).

Therefore, the purpose of §82.4(c) is to delineate that notice of OCCC complaint policies and procedures is not required to be delivered to the subject of the complaint when a complaint is received from a source other than a "person filing the complaint" as defined by the rule.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the new rule is in effect, there will be no fiscal implications for state or local government as a result of administering the rule.

For each year of the first five years §82.4 is in effect, Commissioner Pettijohn has also determined that the public benefit anticipated as a result of the proposed new rule will be that the commission's rules will conform to current practice, will be more easily understood by persons required to comply with the rules, and will be more easily enforced.

There is no anticipated cost to persons who are required to comply with the new rule as proposed. There will be no adverse economic effect on small or micro-businesses. There will be no effect on individuals required to comply with the new rule as proposed.

Comments on the proposed new rule may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to laurie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposal is published in the *Texas Register.* At the conclusion of the 31st day after the proposed new rule is published in the *Texas Register,* no further written comments will be considered or accepted by the commission.

The new rule is proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Chapter 14 and Title 4 of the Texas Finance Code.

The statutory provisions affected by the proposal are contained in Texas Finance Code, Chapter 14 and Title 4.

§82.4. Consumer Complaint Process.

(a) Purpose. The purpose of this section is to clarify the applicability of Texas Finance Code, §14.062, Consumer Information and Complaints.

(b) Definitions.

(1) Generally. This section adopts the words and terms as defined in §82.2 of this title (relating to Public Information Requests; Charges).

(2) Person filing the complaint. For purposes of Texas Finance Code, §14.062(b) and (c), "person filing the complaint" means an individual who has sought or is seeking to obtain goods, services, or financing from a commercial entity.

(c) Notice of OCCC policies and procedures not required. When the OCCC receives a complaint from a source other than a "person filing the complaint" as defined in subsection (b)(2) of this section, the OCCC is not required to send the policies and procedures relating to complaint and investigation and resolution to the subject of 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 October 19, 2012.

TRD-201205460
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 936-7621

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CHAPTER 83. REGULATED LENDERS AND CREDIT ACCESS BUSINESSES

SUBCHAPTER B. RULES FOR CREDIT ACCESS BUSINESSES

DIVISION 5. OPERATIONAL REQUIREMENTS

7 TAC §83.5001

The Finance Commission of Texas (commission) proposes amendments to §83.5001, concerning Quarterly Report for credit access businesses.

In general, the purpose of the amendments to §83.5001 is to provide provisions relating to annual reports and the confidentiality of all data reports submitted by credit access businesses (CABs). The agency believes that these clarifying amendments will provide guidance to the industry and place into rule form existing agency practices.

The proposed amendments to §83.5001(a) and (b) allow for the collection of certain CAB data on an annual basis and add a deadline for when that data is due. In particular, three new sentences conclude subsection (a) by adding a statutory citation and stating that the quarterly data submitted on an annual basis will be referred to as the "annual report" for purposes of the section. Additionally, as new paragraph (2) relating to annual reports is being proposed in subsection (b) concerning due dates, and the current language regarding the quarterly due dates has been relettered and renumbered, along with other technical corrections.

The agency believes that the collection of certain data annually as opposed to quarterly is more efficient for both the industry and the agency as well. The one-time submission lessens the industry's burden and provides these data points when they are more useful for agency analysis. The agency previously worked with a group of CAB stakeholders to compile the data sets collected during each particular timeframe, and the proposed amendments do not change the data sets determined by stakeholder collaboration. In addition, in order to properly encompass data collected on a quarterly and on an annual basis, the title of the rule is proposed to be changed to "Data Reporting Requirements."

The proposed amendments to §83.5001 also add new subsections (c) and (d). Subsection (c) outlines the confidentiality of all individual data reports submitted under Texas Finance Code, §393.622(b), while subsection (d) delineates the publication of aggregated data on the agency's website.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications for state or local government as a result of administering the amendments.

For each year of the first five years the amendments are in effect, Commissioner Pettijohn has also determined that the public benefit anticipated as a result of the proposed amendments will be less burden on the CAB industry by allowing annual reporting of certain data, and a more efficient data review process by the agency. An additional benefit will be clarification regarding CAB data reporting procedures, confidentiality, and publication of aggregate information, resulting in rules that are easier to understand and enforce.

There is no anticipated cost to persons who are required to comply with the amendments as proposed. There will be no effect on individuals required to comply with the amendments as proposed.

The agency is not aware of any adverse economic effect on small or micro-businesses resulting from the proposed amendments. But in order to obtain more complete information concerning the economic effect of the amendments, the agency invites comments from interested stakeholders and the public on any economic impacts on small businesses, as well as any alternative methods of achieving the purpose of the proposal while minimizing adverse impacts on small businesses.

Comments on the proposed amendments may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to laurie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed amendments are published in the *Texas Register.* At the conclusion of the 31st day after the proposed amendments are published in the *Texas Register,* no further written comments will be considered or accepted by the commission.

The amendments are proposed under Texas Finance Code, §393.622, which authorizes the Finance Commission to adopt rules necessary to enforce and administer Texas Finance Code, Chapter 393, Subchapter G.

The statutory provisions affected by the proposal are contained in Texas Finance Code, Chapter 393.

§83.5001. Data Reporting Requirements [~~Quarterly Report~~].

(a) Generally. Each licensee must file the required reports described by this section [~~quarterly report~~] for the prior period's [~~quarter's~~] credit access business activity in a form prescribed by the commissioner and must comply with all instructions relating to submitting the reports [~~report~~]. During each calendar year, licensees are required

to submit four quarterly reports as provided by Texas Finance Code, §393.627. Additionally, certain quarterly data will be collected by the OCCC on an annual basis under Texas Finance Code, §393.622(a)(1). For purposes of this section, the term "annual report" refers to the quarterly data submitted on an annual basis.

(b) Due dates.

(1) Quarterly reports. The quarterly reports are [~~report is~~] due on:

(A) [~~(1)~~] April 30, for transactions conducted during January through March;

(B) [~~(2)~~] July 31, for transactions conducted during April through June;

(C) [~~(3)~~] October 31, for transactions conducted during July through September; and

(D) [~~(4)~~] January 31, for transactions conducted during October through December.

(2) Annual report. The annual report is due on January 31 for transactions conducted during the preceding January through December.

(c) Confidentiality. All individual licensee submissions of data, whether submitted on a quarterly or annual basis, are confidential in their entirety under the provisions of Texas Finance Code, §393.622(b).

(d) Aggregated public information. The OCCC will publish aggregated data on its website within a reasonable time after each quarterly report and annual report is due.

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

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205461
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 936-7621

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PART 7. STATE SECURITIES BOARD

CHAPTER 105. RULES OF PRACTICE IN CONTESTED CASES

7 TAC §105.5

The State Securities Board proposes an amendment to §105.5, concerning contents of notice of hearing. The amendment would add the Director of the Registration Division to the Staff personnel authorized to sign a notice of hearing in an administrative case filed with the State Office of Administrative Hearings.

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

Ms. Loutherback also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be that contested cases involving denials of registration can be brought directly by the Director of Registration. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

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

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

The proposal affects Texas Civil Statutes, Articles 581-14, 581-23, 581-23-2, and 581-24.

§105.5. Contents of Notice of Hearing.

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

(c) A notice of hearing may be signed by [~~Either~~] the Director of the Enforcement Division, [~~or~~] the Director of the Inspections and Compliance Division, or the Director of the Registration Division [~~may sign notices of hearings~~].

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

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205422
John Morgan
Securities Commissioner
State Securities Board
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 305-8304

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CHAPTER 109. TRANSACTIONS EXEMPT FROM REGISTRATION

7 TAC §109.6

The State Securities Board proposes an amendment to §109.6, concerning investment adviser registration exemption for investment advice to financial institutions and certain institutional investors. The amendment would coordinate with new §139.23, concerning registration exemption for investment advisers to private funds, which is concurrently proposed. The exclusion from the exemption in subsection (c) for advisers to "private funds" would be removed and language would be added to reference the new §139.23 exemption for private fund advisers. A grandfathering provision would be added as new subsection (e) to allow an investment adviser currently relying on §109.6 as it now ex-

ists for advisory services rendered to a "private fund" (as defined in new §139.23) to continue using the exemption in certain circumstances--if the private fund is in existence when §139.23 is adopted and the private fund ceases to accept beneficial owners. The text in subsection (e), referencing an effective date for §139.23, would be replaced by a date certain at the time the amendment is adopted and these changes and §139.23 become effective. An additional change would be made in subsection (b)(1) to use the standard definition of "institutional accredited investor" used in the §107.2 definition.

Ronak V. Patel, Deputy Securities Commissioner, Tommy Green, Director, Inspections and Compliance Division, and Patricia Loutherback, Director, Registration Division, have determined that there will be fiscal implications as a result of enforcing or administering the rule on state, but not local government.

The effect on state government for the first five-year period the rule will be in effect would be increased revenue in the form of fees paid by the small number of investment advisers who are unable to continue to utilize the exemption pursuant to the grandfather provision in subsection (e) or the new exemption provided by proposed §139.23 and will be required to register or notice file in Texas. The increase in state revenue from each adviser in this small group would be $275 for the firm and $285 for each officer or investment adviser representative that is registered or notice filed in Texas and thereafter would be $270 and $275, respectively, for each annual renewal.

Mr. Patel, Mr. Green, and Ms. Loutherback also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to preserve the exemption for investment advisers who currently come within its provisions and avoid confusion by using a uniform definition for "institutional accredited investor."

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

The Agency estimates that there are approximately 1,660 investment adviser firms registered and approximately 4,559 notice filed in Texas. Among the total of 6,219 firms, approximately 89% are small businesses and 75% are micro-businesses, although among those registered, approximately 99% are small businesses and 95% are micro-businesses. Many of the notice-filed firms are located outside of Texas. The projected economic impact of the proposed amendment is expected to affect only a few investment advisers. Investment advisers who will not incur any additional costs are those who meet the grandfather provisions in subsection (e) because they can continue to claim the exemption as it existed prior to the amendment. Many investment advisers that can no longer claim the exemption in §109.6 after the rule is amended would be able to claim the new exemption provided in §139.23 and may incur the costs, if any, associated with that rule.

A small number of investment advisers will be required to register or notice file because they will not be grandfathered in §109.6 or able to transition to the exemption in new §139.23. Examples of investment advisers in this group are those who are bad actors or who have associated persons who are bad actors, and advisers who have assets under management of $150 million or more. An investment adviser who registers or makes a notice filing in Texas will incur filing fees for the firm and for each officer or investment adviser representative that is registered or notice filed in Texas and thereafter would also pay fees for each annual renewal. Registering and notice-filing advisers also will be required to complete the Form ADV and would incur the expense of preparing that form. However, notice-filing advisers who are registered with the Securities and Exchange Commission have already prepared Form ADV in connection with their federal registration and therefore would incur no additional preparation cost for the submission in Texas as a result of this proposed rule. There will also be filing fees imposed by third parties for investment advisers and their representatives submitting the initial and annual filings through the Investment Adviser Registration Depository (IARD).

Investment advisers who must register in Texas, rather than notice file, would also face costs to bring their business operations into compliance with the Texas Securities Act and the Board rules. However, these costs are expected to vary significantly depending on the adviser's size, the scope and nature of its business, and the sophistication of its compliance infrastructure. Some advisers, whether registered or not, may have already established compliance infrastructures to fulfill their fiduciary duties towards their clients. Costs will likely be less for new registrants that have already established sound compliance practices and more for new registrants that have not yet established such practices. Costs will likely be lower for small or micro-businesses whose business models are generally less complex.

In preparing the proposal, the Agency considered several alternative methods for achieving the purposes of the amendment. One, the Agency considered repealing the provisions in the existing rule relating to private fund advisers, but determined that continuing to maintain the exemption for certain investment advisers would substantially reduce the number of small businesses having to pay new or increased compliance costs. Two, the Agency considered allowing additional private fund advisers to be grandfathered in, but decided that the investing public would benefit substantially from the protections provided by the amendment. Finally, the Agency considered not adopting the proposed amendment, but determined that varying from the approach adopted in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, and by several other state securities regulators to close the regulatory gap by enhancing the regulation of private funds and their managers by affording a degree of transparency and oversight would not be consistent with the health, safety and economic welfare of the state.

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

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

The amendment is proposed under Texas Civil Statutes, Article 581-5.T, 581-12.C, and 581-28-1. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 12.C provides the Board with the authority to prescribe new dealer, agent, investment adviser, or investment adviser representative registration exemptions by rule. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, in-

cluding rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Civil Statutes, Article 581-5, 581-12, 581-12-1, and 581-18.

§109.6. Investment Adviser Registration Exemption for Investment Advice to Financial Institutions and Certain Institutional Investors.

(a) (No change.)

(b) Investment advice rendered to certain institutional investors. The State Securities Board, pursuant to the Act, §5.T and §12.C, exempts from the investment adviser and investment adviser representative registration requirements of the Act, persons who render investment advisory services to any of the following:

(1) an "institutional accredited investor" [(]as that term is defined in §107.2 of this title (relating to Definitions), excluding, however, any self-directed employee benefit plan with investment decisions made solely by persons that are "individual accredited investors" as defined in §107.2 of this title [Rule 501(a)(1)-(3), (7), and (8) promulgated by the Securities and Exchange Commission (SEC) under the Securities Act of 1933, as amended (1933 Act), as made effective in SEC Release Number 33-6389, as amended in Release Numbers 33-6437, 33-6663, 33-6758, and 33-6825)];

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

(c) Exclusions from exemption. [Investment advice rendered to natural persons and private funds.] There is no exemption under this section for an investment adviser providing investment advisory services to a natural person. A private fund adviser, as that term is defined in §139.23 of this title (relating to Registration Exemption for Investment Advisers to Private Funds), may not rely on this exemption except as provided in subsection (e) of this section. [or to a private fund, such as a hedge fund, that is composed partially or entirely of natural persons. A "private fund" is an entity that:]

[(1) would be subject to regulation under the federal Investment Company Act of 1940 but for the exceptions from the definition of "investment company" provided for:]

[(A) a fund that has no more than 100 beneficial owners, or]

[(B) a fund that is owned exclusively by qualified purchasers who acquired ownership through a non-public offering;]

[(2) permits investors who are natural persons to redeem their interests in the fund within two years of purchasing them; and]

[(3) offers interests in the entity based on the investment advisory skills, ability or expertise of the investment adviser.]

(d) (No change.)

(e) Grandfathering. An investment adviser to a private fund, as that term is defined in §139.23 of this title (relating to Registration Exemption for Investment Advisers to Private Funds), may nonetheless qualify for the exemption described in subsection (b) of this section if:

(1) the private fund existed prior to the effective date of §139.23 of this title;

(2) the investment adviser qualified for the exemption in subsection (b) as modified by subsection (c) as both subsections of this section existed prior to the effective date of §139.23 of this title; and

(3) as of the effective date of §139.23 of this title, the private fund ceases to accept beneficial owners.

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

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205423
John Morgan
Securities Commissioner
State Securities Board
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 305-8304

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CHAPTER 116. INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES

7 TAC §116.11

The State Securities Board proposes an amendment to §116.11, concerning disclosure requirement/brochure rule. The amendment adds a requirement that wrap fee advisers provide Part 2B of Form ADV to clients and prospective clients. Part 2B of Form ADV contains information about advisory personnel providing the clients with investment advice.

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

Mr. Patel and Mr. Green also have determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be that prospective clients and existing clients of wrap fee advisers will receive enhanced disclosures and that the rule will coordinate with federal requirements. There will be no effect on micro- or small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. There is no anticipated impact on local employment.

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

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

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

§116.11. Disclosure Requirement/Brochure Rule.

All registered investment advisers must deliver to all clients or prospective clients a written disclosure statement that may be:

(1) (No change.)

(2) a disclosure statement containing at least the information required by Part 2A Appendix 1 and Part 2B of Form ADV, Uniform Application for Investment Adviser Registration, if the investment adviser is the sponsor, or the sponsor and the portfolio manager, of a wrap fee program that the client will enter into.

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

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

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John Morgan
Securities Commissioner
State Securities Board
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 305-8304

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CHAPTER 139. EXEMPTIONS BY RULE OR ORDER

7 TAC §139.23

The State Securities Board proposes new §139.23, concerning registration exemption for investment advisers to private funds. The new rule would provide a registration exemption for investment advisers to private funds and was developed through negotiations between the Agency Staff and a subcommittee of the Securities Law Committee of the State Bar of Texas. A related amendment is concurrently proposed to §109.6, concerning investment adviser registration exemption for investment advice to financial institutions and certain institutional investors.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203 ("Dodd-Frank") made substantial changes to the regulation of private funds. Dodd-Frank mandated Securities and Exchange Commission ("SEC") registration for investment advisers to private funds if they have assets under management of at least $150 million and subjected them to recordkeeping and disclosure requirements.

In general, private funds include, but are not limited to, hedge funds, private equity funds, and venture capital funds, and are considered to be professionally managed pools of assets that are not subject to regulation under the Investment Company Act of 1940. Private funds qualify for one of two exceptions from regulation under the Investment Company Act by either limiting themselves to 100 total investors (3(c)(1) funds) or by permitting only "qualified purchasers" to invest (3(c)(7) funds).

The SEC provides an exemption from the registration requirements under the Investment Advisers Act of 1940 for an investment adviser that acts solely as an adviser to private funds and has assets under management of less than $150 million. Although exempt from federal registration, these advisers must file reports with the SEC and are called "exempt reporting advisers." The proposed exemption would extend this filing requirement to certain private fund investment advisers so that the Agency would have comparable information on advisers using the exemption. Alternatively, some investment advisers to private funds with assets under management of more than $100 million can opt to register with the SEC.

The proposed exemption would cease to be available for an investment adviser once the adviser becomes registered with the SEC. At that point, the adviser would then notice file in Texas. As with other investment adviser exemptions, the adviser's representatives whose activities are similarly limited are covered by the adviser's exemption from registration. Although the proposed exemption does not specifically address the disclosures that must be made by the exempt investment adviser, the general antifraud provisions of the Texas Securities Act would apply.

Subsection (b)(2) of the proposal contains bad actor disqualifications applicable to the investment adviser and to its advisory affiliates. Subsection (b)(3) automatically waives the disqualifications if the party is licensed or registered to conduct securities or investment advisory business in the state where the disqualification was created. It also provides for waiver of the disqualification at the discretion of the Securities Commissioner upon a showing of good cause.

Subsection (c) of the proposal imposes additional restrictions on 3(c)(1) funds. If the 3(c)(1) fund is not a private equity fund, real estate fund, or venture capital fund, it must be beneficially owned by persons who meet the definition of qualified client. "Qualified client" is a higher standard than that of accredited investor.

The proposed exemption provides if a qualified client is an entity that was organized for the purpose of acquiring an interest in the 3(c)(1) fund, all of the beneficial owners of the entity must also be qualified clients. Under this provision, each "tier" of beneficial ownership must be examined in a like manner. Thus, the adviser must look through each such entity to determine that all beneficial owners at each level are qualified clients.

Conversely, a 3(c)(1) fund that is a private equity fund, real estate fund, or venture capital fund can be owned by persons that are not qualified clients and who could be accredited or nonaccredited investors. Additionally, an adviser who has any 3(c)(1) fund customers who are not a private equity fund, real estate fund, or venture capital fund must comply with §116.17, relating to custody of funds or securities of clients, with respect to all the funds it advises.

Since an exempt investment adviser is no longer subject to unannounced inspection pursuant to Section 13-1 of the Texas Securities Act, subsection (f) adds a requirement whereby the Securities Commissioner can make a written request for the investment adviser's records that relate to the providing of investment advisory services to a private fund.

Ronak V. Patel, Deputy Securities Commissioner, Tommy Green, Director, Inspections and Compliance Division, and Patricia Loutherback, Director, Registration Division, have determined that there will be fiscal implications as a result of enforcing or administering the rule on state, but not local government.

The effect on state government for the first five-year period the rule will be in effect is loss of revenue. Certain investment advisors previously registered with the Agency may now be able to claim this exemption and thereby avoid paying registration fees. However, this may be offset to some extent by the registration or notice filing fees paid by investment advisers that are ineligible for this proposed exemption and are unable to fit within the grandfathering provisions in the §109.6 exemption, which is proposed to be amended in conjunction with this proposal. The an-

nual loss in state revenue from each adviser in this small group would be $270 for the firm and $275 for each officer or investment adviser representative that no longer files for renewal of its registration or notice filing.

Mr. Patel, Mr. Green, and Ms. Loutherback also have determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be increased uniformity with similar exemptions on the federal level and in other states.

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

The Agency estimates that there are approximately 1,660 investment adviser firms registered and approximately 4,559 notice filed in Texas. Among the total of 6,219 firms, approximately 89% are small businesses and 75% are micro-businesses, although among those registered, approximately 99% are small businesses and 95% are micro-businesses. Many of the notice-filed firms are located outside of Texas. The projected economic impact of this proposed rule will be increased costs of compliance for a small number of investment advisers claiming the exemption. However, the amount of those costs will vary based on the complexity of their operations.

Investment advisers with less than $25 million in assets under management who claim the exemption contained in the proposed rule would incur costs to complete and update related reports on Form ADV. Larger investment advisers using the exemption, those with assets under management of between $25 million and $150 million, are exempt reporting advisers and would already be required under the SEC rules to make the filing the proposed rule requires in subsection (b)(1). Therefore, they would not incur any additional preparation cost as a result of this proposed rule.

The proposed rule does not impose any filing fee upon either the investment advisers or their representatives who qualify for the exemption.

Some subset of advisers that use the exemption will be required to comply with the annual surprise audit requirement in §116.17, relating to custody of funds or securities of clients. A "surprise audit" is one pursuant to a written agreement between the investment adviser and the accountant that is conducted at a time chosen by the accountant without prior notice or announcement to the investment adviser and that is irregular from year to year. There will be an economic cost to those private fund advisers that are required to comply with the surprise audit requirement of §116.17, although the cost is expected to vary depending on the size of the firm. However, it is anticipated that many investment advisers will fall within one of the six exceptions to the surprise audit requirement that appear in §116.17(c), including the two discussed above.

However, advisers with "indirect" custody solely as a result of the investment adviser's authority to withdraw its fees from the client's account have an exception from §116.17. Additionally, advisers of limited partnerships or pooled investment vehicles (i.e., hedge funds) would also have an exception from the annual surprise audit requirement if the pooled investment vehicle is subject to an annual audit by a Public Company Accounting Oversight Board ("PCAOB") Registered Accountant and the adviser distributes copies of the audited financials to each investor within 120 days of the pool's fiscal year end.

There may be additional costs for those investment advisers who have not previously retained a PCAOB Registered Accountant and those costs per annual audit would depend on the size of the firm and the number of clients for which it has custody of funds or securities.

The cost to prepare an internal control report relating to custody will vary based on the size and services offered by the qualified custodian.

In preparing the proposal, the Agency considered several alternative methods for achieving the purposes of the new rule. One, the Agency considered not requiring small investment advisers claiming the exemption to complete and update related reports on Form ADV, but determined that the investing public would benefit from this reporting requirement. Two, the Agency considered not requiring private fund advisers to comply with the "surprise audit" requirement of §116.17, but decided that the investing public would benefit from the protections provided by this requirement. Finally, the Agency considered not adopting the proposed rule, but determined that varying from federal regulations resulting from the approach adopted in Dodd-Frank and by several other states securities regulators to close the regulatory gap by enhancing the regulation of private funds and their managers by affording a degree of transparency and oversight would not be consistent with the health, safety and economic welfare of the state.

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

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

The new rule is proposed under Texas Civil Statutes, Article 581-5.T, 581-12.C, and 581-28-1. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 12.C provides the Board with the authority to prescribe new dealer, agent, investment adviser, or investment adviser representative registration exemptions by rule. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The proposal affects Texas Civil Statutes, Article 581-5, 581-7, 581-12, 581-12-1, and 581-18.

§139.23. Registration Exemption for Investment Advisers to Private Funds.

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

(1) Private Fund Adviser--An investment adviser who provides advice:

(A) solely to one or more Private Funds; or

(B) solely to one or more Private Funds and other clients, who are not Private Funds, to whom advice may be provided pursuant to another exemption from investment adviser registration provided under the Texas Securities Act or Board rules.

(2) Private Fund--An issuer that qualifies for an exclusion from the definition of an investment company pursuant to section(s) 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940, 15 U.S.C. §80a.

(3) 3(c)(1) Fund--A Private Fund that relies solely on the exclusion from the definition of an investment company under §3(c)(1) of the Investment Company Act of 1940, 15 U.S.C. §80a-3(c)(l).

(4) Private Equity Fund--A Private Fund that meets the definition of a private equity fund in the Instructions to Part 1A of Form ADV.

(5) Real Estate Fund--A Private Fund that meets the definition of a real estate fund in the Instructions to Part 1A of Form ADV.

(6) Venture Capital Fund--A Private Fund that meets the definition of a venture capital fund in SEC Rule 203(l)-1, 17 CFR §275.203(l)-1.

(b) Exemption for Private Fund Advisers. Subject to the additional requirements of this section, the State Securities Board, pursuant to the Texas Securities Act, §5.T and §12.C, exempts from the investment adviser registration requirements of the Texas Securities Act, §12, a Private Fund Adviser satisfying each of the following conditions and limitations:

(1) the Private Fund Adviser files with the Securities Commissioner each report and amendment thereto as if the Private Fund Adviser was an exempt reporting adviser required to file with the Securities and Exchange Commission pursuant to SEC Rule 204-4, 17 CFR §275.204-4;

(A) a Private Fund Adviser who is an exempt reporting adviser makes these filings electronically through the Investment Adviser Registration Depository (IARD). A report shall be deemed filed when the report required by this subsection is filed and accepted by the IARD on the state's behalf;

(B) a Private Fund Adviser who is not an exempt reporting adviser makes these filings directly with the Commissioner in paper format; and

(2) except as provided in paragraph (3) of this subsection, neither the Private Fund Adviser, nor any of its advisory affiliates, as that term is defined in the Instructions to Part IA of Form ADV, are subject to the following disqualifications:

(A) any of those described in Rule 262 of SEC Regulation A, 17 CFR §230.262;

(B) has been convicted within five years prior to the filing of the notice required under this exemption of any felony or misdemeanor involving the offer, purchase, or sale of any security or the rendering of investment advice, or any felony involving embezzlement, obtaining money under false pretenses, larceny, or conspiracy to defraud;

(C) is currently subject to any order, judgment, or decree of any court of competent jurisdiction, entered within the last five years, temporarily, preliminarily, or permanently restraining or enjoining such party from engaging in or continuing to engage in any conduct or practice involving fraud or deceit in connection with the purchase or sale of a security or the rendering of investment advice;

(D) is the subject of a United States Postal Service fraud order that is currently effective and was issued within the last five years;

(E) is currently subject to any state or federal administrative enforcement order or judgment, entered within the last five years, finding fraud or deceit in connection with the purchase or sale of a security or the rendering of investment advice; or

(F) is the subject of a suspension or expulsion from membership in or association with a member of a self-regulatory organization that is currently effective and was issued within the last five years.

(3) Exceptions from disqualifications. The prohibitions of paragraph (2) of this subsection shall not apply if:

(A) the party subject to the disqualification is duly licensed or registered to conduct securities related business or render investment advisory services in the state in which the order, judgment, or decree creating the disqualification was entered against such party; or

(B) before investment advisory services are rendered under this section, the Securities Commissioner, or the court or regulatory authority that entered the order, judgment, or decree, waives the disqualification upon a showing of good cause.

(c) Additional requirements for Private Fund Advisers to certain 3(c)(1) Funds. In order to qualify for an exemption pursuant to this section, a Private Fund Adviser who advises at least one 3(c)(l) fund that is not a Private Equity Fund, Real Estate Fund, or Venture Capital Fund shall comply with the following additional requirements:

(1) the Private Fund Adviser shall advise only those 3(c)(1) Funds (other than Private Equity Funds, Real Estate Funds, and Venture Capital Funds) whose outstanding securities (other than short-term paper) are beneficially owned entirely by persons who would each meet the definition of a qualified client in SEC Rule 205-3, 17 CFR §275.205-3, at the time the securities are purchased from the issuer; provided that if an entity was organized and exists only for the purpose of acquiring an interest in the 3(c)(1) Fund, each beneficial owner of such entity must be a qualified client; and

(2) the Private Fund Adviser shall comply with §116.17 of this title (relating to Custody of Funds or Securities of Clients by Registered Investment Advisers) as if registered.

(d) Federal covered investment advisers. If a Private Fund Adviser is registered with the Securities and Exchange Commission, the adviser shall not be eligible for this exemption and shall comply with the state notice filing requirements applicable to federal covered investment advisers in the Texas Securities Act, §12-1.

(e) Investment adviser representatives. An investment adviser representative is exempt from the registration requirements of the Texas Securities Act, §12, if he or she is employed by or associated with an investment adviser that is exempt from investment adviser registration in this state pursuant to this regulation and does not otherwise act as an investment adviser representative.

(f) Requests for records.

(1) Upon a written request from the Securities Commissioner or the Commissioner's authorized representative, an investment adviser relying on an exemption provided by this section shall make available to the Commissioner all records subject to the custody or control of the investment adviser related to any private fund to which the investment adviser provides investment advice.

(2) Failure to comply with this subsection will result in the loss of exemptions provided by this section.

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

Filed with the Office of the Secretary of State on October 19, 2012.

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John Morgan
Securities Commissioner
State Securities Board
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 305-8304

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TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 7. LOCAL RECORDS

SUBCHAPTER F. RECORDS STORAGE STANDARDS

13 TAC §§7.161 - 7.165

The Texas State Library and Archives Commission proposes new rules, 13 TAC §§7.161 - 7.165, regarding storage of local government records. The new rules are being proposed to establish minimum storage standards for permanent records and court records and to establish enhanced storage conditions for all local government records.

Craig Kelso, Director, State and Local Records Management Division, has determined that for each year of the first five years the rules are in effect, there may be fiscal implications for state or local governments as a result of administering or enforcing the rules. The amount of any fiscal implications cannot be determined. Mr. Kelso does not anticipate either a loss of, or an increase in, revenue to state or local governments as a result of the proposed rules.

Mr. Kelso has also determined that for each year of the first five years the rules are in effect the public benefit will be that the new rules will help to provide better management of, and public access to, public records by improving storage conditions for permanent records.

There will be no impact on small businesses, micro-businesses, or individuals as a result of enforcing the rules as proposed.

Written comments on the proposed rules may be submitted to Sarah Jacobson, Manager, Records Management Assistance, P.O. Box 12927, Austin, TX 78711; by fax to (512) 936-2306; or by email to sjacobson@tsl.state.tx.us.

The new rules are proposed under Government Code, §441.025, which directs the agency to adopt rules for the storage of court documents filed with, otherwise presented to, or produced by a court in this state before January 1, 1951, and Local Government Code, §203.048, which requires the commission to adopt rules for the proper care and storage of local government records of permanent value.

The proposed section affects Government Code, §441.025, and Local Government, Code §203.048.

§7.161. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. Terms not defined in this subchapter shall have the meanings defined in the Local Government Code, Chapter 201.

(1) Court record--Any instrument, document, paper, or other record filed with, otherwise presented to, or produced by a court in this state.

(2) Local government record--Any document, paper, letter, book, map, photograph, sound or video recording, microfilm, magnetic tape, electronic medium, or other information recording medium, regardless of physical form or characteristic and regardless of whether public access to it is open or restricted under the laws of the state, created or received by a local government or any of its officers or employees pursuant to law, including an ordinance, or in the transaction of public business, except for materials excluded under the Local Government Code, §201.003(8).

(3) Permanent record--Any local government record for which the retention period on a records retention schedule issued by the commission is given as permanent or which has been identified by the records management officer as possessing permanent historical value.

(4) Records management officer--The person identified under the Local Government Code, §203.001 or designated under the Local Government Code, §203.025 as the records management officer.

(5) Retention period--The minimum time that a local government record must be retained as established on a records retention schedule accepted for filing by the Texas State Library and Archives Commission pursuant to Local Government Code, §203.043.

(6) Storage--The long-term holding of inactive records maintained for safekeeping.

§7.162. General.

(a) This subchapter seeks to preserve valuable historic records by establishing minimum and enhanced storage standards for pre-1951 court records and permanent records held by local governments.

(b) The requirements of this subchapter apply only to records in storage and are not required for records being transported, temporarily housed or displayed, or in active use.

(c) Unless otherwise noted, the requirements of this subchapter apply only to paper records. Storage requirements for local government records stored micrographically or electronically are adopted under §7.26 of this title (relating to Storage of Original Microfilm) and §7.76 of this title (relating to Maintenance of Electronic Records Storage Media) respectively.

(d) The effective date of this subchapter shall be two years after the date of its adoption.

§7.163. Minimum Storage Conditions for Non-Permanent Court Records.

(a) Pre-1951 court records with retention periods less than permanent shall be stored under conditions that meet the requirements of this section. Pre-1951 court records with permanent retention, e.g., case papers, shall be stored under conditions that meet the requirements of §7.164 of this title (relating to Minimum Storage Conditions for Permanent Records).

(b) Records shall be stored in a manner that offers protection from fire, water, steam, structural collapse, unauthorized access, theft, and other similar hazards.

§7.164. Minimum Storage Conditions for Permanent Records.

(a) Permanent records shall be stored under conditions that meet the requirements of this section.

(b) Records shall be stored in a manner that complies with the following:

(1) offers protection from fire, water, steam, structural collapse, unauthorized access, theft, and other similar hazards; and

(2) does not expose records to direct sunlight.

(c) Records or storage boxes shall not be stored in contact with the floor.

(d) Records stored in a building or storage area constructed after the effective date of this section shall be protected by an operational fire detection system or the facility must be in compliance with local fire codes.

(e) Records shall not be stored in any area of a building or storage area constructed after the effective date of this section that is located in a 100 year flood plain area, as established by the U.S. Geological Survey at the time of the construction of the building, unless the floor of said area is at least five feet above the 100 year flood level.

§7.165. Enhanced Storage Conditions for Permanent Records.

(a) As resources permit, local governments should strive to store records under conditions that meet as many of the recommendations of this section as practicable.

(b) Records should be stored in a building or storage area that:

(1) has an operational fire detection system;

(2) has an operational fire suppression system;

(3) has adequate environmental controls:

(A) A maximum temperature of 70 degrees Fahrenheit and a constant relative humidity of 45% with a maximum variance of plus/minus 5% relative humidity in a 24-hour period should be maintained in the storage area.

(B) Daily temperature/humidity checks should be conducted.

(C) Positive atmospheric pressure should be maintained within the storage area.

(5) has a pest management program; and

(6) has appropriate shelving:

(A) Shelving should be constructed of metal or other non-porous material.

(B) The lowest shelf should be at least 4 to 6 inches from the floor.

(C) Shelving should be arranged such that records are at least 4 inches from the interior face of exterior walls.

(c) Records should be covered or housed in acid-neutral boxes to protect them from deterioration.

(d) Ultraviolet filtering shields should be affixed to any fluorescent lights or windows.

(e) If a Heating, Ventilation, and Air Conditioning (HVAC) system is in use in a records storage area, it should not be turned off and settings should not be changed for nights and weekends.

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

Filed with the Office of the Secretary of State on October 22, 2012.

TRD-201205485
Edward Seidenberg
Deputy Director
Texas State Library and Archives Commission
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 463-5459

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TITLE 22. EXAMINING BOARDS

PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

CHAPTER 75. RULES OF PRACTICE

22 TAC §75.7

The Texas Board of Chiropractic Examiners (Board) proposes an amendment to §75.7, concerning Required Fees and Charges. This proposed amendment places a $50 inactive license processing fee on all inactive license renewals.

Currently inactive licensees do not have to pay for an inactive license renewal. However, this $50 fee is being proposed to comply with a Contingent Revenue Rider imposed by the Texas Legislature in the Board's appropriation bill pattern for the 2012-2013 biennium. Certain appropriations and 2.0 full time equivalent (FTE) staff positions are contingent upon the Board assessing or increasing fees sufficient to generate, during the 2012-2013 biennium, $146,154 in excess of the Comptroller of Public Accounts' Biennial Revenue Estimate for fiscal years 2012 and 2013. The excess revenue raised in FY 2012 was not quite as high as estimated by the agency, so the Board must raise additional excess revenue to comply with this rider. The appropriations and staff positions contingent upon this fee increase are crucial to the operation of the Board.

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

Ms. Yarbrough has also determined that, for each year of the first five years this amendment will be in effect, the public benefit of the proposed amendment will be collection of licensure fees and compliance with the Contingent Revenue Rider, therefore allowing the agency to function properly.

Ms. Yarbrough has also determined that there will be no adverse economic effect to individuals and small or micro businesses during the first five years this amendment will be in effect. Although the inactive license processing fee will be increased from $0 to $50, the increase is minimal and should not have an adverse economic effect to individuals and small or micro businesses.

Comments on the proposed amendment may be submitted to Yvette Yarbrough, Executive Director, Texas Board of Chiropractic Examiners, 333 Guadalupe Street, Suite 3-825, Austin, Texas 78701, fax: (512) 305-6705, no later than 30 days from the date that this rule is published in the *Texas Register.*

The amendment is proposed under Texas Occupations Code, §201.152, relating to rules, and §201.153, relating to fees. Section 201.152 authorizes the Board to adopt rules necessary to

regulate the practice of chiropractic. Section 201.153 authorizes the Board to set fees as necessary to administer Chapter 201 of the Occupations Code.

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

§75.7. Required Fees and Charges.

(a) Current fees required by the board are as follows:

Figure: 22 TAC §75.7(a)

(b) - (e) (No change.)

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

Filed with the Office of the Secretary of State on October 22, 2012.

TRD-201205481
Yvette Yarbrough
Executive Director
Texas Board of Chiropractic Examiners
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 305-6716

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 38. CHILDREN WITH SPECIAL HEALTH CARE NEEDS SERVICES PROGRAM

25 TAC §§38.1 - 38.16

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §§38.1 - 38.16, concerning the Children with Special Health Care Needs (CSHCN) Services Program.

BACKGROUND AND PURPOSE

As authorized by Health and Safety Code, Chapter 35, the CSHCN Services Program provides services to children younger than 21 years of age who have a chronic physical or developmental condition and to eligible clients with cystic fibrosis regardless of age.

The proposed amendments are necessary to add new definitions, make corrections, make revisions that simplify the eligibility determination process and allow clients a full six-month eligibility period, and to improve flow, accuracy, and clarity in the rules. Additionally, specific references to program fees (related to reimbursement rates for covered medical, dental, and other services) have been removed from the rules to allow the program flexibility to adjust rates when necessary to remain within budgetary limitations. Rates are determined in policy, and current program rates will remain accessible to the public via the program's claim administrator's Online Fee Lookup website.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 38.1 - 38.16 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

Amendments to §§38.1, 38.5 - 38.9, and 38.11 - 38.16 improve flow, accuracy, and clarity. Amendments to §38.2 include new definitions and revisions to existing definitions for terms used within the rules. Amendments to §38.3 add language necessary for clarification of the CSHCN Services Program eligibility requirements. Amendments to §38.4 clarify existing language and add new language for benefits and limitations and increase readability. Amendments to §38.10 clarify existing language and remove program fees and payment methodologies (related to reimbursement rates for covered medical, dental, and other services) so that the program has flexibility to adjust rates when necessary to remain within budgetary limitations.

FISCAL NOTE

Jann Melton-Kissel, RN, MBA, Director, Specialized Health Services Section, has determined that for each year of the first five years that the sections will be in effect, there will be no fiscal impact to state or local governments as a result of enforcing and administering the sections as proposed. The amendments are intended to clarify, update, and strengthen the chapter and are not anticipated to be controversial.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Melton-Kissel has also determined that there will be no adverse effect on small businesses or micro-businesses required to comply with the sections as proposed, because neither small businesses nor micro-businesses that are providers of CSHCN Services Program will be required to alter their business practices in order to comply with the sections.

ECONOMIC COST TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

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

PUBLIC BENEFIT

Ms. Melton-Kissel has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is improved accuracy and consistency and more accurate interpretation of their intent. In addition, the amendments will allow the program to function more efficiently and effectively.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted by mail to Sandra Owen, RN, MN, Policy Formulation and Health Benefit Team Lead, Purchased Health Services Unit, Mail Code 1938, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347; by telephone at (512) 776-3007; or by email to sandra.owen@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

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

STATUTORY AUTHORITY

The amendments are authorized by Government Code, §531.0055(e), and Health and Safety Code, Chapter 35 and §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the rules implements Government Code, §2001.039.

The amendments affect Government Code, Chapter 531, and Health and Safety Code, Chapters 35 and 1001.

§38.1. Purpose and Common Name.

(a) Purpose. The purpose of this chapter is to implement the Children with Special Health Care Needs (CSHCN) Services Program as [~~that is~~] authorized by Health and Safety Code, Chapter 35, to provide the following services to eligible children:

(1) - (7) (No change.)

(b) Common Name. The CSHCN [~~Children with Special Health Care Needs~~] Services Program may adopt a common name to facilitate and improve program marketing and recognition.

§38.2. Definitions.

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

(1) (No change.)

(2) Advanced practice registered nurse--A registered nurse approved by the Texas Board of Nursing to practice as an advanced practice registered nurse[~~, including, but not limited to, a nurse practitioner, nurse anesthetist, or clinical nurse specialist~~].

(3) - (21) (No change.)

(22) Disregards--An amount of money deducted from the family's total income for allowable expenses, such as child care.

(23) [~~(22)~~] Eligibility date for the CSHCN Services Program health care benefits--The effective date of eligibility for the CSHCN Services Program health care benefits is [~~15 days prior to~~] the date of receipt of a complete, approved [~~the~~] application except in the following circumstances.

(A) The effective date of eligibility for newborns who are not born prematurely will be the date of birth. Newborn means a child 28 days old or younger.

(B) The effective date of eligibility for an applicant who is born prematurely shall be the day after the applicant has been out of the hospital for 14 consecutive days, but no earlier than [~~15 days prior to~~] the date of receipt of the application.

(C) The effective date of eligibility following traumatic injury shall be the day after the acute phase of treatment ends, but no earlier than [~~15 days prior to~~] the date of receipt of the application.

(D) The effective date of eligibility for applicants with spenddown is [~~the day after the earliest DOS on which the cumulative bills are sufficient to meet the spenddown amount, but no earlier than 15 days prior to~~] the date of receipt of the medical bills which document that spenddown has been met, following the receipt of a complete application. Only medical bills having a DOS within 12 months prior to or 6 months after the date of receipt of the application[~~, or a DOS within 6 months after the financial eligibility denial date~~] may be included to satisfy spenddown requirements. Medical bills for any member of the family [~~household~~] for which the applicant, parent(s), guardian or managing conservator of the CSHCN Services Program applicant is responsible may be included. Medical bills used to meet spenddown cannot be paid by the CSHCN Services Program.

(E) Excluding applications for clients who are known to be ineligible for Medicaid and the CHIP due to age, citizenship status, or insurance coverage, all applications must include a determination of eligibility from Medicaid and the CHIP. If the CSHCN Services Program application is received without a Medicaid determination, a CHIP determination, or other data or documents needed to process the application, it will be considered incomplete. The applicant will be notified that the application is incomplete and given 60 days to submit the Medicaid determination, CHIP denial or enrollment, or other missing data or documents to the CSHCN Services Program. If the application is made complete within the 60-day time limit, the client's eligibility effective date will be established as [~~15 days prior to~~] the date the CSHCN Services Program application was first received. If the application is made complete more than 60 days after initial receipt, the eligibility effective date will be established as [~~15 days prior to~~] the date the application was made complete.

(24) [~~(23)~~] Emergency--A medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent person with average knowledge of health and medicine could reasonably expect that the absence of immediate medical care could result in:

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

(B) serious impairment to bodily functions; or

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

(25) [~~(24)~~] Emotional or behavioral condition--Behavior which varies significantly from normal, that is chronic and does not quickly disappear, and that is unacceptable because of social or cultural expectations. Emotional or behavioral responses which are so different from those of the generally accepted, age-appropriate norms of people with the same ethnic or cultural background as to result in significant impairment in social relationships, self-care, educational progress, or classroom behavior. Examples include but are not limited to the following:

(A) an inability to build or maintain satisfactory age-appropriate interpersonal relationships with peers or adults;

(B) dangerously aggressive, self-destructive, severely withdrawn, or noncommunicative behaviors;

(C) a pervasive mood of unhappiness or depression; or

(D) evidence of excessive anxiety or fears.

(26) [~~(25)~~] Facility--A hospital, psychiatric hospital, rehabilitation hospital or center, ambulatory surgical center, renal dialysis center, specialty center, or outpatient clinic.

(27) [~~(26)~~] Family--For the purpose of determining family size [~~income~~] for program eligibility, the family includes the following persons who live in the same residence:

(A) the applicant;

(B) those related to the applicant as a parent, stepparent, or spouse who have a legal responsibility to support the applicant, or guardians or managing conservators who have a duty to provide food, shelter, education, and medical care for the applicant;

(C) children under age 19 or wards of the applicant; and

(D) children under age 19 or wards of a parent, stepparent, or spouse.

(28) [~~(27)~~] Family support services--Disability-related support, resources, or other assistance provided to the family of a child with special health care needs. The term may include services described by Part A of the Individuals with Disabilities Education Act (20 U.S.C. §1400 *et seq.),* as amended, and permanency planning, as that term is defined by Government Code, §531.151.

(29) [~~(28)~~] Federal Poverty Level (FPL)--The minimum income needed by a family for food, clothing, transportation, shelter, and other necessities in the United States, according to the United States Department of Health and Human Services, or its successor agency or agencies. The FPL varies according to family size and after adjustment for inflation, is published annually in the *Federal Register.*

(30) [~~(29)~~] Federally qualified health center [~~(FQHC)~~]--A federally qualified health center is designated by CMS to provide core medical services to a Medically Underserved Population [~~(MUP)~~].

(31) [~~(30)~~] Financial independence--A state in which a person currently files his or her own personal U.S. income tax return and is not claimed as a dependent by any other person on his or her U.S. income tax return.

(32) [~~(31)~~] Guardian--A statutory officer appointed under the Texas Probate Code who has a duty to provide food, shelter, education, and medical care for his or her ward.

(33) [~~(32)~~] Health care benefits--CSHCN Services Program benefits consisting of diagnosis and evaluation services, rehabilitation services, medical home care management services, family support services, transportation related services, and insurance premium payment services.

(34) [~~(33)~~] Health insurance and health benefits plan--A policy or plan, individual, group, or government-sponsored, that an individual purchases or in which an individual participates that provides benefits when medical or dental costs are or would be incurred. Sources of health insurance include, but are not limited to, health insurance policies, buy-in programs, health maintenance organizations, preferred provider organizations, employee health welfare plans, union health welfare plans, medical expense reimbursement plans, United States Department of Defense or Department of Veterans Affairs benefit plans, Medicaid, CHIP, and Medicare. Benefits may be in any form, including, but not limited to, reimbursement based upon cost, cash payment based upon a schedule, or access without charge or at minimal charge to providers of medical or dental care. Benefits from a municipal or county hospital, joint municipal-county hospital, county hospital authority, hospital district, county indigent health care programs, or the facilities of a publicly supported medical school shall not constitute health insurance for purposes of this chapter.

(35) Income--The gross income, either earned or unearned, before deductions over a given period of time for each family member.

[~~(34) Household--For the purpose of determining spend-down medical expenses, the living unit in which the applicant resides and which also may include one or more of the following:~~]

[~~(A) mother;~~]

[~~(B) father;~~]

[~~(C) stepparent;~~]

[~~(D) spouse;~~]

[~~(E) foster parent(s), managing conservator, or guardian;~~]

[~~(F) grandparent(s);~~]

[~~(G) sibling(s);~~]

[~~(H) stepbrother(s); or~~]

[~~(I) stepsister(s).~~]

(36) [~~(35)~~] Managing conservator--A person designated by a court to have daily legal responsibility for a child.

(37) [~~(36)~~] Medicaid--A program of medical care authorized by Title XIX of the Social Security Act and the Human Resources Code.

(38) [~~(37)~~] Medical home--A respectful partnership between a client, the client's family as appropriate, and the client's primary health care setting. A medical home is family centered health care that is accessible, continuous, comprehensive, coordinated, compassionate, and culturally competent. A medical home provides primary care that includes preventive care, care coordination, and appropriate referral and collaboration with specialist and other service providers as required.

(39) [~~(38)~~] Medicare--A federal program that provides medical care for people age 65 or older and the disabled as authorized by Title XVIII of the Social Security Act.

(40) [~~(39)~~] Natural home--The home in which a person lives that is either the residence of his or her parent(s), foster parent(s) or guardian, or extended family member(s), or the home in the community where the person has chosen to live, alone or with other persons. A natural home may utilize natural support systems such as family, friends, co-workers, and services available to the general population as they are available.

(41) [~~(40)~~] Other benefit--A benefit, other than a benefit provided under this chapter, to which a person is entitled for payment of the costs of services included in the scope of coverage of the CSHCN Services Program including, but not limited to, benefits available from:

(A) an insurance policy, group health plan, health maintenance organization, or prepaid medical or dental care plan;

(B) home, auto, or other liability insurance;

(C) Title XVIII, Title XIX, or Title XXI of the Social Security Act (42 U.S.C. §§1395 *et seq.,* 1396 *et seq.,* and 1397aa *et seq.),* as amended;

(D) the United States Department of Veterans Affairs;

(E) the United States Department of Defense;

(F) workers' compensation or any other compulsory employers' insurance program;

(G) a public program created by federal or state law or under the authority of a municipality or other political subdivision of the state, excluding benefits created by the establishment of a municipal or county hospital, a joint municipal-county hospital, a county hospital authority, a hospital district, a county indigent health care program, or the facilities of a publicly supported medical school; or

(H) a cause of action for the cost of care, including medical care, dental care, facility care, and medical supplies, required for a person applying for or receiving services from the department or a settlement or judgment based on the cause of action if the expenses are related to the need for services provided under this chapter.

(42) [~~(41)~~] Otologist--A physician whose specialty is diseases of the ear.

(43) [~~(42)~~] Permanency planning--A planning process undertaken for children with chronic illness or developmental disabilities who reside in institutions or are at risk of institutional placement, with the explicit goal of securing a permanent living arrangement that enhances the child's growth and development, which is based on the philosophy that all children belong in families and need permanent family relationships. Permanency planning is directed toward securing: a consistent, nurturing environment, an enduring, positive adult relationship(s), and a specific person who will be an advocate for the child throughout the child's life. Permanency planning provides supports to enable families to nurture their children, to reunite with their children when they have been placed outside the home, and to place their children in family environments.

(44) [~~(43)~~] Person--An individual, corporation, government or governmental subdivision or agency, business trust, partnership, association, or any other legal entity.

(45) [~~(44)~~] Physician--A person licensed by the Texas Medical Board to practice medicine in this state.

(46) [~~(45)~~] Physician assistant--A person licensed as a physician assistant by the Texas Physician Assistant Board.

(47) Practitioner--A person who is licensed to practice medicine, dentistry, nursing or an allied health profession.

(48) [~~(46)~~] Prematurity or born prematurely--A child born at less than 36 weeks gestational age and hospitalized since birth.

(49) [~~(47)~~] Program--The Children with Special Health Care Needs (CSHCN) Services Program.

(50) [~~(48)~~] Provider--A person or facility as defined in §38.6 of this title (relating to Providers) that delivers services purchased by the CSHCN Services Program for the purpose of implementing the Act.

(51) [~~(49)~~] Rehabilitation services--The process of the physical restoration, improvement, or maintenance of a body function destroyed or impaired by congenital defect, disease, or injury which includes the following acute and chronic or rehabilitative services:

(A) facility care, medical and dental care, and occupational, speech, and physical therapies;

(B) the provision of medications, braces, orthotic and prosthetic devices, durable medical equipment, and other medical supplies; and

(C) other services specified in this chapter.

(52) [~~(50)~~] Respite care--A service provided on a short-term basis for the purpose of relief to the primary care giver in providing care to individuals with disabilities. Respite services can be provided in either in-home or out-of-home settings on a planned basis or in response to a crisis in the family where a temporary caregiver is needed.

(53) [~~(51)~~] Rural health clinic--A rural health clinic is designated by CMS to provide core medical services in a Medically Underserved Area [~~(MUA)~~].

(54) [~~(52)~~] Routine child care--Child care for a child who needs supervision while the parent or guardian is at work, in school, or in job training.

(55) [~~(53)~~] Services--The care, activities, and supplies provided under the Act, including but not limited to, both acute and chronic or rehabilitative medical care, dental care, facility care, medications, durable medical equipment, medical supplies, occupational, physical, and speech therapies, family support services, case management services, and other care specified by program rules.

(56) [~~(54)~~] Social service organization--For purposes of this chapter, a for-profit or nonprofit corporation or other entity, not including individual persons, that provides funds for travel, meal, lodging, and family supports expenses in advance to enable CSHCN Services Program clients to obtain program services.

(57) [~~(55)~~] Specialty center--A facility and staff that meet the CSHCN Services Program minimum standards established in this chapter and are designated for use by CSHCN Services Program clients as part of the comprehensive services for a specific medical condition.

(58) [~~(56)~~] Spenddown--A process that allows an applicant to obtain program financial eligibility when the applicant's family income exceeds 200% of the FPL. The family must prove cumulative medical expenses that exceed the difference between the family income and 200% of the FPL income limit. [~~Financial eligibility achieved when household income exceeds 200% of the FPL if the applicant's family can document its responsibility for household medical bills that are equal to or greater than the amount in excess of the 200% level.~~]

(59) [~~(57)~~] State--The State of Texas.

(60) [~~(58)~~] Subrogation--Assumption by third party, such as a second creditor or an insurance company, of another person's legal right to collect a debt or damages.

(61) [~~(59)~~] Supplemental Security Income Program (SSI)--Title XVI of the Social Security Act which provides for payments to individuals (including children under age 18) who are disabled and have limited income and resources.

(62) [~~(60)~~] Support--The contribution of money or services necessary for a person's maintenance, including, but not limited to, food, clothing, shelter, transportation, and health care.

(63) [~~(61)~~] Texas resident--A person who:

(A) is physically present within the geographic boundaries of the state;

(B) has an intent to remain within the state;

(C) maintains an abode within the state (i.e., house or apartment, not merely a post office box);

(D) has not come to Texas from another country for the purpose of obtaining medical care with the intent to return to the person's native country;

(E) does not claim residency in any other state or country; and

(i) is a minor child residing in Texas whose parent(s), managing conservator, guardian of the child's person, or caretaker (with whom the child consistently resides and plans to continue to reside) is a Texas resident;

(ii) is a person residing in Texas who is the legally dependent spouse of a Texas resident; or

(iii) is an adult residing in Texas, including an adult whose parent(s), managing conservator, guardian of the adult's person, or caretaker (with whom the adult [~~consistently~~] resides and plans to continue to reside) [~~is a Texas resident or who is his or her own guardian~~].

(64) [~~(62)~~] Treatment plan--The plan of care for the client (time and treatment specific) as certified by and implemented under the supervision of a physician or other practitioner in the program.

(65) [~~(63)~~] United States Public Health Service [~~(USPHS)~~] price--The average manufacturer price for a drug in the preceding calendar quarter under Title XIX of the Social Security Act, reduced by the rebate percentage, as authorized by the Veterans Health Care Act of 1992 (P.L. 102-585, November 4, 1992).

(66) [~~(64)~~] Urgent need for health care benefits--A [~~client~~] need for health care services when the lack of those services would cause a permanent increase in disability, intense pain or suffering, or death [~~that fits the criteria and protocol described in §38.16(e) of this title~~].

(67) [~~(65)~~] Ward--An individual placed under the protection of a guardian, or a person who by reason of incapacity is under the protection of a court either directly or through a guardian appointed by the court.

§38.3. Eligibility for Services.

(a) Eligibility for health care benefits. In order to be determined eligible for program health care benefits, applicants must meet the medical, financial, and other criteria in this section.

(1) Medical or dental criteria. At least annually, a physician or dentist must certify that the person meets the definition of "child with special health care needs" as defined by §38.2(5) of this title (relating to Definitions). The medical or dental criteria certification must be based upon a physical examination conducted within the 12 months immediately preceding the date of certification. The physician or dentist must document the medical or dental diagnosis code and descriptor from the International Classification of Diseases, Ninth Revision, Clinical Modification (ICD-9-CM), or its successor, for the person's primary diagnosis that meets the medical or dental criteria certification definition and for each of the person's other medical or dental conditions for statistical and referral purposes. To facilitate application to the program for certain applicants, the program Medical Director or Assistant Medical Director may accept written documentation of medical or dental criteria certification submitted by a physician or dentist who is licensed to practice in a state or jurisdiction of the United States of America other than Texas. The program does not reimburse for written documentation of medical or dental criteria certification. If a physician or dentist requests coverage of diagnosis and evaluation services to determine if the person meets the definition of a "child with special health care needs" and the person meets all other eligibility criteria for health care benefits, then the person may be given up to 60 days of program coverage for diagnosis and evaluation services only. Only program providers as specified in §38.6 of this title (relating to Providers), may be reimbursed for services as defined in §38.2 of this title.

(2) Financial criteria. Financial criteria are determined at least annually [~~every six months~~] or as directed by statute [~~statutory requirements~~]. Financial criteria are based upon the [~~same~~] determinations of income, family size, and disregards [~~as the CHIP. Premiums paid for health insurance may be included as a disregard~~]. All families must verify their income and disregards[~~, if applicable~~].

(A) The income level for eligibility is 200% of the FPL [~~federal poverty level~~]. If the family income exceeds this level, and the applicant's family can document its responsibility for family [~~household~~] medical bills incurred within 12 months prior to the application date or within 6 months after the financial eligibility denial date that are equal to or greater than the amount in excess of the 200% level, the applicant may be determined financially eligible for a period of 6 months, or as directed by statutory requirements, beginning on the eligibility date.

(B) Applications to Medicaid and the SSI [~~Supplemental Security Income (SSI)~~] programs.

(i) - (ii) (No change.)

(3) - (7) (No change.)

(8) Determination of continuing eligibility for health care benefits. Financial criteria for eligibility for health care benefits must be re-established at least annually [~~every six months~~] or as directed by statute [~~statutory requirements~~]. Medical or dental criteria must be re-established at least annually (i.e., within 365 days from the first day of the client's initial date of program [~~current~~] eligibility [~~period~~] or within 366 days during a leap year). Clients [~~Ongoing clients~~] for health care benefits will be notified of program deadlines for re-establishment of eligibility. If an ongoing client for health care benefits does not meet program deadlines for submitting information required for the determination of continuing eligibility, the client's eligibility for health care benefits will end. If the then former client re-applies to the program after such lapse in eligibility and is determined eligible for health care benefits, the former client will be considered a new client. If the program has a waiting list for health care benefits, the new client will be placed on the waiting list in order according to the date and time the client is determined eligible for health care benefits.

(b) (No change.)

§38.4. Covered Services.

(a) (No change.)

(b) Types of service.

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

(3) Rehabilitation services. Rehabilitation services means a process of physical restoration, improvement, or maintenance of a body function destroyed or impaired by congenital defect, disease, or injury which includes the following acute and chronic or rehabilitative services: facility care, medical and dental care, occupational, speech, and physical therapies, the provision of medications, braces, orthotic and prosthetic devices, durable medical equipment, other medical supplies, and other services specified in this chapter. To be eligible for program reimbursement, treatment must be for a client and must have been prescribed by a practitioner [~~provider~~] in compliance with all applicable laws and regulations of the State of Texas. Services may be limited and the availability of certain services described in the following subparagraphs is contingent upon implementation of automation procedures and systems.

(A) Medical or dental assessment and treatment. A physician or dentist [~~Physicians~~] must provide medical or dental assessment and treatment services, including [~~medically~~] necessary laboratory and radiology studies. All [~~Other~~] practitioners must be li-

censed by the State of Texas, enrolled as providers in the program, and practicing within the scope of their respective licenses or registrations.

(B) Outpatient mental health services. Outpatient mental health services are limited to no more than 30 encounters in a calendar year by all professionals licensed to provide mental or behavioral health services including psychiatrists, psychologists, licensed clinical social workers [~~(LCSW)~~], licensed marriage and family therapists, and licensed professional counselors per eligible client per calendar year. Coverage includes, but is not limited to psychological or neuropsychological testing, psychotherapy, and counseling.

(C) Preventive and therapeutic dental services (including oral and maxillofacial surgery). Preventive and therapeutic dental services must be provided by licensed dentists enrolled to participate in the program. Coverage for therapeutic dental services, including prosthetics and oral and maxillofacial surgery, follows the Texas Medicaid program guidelines. Orthodontic care must be prior authorized and may be provided only for CSHCN Services Program eligible clients with diagnoses of cleft-craniofacial abnormalities, dentofacial abnormalities, or late effects of fractures of the skull and face bones.

(D) Podiatric services. Podiatric services must be provided by licensed practitioners [~~providers~~] enrolled to participate in the program. Podiatrists are limited to services medically necessary to treat conditions of the foot and ankle. Podiatric services follow the Texas Medicaid program guidelines. Supportive devices, such as molds, inlays, shoes, or supports, must comply with coverage limitations for foot orthoses.

(E) Treatment in program participating facilities. Hospital [~~Non-emergency hospital~~] care must be provided in facilities that are enrolled as program providers. The length of stay is limited according to diagnosis, procedures required, and the client's condition.

(i) Inpatient hospital care, coverage limitations, and inpatient psychiatric care.

(I) (No change.)

(II) Coverage limitations. Coverage is limited to 60 days per calendar year [~~except for stem cell transplantation, for which coverage is available for 120 days per calendar year~~]. For stem cell transplantation, an additional 60 days coverage may be allowed.

(III) (No change.)

(ii) - (iv) (No change.)

(v) Care for renal disease. Renal dialysis is limited to the treatment of acute renal disease or chronic (end stage) renal disease. Treatment may be provided through a renal dialysis facility, inpatient or outpatient hospital, or in the client's home. Covered services include [~~and includes~~], but are [~~is~~] not limited to dialysis, laboratory services, drugs and supplies, declotting shunts, on-site physician services, and appropriate access surgery. Renal transplants must be prior authorized, and approval is subject to the availability of funds. If funding is available, renal [~~Renal~~] transplants may be covered in approved renal transplant centers if the projected cost of the transplant and follow-up care is less than that of continuing renal dialysis. Estimated cost of the renal transplant over a one-year period versus the cost of renal dialysis for one year at their facility must be documented. For each client 18 years of age and older, the transplant team must also provide a plan of care to be implemented after the client reaches 21 years of age and is no longer eligible for program services. [~~Renal transplants must be prior authorized, and approval is subject to the availability of funds.~~]

(F) - (H) (No change.)

(I) Hyperalimentation and TPN [~~Total Parenteral Nutrition (TPN)~~] Services. Services include, but are not limited to solutions and additives, supplies and equipment, customary and routine laboratory work, enteral supplies, and nursing visits. These services may be provided on a daily basis when oral intake cannot maintain adequate nutrition. Covered services must be reasonable, medically necessary, appropriate, and prescribed by a practitioner licensed to do so.

(J) - (S) (No change.)

(4) (No change.)

(5) Family support services. Family support services include disability-related support, resources, or other assistance and may be provided to the family of a client with special health care needs.

(A) - (D) (No change.)

(E) Unallowable services. Family support funds may not be used to provide those services that do not relate to the client's disability and do not directly support the client's living in his or her natural home and participating in family life and integrated or inclusive community activities. Examples of unallowable services include, but are not limited to:

(i) - (xviii) (No change.)

(xix) services provided by an individual under the age of 18 years or by the client's parent(s), guardian, or other individual(s) residing with the client [~~member of the client's household~~]; and

(xx) services exclusively to support the care of siblings or other individual(s) residing with the client [~~members of the client's household~~], but which are not necessary to meet the medical needs of the client.[;]

(F) (No change.)

(6) Other types of services. The following services also are available through the program.

(A) - (B) (No change.)

(C) Meals and lodging. The program may provide meals and lodging to enable a client, accompanied by a parent, guardian, or their designee as needed, to obtain inpatient or outpatient care [~~for a client~~] at a facility located away from their home. The reason for the inpatient or outpatient visit must be directly related to medically necessary treatment for the client that is provided by program enrolled providers and covered by the program. Meals and lodging associated with travel to services that are provided more than 50 miles from the Texas border will not be approved except as specified in §38.6(e) of this title.

(D) (No change.)

(E) Payment of insurance premiums, coinsurance, co-payments, and deductibles. The program may pay public or private health insurance premiums to maintain or acquire a health benefit plan or other third party coverage for the client, and if paying for such health insurance can reasonably be expected to be cost effective for the program. The program may pay for coinsurance and deductible amounts when the total amount paid (including all payers) to the provider does not exceed the amount allowed by the program for the covered service. The program may reimburse clients for co-payments paid for covered drugs [~~services~~]. The program will not pay premiums, deductibles, coinsurance, or co-payments for clients enrolled in CHIP.

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

§38.5. Rights and Responsibilities of a Client's Parent(s) [~~Parents~~], Foster Parent(s) [~~Parents~~], Guardian, or Managing Conservator, or an Adult Client.

(a) Rights. A client's parent(s) [~~parents~~], foster parent(s) [~~parents~~], guardian, or managing conservator, or an adult client has [~~shall have~~] the right to:

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

(b) Responsibilities. A client's parent(s) [~~parents~~], foster parent(s) [~~parents~~], guardian, or managing conservator, or an adult client has [~~shall have~~] the responsibility to:

(1) - (9) (No change.)

(c) (No change.)

§38.6. Providers.

(a) General requirements for participation. The Children with Special Health Care Needs Services [~~(CSHCN)~~] Act, Health and Safety Code, §35.004, requires that all [~~physicians, dentists, licensed dietitians, facilities, specialty centers, and other~~] providers be approved to participate in the program according to program criteria and procedures.

(1) Providers seeking approval for program participation must submit a completed application to the program or its designee including a signed provider agreement and all documents requested [~~on the application~~].

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

(6) All approved providers must agree to the following:

(A) (No change.)

(B) retain these records and claims for a period of five years from the date of service, [~~until~~] the client's 21st birthday, or until all audit questions, appeal hearings, investigations, litigation, or court cases are resolved, whichever occurs last;

(C) (No change.)

(D) allow the department, the Office of Inspector General [~~(OIG)~~], HHSC, or designees of these organizations access to its premises; and cooperate and assist with any audit or investigation.

(7) - (8) (No change.)

(9) If a license or certification is required by law to practice in the State of Texas, the provider must maintain the required license or certification and practice within the scope of the license, certification, registration, and any other applicable requirements.

(10) - (11) (No change.)

(b) (No change.)

(c) Provider types. Approved providers include, but are not limited to:

(1) - (23) (No change.)

(24) physician [~~physicians~~] assistants;

(25) - (28) (No change.)

(d) - (e) (No change.)

§38.7. Ambulatory Surgical Care Facilities.

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

(c) The program reimbursement for care at freestanding ASC facilities shall be limited to Levels I and II surgical procedures as [~~so~~] designated by the American Society of Anesthesiologists.

§38.8. Inpatient Rehabilitation Centers.

(a) (No change.)

(b) The criteria for inpatient rehabilitation center approval include the following.

(1) (No change.)

(2) The center shall be located in Texas.

(3) The center shall be located outside Texas, in the United States within 50 miles of the Texas border.

§38.9. Cleft-Craniofacial Services.

To assure that clients with cleft lip, cleft palate, or other craniofacial anomalies receive quality, comprehensive services, cleft-craniofacial teams requesting approval from the program must comply with the following standards:

(1) All cleft-craniofacial surgical procedures are provided within the context and consultation of a coordinated, comprehensive, interdisciplinary cleft-craniofacial team and must be prior authorized. Team composition is consistent with current basic standards of the American Cleft Palate-Craniofacial Association [~~(ACPA)~~].

(2) A [~~The~~] comprehensive cleft-craniofacial team will include an operating surgeon, orthodontist, speech-language pathologist, and at least one additional specialist from otolaryngology, audiology, pediatrics, genetics, social work, psychology, and general pediatric or prosthetic dentistry. Adjunct participants may be added as determined by the cleft-craniofacial team to meet the needs of individual clients.

(3) (No change.)

§38.10. Payment of Services.

The program reimburses providers for covered services for clients. Payment may be made only after the delivery of the service, with the exception of meals, transportation, lodging, and insurance premium payments. Excluding allowable insurance or health maintenance organization co-payments, the client or client's family must not be billed for the service or be required to make a preadmission or pretreatment payment or deposit. Providers may not request or accept payment from the client or the client's family for completing any program forms. Providers must agree to accept established fees as payment in full. The program may negotiate reimbursement alternatives to reduce costs through requests for proposals, contract purchases, or incentive programs.

(1) Payment or denial of claims. Payments [~~All payments~~] made on behalf of a client will be for claims received by the program or its payment contractor within 95 days of the date of service, within 95 days from the date of discharge from inpatient hospital and inpatient rehabilitation facilities, within 95 days from the date the client's eligibility is added to program automation systems, or within the submission deadlines listed in paragraphs (1)(B)(ii) and (2) of this section, whichever is later. Claims for family support services, drug co-payments, and insurance premium payment assistance must be submitted within 95 days of the last day of the month in which services were provided. If the 95th day for receipt of a claim falls on a weekend or holiday, the deadline shall be extended to the next business day following the weekend or holiday. The program must process the claims of eligible providers within a period not to exceed 30 days of receipt and determination of proper evidence establishing the validity of claims, invoices, and statements. In cases where the program determines that a basis exists for further review, suspension, or other irregularity, extended processing time may be required. [~~Claims will either be paid or denied within 30 days of receipt.~~] The manager of the department unit having responsibility for oversight of the program or his or her designee(s) may waive the filing deadlines according to the conditions

and circumstances specified in paragraphs (3) - (5) of this section. A claim must be processed and paid within 24 months of the date of service. Claims received by the program or its payment contractor after this time frame will not be considered for payment by the program.

(A) - (B) (No change.)

(2) Claims involving health insurance coverage, CHIP, or Medicaid. Any health insurance that provides coverage to the client must be utilized before the program can pay for services. Providers must file a claim with health insurance, CHIP, or Medicaid prior to submitting any claim to the program for payment. Claims with health insurance must be received by the program within 95 days of the date of disposition by the other third party resource, and no later than 365 days from the date of service. The program will consider claims received for the first time after the 365-day deadline if a third party resource recoups a payment made in error; however, the claim must be received by the program within 95 days from the third party's disposition. The program may pay for covered health care benefits during CHIP or other health insurance enrollment waiting periods. During these periods, providers may file claims directly with the program without evidence of denial by the other insurer.

(A) Health insurance denial [~~or nonresponse~~]. If a claim is denied by health insurance, the provider may bill the program if the letter of denial also is submitted with the claim form. If the denial letter is not available, the provider must include on the claim form the date the claim was filed with the insurance company, the reason for the denial, name and telephone number of the insurance company, the policy number, the name of the policy holder and identification numbers for each policy covering the client, the name of the insurance company employee who provided the information on the denial of benefits, and the date of the contact. [~~If more than 110 days have elapsed from the date a claim was filed with the third party resource and no response has been received, the claim may be submitted to the program for consideration of payment. Claims must be submitted with documentation indicating the third party resource has not responded.~~]

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

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

(6) Program fees. The program establishes fees and payment methodologies for covered medical, dental, and other services based upon appropriated funds. All fees are subject [~~Subject~~] to [~~any~~] reductions or limitations authorized by §38.16(b)(2)(E) of this title (relating to Procedures to Address Program Budget Alignment).[~~, the program or its designee shall reimburse claims for covered medical, dental, and other services according to the following:~~]

[~~(A) meals, lodging, and transportation:~~]

~~*(i)* meals--up to the amount specified in the current State of Texas Travel Allowance Guide as per diem meal expenses;~~]

~~*(ii)* lodging:~~]

~~*(I)* hotel--the amount as contracted with the Texas Medicaid Medical Transportation Program (MTP), not to exceed the amount specified in the current State of Texas Travel Allowance Guide as per diem lodging expenses plus all applicable hotel occupancy taxes; and~~]

~~*(II)* Ronald McDonald House--the amount contracted with the MTP; and~~]

~~*(iii)* transportation:~~]

~~*(I)* mileage--the distance and amount per mile as specified in the current State of Texas Travel Allowance Guide;~~]

~~*(II)* by contract--the amount as negotiated by the MTP with contractors such as intercity buses, vans, cabs, or urban mass transit authorities;~~]

~~*(III)* air fare--the ticket price reflecting the state discount if ordered by MTP or the billed amount if MTP had no opportunity to coordinate transportation in an emergency; and~~]

~~*(IV)* cab fare--the billed amount if other transportation is unavailable or the MTP is unable to coordinate transportation;~~]

[~~(B) administrative fee to social service organizations--the percentage of the charge for meals, lodging, and transportation negotiated by the MTP with these entities;~~]

[~~(C) ambulance service--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;~~]

[~~(D) transportation of remains:~~]

~~*(i)* first call--$150;~~]

~~*(ii)* embalming--$100;~~]

~~*(iii)* container--$150;~~]

~~*(iv)* mileage billed by funeral home--$1.00 per mile; and~~]

~~*(v)* air freight--the billed amount;~~]

[~~(E) nutritional products--the least of the billed amount, the amount allowed by the Texas Medicaid Program, or the Average Wholesale Price (AWP) per unit according to the prices in the current edition of the Drug Topics Red Book, published by Medical Economics Company, Inc., Montvale, New Jersey 07645-1742, on file with the CSHCN Services Program. For products not listed in the current edition of the Drug Topics Red Book, reimbursement shall be based on the same methodology using the AWP supplied by the manufacturer of the product;~~]

[~~(F) nutritional services--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;~~]

[~~(G) medical foods--the least of the billed amount, the manufacturer's suggested retail price (MSRP), or the amount allowed by the Texas Medicaid Program;~~]

[~~(H) out-patient medications:~~]

~~*(i)* medications covered by Medicaid when billed by pharmacies--the same drug costs and dispensing fees allowed by the Texas Medicaid Vendor Drug Program;~~]

~~*(ii)* medications not covered by Medicaid when billed by pharmacies--the lower of the billed amount or the drug cost available through the database used by the Texas Medicaid Vendor Drug Program plus the same dispensing fees allowed by the Texas Medicaid Vendor Drug Program;~~]

~~*(iii)* medications covered by Medicaid when billed by hospitals--(the lower of the billed amount or the drug cost available through the database used by the Texas Medicaid Vendor Drug Program plus dispensing fee); and~~]

~~*(iv)* hemophilia blood factor products--the lower of the billed price or the United States Public Health Service (USPHS) price in effect on the date of service;~~]

[~~(I) expendable medical supplies--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;~~]

[(J) durable medical equipment--provided by enrolled home health agencies and durable medical equipment providers, the lower of the billed amount or the amount allowed by the Texas Medicaid Program. If the Texas Medicaid Program has not established an allowable amount, then reimbursement will be the least of the following:]

[(i) the billed amount; or]

[(ii) the Medicare fee schedule as defined in 1 Texas Administrative Code, §354.1031(b)(9); or]

[(iii) the Manufacturer's Suggested Retail Price (MSRP) minus a discount as established by the Texas Medicaid Program; or if no MSRP exists, the incurred cost to the dealer plus a percentage as determined by the Texas Medicaid Program;]

[(K) orthotics and prosthetics--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;]

[(L) total parenteral nutrition and hyperalimentation (including equipment, supplies and related services)--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;]

[(M) home health nursing services (provided only through participating program home and community support service agencies)--reimbursement for a maximum of 200 hours per client per calendar year, with an additional 200 hours per client per calendar year available if justification of need and cost effectiveness are documented;]

[(i) services provided by a registered nurse--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;]

[(ii) services provided by a licensed vocational nurse--the lower of the billed amount or the amount allowed by the Texas Medicaid Program; and]

[(iii) services provided by a home health aide or home health medication aide (including those legally delegated by a supervising registered nurse)--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;]

[(N) outpatient physical therapy, occupational therapy, speech-language pathology, and respiratory therapy (provided by physicians or by therapists other than physicians)--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;]

[(O) audiological testing and amplification devices--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;]

[(P) insurance premium payment assistance program--the lowest available premium for a plan which covers the client if cost effective;]

[(Q) hospital (inpatient and outpatient care) and inpatient psychiatric care--reimbursed at 80% of the rate authorized by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) which is equivalent to the hospital's Medicaid interim rate;]

[(R) inpatient rehabilitation care--reimbursed at 80% of TEFRA rates for a maximum of 90 inpatient days per calendar year;]

[(S) hospice services--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;]

[(T) care for renal disease--]

[(i) renal dialysis services--the lower of the billed amount or the amount allowed by the Texas Medicaid Program; and]

[(ii) renal transplant services--renal transplants may be covered if the projected cost for the transplant and follow-up care is less than that of continuing renal dialysis. Negotiated coverage and cost are based on prior authorization documentation of cost effectiveness;]

[(U) freestanding ambulatory surgical centers--the lower of the billed amount or the amount allowed by the Texas Medicaid Program based upon Ambulatory Surgical Code Groupings approved by the Centers for Medicare and Medicaid Services (CMS) and the Department of State Health Services;]

[(V) hospital ambulatory surgical centers--the lower of the amount billed or the amount allowed by the Texas Medicaid Program based upon Ambulatory Surgical Code Groupings approved by the CMS and the Department of State Health Services;]

[(W) covered professional services by physicians, podiatrists, advanced practice registered nurses, psychologists, licensed professional counselors, or other providers that are not otherwise specified--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;]

[(X) independent laboratory--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;]

[(Y) radiology services--the lower of the billed amount or the amount allowed by the Texas Medicaid Program;]

[(Z) dental services--the lower of the billed amount or the amount allowed by the Texas Medicaid Program; and]

[(AA) vision services--the lower of the billed amount or the amount allowed by the Texas Medicaid Program, except certain specialized lenses, which are reimbursed at the manufacturer's suggested retail price less 18%.]

(7) - (8) (No change.)

§38.11. Contracts, Written Agreements, and Donations.

The program may contract on a bid basis for treatment, equipment, medications, supplies, program operations, and other services in order to conserve funds and administer the program effectively.

(1) (No change.)

(2) The program may use consultants from any medical or dental specialty or other discipline to address specific issues or [and] problems in relation to the identification, diagnosis and evaluation, rehabilitation, case management, other family support services, and health benefits coverage for clients.

(3) (No change.)

§38.12. Denial, Modification, Suspension, or Termination of Program Eligibility or Eligibility for Health Care Benefits.

(a) Any person applying for or eligible for health care benefits from the program shall be notified in writing if the program proposes to deny, modify, suspend, or terminate such health care benefits because:

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

(6) the [a] client has received third party or liability payments and has failed to reimburse the department for services provided to the client;

(7) - (10) (No change.)

(b) (No change.)

§38.13. Right of Appeal.

(a) Administrative review.

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

(7) If the program receives a written request for administrative review within 30 days of the date of the notification, the program shall conduct an administrative review of the circumstances surrounding the proposed action. Within 30 days following receipt of a request for administrative review, the [~~The~~] program shall send [~~give~~] the applicant, client, family, or provider written notice of:

(A) the program decision, including [~~and~~] the supporting reasons for the decision; or [~~within 30 days of receipt of the request for administrative review.~~]

(B) the need for extended time to research the circumstances, including an expected date for response to the request.

(8) (No change.)

(b) (No change.)

§38.14. Development and Improvement of Standards and Services.

To ensure that cost-effective, quality, appropriate medical and related services are available and delivered to clients, the program may establish a system of program evaluation. Program evaluation may include information obtained from management [~~to obtain management information~~] about the program's operation and effectiveness, may [~~to~~] establish guidelines and standards for program health care services, may [~~to~~] monitor compliance with these established standards and guidelines, may [~~to~~] identify and analyze patterns and trends in provider billing and service delivery, and may [~~to~~] develop systems which promote family-centered, community-based alternatives that nurture and support children with special health care needs.

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

§38.15. Third Party Recovery.

(a) The program or the program's designee may recover the cost of services provided to a client from any [~~a~~] person or entity who does not pay or reimburse the department as required by Health and Safety Code, §35.007.

(b) - (d) (No change.)

§38.16. Procedures to Address Program Budget Alignment.

(a) The department must [~~shall~~] analyze actuarial cost projections concerning program administrative and client services to estimate the amount of funds needed in the fiscal year by the program to serve program clients and shall monitor such program cost projections and funding analyses at least monthly to determine whether the estimated amount of funds needed by the program will:

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

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

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

Filed with the Office of the Secretary of State on October 22, 2012.

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Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 776-6972

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CHAPTER 169. ZOONOSIS CONTROL
SUBCHAPTER A. RABIES CONTROL AND ERADICATION
25 TAC §§169.21 - 169.34

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §§169.21 - 169.34, concerning the control of rabies.

BACKGROUND AND PURPOSE

These rules are necessary to comply with Health and Safety Code, Chapter 826, "Rabies," §826.011, which provides the Executive Commissioner of the Health and Human Services Commission with the authority to administer the rabies control program and adopt rules necessary to effectively administer the program.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 169.21 - 169.34 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

Specifically, the sections cover purpose, definitions, information relating to the control of rabies, preexposure rabies vaccination, reports of human exposure to rabies, facilities for the quarantining or impounding of animals, quarantine method and testing, requirements of a quarantine facility, vaccination requirement, disposition of domestic animals exposed to rabies, interstate movement of dogs and cats into Texas, international movement of dogs and cats into Texas, submission of specimens for laboratory examination, and statewide quarantine.

The proposed revisions to the sections update and clarify language to enable those subject to the sections to more readily comply. The amendments enhance implementation of a comprehensive rabies control program that will diminish public exposure to rabies, reduce morbidity and mortality from rabies among humans and animals, and provide for humane treatment of animals suspected of rabies. After carefully considering the alternatives, the department believes the rules as amended are the best method of implementing the statute to protect the public health with rules for the control and eradication of rabies in the State of Texas.

SECTION-BY-SECTION SUMMARY

The amendments to §§169.21, 169.23 and 169.24 modify language to make the sections more concise and remove superfluous language.

The amendment to §169.22 updates and adds definitions to maintain the sections technically correct.

The amendment to §169.25 clarifies the type of exposure and adds a legal citation.

The amendment to §169.26 clarifies facility and animal care requirements and provides succinct descriptions.

The amendment to §169.27 clarifies language relating to rabies exposure and animal quarantine and disposition, plus reformats current language to establish a smoother reading transition.

The amendment to §169.28 clarifies and updates language relating to the requirements of quarantine facilities, including explaining how appeals are handled.

The amendment to §169.29 clarifies the rabies vaccination requirement and the intent of the rule.

The amendment to §169.30 modifies language pertaining to disposition of domestic animals exposed to rabies to coincide with proposed updates to definitions.

The amendments to §169.31 and §169.32 clarify language pertaining to dogs and cats coming into Texas from other states and other countries and required rabies vaccination documentation.

The amendment to §169.33 modifies language pertaining to the submission of rabies specimens for laboratory examination to meet recent changes in the needs of the department's laboratory.

The amendment to §169.34 clarifies language pertaining to the statewide quarantine and the animals subject to the statewide quarantine, including updating information on associated agencies.

FISCAL NOTE

Janna Zumbrun, Director, Infectious Disease Prevention Section, has determined that for each year of the first five years that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Zumbrun has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed. The Texas Veterinary Medical Association and the Texas State Board of Veterinary Medical Examiners were contacted about proposed changes to rabies vaccination certificate requirements; there is not an anticipated fiscal impact for veterinarians who will need to comply with these amendments. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Ms. Zumbrun has determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections will be enhancing public health and safety by advising preexposure rabies vaccination of persons at high risk for rabies exposure; requiring reporting of potential exposure of humans to rabies; imposing quarantine or testing of animals that potentially exposed a human to rabies; setting standards for the humane and effective quarantine of these animals; establishing minimum standards for vaccination of dogs and cats against rabies with associated recordkeeping and records retention; establishing requirements for the disposition of domestic animals exposed to a rabid animal; establishing rabies vaccination requirements for interstate and international movement of dogs and cats into Texas; establishing standards for the submission of specimens to the department's laboratory for rabies testing; and establishing statewide rabies quarantine for particular wildlife species. After careful consideration of alternatives, the department concludes that the rules, as revised, provide a clear, concise, comprehensive policy of rabies control that will diminish public exposure to rabies, reduce morbidity and mortality from rabies among humans and animals, and provide for humane treatment of animals suspected of rabies. This policy is the most efficient use of public and private resources to achieve these goals.

REGULATORY ANALYSIS

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

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Comments on the proposal may be submitted to Tom Sidwa, DVM, MPH, Department of State Health Services, Infectious Disease Prevention Section, Zoonosis Control Branch, Mail Code 1956, P.O. Box 149347, Austin, Texas 78714-9347 or by email to Tom.Sidwa@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

LEGAL CERTIFICATION

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

STATUTORY AUTHORITY

The amendments are authorized by Health and Safety Code, §81.004, which provides the department with the authority to adopt rules necessary for the implementation of the Communicable Disease Prevention and Control Act; §826.011, which provides the department with the authority to administer the rabies control program and adopt rules necessary to effectively administer this program; §826.012, which provides that rules adopted by the department are minimum standards for rabies control; §826.042, which provides that the department shall adopt rules governing the testing of quarantined animals and the procedure for and method of quarantine; §826.045, which requires the department to adopt rules to enforce an area rabies quarantine; §826.051, which requires the department to adopt rules governing the types of facilities that may be used to quarantine or impound animals; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary

for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The amendments affect Health and Safety Code, Chapters 81, 826, and 1001; and Government Code, Chapters 531 and 2001.

§169.21. Purpose.

The purpose of this subchapter [~~these sections~~] is to protect public health by establishing standardized [~~uniform~~] rules for the control and eradication of rabies in the State of Texas, in accordance with [~~Chapter 826 of~~] the Texas Health and Safety Code, Chapter 826.

§169.22. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Unless defined below, all words have definitions as provided in the Texas Health and Safety Code, §826.002.

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

(5) Currently vaccinated--Vaccinated and satisfying all the following criteria.

(A) The animal must have been vaccinated against rabies with a vaccine licensed by the United States Department of Agriculture (USDA) for that [~~animal~~] species at or after the minimum age requirement and using the recommended route of administration for the vaccine.

(B) - (C) (No change.)

(6) - (10) (No change.)

(11) Euthanatize--To cause the death of an animal implementing a technique that is in accordance with the methods, recommendations, and procedures prepared by the American Veterinary Medical Association (AVMA) and set forth in the *AVMA Guidelines on Euthanasia* (June 2007) and:

(A) rapidly produces unconsciousness and death with minimal pain or distress; or

(B) utilizes anesthesia produced by an agent that causes painless loss of consciousness and death following such loss of consciousness.

(12) [~~(11)~~] Health service region--A contiguous group of Texas counties, so designated by the Executive Commissioner of the Health and Human Services Commission.

(13) [~~(12)~~] High-risk animals--Those animals which have a high probability of transmitting rabies; they include skunks, bats, foxes, coyotes, and raccoons.

(14) [~~(13)~~] Housing facility--Any room, building, or area used to contain a primary enclosure or enclosures.

[~~(14) Humanely killed--To cause the death of an animal by a method which:~~]

[~~(A) rapidly produces unconsciousness and death without pain or distress; or~~]

[~~(B) utilizes anesthesia produced by an agent that causes painless loss of consciousness, and death following such loss of consciousness.~~]

(15) - (25) (No change.)

(26) Sanitize--To make visibly [~~physically~~] clean followed by the use of a disinfectant [~~and~~] to destroy disease-producing agents.

(27) Suitable Specimen--For rabies testing, a head with brain and brain stem intact or a complete transverse cross section of the brain stem and tissue from at least one of the following: cerebellum and/or hippocampus.

(28) [~~(27)~~] Unowned animal--Any animal for which a custodian has not been identified.

(29) [~~(28)~~] Vaccinated--Properly administered by or under the direct supervision of a veterinarian with a rabies vaccine licensed for use in that species by the USDA.

(30) [~~(29)~~] Veterinarian--A person licensed to practice veterinary medicine in the United States.

(31) [~~(30)~~] Zoonosis Control Branch--The branch within the department to which the responsibility for administering these rules is assigned.

§169.23. Information Relating to the Control of Rabies.

The department's Zoonosis Control Branch will assume the responsibility of collecting, analyzing, and preparing monthly and annual summaries [~~summations~~] of rabies activity in the state. These reports will be forwarded to national, state, and municipal agencies as requested [~~required~~], and selected statistics will be sent to veterinary medical and animal control organizations throughout the state.

§169.24. Preexposure Rabies Vaccination.

Preexposure rabies vaccinations should be administered to [~~all~~] individuals whose activities place them at a significant risk of exposure to rabies, in accordance with the recommendations of the Centers for Disease Control and Prevention (CDC) Advisory Committee on Immunization Practices (ACIP).

§169.25. Reports of Human Exposure to Rabies.

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

(c) The local rabies control authority will investigate each potential rabies exposure and assure appropriate resolution, in accordance with §169.27 of this title.

§169.26. Facilities for the Quarantining or Impounding of Animals.

(a) Generally.

(1) (No change.)

(2) Water and electric power. Reliable and adequate electric power, if required to comply with other provisions of these sections, and adequate fresh, clean [~~potable~~] water shall be available.

(3) Storage. Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against infestation or contamination by vermin. Refrigeration shall be provided for supplies of perishable food. Non-perishable foods, such as dry food, do not require refrigeration. Open [~~For example, open~~] bags of non-perishable dry food should [~~may~~] be sealed or stored in sealed cans, and unopened bags should [~~may~~] be stacked on pallets or shelves with at least 12 inches of clearance between the floor and the first level to enable effective inspection and cleaning practices.

(4) - (5) (No change.)

(6) Management. The manager of a facility should be either an individual who has satisfactorily completed an appropriate [~~department~~] training course or a veterinarian.

(7) (No change.)

(8) Heating. Adequate shelter shall be provided to protect animals from any form of cold or inclement weather and direct effects

of wind, rain, or snow. Auxiliary heat or clean, dry bedding material shall be provided any time the ambient temperature falls below 50 degrees Fahrenheit (10 degrees Celsius) [~~for more than four consecutive hours~~] when animals are present. If supplemental bedding material is used during cold weather, [~~larger~~] quantities should be adequate to prevent hypothermia [~~used~~] as temperatures drop.

(9) Cooling and Ventilation. Adequate shelter shall be provided to protect animals from any form of overheating and direct rays of the sun. Facilities shall be provided with fresh air either by means of windows, doors, vents, fans, or air conditioning and shall be ventilated so as to minimize drafts, odors, and moisture condensation. Auxiliary ventilation, such as fans or air conditioning, shall be provided in indoor facilities when the ambient temperature is 85 degrees Fahrenheit (29.5 degrees Celsius) or higher when animals are present.

(10) - (11) (No change.)

(12) Primary enclosures. Primary enclosures should be designed based upon enclosure guidelines prepared by The Association of Shelter Veterinarians and set forth in *Guidelines for Standards of Care in Animal Shelters* (2010). Primary enclosures shall:

(A) - (E) (No change.)

(F) provide sufficient space to allow each animal to make normal postural adjustments without touching the top of the enclosure, including turning freely, standing easily, sitting, stretching, moving its head, lying in a comfortable position with limbs extended, and moving and assuming a comfortable posture for feeding, drinking, urinating, and defecating [~~turn around fully, stand, sit, and lie in a comfortable position~~].

(b) Feeding.

(1) (No change.)

(2) Dogs and cats shall be fed at least once a day or more often as appropriate for the age and condition of the animal, except as directed by a veterinarian.

(3) (No change.)

(4) All other animals shall be fed appropriately as described on the packaging of a commercial, species-specific food, except [~~or~~] as directed by a veterinarian.

(5) (No change.)

(c) Watering. If fresh, clean [~~potable~~] water is not accessible to all animals at all times, it shall be offered to them at least twice daily for periods of not less than one hour, except as directed by a veterinarian. Drinking bottles may be used for animals acclimated to their use. Domestic ferrets shall have fresh, clean [~~potable~~] water accessible at all times, provided in drinking bottles of appropriate size to maintain a fresh supply. Water receptacles shall be kept clean and sanitary.

(d) (No change.)

(e) Pest Control. A regular program for the control of insects, ectoparasites, and other pests shall be established and maintained. The facility shall be free of visible signs of [~~insects,~~] rodents[~~,~~] and keep other vermin infestations to a minimum at all times. Each pesticide must be used in accordance with its manufacturer's label instructions.

(f) - (g) (No change.)

§169.27. Quarantine Method and Testing.

(a) When a dog, cat, or domestic ferret which has bitten a human has been identified, the custodian will place the animal (regardless of its vaccination status) in quarantine as defined in the Texas Health and Safety Code, §826.002, until the end of the 10-day observation period. The animal must also be quarantined if there is probable cause to believe that it has otherwise exposed a human to rabies. The observation period will begin at the time of the exposure. The animal must be placed in a department-licensed quarantine facility specified by the local rabies control authority and observed at least twice daily. However, the local rabies control authority may allow the animal to be quarantined in a veterinary clinic. As an alternative to quarantine at a department-licensed facility or a veterinary clinic, the local rabies control authority may allow home confinement. [~~If the potential rabies exposure occurs in a city or county other than where the animal's custodian resides, the animal may be transferred to a department-licensed quarantine facility or a veterinary clinic in the city or county of the custodian's residence or allowed home confinement, if applicable, if there is mutual agreement to do so between the local rabies control authorities for the city or county where the exposure occurred and where the custodian resides. The alternative to quarantining (to include home confining) a dog, cat, or domestic ferret is to have the animal humanely killed in such a manner that the brain is not damaged and a suitable specimen (head with brain intact or brain) submitted to a department-designated laboratory for rabies testing as specified in subsection (h) of this section.~~] To allow home confinement, the following criteria must be met.

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

(3) During the confinement period, the animal's custodian must monitor the animal's behavior and health status and immediately notify the local rabies control authority if any change is noted.

(4) [~~(3)~~] The local rabies control authority or a veterinarian must observe the animal at least on the first and last days of the home confinement.

(5) [~~(4)~~] The animal was not a stray as defined in the Texas Health and Safety Code, §826.002, at the time of the potential exposure.

(b) If the potential rabies exposure described in subsection (a) of this section occurs in a city or county other than where the animal's custodian resides, the animal may be transferred to a department-licensed quarantine facility or a veterinary clinic in the city or county of the custodian's residence or allowed home confinement, if applicable, if there is mutual agreement to do so between the local rabies control authorities for the city or county where the exposure occurred and where the custodian resides.

(c) The alternative to quarantining (to include home confining) a dog, cat, or domestic ferret that has bitten or otherwise potentially exposed a person to rabies as described in subsection (a) of this section is to have the animal euthanatized in such a manner that the brain is not damaged and a suitable specimen submitted to a department-designated laboratory for rabies testing. A list of department-designated laboratories may be found on the department's website or may be obtained from any of the department's regional Zoonosis Control offices.

(d) [~~(b)~~] A domestic animal which has potentially exposed a human to rabies and has been designated by the local rabies control authority as unowned may be euthanatized [~~humanely killed~~]. If the animal is euthanatized, a [~~A~~] suitable specimen shall be submitted for rabies testing [~~as specified in subsection (h) of this section~~].

(e) [~~(c)~~] If the animal implicated in the potential exposure is a high-risk animal, it shall be euthanatized [~~humanely killed~~] and a suitable specimen submitted for rabies testing [~~as specified in subsection (h) of this section~~].

(f) [~~(d)~~] If the animal implicated in the potential exposure is a low-risk animal, neither quarantine nor rabies testing will be required unless the local rabies control authority has cause to believe the animal is rabid, in which case it shall be euthanatized [~~humanely killed~~] and a

suitable specimen submitted for rabies testing [~~as specified in subsection (h) of this section~~].

(g) [~~(e)~~] The local rabies control authority may require an animal which has inflicted multiple bite wounds, punctures, or lacerations to a person to be euthanatized. [~~humanely killed~~] If the animal is euthanatized, [~~and~~] a suitable specimen shall be submitted for rabies testing [~~as specified in subsection (h) of this section~~].

(h) [~~(f)~~] If the animal implicated in the potential exposure is not included in subsections (a) - (g) [~~subsection (a), (b), (c), (d), or (e)~~] of this section, the animal either will be euthanatized [~~humanely killed~~] and a suitable specimen submitted for rabies testing [~~as specified in subsection (h) of this section~~] or the local rabies control authority may require the animal to be quarantined at a department-licensed quarantine facility or a veterinary clinic, or confined elsewhere as deemed appropriate by the local rabies control authority for the 30-day observation period as an alternative to euthanatizing [~~killing~~] and testing. If the potential rabies exposure occurs in a city or county other than where the animal's custodian resides, the animal may be transferred to a department-licensed quarantine facility or a veterinary clinic in the city or county of the custodian's residence or allowed confinement deemed appropriate if there is mutual agreement to do so between the local rabies control authorities for the city or county where the exposure occurred and where the custodian resides. During the observation period, the animal's custodian must monitor the animal's behavior and health status and immediately notify the local rabies control authority if any change is noted.

(i) [~~(g)~~] Any animal required to be quarantined under this section that[~~, which~~] cannot be maintained in secure quarantine[~~,~~] shall be euthanatized [~~humanely killed~~] and a suitable specimen submitted for rabies testing [~~as specified in subsection (h) of this section~~].

(j) [~~(h)~~] All laboratory specimens referred to in subsections (c) - (i) [~~(a) - (g)~~] of this section shall be submitted in accordance with §169.33 of this title (relating to Submission of Specimens for Laboratory Examination).

(k) [~~(i)~~] At the discretion of the local rabies control authority, assistance animals may not be required to be placed in quarantine (to include confinement) during the observation period. During the applicable observation period, the animal's custodian must monitor the animal's behavior and health status and immediately notify the local rabies control authority if any change is noted.

(l) [~~(j)~~] Police service animals are exempted from quarantine per the Texas Health and Safety Code, §826.048, including confinement. During the applicable observation period, the animal's custodian must monitor the animal's behavior and health status and immediately notify the local rabies control authority if any change is noted.

(m) [~~(k)~~] Animals should not be vaccinated against rabies during the observation period; however, animals may be treated for [~~unrelated~~] medical problems that are diagnosed by a veterinarian and are not related to rabies. If the animal becomes ill during the observation period, the local rabies control authority must be notified by the person having possession of the animal.

§169.28. Requirements of a Quarantine Facility.

(a) Quarantine procedures.

(1) (No change.)

(2) An animal that is [~~being~~] quarantined because it may have exposed a human to rabies must be maintained in a primary enclosure, separated from all other animals by a solid partition so that there is no possibility of physical contact between animals. An empty chamber between animals is not an acceptable alternative. To prevent rabies transmission, handling of quarantined animals shall be minimized and carried out in a manner that avoids physical contact of other animals and people with the saliva of quarantined animals. Individuals handling quarantined animals should utilize appropriate personal protective equipment. To prevent escape, the primary enclosure must be enclosed on all sides, including the top. Quarantine cages, runs, or rooms must have "Rabies Quarantine" signs posted.

(b) Facilities planning. Any entity desiring to construct a quarantine facility shall submit plans to the department for review prior to beginning construction of a new facility or significant renovation to an existing facility.

(c) Inspection requirements of quarantine facilities.

(1) It will be the responsibility of the department to inspect all quarantine facilities, including those operated by government contractors. The inspection of the premises will be accomplished during ordinary business hours. All deficiencies will be documented in writing. Those that are of sufficient significance to affect the humane care or security of any animal housed within the facility must be corrected within a reasonable period of time.

(2) The inspections will be accomplished annually and [~~or~~] more frequently when significant discrepancies have been identified. Any facility that does not achieve acceptable standards will not be licensed for rabies quarantine operations.

(3) The quarantine facility manager has the right to appeal the results of the inspection. If the opinion of management of the quarantine facility is in conflict with the inspection, he or she may request a review of the inspection by the manager of the department's Zoonosis Control Branch, who will then notify[~~. The appeal listed in this paragraph will be made in writing through~~] the regional director's office of the health service region in which the quarantine facility is located that an appeal has been submitted. The appeal listed in this paragraph will be made in writing and submitted within 30 days of the inspection. After receipt of the appeal, the department will have 60 days to respond.

§169.29. Vaccination Requirement.

(a) The custodian (excluding animal shelters as defined in the Texas Health and Safety Code, §823.001) of each dog or cat shall have the animal vaccinated against rabies by 16 weeks of age. The animal must be vaccinated by or under the direct supervision of a veterinarian with rabies vaccine licensed by the United States Department of Agriculture for that [~~animal~~] species at or after the minimum age requirement and using the recommended route of administration for the vaccine. If a previously vaccinated animal is overdue for a booster, once revaccinated, the animal will be considered currently vaccinated; the animal should be placed on a vaccination schedule according to the maximum labeled duration of immunity for the most recently administered vaccine. The attending veterinarian has discretion as to when the subsequent vaccination will be scheduled as long as the revaccination due date does not exceed the recommended interval for booster vaccination as established by the manufacturer or vaccination requirements instituted by local ordinance. [~~The custodian shall retain each vaccination certificate until the animal receives a subsequent booster.~~] Livestock [~~(especially those that have frequent contact with humans)~~], domestic ferrets, and wolf-dog hybrids should be vaccinated against rabies. Among livestock species, vaccination of equines and others that have frequent contact with humans is strongly advised. The administration of a rabies vaccine in a species for which no licensed vaccine is available is at the discretion of the veterinarian; however, an animal receiving a rabies vaccine under these conditions will not be considered to be vaccinated against rabies virus in potential rabies exposure situations.

(b) (No change.)

(c) Each veterinarian who issues a rabies vaccination certificate, or the veterinary practice where the certificate was issued, shall retain a readily retrievable copy of the certificate for a period of not less than five [~~two~~] years [~~after the revaccination due date~~].

(d) (No change.)

(e) The custodian shall retain each rabies vaccination certificate until the animal receives a subsequent booster and shall produce the certificate upon request by any local rabies control authority, public health official, or animal control, law enforcement, or peace officer when the request is part of the requester's official duty.

§169.30. Disposition of Domestic Animals Exposed to Rabies.

(a) Not currently vaccinated animals which have been bitten by, directly exposed by physical contact with, or directly exposed to the fresh tissues of a rabid animal shall be:

(1) euthanatized [~~humanely killed~~]; or

(2) immediately vaccinated against rabies, placed in confinement for 90 days, and given booster vaccinations during the third and eighth weeks of confinement. For young animals, additional vaccinations may be necessary to ensure that the animal receives at least two vaccinations at or after the age prescribed by the United States Department of Agriculture (USDA) for the vaccine administered.

(b) Currently vaccinated animals which have been bitten by, directly exposed by physical contact with, or directly exposed to the fresh tissues of a rabid animal shall be:

(1) euthanatized [~~humanely killed~~]; or

(2) immediately given a booster rabies vaccination and placed in confinement for 45 days.

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

§169.31. Interstate Movement of Dogs and Cats into Texas.

Each dog and cat 12 weeks of age or older to be transported into Texas for any purpose shall be admitted only when vaccinated against rabies and the time elapsed since the most recent vaccination has not exceeded the manufacturer recommendations for the vaccine. If an initial vaccination was administered less than 30 days prior to arrival, the custodian should confine the dog or cat for the balance of the 30 days. Additionally, documentation must be provided by a vaccination certificate showing the date of vaccination, vaccine used, revaccination due date, identification information for the vaccinated animal, contact information of the animal's custodian, and signature, signature stamp, or computerized signature and contact information of the veterinarian responsible for administration of the vaccine. If the dog or cat is less than 12 weeks of age, the custodian should confine the animal until 30 days subsequent to its initial vaccination.

§169.32. International Movement of Dogs and Cats into Texas.

The federal government regulates the entry of pets into the United States; requirements set forth in this section are in addition to meeting federal requirements. If the department receives a federal importation notice, the department may request the local rabies control authority in the area where the animal will be located to monitor the notice for compliance. Contingent upon the department receiving notification of an importation-compliance failure, the department may report the failure to the appropriate authority. Each dog and cat 12 weeks of age or older to be transported into Texas for any purpose shall be admitted only when vaccinated against rabies and the time elapsed since the most recent vaccination has not exceeded the manufacturer recommendations for the vaccine. If an initial vaccination was administered less than 30 days prior to arrival in the United States, the custodian must confine the dog or cat for the balance of the 30 days. Additionally, documentation must be provided by a vaccination certificate or passport showing the date of vaccination, vaccine used, revaccination due date, identification information for the vaccinated animal, contact information of the animal's custodian, and signature, signature stamp, or computerized signature and contact information of the veterinarian responsible for administration of the vaccine. If the dog or cat is less than 12 weeks of age, the custodian shall [~~must~~] confine the animal until 30 days subsequent to its initial vaccination.

§169.33. Submission of Specimens for Laboratory Examination.

Preparation of specimens either for shipment or for personal delivery for rabies diagnosis shall include the following.

(1) (No change.)

(2) The head of the suspect animal shall be separated from the body by a qualified person wearing appropriate personal protective equipment as soon as possible after the death of the animal. Only the head shall be submitted with the exception that whole bats and small rodents may be submitted. If only the brain is submitted rather than the entire head, the minimum tissue requirements for rabies testing are a complete transverse cross section of the brain stem and tissue from at least one of the following: cerebellum and/or [~~or~~] hippocampus. Submissions that do not meet these tissue requirements will be considered unsatisfactory due to a lack of sufficient material.

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

(7) The following procedures are required for shipment:

(A) shipment shall be by bus or other reliable carrier; the department does not recommend the United States Postal Service. If an overnight carrier (other than bus) is used, [~~such as United Parcel Service (UPS) or Federal Express,~~] ship the specimen such that it will arrive by Friday or delay shipment until Monday. Do not ship via overnight carrier on Friday or the day before a holiday. These services do not deliver to the department on the weekend;

(B) (No change.)

(C) at the time of the shipment, the shipper shall [~~telephone the laboratory and~~] notify laboratory personnel of the shipment via telephone or laboratory-approved electronic format; and

(D) (No change.)

(8) (No change.)

§169.34. Statewide Quarantine.

(a) Declaration. The Executive Commissioner of the Health and Human Services Commission (HHSC) declares a statewide rabies quarantine.

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

(3) Animals subject to the statewide rabies quarantine include any live species of fox, skunk, coyote, or raccoon [~~foxes~~] indigenous or naturalized to North America[~~, coyote (*Canis latrans*), or raccoon (*Procyon lotor*)~~].

(4) Transport exceptions. Animals subject to the statewide rabies quarantine may be transported by peace officers and individuals hired or contracted by local, state, or federal government agencies to deal with stray animals when such transport is a part of their official duty. These animals may also be transported by employees of zoos or other institutions accredited by the Association of Zoos and Aquariums [~~American Association of Zoological Parks and Aquariums~~] when such transport is part of their official duty; educators permitted by the Texas Parks and Wildlife Department for educational display; rehabilitators permitted by the Texas Parks and Wildlife Department; an entity issued authorization for nuisance fur-bearing animal relocation from the

Texas Parks and Wildlife Department; and pest management professionals licensed by the Texas Department of Agriculture. If an exempt individual transports such animals for release, the animals must be released within a ten-mile radius or within ten miles of the city limits of where they were originally captured and the release must be within the county in which they were originally captured.

(b) (No change.)

~~[(c) Special provisions for raccoons. In addition to the transport exceptions listed in subsection (a)(4) of this section, the following individuals may transport raccoons:]~~

~~[(1) rehabilitators permitted by the Texas Parks and Wildlife Department may transport raccoons within a ten-mile radius or within ten miles of the city limits of where they were originally captured;]~~

~~[(2) pest control operators licensed by the Structural Pest Control Board may transport raccoons within a ten-mile radius or within ten miles of the city limits of where they were originally captured; and]~~

~~[(3) educators permitted by the Texas Parks and Wildlife Department for educational display.]~~

~~[(d) Rehabilitation of animals. Except for raccoons, rehabilitation of animals listed in subsection (a)(3) of this section is prohibited.]~~

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

Filed with the Office of the Secretary of State on October 22, 2012.

TRD-201205478
Lisa Hernandez
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 776-6972

♦ ♦ ♦

TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER X. PREFERRED AND EXCLUSIVE PROVIDER PLANS

The Texas Department of Insurance proposes amendments to 28 TAC Chapter 3, Subchapter X, Preferred Provider Plans, §§3.3701 - 3.3710, concerning the regulation of preferred provider benefit plans, and new §§3.3720 - 3.3725, concerning the regulation of exclusive provider benefit plans. The proposed amendments include the addition of two new divisions. The first new division includes current §§3.3701 - 3.3711 and §3.3713, and the second new division includes new §§3.3720 - 3.3725. The proposed amendments and new sections are necessary to implement those portions of House Bill (HB) 1772, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011, that amend the Insurance Code Chapter 1301 to allow insurers to offer exclusive provider benefit plans in the commercial insurance market in Texas.

The department previously proposed amendments and new sections for 28 TAC Chapter 3, Subchapter X, which were published in the June 29, 2012, issue of the *Texas Register* (37 TexReg 4783). A public hearing was held on the previously proposed rules on July 16, 2012, and the department also received numerous comments on the June 29 proposed rules. Based on comments received during the public hearing and in response to the rule proposal, the department decided to withdraw the June 29 proposed rules and prepare a new rule proposal to ensure that all parties are afforded appropriate opportunities to review and comment on the rule. The June 29 proposed rules are withdrawn elsewhere in this issue of the *Texas Register*.

The bulk of the comments the department received in response to the June 29 proposed rules related to concerns about network adequacy and about the proposed deletion of provisions adopted in 2011 concerning certain insurer reporting requirements.

Regarding network adequacy, some commenters were concerned that the proposed rules relaxed requirements for insurers. Regarding the proposed deletion of insurer reporting provisions, some commenters were concerned that deletion of the provisions would result in less transparency for consumers.

After reexamining the issues in light of the comments, the department determined that the best approach is to propose revised rules that more clearly express the department's intent to require that insurers provide consumers complete networks, limit insurers' reliance on alternatives to complete networks which provide only limited protections from balance billing, and provide additional substantive protections against balance billing for insureds obtaining out-of-network care in cases of emergency or because no network providers are available.

Amendments to Subchapter X are necessary to implement HB 1772 and to conform existing provisions of Subchapter X with HB 1772. The intent of HB 1772 is to provide health insurers offering health plan coverage in Texas with additional options to offer lower cost health plans to employers and individual consumers by permitting plans with closed networks where, as with health maintenance organizations (HMOs), "only services provided by network providers are covered, with the exception of emergency services and out-of-network services provided when no network provider is available." *HOUSE COMM. ON INSURANCE, BILL ANALYSIS,* HB 1772, 82nd Legislature, Regular Session (2011).

The amended and new sections are proposed under and intended to implement: the Insurance Code §1301.003, which permits exclusive benefit plans that meet the requirements of the Insurance Code Chapter 1201; the Insurance Code §1301.007, which authorizes the commissioner to adopt rules to implement Chapter 1301; and the Insurance Code §1301.0042, which provides that a provision of the Insurance Code or other insurance law that applies to a preferred provider benefit plan also applies to an exclusive provider benefit plan unless the provision is determined to be inconsistent with the function and purpose of an exclusive provider benefit plan and authorizes the commissioner to determine whether a provision is inconsistent with the function and purpose of an exclusive provider benefit plan.

In accord with the Insurance Code §1301.0042(a), a provision of this code or another insurance law of this state that applies to a preferred provider benefit plan applies to an exclusive provider benefit plan unless the department makes a determination that

the provision is inconsistent with the function and purpose of an exclusive provider benefit plan. In addition to this extension of applicability of current insurance law, the HB 1772 amendments to Chapter 1301 require an insurer that offers an exclusive provider benefit plan to establish quality improvement and utilization management procedures to ensure that health care services are provided to insureds under reasonable standards of quality of care consistent with prevailing professionally recognized standards of care or practice. The amendments made by the bill also require that the department conduct qualifying and ongoing examinations of the plan. Additionally, the bill establishes requirements for: emergency care services, referrals to nonpreferred providers when medically necessary covered services are not available through a preferred provider, network adequacy, and information that must be provided to prospective and current insureds.

Amendments to Subchapter X revise the subchapter's heading to be "Preferred and Exclusive Provider Plans" and divide the subchapter into two new divisions. New Division 1, relating to General Requirements, addresses general requirements that are applicable to both preferred provider benefit plans and exclusive provider benefit plans, unless otherwise indicated. New Division 1 encompasses the sections that are currently contained in Subchapter X, §§3.3701 - 3.3711 and §3.3713. No amendments are proposed for existing §3.3711 or §3.3713 in this rule proposal, though the proposed repeal of §3.3713 is included elsewhere in this issue of the *Texas Register.* Amendments to §§3.3701 - 3.3710 revise the sections as necessary to address exclusive provider benefit plans and align regulation of the two types of plans. The amendments also specify minimum requirements for the content of a waiver request and strengthen the review process for a local market access plan by requiring that an insurer submit a waiver request to the department to approve use of a local market access plan in instances where the status of a network utilized in any network plan changes so that the plan no longer complies with the network adequacy requirements specified in §3.3704. New Division 2, relating to Exclusive Provider Benefit Plan Requirements, addresses requirements that are applicable only to exclusive provider benefit plans, and consists of new §§3.3720 - 3.3725.

Amendments throughout new Division 1 revise capitalization in catchlines, replace the phrase "is required to" with the word "must," and remove or revise the word "such" where necessary for consistency with department rule drafting style. Amendments also change the word "subchapter" to "title" where necessary for consistency with department style for references to other sections within rule text. Amendments also update references to "access plan" to state "local market access plan" for consistent use of terminology. Additionally, amendments throughout new Division 1 make nonsubstantive revisions to correct punctuation errors in the current rule text.

Amendments to §3.3701 provide effective dates for the rules to preferred provider benefit plans and exclusive provider benefit plans and also address applicability of rules in Title 28 to exclusive provider plans. These provisions are necessary to provide sufficient notice to insurers of the applicability and effective dates of amended and new regulations under the subchapter, to clarify certain limitations on the scope of the amended subchapter, and to ensure conformity with amendments throughout the Insurance Code Chapter 1301 as provided by HB 1772.

Amendments to §3.3701(a) provide that the subchapter applies to any preferred or exclusive provider benefit plan that is offered, delivered, or issued for delivery on or after 150 days from the effective date of §3.3701. This effective date is intended to supersede Commissioner's Bulletin #B-0050-11, in which the department suspended its enforcement of amendments to the preferred provider benefit plan rules that were to become effective May 19, 2012. It is the department's expectation that insurers whose networks do not comply with the network adequacy requirements of the rule will either cease marketing in service areas where their networks are inadequate or file requests for waivers with accompanying access plans for those service areas where they seek to continue marketing. The amendments also provide that the subchapter does not apply to exclusive provider benefit plans providing services for the Texas Children's Health Insurance Program, Medicaid, or the Statewide Rural Health Care System.

New §3.3701(f) provides that provisions in Title 28 applicable to preferred provider benefit plans are also applicable to exclusive provider benefit plans unless specified otherwise.

Amendments to §3.3702 incorporate definitions for terms defined in the Insurance Code Chapter 1301, add necessary definitions for additional terms used in the subchapter, redesignate paragraphs as necessary for inclusion of the new definitions, and remove terms that are defined solely by references to the Insurance Code Chapter 1301. The amendments to §3.3702 ensure consistent terminology throughout Subchapter X. The amendments add subsections (a) and (b) to the section and incorporate the terms currently defined in the section into subsection (b).

Proposed §3.3702(a) provides that words and terms defined in the Insurance Code Chapter 1301 have the same meaning when used in Subchapter X. Amendments to §3.3702(b) add the following defined terms: "adverse determination," "allowed amount," "complainant," "complaint," "exclusive provider network," "in-network," and "out-of-network." Additionally, the proposal amends the definition of "urgent care."

Section 3.3702(b) removes the following defined terms, which are unnecessary due to the addition of proposed §3.3702(a): "emergency care," "health insurance policy," "hospital," "institutional provider," "insurer," "physician," "practitioner," "preferred provider," "preferred provider benefit plan," "prospective insured," "quality assessment," and "service area."

Amendments to §3.3703 clarify language and address the current standards and requirements for contracting, enforcement of contracting standards and rights, and delegation of contracting to exclusive provider benefit plans, exclusive provider organizations, and health care collaboratives. The amendments also establish contracting requirements that provide for notice to insurers and insureds in specific instances where a recommended or scheduled surgery may result in care being provided to an insured by an out-of-network provider.

An amendment to §3.3703(a)(1) updates the reference to preferred provider organizations to include networks or organizations and inserts a reference to exclusive provider benefit plans, exclusive provider networks or organizations, and health care collaboratives. An amendment to §3.3703(a)(11) removes a reference to the Insurance Code Chapter 1301, Subchapter C, and 28 TAC §§21.2801 - 21.2820 because it is unnecessary. The subchapter and sections are applicable without specific citation to them in §3.3703.

The amendment to §3.3703(b)(26) clarifies the language without making a substantive change.

Amendments also add new §3.3703(b)(27) - (29).

Section 3.3703(b)(27) provides that a contract between an insurer and a preferred provider require that a physician or provider referring an insured to a facility for surgery notify the insured of the possibility that out-of-network providers may provide treatment, notify the insurer that surgery has been recommended, and notify the insurer of the facility that has been recommended for the surgery.

Section 3.3703(b)(28) provides that a contract between an insurer and a facility must require that the facility, when scheduling surgery, notify the insured of the possibility that out-of-network providers may provide treatment, and notify the insurer that surgery has been scheduled.

Section 3.3703(b)(29) addresses the impact of §3.3703(b) on contractual provisions not directly addressed by subsection (b). It provides that the subsection does not prohibit other contractual provisions not prohibited by law.

The amendment to §3.3703(c) clarifies that delegation requirements apply to exclusive provider networks and health care collaboratives. The amendment also provides that an insurer may not delegate its responsibility to provide to the department upon request all documentation necessary to demonstrate compliance with applicable rules. It is necessary that an insurer remain responsible for compliance with these standards and requirements, even if the insurer delegates them to an exclusive provider benefit plan, an exclusive provider organization, an exclusive provider network, or a health care collaborative, to ensure that all medical and health care services and items contained in the package of benefits for which coverage is provided, including treatment of illnesses and injuries, will be provided under the new plans in a manner that assures both availability and accessibility of adequate personnel, specialty care, and facilities.

Amendments to §3.3704 add clarifying language and provide consistency with department style for rules.

Amendments to §3.3704(a) remove several unnecessary section symbols. Amendments to §3.3704(a)(1), (6), (8), (10), and (11) exempt exclusive provider benefit plans from the general application of fairness requirements specified in the paragraphs to the extent necessary to conform with the statutorily permitted structure of exclusive provider benefit plans, which are only required to provide benefits for the services of nonpreferred providers in limited circumstances. An amendment to §3.3704(a)(5) clarifies that the right of the insured to emergency care services includes providing payment for the services in accord with the Insurance Code §1301.0053, and also §3.3725 and §3.3708. An amendment to §3.3704(a)(7) applies the right of insureds to exercise full freedom of choice in the selection of preferred providers under exclusive provider benefit plans. The amendment to §3.3704(a)(12) incorporates the existing right of insureds to receive nonpreferred provider care for medically necessary covered services that are not available through a preferred physician or provider.

The amendment to §3.3704(b) clarifies that only covered services of nonpreferred providers must be paid in the same prompt and efficient manner as are preferred providers.

Amendments to §3.3705 update or clarify language throughout the section. These amendments are necessary to ensure conformity with amendments throughout the Insurance Code Chapter 1301 as provided by HB 1772.

An amendment to §3.3705(b) clarifies that required written descriptions of requirements are to be included as applicable. An amendment to §3.3705(b)(1) imposes a requirement to disclose to current or prospective group contract holders or insureds that, in the case of an exclusive provider benefit plan, the contract only provides benefits for services received from preferred providers, except as otherwise noted. An amendment to §3.3705(b)(9) clarifies that the disclosure requirements for prior authorizations encompass any authorization requirements, regardless of when the authorization process is initiated. An amendment to §3.3705(b)(12) modifies the electronic disclosure requirements of provider listings to allow for electronic disclosure when notice regarding how to obtain a nonelectronic copy is provided with the electronic disclosure. An amendment to §3.3705(b)(14) revises reporting requirements by eliminating provisions that, based on stakeholder input, the department has determined will not provide a substantial benefit to consumers, but would likely increase premiums.

The deleted provisions in §3.3705(b)(14) require information regarding network demographics related to the number of insureds in a service area, the number of specified provider types, and the number of preferred provider hospitals in a service area or region. However, §3.3705(b)(14) only requires insurers to update the required information annually, which means that it may not provide a current snapshot of the network to a consumer, and might be misleading.

Reporting requirements related to an insurer's waivers and local market access plans replace the reporting requirements removed from §3.3705(b)(14). As revised, §3.3705(b)(14) requires an insurer to provide information on whether a waiver or a local market access plan applies to specified types of facilities or providers. The revised paragraph also requires that the information be categorized by service area, county, or geographic region, and that it identify how the local market access plan may be obtained or viewed. The department believes that this information will be of more practical use to a current or prospective group contract holder or a current or prospective insured.

An amendment to §3.3705(c) updates the email address and mailing address that insurers should use when submitting provider listings under §3.3705(b)(12).

An amendment to §3.3705(d) exempts exclusive provider benefit plans from the illustration proximity requirements of the subsection since exclusive provider benefit plans are not required to contain basic benefits.

An amendment to §3.3705(f) updates the reference to the figure currently in the subsection to be Figure: 28 TAC §3.3705(f)(1) and updates the reference to the department's website within the figure. The current figure is also amended to clarify terms and conform to substantive changes elsewhere in the rule. Additionally, the amendment to §3.3705(f) adds a second figure, Figure: 28 TAC §3.3705(f)(2), which provides information equivalent to that in Figure: 28 TAC §3.3705(f)(1), but in regard to exclusive provider benefit plans.

An amendment to §3.3705(k) updates the subsection to address both preferred and exclusive provider benefit plan requirements.

Amendments to §3.3705(l) modify additional listing-specific disclosure requirements. The deleted provisions require that an insurer provide information related to the percentage of the total dollar amount of claims filed with the insurer by or on behalf of facility-based physicians that are not under contract with the in-

surer. Under the deleted provisions, an insurer may base this information on claims filed in a 12-month period ending not more than 12 months before the date the information is provided to an insured. However, such information does not provide a view of providers currently available in the network or give an insured information on specific instances where the insured may be receiving care from an out-of-network provider in the future.

Another amendment to §3.3705(l) revises a reference to required font point size to provide consistency in how font point is addressed in the sections.

An amendment to §3.3705(m) revises a citation to the section that addresses local market access plans for conformity with changes made elsewhere in the rule proposal.

The amendments to §3.3705(o), which the department proposes to redesignate as §3.3705(n), modify disclosures concerning reimbursement of out-of-network services to update language and to exempt exclusive provider benefit plans from required notice provisions as necessary to conform with amendments to Chapter 1301.

Finally, amendments to §3.3705 also delete the current §3.3705(n), along with §3.3705(p) and (q), to remove requirements regarding disclosure of substantial decreases in the availability of certain preferred providers, plan designations, and loss of status as an approved hospital care network.

According to stakeholders, network contracts between insurers and providers sometimes terminate for short periods of time until contract terms are agreed upon. These changes in provider in-network status may only temporarily impact a network to the degree addressed by the deleted provisions without reflecting a true failure of the insurer to satisfy network requirements. Additionally, under §3.3705(i) and (j) an insurer must make provider listings available to insureds and update the listings regularly, and under §3.3705(k), an insured is entitled to rely on the listings provided by the insurer.

If a provider's in-network status is permanently changed, the insurer should update its provider listings to reflect this. If the listings are not updated and an insured relies on them, the insured will be protected by §3.3705(k). Therefore, the department has determined that the deleted provisions are unnecessary.

Amendments to §3.3706 correct an error and make changes for consistency with department style.

An amendment to §3.3706(b)(2)(B) replaces an erroneous reference to "insured" with a reference to "insurer."

An amendment to §3.3706(c) changes "shall" to "will" and an amendment to §3.3706(h) changes "shall" to "must" for consistency with department rule drafting style. Additional amendments to §3.3706(c) revise the subsection to clarify that "NCQA" stands for "National Committee for Quality Assurance" and to remove a reference to the American Accreditation HealthCare Commission. "American Accreditation HealthCare Commission, Inc." is an alternative name occasionally used by URAC. Because the subsection references URAC, it is not necessary to also list the alternative name occasionally used by URAC.

Amendments to §3.3707 revise the waiver process to clarify information that must be provided in a waiver request and link insurer use of local market access plans to department approval and annual renewal of waivers. Additionally, amendments to §3.3707 update statutory references, clarify language regarding the application process for a waiver from one or more of the network adequacy requirements, and exempt exclusive provider benefit plans from the application of the section.

The amendments create new §3.3707(b) and (c).

New §3.3707(b) establishes minimum requirements for the contents of a waiver request. This required information is necessary to confirm the need for a waiver and address the steps the insurer intends to take to avoid a need to renew the waiver in the future.

New §3.3707(c) establishes a requirement that an insurer file a local market access plan at the same time it files a request for a waiver so that the commissioner can take the insurer's local market access plan into consideration in deciding whether to grant or deny its waiver request. This provision is necessary to ensure that a department grant of a waiver does not leave insureds without access to care.

The amendment to current §3.3707(b), which the department proposes to redesignate as §3.3707(d), clarifies that an insurer is not required to disclose information to providers that would violate state or federal law and requires filing of waivers electronically rather than through mail.

The amendment to current §3.3707(d), which the department proposes to redesignate as §3.3707(f), clarifies that the department will post information relevant to the grant of a waiver, including the statutorily required items listed in the provision.

The amendments to current §3.3707(e), which the department proposes to redesignate as §3.3707(g), provides clear application and renewal deadlines to allow simpler administration of the waiver process. The amendments also require that at the same time the insurer files an application for renewal of a waiver, the insurer file any applicable local market access plan the insurer uses pursuant to the waiver, in the manner specified by subsection (i)(2) of this section. Finally, the amendment provides that a waiver the department has granted will remain in effect unless the insurer fails to timely file an annual application for renewal of the waiver with any applicable local market access plan or the department denies the application for renewal.

An amendment creates new §3.3707(h), which provides that a waiver will expire one year after the date the department granted it if an insurer fails to timely request a renewal under subsection (g) of the section or if the department denies the insurer's request for renewal.

New §3.3707(i) specifies when an insurer must file a waiver request and local market access plan with the department. The section also addresses the content of a local market access plan and states how an insurer should file its local market access plan.

New §3.3707(j) - (l) provide details on the content and procedures an insurer must include in a local market access plan. These provisions are relocated from current §3.3709(e) - (g).

Amendments to the text that this proposal moves from §3.3709(e) to new §3.3707(j) revise a reference to benefit claims to reference out-of-network benefit claims. The amendments also delete a provision in current §3.3709(e)(2) of the section specifying that the department may request additional information necessary to assess the local market access plan. Other rules and statutes already provide the department sufficient authority to access information necessary to assess a local market access plan. Removal of paragraph (2) necessitates that the department incorporate paragraph (1) into subsection (j), and redesignate the subparagraphs within paragraph (1). Additionally, an amendment inserts a necessary reference to

new §3.3725 (relating to Payment of Certain Out-of-Network Claims).

An amendment to the text that this proposal moves from §3.3709(f)(1)(C) to new §3.3707(k)(1)(C) exempts exclusive provider benefit plans from the requirement to notify an insured that the insured may be liable for any amounts charged by a physician or provider when charges are not paid in full by the insurer due to other protections afforded insureds covered by exclusive provider benefit plans. An amendment to the text that this proposal moves from §3.3709(f)(2)(B) to new §3.3707(k)(2)(B) clarifies that when an insurer utilizes a documented procedure to make initial or subsequent payment of claims, the insurer must do so in the manner required by Subchapter X.

New §3.3707(m) requires an insurer to submit a local market access plan established pursuant to §3.3707 as a part of the annual report on network adequacy required under §3.3709.

In the withdrawn rule proposal for 28 TAC Subchapter X, the department proposed excluding exclusive provider benefit plans from §3.3707. However, the department has determined that this exclusion is not necessary. Under the current proposed §3.3707, the department will grant a waiver to an exclusive provider benefit plan in appropriate cases to allow it to provide coverage in additional parts of the state. As a part of the waiver process, the exclusive provider benefit plan will be required to submit an adequate local market access plan demonstrating that the insurer will hold the insured harmless for any balance billing.

An amendment deletes current §3.3707(f). Current §3.3707(f) references a requirement under current §3.3705(p), but the department has proposed to delete that subsection in this proposal.

Amendments to §3.3708 address payment of claims when services are rendered to an insured by a nonpreferred provider because no preferred provider is reasonably available to the insured, add clarification to the section, and address inapplicability of the section to exclusive provider plans.

An amendment to §3.3708(b) provides that when services are rendered to an insured by a nonpreferred provider because no preferred provider is reasonably available to the insured, the insurer must pay the claim based on usual or customary charges.

This requirement is based on and clarifies the provisions of the Insurance Code §1301.005(b) and §1301.155(b), which require that claims in these circumstances be paid at the same level of reimbursement as for a preferred provider. It also is based on the requirement of the Insurance Code §1301.005(a) that an insurer make out-of-network (basic level) benefits "reasonably available" to all insureds. The Texas Department of Insurance has received complaints that some carriers pay these claims at rates that are a fraction of usual and customary rates. This can be seen in a survey of carriers the department reported on in a 2009 report: www.tdi.texas.gov/reports/life/documents/hlthnetwork09.doc. Table 4 of that report, on page 24, reflected the average allowed amounts for uncontracted providers by five health plans.

Taking radiology as an example, one plan paid uncontracted providers on average 95 percent of their billed charges, while another plan paid 38.7 percent, with insureds thus responsible for their share of the 38.7 percent under their plans and 100 percent of the remaining 61.3 percent. In cases of large bills, such low reimbursements could result in a consumer with major medical coverage being responsible for paying the majority of the billed charge, an amount that in some cases could result in bankruptcy or make the out-of-network benefits effectively unavailable.

The rule clarifies the legislature's intent in requiring payment of these particular claims at the preferred level by specifying that the calculation must be based at a minimum on the usual and customary rate for such services, rather than any arbitrary amount chosen by a carrier. By requiring payment at the usual and customary rate in situations where the insured has no choice in whether to see an out-of-network provider, either due to emergency or due to the insurer's own failure to provide an adequate network, the statute and this clarifying rule attempt to give the insured some certainty in their insurance coverage and their financial security.

The amendments to §3.3708(b) also clarify that, when an insured receives services from a nonpreferred provider because no preferred provider is reasonably available and the insured actually pays a balance bill to the nonpreferred provider, the insurer must credit the full amount paid by the insured to the insured's deductible and annual out-of-pocket maximum applicable to in-network services.

An amendment revises §3.3708(e) to remove a notice requirement regarding the right to request information concerning negotiated rates for comparison purposes. As amended, §3.3708(e) requires an insurer to provide notice on explanations of benefits that an insured may have the right to request mediation under the Insurance Code Chapter 1467 and Chapter 21, Subchapter PP when services are rendered to the insured by a nonpreferred provider.

An amendment adds new §3.3708(f), which exempts exclusive provider benefit plans from application of the section because those insured under exclusive provider benefit plans have other protections against balance billing.

Amendments to §3.3709 revise the section to reflect the department's incorporation of local market access plans into the waiver process of §3.3707. Additionally, amendments to §3.3709 update references to benefit claims to address out-of-network claims, add a reference to a proposed new section, and exempt exclusive provider benefit plans from a notification requirement inapplicable to the plans. The amendments also delete an unnecessary catch-all provision and redesignate the subparagraphs in a subsection.

An amendment to the heading of §3.3709 removes the words "access plan."

The amendments to §3.3709(c) revise references to claims for benefits in paragraphs (1) and (2) to reference claims for out-of-network benefits.

Amendments to §3.3709(d) - (g) and (i) delete provisions applicable to local market access plans. Additional amendments in this proposal relocate these provisions to §3.3707 and update them as necessary for consistency with the other amendments in the proposal.

An amendment to current §3.3709(h), which this proposal redesignates as §3.3709(d), updates the email address to which an insurer must submit the annual report required under §3.3709.

Amendments to §3.3710 address applicability to exclusive provider networks and update a statutory citation. The amendments revise §3.3710(a) to remove the description "preferred provider service delivery" to encompass applicability to exclusive provider networks and update a statutory reference

concerning cease and desist orders to include the Insurance Code Chapter 82.

New Division 2, relating to Exclusive Provider Benefit Plan Requirements, addresses requirements that are applicable only to exclusive provider benefit plans.

New §3.3720 addresses applicability of the division. It is only applicable to exclusive provider benefit plans.

New §3.3721 provides that an insurer may not offer, deliver, or issue for delivery an exclusive provider benefit plan prior to obtaining commissioner approval of the insurer's exclusive provider network for each service area where the plan will be offered. This requirement is necessary to ensure that an insurer has met network adequacy requirements prior to offering, delivering, or issuing for delivery an exclusive provider benefit plan in accord with the Insurance Code §1301.0056(a), which provides that an insurer is subject to a qualifying examination of the insurer's exclusive provider benefit plan.

New §3.3722 sets forth filing requirements and specifies the content of the initial application for approval of an exclusive provider benefit plan. These requirements and procedures are necessary to ensure compliance with network adequacy requirements.

New §3.3722(a) requires an insurer that seeks to offer an exclusive provider benefit plan to file an application for approval with the department. It also provides the web address for a form that an insurer may use to prepare the application.

New §3.3722(b) sets forth general filing requirements, including legibility requirements and copy requirements for the original application packet and for any revisions or supplements to the application packet.

New §3.3722(c) includes 12 elements that must be included with an application for certificate of compliance. These elements are: (i) a statement regarding whether the filing is for an original or modified certificate of compliance; (ii) the name and contact information for the insurer; (iii) the name and contact information of an individual point of contact regarding the application; (iv) an attestation regarding the accuracy and completeness of the application and stating that the network is adequate for the services to be provided under the exclusive provider benefit plan; (v) a description and map of the service area; (vi) a list of all plan documents and each document's associated form filing ID number or form number; (vii) the forms for physician and provider contracts or an attestation that the contracts comply with the requirements of the Insurance Code Chapter 1301 and 28 TAC Chapter 3, Subchapter X; (viii) a description of the quality improvement program; (ix) network configuration information; (x) documentation that demonstrates the insurer's intent to provide emergency care services; (xi) documentation that the insurer maintains a reasonable complaint system; and (xii) notification of the physical address of all books and records required under subsection (d) of the section.

New §3.3722(d) includes requirements that apply during a qualifying examination. These requirements are: insurers must make available for review by the department documents relating to quality improvement; utilization management; network configuration, including executed contracts; credentialing files; written materials for prospective insureds that contain information about the network and how preferred and nonpreferred providers will be reimbursed under the plan; the policy and certificate of insurance; and the complaint log.

New §3.3722(e) addresses approval and notification requirements for any changes implemented by an insurer after the department has granted approval of a certificate of compliance. New §3.3722(e)(1) requires an insurer to file an application for approval with the department prior to making changes to network configuration that impact the adequacy of the network, expand or reduce an existing service area, or add a new service area. New §3.3722(e)(2) requires an insurer to file with the department changes in maps of service areas, forms of contracts, or network configuration information. New §3.3722(e)(3) provides that, before the department grants approval of a service area expansion or reduction application, an insurer must be in compliance with the requirements of §3.3724 in existing and proposed service areas. New §3.3722(e)(4) requires that an insurer file with the department any information other than the information described in §3.3722(e)(2) that amends, supplements, or replaces the items required under §3.3722(c) no later than 30 days after the implementation of any change.

New §3.3723 provides standards and requirements for examinations relating to exclusive provider benefit plans conducted by the department. These requirements are necessary to ensure continued compliance with network adequacy standards.

New §3.3723(a) states that the commissioner may conduct an examination as often as the commissioner considers necessary, and it specifies that an examination be conducted at least once every five years.

New §3.3723(b) requires financial, market conduct, complaint, or quality of care exams to be conducted pursuant to the Insurance Code Chapter 401, Subchapter B, relating to the examination of carriers; the Insurance Code Chapter 751, relating to market conduct surveillance; and 28 TAC §7.83, relating to appeal of examination reports.

New §3.3723(c) requires an insurer to make books and records relating to its operations available to the department to facilitate an examination.

New §3.3723(d) requires an insurer to provide to the commissioner on request a copy of any contract, agreement, or other arrangement between the insurer and a physician or provider.

New §3.3723(e) allows the commissioner to examine and use the records of an insurer, including records of a quality of care program and records of a medical peer review committee, for examination and enforcement purposes.

New §3.3723(f) requires the insurer to make available for review by the department documents relating to quality improvement, utilization management, complaints, satisfaction surveys, network configuration information, credentialing files, and reports.

New §3.3724 establishes minimum standards and requirements for a quality improvement program for commercial exclusive provider benefit plans in accord with the Insurance Code §1301.0051. The section is necessary to ensure availability, accessibility, quality, and continuity of care for insureds.

New §3.3724(a) requires an insurer to develop and maintain an ongoing quality improvement program designed to evaluate the quality and appropriateness of care and services and to pursue opportunities for improvement. New §3.3724(a)(1) - (5) prescribes minimum standards for the quality improvement program and provides that the program must include specified standards. The standards are that the insurer: (i) include a written description of the quality improvement program that outlines program organizational structure, functional responsibilities, and meeting

frequency; (ii) include an annual quality improvement work plan that includes program areas as specified in the section and that is designed to reflect the type of services and the population served by the exclusive provider benefit plan in terms of age groups, disease categories, and special risk status; (iii) include an annual written report on the quality improvement program; (iv) implement a documented process for selection and retention of contracted preferred providers that complies with the credentialing requirements set forth in §3.3706(c); and (v) provide for a peer review procedure for physicians and individual providers.

New §3.3724(b) requires the insurer's governing body to appoint a quality improvement committee, approve the quality improvement program, approve an annual quality improvement plan, meet at least once a year to review reports of the quality improvement committee, and review the annual written report on the quality improvement program.

New §3.3724(c) requires the quality improvement committee to evaluate the overall effectiveness of the quality improvement program and sets forth delegation, collaboration, and multidisciplinary team requirements.

New §3.3724(d) provides that when reviewing an insurer's quality improvement program, the department will presume that the insurer is in compliance with statutory and regulatory requirements regarding the insurer's quality improvement program if the insurer has received nonconditional accreditation or certification specific to quality improvement by the National Committee for Quality Assurance, the Joint Commission, URAC, or the Accreditation Association for Ambulatory Health Care. However, new §3.3724(d) also provides that if the department determines that an accreditation or certification program does not adequately address a material Texas statutory or regulatory requirement, the department will not presume the insurer to be in compliance with that requirement.

New §3.3725 provides minimum standards for emergency care services and services provided out-of-network when no preferred provider is available, claim payments, reimbursement rates, and reimbursement methodologies. New §3.3725 ensures an adequate process for insureds to obtain out-of-network services when necessary and ensures an adequate claims payment and reimbursement process.

New §3.3725(a) requires an insurer to fully reimburse a nonpreferred provider for emergency care services specified in the subsection at the usual and customary rate or at a rate agreed to by the insurer and the nonpreferred provider for emergency care services when an insured cannot reasonably reach a preferred provider, until the insured can reasonably be expected to transfer to a preferred provider.

New §3.3725(b) requires an insurer to, upon request of a preferred provider, timely approve a referral to a nonpreferred provider for medically necessary covered services when the services are not available through a preferred provider and to provide a review by a health care provider with similar expertise as the provider to whom a referral is requested prior to denying a requested referral.

The language of §3.3725 differs from §3.3708, the section that addresses similar requirements applicable to preferred provider benefit plans, in that the department has not incorporated requirements in §3.3708(b) relating to payments of out-of-network providers when no preferred provider is reasonably available. The department determined that the language in §3.3708(b) is unnecessary given the statutory requirements in the Insurance Code §§1301.0052, 1301.0053, and 1301.155. The Insurance Code §1301.0052 requires an issuer of a preferred provider plan to fully reimburse a nonpreferred provider at the usual and customary rate or at a rate agreed to by the issuer and the nonpreferred provider for covered medically necessary services not available through a preferred provider. The Insurance Code §1301.0053 requires an issuer of a preferred provider plan to reimburse a nonpreferred provider at the usual and customary rate or at a rate agreed to by the issuer and the nonpreferred provider for the provision of emergency care services. The Insurance Code §1301.155 requires an insurer of a preferred provider plan to provide reimbursement for specified emergency care services at the preferred level of benefits until the insured can reasonably be expected to transfer to a preferred provider.

New §3.3725(c) addresses insurer facilitation of an insured's selection of a nonpreferred provider when medically necessary covered services, excluding emergency care, are not available through a preferred provider. Section 3.3725(c) provides that if an insurer chooses to facilitate an insured's selection of a nonpreferred provider pursuant to the subsection, the insurer must offer an insured a list of at least three nonpreferred providers with expertise in the necessary specialty who are reasonably available considering the medical condition and location of the insured. If the insured selects a nonpreferred provider from the list provided by the insurer, §3.3725(d) - (f) are applicable. If the insured selects a nonpreferred provider that is not included in the list provided by the insurer, then §3.3725(d) - (f) are not applicable and, notwithstanding §3.3708(f), the insurer must pay the claim in accordance with §3.3708.

New §3.3725(d) provides that an insurer reimbursing a nonpreferred provider under §3.3725(a), (b), or (c)(2) must ensure that the insured is held harmless for any amounts beyond the copayment, deductible, and coinsurance percentage that the insured would have paid had the insured received services from a preferred provider.

New §3.3725(e) sets the process for an insurer to follow when determining that a claim from a nonpreferred provider under subsection (a), (b), or (c)(2) is payable. It specifies that the insurer issue payment to the nonpreferred provider at the usual and customary rate or at a rate agreed to by the insurer and the nonpreferred provider. The insurer must also provide an explanation of benefits to the insured along with a request that the insured notify the insurer if the nonpreferred provider bills the insured for amounts beyond the amount paid by the insurer. The section requires that the insurer resolve any amounts that the nonpreferred provider bills the insured beyond the amount paid by the insurer in a manner consistent with §3.3725(d).

New §3.3725(e) also permits the insurer to require in its policy or certificate issued to an insured that, if a claim is eligible for mediation under the Insurance Code Chapter 1467 and 28 TAC Chapter 21, Subchapter PP (relating to Out-of-Network Claim Dispute Resolution), the insured must request mediation, but the rule prohibits the insurer requiring the insured participate in a mediation. The section requires that the insurer notify the insured when mediation is available, specifies what amount should be taken into consideration in determining when mediation is available, and provides that the insurer may not require that the insured participate in mediation and may not penalize the insured for failing to request mediation. The provision also provides that the insurer is not responsible for any balance bill after the insurer requests that the insured initiate mediation and until mediation is requested.

New §3.3725(f) provides methodology standards for insurer calculation of reimbursements.

On February 7, 2012, the department posted a call for comments from the public on the substance of an informal draft rule and on the costs of implementing the rule. In addition to receiving written comments on the informal draft, the department held a stakeholder meeting on February 23, 2012, to discuss the rule and the potential costs of implementation. The department appreciates all comments received and discussions held during the drafting process.

FISCAL NOTE. Doug Danzeiser, manager, Regulatory Matters, has determined that for each year of the first five years the proposal will be in effect, there will be no measurable fiscal impact to state or 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. Mr. Danzeiser also has determined that for each year of the first five years the proposed amendments and new sections are in effect, there are several public benefits anticipated as a result of the enforcement and administration of this proposal, as well as potential costs of compliance for insurers with preferred provider benefit plans or insurers choosing to enter the exclusive provider benefit plan market. The department has drafted the proposed rules to maximize public benefits consistent with the authorizing statutes while mitigating costs.

The anticipated public benefits are: (i) implementation of rules necessary to comply with HB 1772; (ii) establishment of regulatory standards for the new exclusive provider benefit plan, including standards for certification, contracting, network adequacy, preferred provider designation, and claims payment; (iii) establishment of transparency of information for consumers utilizing exclusive provider benefit plans, through required notices, preferred provider directory requirements, complaint resolution requirements, and quality improvement program requirements; and (iv) efficient regulation and operation of preferred and exclusive provider benefit plans in Texas.

On February 7, 2012, the department posted a call for comments on its website that included a request for comments regarding the costs of implementing the proposed rules. As a result, the department received general input on the cost of compliance, but did not receive specific cost estimates. In addition, the department received a comment on the withdrawn proposal addressing costs to implement §3.3708 and §3.3725. The commenter was unable to provide specific cost estimates, but felt that the department had underestimated the costs of implementing those sections. The department has modified the rule text in a number of ways to minimize potential costs and has developed estimated costs for compliance with the proposed rules based on cost components previously used by the department for similar compliance requirements. Individual insurers that identify, based on their own operations, differing costs for those cost components will be able to calculate their particular costs using the department's cost analysis approach.

The department has identified eight categories of labor reasonably necessary to implement the proposed changes to the subchapter. Insurers may calculate the total cost of labor for each category by multiplying the number of estimated hours for each cost component by the median hourly wage for each category of labor. The median hourly wage for each category of labor is published online by the Texas Workforce Commission as follows:

(i) a general operations manager or functional director: $58.64 (www.texasindustryprofiles.com/apps/win/eds.php?geocode=4801000048&indclass=8&indcode=5241&occcode=11-1021&compare=2);

(ii) a computer programmer: $38.60 (www.texasindustryprofiles.com/apps/win/eds.php?indcode=5241&indclass=8);

(iii) an administrative assistant: $21.69 (www.texasindustryprofiles.com/apps/win/eds.php?geocode=4801000048&indclass=8&indcode=5241&occcode=43-6011&compare=2);

(iv) a staff attorney: $51.56 (www.texasindustryprofiles.com/apps/win/eds.php?geocode=4801000048&indclass=8&indcode=5241&occcode=23-1011&compare=2);

(v) a medical director: $105.65 (www.texasindustryprofiles.com/apps/win/eds.php?geocode=4801000048&indclass=8&indcode=6221&occcode=11-1011&compare=2);

(vi) a registered nurse: $31.87 (www.texasindustryprofiles.com/apps/win/eds.php?geocode=4801000048&indclass=8&indcode=6221&occcode=29-1111&compare=2);

(vii) a desktop publisher: $19.64 (www.texasindustryprofiles.com/apps/win/eds.php?indcode=52&indclass=6); and

(viii) a paralegal: $26.69 (www.texasindustryprofiles.com/apps/win/eds.php?geocode=4801000048&indclass=8&indcode=5241&occcode=23-2011&compare=2).

The department estimates that an insurer's overall printing, copying, mailing, and transmitting costs will likely be impacted as a result of implementation of the new subchapter. According to the United States Postal Service business price calculator, available at dbcalc.usps.gov, the cost to mail machinable letters in a standard business mail envelope with a weight limit of 3.3 ounces to a standard five-digit ZIP code in the United States is 26 cents. With the weight limit of 3.3 ounces, approximately 18 pages could be sent per envelope for the 26 cents. This estimate is based on an anticipated use of six pages of standard printing paper, with a total weight of one ounce. The department has determined that the cost of a standard business envelope is 1.6 cents. The department further estimates that the cost of printing or copying is between 6 and 8 cents per page.

It is not feasible for the department to estimate the total increased printing, copying, mailing, and transmitting costs attributable to compliance with the proposed changes to the subchapter because there are numerous factors involved that are not suited to reliable quantification by the department, including the size of the insurer's service area, the number of insureds enrolled in the plan, the number of contracted physicians and providers, and the number of complaints generated annually. The department estimates that each insurer has the information necessary to determine its individual printing, copying, mailing, and transmitting costs necessary to meet the requirements of the subchapter, and the department has identified factors throughout the sections that may contribute to an increased cost for printing, copying, mailing, and transmitting where applicable.

The department has determined that the actual cost of implementation could be significantly lower than estimated because insurers sometimes contract with independent provider networks (networks) in order to meet network adequacy requirements. An arrangement like this is likely to occur in the context of exclusive provider plans. Specifically, insurers could contract with one or

more networks that would assume primary responsibility for undertaking one or more of the steps necessary to comply with §§3.3703 - 3.3706, 3.3709, and 3.3722 - 3.3724 of this proposal. While it would still remain the responsibility of the insurer to either meet the requirements or ensure that the requirements are met in accord with §3.3703(c), the factors and components affecting the cost of compliance with the requirements would vary for each requirement. The department estimates that this variation would be based upon the size of the network used by an insurer, the scope of the underlying contract between the insurer and the network, and the fees charged by the network for performance of the contract.

Many of the requirements of the proposed rule may also be substantially less costly than the estimates set forth in this proposal in the case of insurers already offering preferred provider benefit plans. Many of the proposed requirements for exclusive provider benefit plans are identical to regulations already applicable to preferred provider benefit plans, and the department estimates that most, if not all, of the insurers that will be offering exclusive provider benefit plan products will already be offering preferred provider benefit plan products that are compliant with the common provisions.

Section 3.3703: Notices required by additional required contract terms. Amendments to §3.3703(a) provide that a contract between an insurer and a preferred provider must require that a physician or provider referring an insured to a facility for surgery provide notice to the insured and the insurer so that the insured will be aware that out-of-network providers may provide treatment and that the insured can contact the insurer to coordinate the insured's care, and so that the insurer is aware of the facility that the physician recommended and has the opportunity to coordinate coverage. This requirement could result in costs to a physician or provider to provide the required notice. However, physicians and providers already generally provide information to insureds and insurers related to referrals and recommendations for care, and the department anticipates that physicians and providers can reduce costs by combining this notice with the other information they already provide.

The department expects that a physician or provider may incur a cost for printing additional pages to address the required notice. The department estimates that this cost will be approximately 6 to 8 cents per page for printing and paper and that each notice will require approximately one page.

Section 3.3705: Nature of communications with insureds; readability, mandatory disclosure requirements, and plan designations. Amendments to §3.3705(b)(1) impose a requirement on exclusive provider plans to disclose to current or prospective group contract holders or insureds that the exclusive provider contract only provides benefits for services received from preferred providers, except as otherwise noted. Amendments to §3.3705(f) modify the notice requirements concerning rights of insured participants by requiring that the notice of rights required by §3.3705(f) also be provided in disclosures made under §3.3705(b) and by requiring a separate notice template with language tailored to exclusive provider benefit plans. These requirements could result in costs to comply for insurers.

The department expects that insurers will avoid any mailing costs as a result of compliance with the §3.3705(b) and (f) amendments by providing the notice along with the policy or certificate at issuance or renewal and within the disclosure document that is already required by §3.3705(b). The department's estimate of costs for an insurer to comply with the amendments to §3.3705(b) and (f) is based on: (i) the cost of administrative staff to amend the current documents and prepare the new required notice of rights for inclusion in all policies, certificates, disclosures, and outlines of coverage; and (ii) the cost to print additional pages for printed documents.

(i) Cost of administrative staff to prepare the required notice of rights for inclusion in all policies, certificates, disclosures, and outlines of coverage. The department estimates that preparation of the required amendments and notice of rights for inclusion in policies, certificates, disclosures, and outlines of coverage as specified in §3.3705(b) and (f) will likely require a one-time cost of approximately two to 10 hours of administrative staff time. In a comment on the withdrawn proposal, a commenter suggested that the required time might be longer than this and could subject an insurer to filing fees, but did not list specific forms the commenter thought would need to be filed and was unable to provide a specific cost estimate. The cost to the insurer will vary depending on whether the insurer elects to have an administrative assistant, a general operations manager, or a combination of both positions, perform this function.

(ii) Cost to print additional pages. The department expects that an insurer will incur a cost for printing the required notice of rights specified in §3.3705(f) in all policies, certificates, disclosures, and outlines. The department estimates that this cost will be approximately 6 to 8 cents per page for printing and paper and that each notice of rights will require approximately one or two printed pages. It is likely that the insurer has the information necessary to determine its individual printing costs necessary for compliance with §3.3705(f), including the number of pages that will need to be printed and in-house or out-of-house printing costs. An insurer's potential printing costs may vary if the insurer does not use in-house printing. An insurer's costs will also vary based upon the number of policies, certificates, and outlines of coverage for which the insurer must include the notice of rights. The total cost to comply with §3.3705(f) could also vary depending on the insurer's administrative processes.

Section 3.3707: Required content of waiver request. An amendment to §3.3707 requires an insurer to include in a waiver request either five specified categories of information related to the insurer's attempts to contract with providers or physicians or an assertion that no providers or physicians are available within the relevant area for the covered service or services for which a waiver is requested. This information is data an insurer should have available based on its attempts to contract, and the department anticipates that an insurer's administrative staff or general operations manager will prepare the information in response to this requirement. The department estimates that it would be reasonably necessary for an administrative assistant or a general operations manager to spend an average of three to six hours preparing this information.

Preparation of a waiver renewal request is estimated to take less time to prepare than the original renewal. In cases where a waiver is denied, a carrier will receive reduced premiums as it ceases to market in that service area. The department is unable to quantify at this time how many waiver requests will be denied because it has not reviewed any preferred provider benefit plan networks for adequacy and has not ascertained the reasons for insurers' failure to contract in some areas. Insurers, familiar with their own attempts to contract, are in the best position to estimate this potential cost.

Section 3.3708: Payment of certain basic benefit claims and related disclosures. New text in §3.3708(b)(1) requires an insurer

to pay claims, at a minimum, at the usual and customary charge for the service, less any patient responsibility, in cases of emergency or when no network provider is reasonably available. New text in §3.3708(b)(3) requires that insurers credit amounts shown by the insured to have been actually paid to the insured's in-network deductible and out-of-pocket maximums, in addition to any amounts that would have been credited had the provider been a preferred provider.

The cost of compliance with these requirements will depend on a number of factors, which will be known or subject to estimation by the insurer, including the insurer's current rate of reimbursement of claims compared to the usual and customary charges and how often such claims occur. Insurers may have their own information on usual and customary billed charges, and at least one website makes usual and customary information available at no charge. Carriers may also reduce this expense by working to increase their networks or by ceasing to market in areas where they are unable to contract for complete networks.

New text in §3.3708(e) requires that insurers provide a notice of the right to request mediation. The department anticipates that the cost to comply with this requirement will vary depending on whether the insurer provides the notice on all explanations of benefits or some subset, with the cost of programming potentially increasing with more selective use of the notice.

The department anticipates that a simple amendment of all explanations of benefits issued by the insurer would require two to 10 hours work by a computer programmer. More specific programming would potentially require additional time.

Section 3.3721 and §3.3722: Required network approval, application, qualifying examination, and modifications. New §3.3721 requires an insurer to complete a qualifying examination and obtain approval from the department that the insurer's exclusive provider network is in compliance with the requirements of Subchapter X prior to entering the exclusive provider benefit plan market. New §3.3722 provides the content and filing requirements for the initial application, requirements that specified documents be available for the qualifying examination, and requirements for any subsequent modifications of the network.

The department estimates that an insurer's administrative staff or general operations manager will provide most, if not all, of the labor necessary to assemble and file an application for approval. The department estimates that it would be reasonably necessary for an administrative assistant or a general operations manager to spend an average of six hours copying, printing, and combining the required documents, filling out the required application, and filing the completed application packet with the department. In a comment on the withdrawn proposal, a commenter suggested that the required time might be longer than this and could total 40 to 50 hours. The commenter also suggested that some insurers may chose to have an attorney assist in the preparation of the application, resulting in additional cost for the attorney's time, but did not indicate how much attorney time an insurer might need. The department estimates that the labor cost to an insurer may vary depending on whether the insurer elects to have an administrative assistant, a general operations manager, an attorney, or a combination of these individuals, assemble and file the application packet with the department.

The department also estimates that it would be reasonably necessary for an insurer to employ a computer programmer to assist with the compilation of application contents required in §3.3722(c)(5), regarding the submission of a map of the service area, and in §3.3722(c)(9), regarding the submission of a map for each specialty and lists of physicians, individual providers, and institutional providers. The department estimates that the number of hours necessary to determine service areas, maps, and provider lists will vary from plan to plan with a range from five to 15 hours of computer programmer labor to assist with the compilation of the required application contents.

New §3.3722(d) requires insurers to make available seven categories of documents for review during a qualifying exam, as set forth in new §3.3722(d)(1) - (7). The department estimates that it would be reasonably necessary for an insurer to temporarily employ both a general operations manager and an administrative assistant to ensure compliance with the proposed new section during the qualifying examination.

The department estimates that it would be reasonably necessary for a general operations manager to spend an average of three hours identifying and collecting the applicable documents for the qualifying examination. The department further estimates that it would be reasonably necessary for an administrative assistant to spend an average of two hours copying or printing and combining the required documents. The department estimates insurers may incur additional costs necessary to print or copy the required documents. The average print and copy costs necessary for compliance could vary slightly for each plan depending on the number of pages necessary to print or copy.

Though the department has identified factors attributable to the cost of compliance with new §3.3722(d), it is not possible for the department to estimate the total compliance costs an insurer could incur because there are numerous factors involved that prevent a general quantification for all insurers, including the size of a plan and the number of additional relevant documents requested by the department during any given examination. If an insurer has a larger than average plan and the department determines that additional relevant documents need to be reviewed during an examination, the cost for making the required documents available for a qualifying examination will be accordingly higher. The estimated cost to comply with the new subsection represents an estimate for an insurer with an average plan size, with documents stored in electronic format, and with a simple qualifying examination that does not require the department to request numerous additional documents.

New §3.3722(e) provides the application content and filing requirements for the approval of an expansion or reduction of an existing service area and for the approval of a new service area. The department estimates that an insurer's administrative staff or general operations manager will provide most if not all of the labor necessary for an insurer to apply for the certificate of compliance for the network modification. The department estimates that it would be reasonably necessary for an administrative assistant or a general operations manager to spend an average of six hours copying, printing and combining the required documents, filling out the required application, and filing the completed application packet with the department. The department estimates that the labor cost to an insurer will vary depending on whether the insurer elects to have an administrative assistant, a general operations manager, or a combination of both, complete and file the application.

The department also estimates that it would be reasonably necessary for an insurer to employ a computer programmer to assist with the compilation of the application contents required in §3.3722(e) regarding the submission of a map of the existing

and proposed service areas; a map for each specialty; and lists of physicians, individual providers, and institutional providers.

The department estimates that the number of hours necessary to compare the existing and proposed service areas for changes, compile maps, and compile the required network configuration information will vary from plan to plan with a range from five to 15 hours of computer programmer labor to assist with the compilation of the required application contents. The department estimates that an insurer may incur additional costs necessary to print and copy the application, procedures, and additional paperwork to complete the application and additional costs necessary to mail the completed application. The average print, copy, and postage costs necessary for compliance could vary slightly for each plan depending on the number of pages necessary to print, copy, and mail per application.

The estimated cost to comply with the new sections represents an estimate for an insurer with average existing and proposed service areas in Texas, as compared to service areas the department has seen in past HMO and preferred provider benefit plan filings. The department estimates that costs will vary for insurers opting for smaller or larger service areas. Additionally, the department estimates insurers may incur additional costs necessary to print, copy, and mail the completed application. The department estimates that print, copy, and mail costs could vary slightly for each plan depending upon the number of pages necessary to print, copy, and file per application.

Proposed §3.3723: Examinations. New §3.3723(c) requires that insurers make their books and records relating to their operations available to the department to facilitate an examination. New §3.3723(d) further requires insurers to provide a copy of any contract, agreement, or other arrangement between the insurer and a physician or provider on request by the commissioner. Finally, new §3.3723(f) requires insurers to make available seven additional categories of documents for review, as set forth in new §3.3723(f)(1) - (7). Pursuant to §3.3723(a), examinations will occur at least once every five years.

The department estimates that §3.3723(c), (d), and (f) could result in costs to comply for insurers and has determined that the total estimated cost for compliance could vary based upon certain components. The department considered: (i) the cost of identifying, collecting, producing, and printing or copying the required documents for each examination; (ii) the cost of facilitating an examination in compliance with §3.3723(c); (iii) the cost of auto-mapping software (for example, Geo-Access) to make the required maps available for review in compliance with §3.3723(f)(5); and (iv) the cost of information technology staff necessary to use the auto-mapping software.

The department estimates that it would be reasonably necessary for an insurer to employ a general operations manager, an administrative assistant, and a functional division director from each of the insurer's functional divisions to make the required documents available to the department during a subsequent examination. The department estimates that it would be reasonably necessary for a general operations manager to spend an average of three hours identifying and collecting the applicable documents per examination and to spend an average of two to 10 hours reviewing deficiencies and generating corrected responses. This estimate could vary, depending on the accuracy and completeness of the documents produced from each functional division and number of functional divisions an insurer opts to include within its organizational structure. The department additionally estimates that it would be reasonably necessary for an administrative assistant to spend an average of two hours copying or printing and combining the required documents per examination. The department further estimates that it would be reasonably necessary for a functional division director to spend an average of two hours of time gathering, reviewing, and producing required documents and to spend an average of one hour correcting any deficiencies per examination.

In addition, the department estimates that it would be reasonably necessary for an insurer to employ a general operations manager and a functional division director from each of the insurer's functional divisions to facilitate an examination in compliance with §3.3723(c). The department estimates that it would be reasonably necessary for a general operations manager and each functional division director to spend an average of six hours each per examination facilitating the examination by attending meetings with staff from the department. The total time necessary for an insurer's functional division director to facilitate an examination will vary from plan to plan, depending on the number of functional divisions the insurer opts to include within its organizational structure and the complexity of the issues that arise during the examination.

The department estimates that it would be reasonably necessary for an insurer to procure auto-mapping software, like Geo-Access or ArcGIS, to make the required maps available for review in compliance with §3.3723(f)(5) and to employ information technology staff to use the auto-mapping software. The department estimates that the initial cost of procuring ArcGIS software is $3,000 to $5,000. This is based on the cost estimates received from web-based searches conducted by department staff for software availability and price quotes. The department also estimates that it would be reasonably necessary for an insurer's computer programmer to spend an average of five to 15 hours operating the auto-mapping software, determining service areas, and printing the required maps. It is likely that insurers with dense, limited service areas would be able to provide the necessary information with lower costs because of the decreased time needed to generate the necessary information.

Additionally, the department estimates that the average printing and copying costs necessary for compliance could vary slightly for each plan depending on the number of pages necessary to print or copy per examination. Though the department has identified factors attributable to the cost of compliance with new §3.3723, it is not possible for the department to estimate the absolute total amount of compliance costs that an insurer could incur because there are numerous factors involved that limit reliable quantification by the department, including plan size and the number of relevant documents that might be requested by the department during any given examination. If an insurer has a larger than average plan and the department determines that additional relevant documents are necessary during an examination, the cost for making the required documents available for a qualifying examination will be accordingly higher. The estimated cost to comply with the new subsection represents an estimate for an insurer with an average plan size, with documents stored in electronic format, and with a simple subsequent examination that does not require the department to request numerous additional documents. If it is necessary for the department to perform additional exams during the five-year period, the costs will be accordingly higher.

Section 3.3724: Quality improvement program. New §3.3724(a) requires that an insurer develop and maintain an ongoing quality improvement program. The quality improvement program must

include: (i) a written description of the program outlining organizational structure, functional responsibilities, and meeting frequency; (ii) an annual work plan that includes objective and measurable goals, planned activities, timeframes, responsible individuals, and evaluation methodologies for 13 program areas as set forth in new §3.3724(a)(2)(B); (iii) an annual written report on the quality improvement program that includes information regarding completed activities, trending of clinical and service goals, program performance, and general conclusions; (iv) a credentialing process for the selection and retention of contracted physicians and providers; and (v) a peer review procedure for physicians and providers to obtain recommendations regarding credentialing decisions.

New §3.3724(b) requires an insurer's governing body to appoint a quality improvement committee, approve the quality improvement program, approve an annual quality improvement plan, meet at least once a year to review the quality improvement committee report, and to review the annual written report of the quality improvement program. Finally, new §3.3724(c) requires the quality improvement committee to meet regularly and provide an ongoing evaluation of the overall effectiveness of the quality improvement program.

The department estimates that new §3.3724 could result in compliance costs for insurers. The department has determined that the total estimated cost for an insurer to comply with the new subsections could vary based upon certain components. The department considered the cost of: (i) hiring staff necessary to develop and maintain an ongoing quality improvement program in compliance with new §3.3724(a); (ii) hiring a qualified credentialing organization or an in-house credentialing body to comply with the credentialing function requirements in new §3.3724(a)(4); (iii) compensating members of the required credentialing committee to comply with new §3.3724(a)(5); (iv) conducting annual meetings in compliance with new §3.3724(b); (v) compensating members of the quality improvement committee for its ongoing evaluation of quality improvement activities to comply with new §3.3724(c); and (vi) copying, printing, and mailing.

The department estimates that it would be reasonably necessary for an insurer to employ a medical director or registered nurse to serve as clinical director for the required quality improvement program, to employ administrative staff to assist the clinical director, and to employ information technology personnel to assist with the compilation of data necessary for drafting the required work plan and written report.

The department estimates that an insurer's clinical director might provide most of the labor necessary to develop and maintain an ongoing quality improvement program, including providing the required written description, drafting an annual work plan, drafting an annual written report, implementing the required credentialing process, and overseeing the peer review process. The department estimates that it would be reasonably necessary for a medical director or a registered nurse to spend between 10 and 40 hours per week developing and maintaining the quality improvement program. The department estimates that the total average labor cost for an insurer's clinical director to develop and maintain the quality improvement program in compliance with new §3.3724(a) could vary depending on the size of the network and whether the insurer hires a medical director or registered nurse to develop and maintain the quality improvement program.

The department estimates that an insurer's administrative staff will provide some of the labor necessary to develop and maintain an ongoing quality improvement program in compliance with new §3.3724(a), including drafting, copying, printing, combining, and mailing the required work plan described in §3.3724(a)(2) and the required written report described in §3.3724(a)(3). The department estimates that it would be reasonably necessary for an administrative assistant to spend an average of six hours per week assisting the clinical director with the work plan and written report.

The department further estimates that it would be reasonably necessary for an insurer to employ a computer programmer to assist with the compilation of data necessary to track the requirements in §3.3724(a)(2), regarding the annual work plan, and in §3.3724(a)(3), regarding the annual written report. The department estimates that the number of hours necessary to compile data for the required work plan and written report will vary from plan to plan with an average range from five to 15 hours of computer programmer labor per year to assist the clinical director with the required submissions.

The department estimates that it would be reasonably necessary for an insurer to delegate credentialing functions to a qualified credentialing organization for a per-provider fee or employ an in-house credentialing body, including a peer review committee to review and approve credentialed providers. The department estimates that an insurer may incur costs for staff time spent researching credentials and for fees for accessing credentialing databases as a result of compliance with §3.3724(a)(4). The department has determined that an insurer may spend up to one hour per provider researching physician and provider credentials with an additional estimated access cost of $10 per physician to access the various credentialing databases. The department estimates that an insurer may opt to have an administrative assistant perform these tasks. The department estimates that this monthly cost component will vary for each insurer depending on how many providers are researched for credentialing and that each insurer has the information necessary to determine its approximate estimated cost.

It may be reasonably necessary for an insurer to provide compensation to members of the credentialing committee for the time necessary to review and make recommendations regarding credentialing decisions. It is not feasible for the department to estimate the total cost attributable to compliance with new §3.3724(a)(5) because there are numerous factors involved that are not suitable to reliable quantification by the department, including the size of the insurer's service area(s), the number of physicians and providers requesting a peer review of a credentialing decision, variation in the negotiated fees of physicians and providers to participate in the committee, and the number of physicians and providers designated to the committee by the insurer. The department estimates that each insurer has the information necessary to determine its individual labor costs necessary to meet the requirements of new §3.3724(a)(5).

It may be reasonably necessary for an insurer to provide additional compensation to members of the governing body for the time necessary to plan and conduct the required annual meetings of the governing body. However, it is not feasible for the department to estimate the total cost attributable to compliance with new §3.3724(b), because there are numerous factors involved that are not suitable for reliable quantification by the department, including the size of the insurer's service area(s) and the current salaries of the insurer's governing body members. The department estimates that each insurer has the information

necessary to determine its individual labor costs necessary to meet the requirements of new §3.3724(b).

The department estimates that it may be reasonably necessary for an insurer to provide compensation to members of the appointed quality improvement committee for time necessary to meet regularly and to provide an ongoing evaluation of the overall effectiveness of the quality improvement program. However, it is not feasible for the department to estimate the total cost attributable to compliance with new §3.3724(c) because there are numerous factors involved that are not suitable for reliable quantification by the department, including the size of the insurer's service area, the variation in the negotiated fees of physicians and providers agreeing to participate in the committee, and the number of physicians and providers appointed to the committee by the insurer's governing body. The department estimates that each insurer has the information necessary to determine its individual labor costs necessary to meet the requirements of new §3.3724(c).

Additionally, the department estimates that insurers may incur cost to print or copy the required written description, annual work plan, annual written report, required committee reports, procedures, and additional paperwork necessary to comply with new §3.3724. The average print, copy, and postage costs necessary for compliance could vary for each plan depending upon the number of pages necessary to print and copy per year.

Section 3.3725: Nonpreferred provider claims. New §3.3725(d) requires insurers reimbursing a nonpreferred provider under §3.3725(a), (b), or (c)(2) to ensure that an insured is held harmless for any amounts beyond the copayment, deductible, and coinsurance percentage that the insured would have paid had the insured received services from a preferred provider. New §3.3725(e) provides that, upon finding that a claim from a nonpreferred provider under §3.3725(a), (b), or (c)(2) is payable, an insurer must issue payment at a usual and customary rate or at an agreed rate when the medically necessary covered services are not available through a preferred provider and have been requested by a preferred provider.

The department estimates that §3.3725 could result in costs to comply for insurers. The department has determined that the total estimated cost for an insurer to comply with the new section could vary based upon the following components: (i) the cost of information technology staff necessary to program the insurer's computer software system to pay claims as required under §3.3725; and (ii) the cost of acquiring additional data concerning usual and customary rates.

The department estimates that an insurer's information technology staff will provide most if not all of the labor necessary to program the insurer's computer software system to pay claims. The department estimates that it would be reasonably necessary for a computer programmer to spend an average of 10 to 100 hours making necessary programming changes to the insurer's software, depending on the complexity of the insurer's current computer software system.

The department estimates that it may be reasonably necessary for an insurer to incur an additional annual cost to acquire additional data for determining usual and customary rates for claims payment. It is not feasible for the department to estimate the total amount of cost attributable to compliance with new §3.3725 regarding the determination of usual and customary rates, because there are numerous factors involved that are not suitable to reliable quantification by the department, including the insurer's current reimbursement methodologies, the market share of the insurer, the service areas the data will be required to cover, and other facts specific to each insurer. The department estimates that each insurer has the information necessary to determine its individual costs necessary to determine usual and customary rates for its service areas.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. As required by the Government Code §2006.002(c), the department has determined that the proposed amendments may have an adverse economic effect on 10 to 40 small or micro businesses that must comply with the proposed rules. The cost of compliance with the proposal will not vary between large businesses and small or micro businesses on the basis that a business is a large, small, or micro business, and the department's cost analysis and resulting estimated costs for insurers in the Public Benefit/Cost Note portion of this proposal is equally applicable to small or micro businesses. The total cost to large businesses and small or micro businesses to comply with the updated requirements for preferred provider benefit plans or the new requirements applicable to exclusive provider benefit plans is not dependent on the size of the insurer, but rather is dependent upon the individual insurer's particular cost for each component. The department estimates that an individual insurer's particular cost for each component will vary based on multiple factors as described in the Public Benefit/Cost Note portion of this proposal.

In accord with the Government Code §2006.002(c-1), the department has considered other regulatory methods to accomplish the objectives of the proposal that will also minimize any adverse impact on small and micro businesses.

The primary objective of the proposal is to provide health insurers offering health plan coverage in Texas with additional options to offer lower cost health plans to employers and individual consumers in a way that is consistent with HB 1772 by authorizing and providing the regulatory requirements for exclusive benefit provider plans.

The other regulatory methods considered by the department to accomplish the objectives of the proposal and to minimize any adverse impact on small and micro businesses include: (i) not proposing the amendments; (ii) proposing different requirements for small and micro businesses; and (iii) excluding small and micro businesses from applicability under the amendments and new sections included in this proposal.

Not proposing the amendments. As previously noted, the purpose of this rule proposal is to provide the regulatory requirements for exclusive benefit provider plans and to align the regulations applicable to preferred and exclusive provider benefit plans. If the rule were not proposed, no rules could be adopted that provide regulatory requirements for exclusive benefit provider plans. Current rules are in place that address preferred provider benefit plans. If the department does not create exceptions to those rules, some of them might be applicable to an insurer attempting to implement an exclusive provider benefit plan.

Uncertainty regarding which rules apply to exclusive provider benefit plans and which rules do not apply to them would hamper the creation of exclusive provider benefit plans, and the result would be the delay or lack of creation of exclusive provider benefit plans. This, in turn, would frustrate the intent of HB 1772 to allow insurers to offer lower cost health plans to employers and

individual consumers by permitting plans with closed networks where only services provided by network providers are covered.

For this reason, the department has rejected this option.

Proposing different requirements for small and micro businesses. The department has worked with stakeholders since the passage of HB 1772 to develop amendments to the current rules applicable to preferred provider benefit plans and new rules applicable to exclusive provider benefit plans that best achieve the goals of HB 1772. Many changes have been made to earlier drafts of the proposed amendments and new sections based on input from stakeholders and stakeholder groups, including groups that have among their membership small businesses. The department believes that proposing different standards than those included in this proposal would not provide a better option for small or micro businesses. Additionally, the department anticipates that many costs of compliance will be lower for insurers that have small service areas and networks, including small and micro businesses, which may have smaller service areas and networks than larger insurers. For example, in these instances this would reduce the impact of requirements for credentialing and quality improvement for small and micro businesses.

Also, the department believes that the potential harm of lessened regulatory requirements to consumers and providers would outweigh the potential benefit to small or micro businesses. The proposed requirements include provisions addressing notice, claim payment, and network access and quality. Since many of the regulatory requirements are not reflected in policy documents, consumers and providers would not know what different regulations a small or micro business insurer would be following.

In addition, exempting small and micro businesses from these requirements or reducing these requirements for those insurers within their service areas could result in additional costs and potentially less access to care or quality of care for the insureds of small or micro business insurers. Consumers would also be generally unable to make adequate comparisons and informed decisions in shopping for health insurance if different insurers were treated differently under the proposed rules, because consumers generally would not know what types of care the consumers would require in the future and because it would be difficult to recognize which insurers are large and small or to recognize the differences in the regulatory requirements applicable to the small versus large insurers.

For these reasons, the department has rejected this option.

Excluding small and micro businesses from applicability under the new sections included in this proposal. As addressed in the Public Benefit/Cost Note portion of this proposal, anticipated costs under the proposal are the result of the new requirements applicable to exclusive provider benefit plans. If small and micro businesses were excluded from applicability under the new sections applicable to exclusive provider benefit plans, they would not face the economic impacts. However, if small and micro businesses were excluded from applicability under the new sections applicable to exclusive provider benefit plans, they would not be subject to the credentialing or quality of care requirements, network adequacy standards, or other consumer protections included in the proposed rules. The department believes that the lack of these consumer protections would create potential harm for insureds that would outweigh the potential benefit to small or micro businesses.

Additionally, failure to adopt rules applicable to small and micro businesses would be contrary to the Insurance Code. For example, failure to adopt network adequacy standards applicable to small and micro businesses would conflict with the Insurance Code §1301.055, which requires the commissioner to adopt network adequacy standards adapted to local markets in which an insurer offering a preferred provider benefit plan operates.

For these reasons, the department has rejected this option.

TAKINGS IMPACT ASSESSMENT. The department has determined that this proposal affects no private real property interests, nor does it 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. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on December 3, 2012 to Sara Waitt, general counsel, by email at: chiefclerk@tdi.state.tx.us or by mail at: Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be simultaneously submitted to Doug Danzeiser by email at: LHLcomments@tdi.state.tx.us or by mail at: Regulatory Matters, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

The commissioner will consider the proposed amendments to §§3.3701 - 3.3710 and new §§3.3720 - 3.3725 in a public hearing under Docket No. 2745 scheduled for November 14, 2012, at 9:30 a.m. in Room 100 of the William P. Hobby Jr. State Office Building, 333 Guadalupe Street, Austin, Texas. The department will consider written and oral comments presented at the hearing.

DIVISION 1. GENERAL REQUIREMENTS

28 TAC §§3.3701 - 3.3710

STATUTORY AUTHORITY. The amendments are proposed under the Insurance Code §§1301.003, 1301.0042, 1301.007, and 36.001.

The Insurance Code §1301.003 provides that an exclusive provider benefit plan that meets the requirements of Chapter 1301, relating to Preferred Provider Benefit Plans, is permitted.

The Insurance Code §1301.0042 provides that, except for dental care benefits, a provision of the Insurance Code or other insurance law that applies to a preferred provider benefit plan also applies to an exclusive provider benefit plan unless the provision is determined to be inconsistent with the function and purpose of an exclusive provider benefit plan. The Insurance Code §1301.0042 also authorizes the commissioner to determine whether a provision is inconsistent with the function and purpose of an exclusive provider benefit plan.

The Insurance Code §1301.007 authorizes the commissioner to adopt rules to implement Chapter 1301, relating to Preferred Provider Benefit Plans, and to ensure reasonable accessibility and availability of preferred provider services to residents of this state.

The Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code §§401.054,

541.003, 541.051, 751.303, 1251.006, 1301.001, 1301.003, 1301.0041, 1301.0042, 1301.0045, 1301.005, 1301.0051, 1301.0052, 1301.0053, 1301.054, 1301.0055, 1301.0056, 1301.006, 1301.007, 1301.051, 1301.057, 1301.058, 1301.066, 1301.134, 1301.136, 1301.152 - 1301.154, 1301.160, 1301.161, 1456.003, 1456.006, 1661.002, 1701.055, 1701.057, and 1701.060; Insurance Code Chapters 82, 83, 544, 1451, and 1460; and Insurance Code Chapter 1301, Subchapters B and C.

§3.3701. Applicability and Scope [~~Application~~].

(a) Except as otherwise specified in this subchapter, [~~the sections of~~] this subchapter applies [~~apply~~] to any preferred provider benefit plan or exclusive provider benefit plan as specified in this subsection.

(1) This subchapter applies to any preferred or exclusive provider benefit plan policy that is offered, delivered, issued for delivery, or renewed on or after 150 days from the effective date of this section [~~May 19, 2012~~]. Any preferred or exclusive provider benefit plan policy delivered, issued for delivery, or renewed prior to this applicability date [~~May 19, 2012,~~] is subject to the statutes and provisions of this subchapter in effect at the time the policy was delivered, issued for delivery, or renewed.

(2) This [~~The sections of this~~] subchapter does [~~do~~] not apply to:

(A) provisions for dental care benefits in any health insurance policy; or[~~.~~]

(B) an exclusive provider benefit plan regulated under Subchapter KK of this chapter (relating to Exclusive Provider Benefit Plan) written by an insurer pursuant to a contract with the Texas Health and Human Services Commission to provide services under the Texas Children's Health Insurance Program, Medicaid, or with the Statewide Rural Health Care System.

(b) - (e) (No change.)

(f) A provision of this title applicable to a preferred provider benefit plan is applicable to an exclusive provider benefit plan unless specified otherwise.

§3.3702. Definitions.

(a) Words and terms defined in the Insurance Code Chapter 1301 have the same meaning when used in this subchapter, unless the context clearly indicates otherwise.

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

(1) Adverse determination--As defined in the Insurance Code §4201.002(1).

(2) Allowed amount--The amount of a billed charge that an insurer determines to be covered for services provided by a nonpreferred provider. The allowed amount includes both the insurer's payment and any applicable deductible, copayment, or coinsurance amounts for which the insured is responsible.

(3) [~~(1)~~] Billed charges--The charges for medical care or health care services included on a claim submitted by a physician or provider.

(4) Complainant--As defined in §21.2502 of this title (relating to Definitions).

(5) Complaint--As defined in §21.2502 of this title.

(6) [~~(2)~~] Contract holder--An individual who holds an individual health insurance policy, or an organization that [~~which~~] holds a group health insurance policy.

[~~(3) Emergency care--As defined in the Insurance Code §1301.155.~~]

(7) Exclusive provider network--The collective group of physicians and health care providers that are available to an insured under an exclusive provider benefit plan and that are directly or indirectly contracted with the insurer of an exclusive provider benefit plan to provide medical or health care services to individuals insured under the plan.

(8) [~~(4)~~] Facility--

(A) an ambulatory surgical center licensed under the Health and Safety Code Chapter 243;

(B) a birthing center licensed under the Health and Safety Code Chapter 244; or

(C) a hospital licensed under the Health and Safety Code Chapter 241.

(9) [~~(5)~~] Facility-based physician--A radiologist, an anesthesiologist, a pathologist, an emergency department physician, or a neonatologist:

(A) to whom a facility has granted clinical privileges; and

(B) who provides services to patients of the facility under those clinical privileges.

(10) [~~(6)~~] Health care provider or provider--As defined in the Insurance Code §1301.001(1).

[~~(7) Health insurance policy--As defined in the Insurance Code §1301.001(2).~~]

(11) [~~(8)~~] Health maintenance organization (HMO)--As defined in the Insurance Code §843.002(14).

(12) In-network--Medical or health care treatment, services, or supplies furnished by a preferred provider, or a claim filed by a preferred provider for the treatment, services, or supplies.

[~~(9) Hospital--As defined in the Insurance Code §1301.001(3), a licensed public or private institution as defined by the Health & Safety Code Chapter 241 or the Health & Safety Code Title 7, Subtitle C.~~]

[~~(10) Institutional provider--As defined in the Insurance Code §1301.001(4).~~]

[~~(11) Insurer--As defined in the Insurance Code §1301.001(5).~~]

(13) [~~(12)~~] NCQA--The National Committee for Quality Assurance, which reviews and accredits managed care plans.

(14) [~~(13)~~] Nonpreferred provider--A physician or health care provider, or an organization of physicians or health care providers, that does not have a contract with the insurer to provide medical care or health care on a preferred benefit basis to insureds covered by a health insurance policy issued by the insurer.

(15) Out-of-network--Medical or health care treatment services, or supplies furnished by a nonpreferred provider, or a claim filed by a nonpreferred provider for the treatment, services, or supplies.

(16) [~~(14)~~] Pediatric practitioner--A physician with appropriate education, training, and experience whose practice is limited

to providing medical and health care services to children and young adults.

[(15) Physician--As defined in the Insurance Code §1301.001(6).]

[(16) Practitioner--As defined in the Insurance Code §1301.001(7).]

[(17) Preferred provider--As defined in the Insurance Code §1301.001(8).]

[(18) Preferred provider benefit plan--As defined in the Insurance Code §1301.001(9).]

[(19) Prospective insured--As defined in the Insurance Code §1301.158(a).]

[(20) Quality assessment--As defined in the Insurance Code §1301.059(a).]

(17) [(21)] Rural area--

(A) a county with a population of 50,000 or less as determined by the United States Census Bureau in the most recent decennial census report;

(B) an area that is not designated as an urbanized area by the United States Census Bureau in the most recent decennial census report; or

(C) any other area designated as rural under rules adopted by the commissioner, notwithstanding subparagraphs (A) and (B) of this paragraph.

[(22) Service area--As defined in the Insurance Code §1301.001(10).]

(18) [(23)] Urgent care--Medical or health [Health] care services provided in a situation other than an emergency that [which] are typically provided in a setting such as a physician or individual provider's office or urgent care center, as a result of an acute injury or illness that is severe or painful enough to lead a prudent layperson, possessing an average knowledge of medicine and health, to believe that the person's [his or her] condition, illness, or injury is of such a nature that failure to obtain treatment within a reasonable period of time would result in serious deterioration of the condition of the person's [his or her] health.

(19) [(24)] Utilization review--As defined in the Insurance Code §4201.002(13).

§3.3703. Contracting Requirements.

(a) An insurer marketing a preferred provider benefit plan must [is required to] contract with physicians and health care providers to assure that all medical and health care services and items contained in the package of benefits for which coverage is provided, including treatment of illnesses and injuries, will be provided under the plan in a manner that assures both availability and accessibility of adequate personnel, specialty care, and facilities. Each contract must [is required to] meet the following requirements:

(1) A contract between a preferred provider and an insurer may not restrict a physician or health care provider from contracting with other insurers, preferred provider plans, preferred provider networks or organizations, exclusive provider benefit plans, exclusive provider networks or organizations, health care collaboratives, or HMOs.

(2) - (7) (No change.)

(8) An insurer's contract with a physician, physician group, or practitioner must [is required to] have a mechanism for the resolution of complaints that are initiated by an insured, a physician, physician group, or practitioner. The mechanism must provide for reasonable due process including, in an advisory role only, a review panel selected as specified in [subsection (b)(2) of] §3.3706(b)(2) of this title [subchapter] (relating to Designation as a Preferred Provider, Decision to Withhold Designation, Termination of a Preferred Provider, Review of Process).

(9) - (10) (No change.)

(11) A contract between a preferred provider and an insurer must require the insurer to comply with all applicable statutes and rules pertaining to prompt payment of clean claims[, including the Insurance Code Chapter 1301, Subchapter C and §§21.2801 - 21.2820 of this title (relating to Submission of Clean Claims)] with respect to payment to the provider for covered services that are rendered to insureds.

(12) - (18) (No change.)

(19) A contract between a preferred provider and an insurer must require written notice to the provider on [upon] termination of the contract by the insurer, and in the case of termination of a contract between an insurer and a physician or practitioner, the notice must include the provider's right to request a review, as specified in §3.3706(d) of this title [subchapter].

(20) - (25) (No change.)

(26) A contract between an insurer and a facility must require that the facility give notice to the insurer of the termination of a contract between the facility and a facility-based physician group that is a preferred provider for the insurer as soon as reasonably practicable, but not later than the fifth business day following the termination of the [a] contract [between the facility and a facility-based physician group that is a preferred provider for the insurer].

(27) A contract between an insurer and a preferred provider must require that a physician or provider referring an insured to a facility for surgery:

(A) notify the insured of the possibility that out-of-network providers may provide treatment and that the insured can contact the insurer to coordinate the insured's care;

(B) notify the insurer that surgery has been recommended so that the insurer has the opportunity to coordinate the insured's care; and

(C) notify the insurer of the facility that has been recommended for the surgery.

(28) A contract between an insurer and a facility must require that the facility, when scheduling surgery:

(A) notify the insured of the possibility that out-of-network providers may provide treatment and that the insured can contact the insurer to coordinate the insured's care; and

(B) notify the insurer that surgery has been scheduled so that the insurer has the opportunity to coordinate the insured's care.

(29) This subsection does not prohibit other contractual provisions not prohibited by law.

(b) (No change.)

(c) An insurer may enter into an agreement with a preferred provider organization, an exclusive provider network, or a health care collaborative for the purpose of offering a network of preferred providers, provided that it remains the insurer's responsibility to:

(1) meet the requirements of the Insurance Code Chapter 1301 and this subchapter; [or]

(2) ensure that the requirements of the Insurance Code Chapter 1301 and this subchapter are met; and[.]

(3) provide all documentation to demonstrate compliance with all applicable rules on request by the department.

§3.3704. Freedom of Choice; Availability of Preferred Providers.

(a) Fairness requirements [~~Requirements~~]. A preferred provider benefit plan is not considered unjust under the Insurance Code §§1701.002 - 1701.005; [§§]1701.051 - 1701.060; [§§]1701.101 - 1701.103; and [§]1701.151, or to unfairly discriminate under the Insurance Code Chapter 542, Subchapter A, or §§544.051 - 544.054, or to violate §§1451.001, 1451.053, 1451.054, or [§§]1451.101 - 1451.127 of the Insurance Code provided that:

(1) pursuant to the Insurance Code §§1251.005, 1251.006, 1301.003, 1301.006, 1301.051, 1301.053, 1301.054, 1301.055, 1301.057 - 1301.062, 1301.064, 1301.065, 1301.151, 1301.156, and 1301.201, the preferred provider benefit plan does not require that a service be rendered by a particular hospital, physician, or practitioner, except that an exclusive provider benefit plan may utilize an exclusive network as permitted under the Insurance Code Chapter 1301;

(2) - (4) (No change.)

(5) insureds have the right to emergency care services as set forth in the Insurance Code §1301.0053 and §1301.155, and §3.3708 of this title (relating to Payment of Certain Basic Benefit Claims and Related Disclosures) and §3.3725 of this title (relating to Payment of Certain Out-of-Network Claims);

(6) the basic level of coverage, excluding a reasonable difference in deductibles, is not more than 50 percent less than the higher level of coverage, except as provided under an exclusive provider benefit plan. A reasonable difference in deductibles is determined considering the benefits of each individual policy;

(7) the rights of an insured to exercise full freedom of choice in the selection of a physician or provider, or in the selection of a preferred provider under an exclusive provider benefit plan, are not restricted by the insurer;

(8) if the insurer is issuing other health insurance policies in the service area that do not provide for the use of preferred providers, the basic level of coverage of a plan that is not an exclusive provider benefit plan is reasonably consistent with [~~such~~] other health insurance policies offered by the insurer that do not provide for a different level of coverage for use of a preferred provider;

(9) (No change.)

(10) a preferred provider benefit plan that is not an exclusive provider benefit plan may provide for a different level of coverage for use of a nonpreferred provider if the referral is made by a preferred provider only if full disclosure of the difference is included in the plan and the written description as required by §3.3705(b) of this title [~~subchapter~~] (relating to Nature of Communications with Insureds; Readability, Mandatory Disclosure Requirements, and Plan Designations); [~~and~~]

(11) both preferred provider benefits and, except to the extent permitted by the Insurance Code Chapter 1301 in an exclusive provider benefit plan, basic level benefits are reasonably available to all insureds within a designated service area; and[.]

(12) if medically necessary covered services are not available through preferred physicians or providers, insureds have the right to receive care from a nonpreferred provider in accord with the Insurance Code §1301.005 and §1301.0052, and §3.3708 and §3.3725 of this title, as applicable.

(b) Payment of nonpreferred providers [~~Nonpreferred Providers~~]. Payment by the insurer must be made for covered services of a nonpreferred provider in the same prompt and efficient manner as to a preferred provider.

(c) Retaliatory action prohibited [~~Action Prohibited~~]. An insurer is prohibited from engaging in retaliatory action against an insured, including cancellation of or refusal to renew a policy, because the insured or a person acting on behalf of the insured has filed a complaint against the insurer or a preferred provider or has appealed a decision of the insurer.

(d) Access to certain institutional providers [~~Certain Institutional Providers~~]. In addition to the requirements for availability of preferred providers set forth in the Insurance Code §1301.005, any insurer offering a preferred provider benefit plan must [~~is required to~~] make a good faith effort to have a mix of for-profit, non-profit, and tax-supported institutional providers under contract as preferred providers in the service area to afford all insureds under the [~~such~~] plan freedom of choice in the selection of institutional providers at which they will receive care, unless the [~~such a~~] mix is [~~proves to be~~] not feasible due to geographic, economic, or other operational factors. An insurer must [~~is required to~~] give special consideration to contracting with teaching hospitals and hospitals that provide indigent care or care for uninsured individuals as a significant percentage of their overall patient load.

(e) Network requirements [~~Requirements~~]. Each preferred provider benefit plan must [~~is required to~~] include a health care service delivery network that complies with the Insurance Code §1301.005 and §1301.006 and the local market adequacy requirements described in this section. An adequate network must [~~is required to~~]:

(1) - (11) (No change.)

(f) Network monitoring and corrective action [~~Monitoring and Corrective Action~~]. Insurers must [~~are required to~~] monitor compliance with subsection (e) of this section on an ongoing basis, taking any needed corrective action as required to ensure that the network is adequate.

(g) Service areas [~~Areas~~]. For purposes of this subchapter, a preferred provider benefit plan may have one or more contiguous or noncontiguous service areas, but any service areas that are smaller than statewide must [~~are required to~~] be defined in terms of one of the following:

(1) one or more of the 11 Texas geographic regions designated in §3.3711 of this title [~~subchapter~~] (relating to Geographic Regions);

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

§3.3705. Nature of Communications with Insureds; Readability, Mandatory Disclosure Requirements, and Plan Designations.

(a) (No change.)

(b) Disclosure of terms and conditions of the policy [~~Terms and Conditions of the Policy~~]. The insurer is required, on [~~upon~~] request, to provide to a current or prospective group contract holder or a current or prospective insured an accurate written description of the terms and conditions of the policy that allows the current or prospective group contract holder or current or prospective insured to make comparisons and informed decisions before selecting among health care plans. An insurer may utilize its handbook to satisfy this requirement provided that the insurer complies with all requirements set forth in this subsection including the level of disclosure required. The written description must [~~is required to~~] be in a readable and understandable format, by category, and must [~~is required to~~] include a clear, complete, and accurate description of these items in the following order:

(1) a statement that the entity providing the coverage is an insurance company;[,] the name of the insurance company;[, and] that, in the case of a preferred provider benefit plan, the insurance contract contains preferred provider benefits; and, in the case of an exclusive provider benefit plan, that the contract only provides benefits for services received from preferred providers, except as otherwise noted in the contract;

(2) - (8) (No change.)

(9) any authorization requirements [prior authorizations], including preauthorization review, concurrent review, post-service review, and post-payment [postpayment] review; and any penalties or reductions in benefits resulting from the failure to obtain any required authorizations;

(10) - (11) (No change.)

(12) a current list of preferred providers and complete descriptions of the provider networks, including names and locations of physicians and health care providers, and a disclosure of which preferred providers will not accept new patients. Both [, both] of these items [which] may be provided electronically, if notice is also provided in the disclosure required by this subsection regarding how a nonelectronic copy may be obtained free of charge [with the agreement of the insured provided that information about how to obtain a nonelectronic provider listing free of charge is also provided];

(13) (No change.)

(14) information that is updated at least annually regarding whether any waivers or local market access plans approved pursuant to §3.3707 of this title (relating to Waiver Due to Failure to Contract in Local Markets) apply to the plan and that complies with the following [network demographics for each service area, if the preferred provider benefit plan is not offered on a statewide service area basis, or for each of the 11 regions specified in §3.3711 of this subchapter (relating to Geographic Regions), if the plan is offered on a statewide service area basis]:

(A) if a waiver or a local market access plan applies to facility services or to internal medicine, family or general practice, pediatric practitioner practice, obstetrics and gynecology, anesthesiology, psychiatry, or general surgery services, this must be specifically noted;

(B) the information may be categorized by service area or county if the preferred provider benefit plan is not offered on a statewide service area basis, and, if by county, the aggregate of counties is not more than those within a region; or for each of the 11 regions specified in §3.3711 of this title (relating to Geographic Regions), if the plan is offered on a statewide service area basis; and

(C) the information must identify how the local market access plan may be obtained or viewed.

[(A) the number of insureds in the service area or region;]

[(B) for each provider area of practice, including at a minimum internal medicine, family/general practice, pediatric practitioner practice, obstetrics and gynecology, anesthesiology, psychiatry, and general surgery, the number of preferred providers, as well as an indication of whether an active access plan pursuant to §3.3709 of this subchapter (relating to Annual Network Adequacy Report; Access Plan) applies to the services furnished by that class of provider in the service area or region and how such access plan may be obtained or viewed, if applicable; and]

[(C) for hospitals, the number of preferred provider hospitals in the service area or region, as well as an indication of whether an active access plan pursuant to §3.3709 of this subchapter applies to hospital services in that service area or region and how the access plan may be obtained or viewed.]

(c) Filing required [Required]. A copy of the written description required in subsection (b) of this section must be filed with the department with the initial filing of the preferred provider benefit plan and within 60 days of any material changes being made in the information required in subsection (b) of this section. Submission of listings of preferred providers as required in subsection (b)(12) of this section may be made electronically in a format acceptable to the department or by submitting with the filing the Internet website address at which the department may view the current provider listing. Acceptable formats include Microsoft Word and Excel documents. Electronic submission of the provider listing, if applicable, must be submitted to the following email [e-mail] address: LifeHealth@tdi.state.tx.us [hwcn@tdi.state.tx.us]. Nonelectronic filings must [are required to] be submitted to the department at: Life/Health and HMO Intake Team [Filings Intake Division], Mail Code 106-1E, Texas Department of Insurance, P.O. Box 149104, Austin, Texas[,] 78714-9104.

(d) Promotional disclosures required [Disclosures Required]. The preferred provider benefit plan and all promotional, solicitation, and advertising material concerning the preferred provider benefit plan must [are required to] clearly describe the distinction between preferred and nonpreferred providers. Any illustration of preferred provider benefits must [is required to] be in close proximity to an equally prominent description of basic benefits, except in the case of an exclusive provider benefit plan.

(e) Internet website disclosures [Website Disclosures]. Insurers that maintain an Internet website providing information regarding the insurer or the health insurance policies offered by the insurer for use by current or prospective insureds or group contract holders must [are required to] provide:

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

(f) Notice of rights [Rights] under a network plan required [Network Plan Required]. An insurer must [is required to] include the notice specified in Figure: 28 TAC §3.3705(f)(1), for a preferred provider benefit plan that is not an exclusive provider benefit plan, or Figure: 28 TAC §3.3705(f)(2), for an exclusive provider benefit plan, [§3.3705(f)] in all policies, certificates, disclosures of policy terms and conditions provided pursuant to subsection (b) of this section, and outlines of coverage in at least 12 point font:

(1) Preferred provider benefit plan notice.
Figure: 28 TAC §3.3705(f)(1)
[Figure: 28 TAC §3.3705(f)]

(2) Exclusive provider benefit plan notice.
Figure: 28 TAC §3.3705(f)(2)

(g) Untrue or misleading information prohibited [Misleading Information Prohibited]. No insurer, or agent or representative of an insurer, may cause or permit the use or distribution of information which is untrue or misleading.

(h) Disclosure concerning access to preferred provider listing [Concerning Access to Preferred Provider Listing]. The insurer must [is required to] provide notice to all insureds at least annually describing how the insured may access a current listing of all preferred providers on a cost-free basis. The notice must include, at a minimum, information concerning how a nonelectronic copy of the listing may be obtained and a telephone number through which insureds may obtain assistance during regular business hours to find available preferred providers.

(i) Required updates of available provider listings [~~Updates of Available Provider Listings~~]. The insurer must [~~is required to~~] ensure that all electronic or nonelectronic listings of preferred providers made available to insureds are updated at least every three months.

(j) Annual provision of provider listing required in certain cases [~~Provision of Provider Listing Required in Certain Cases~~]. If no Internet-based preferred provider listing or other method of identifying current preferred providers is maintained for use by insureds, the insurer must [~~is required to~~] distribute a current preferred provider listing to all insureds no less than annually by mail, or by an alternative method of delivery if an [~~such~~] alternative method is agreed to by the insured, group policyholder on behalf of the group, or certificate holder.

(k) Reliance upon provider listing in certain cases [~~Upon Provider Listing in Certain Cases~~]. A claim for services rendered by a nonpreferred provider must be paid in the same manner as if no preferred provider had been available under §3.3708(b) - (d) of this title (relating to Payment of Certain Basic Benefit Claims and Related Disclosures) and §3.3725(d) - (f) of this title (relating to Payment of Certain Out-of-Network Claims), as applicable, [~~at the applicable preferred benefit coinsurance percentage~~] if an insured demonstrates that:

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

(l) Additional listing-specific disclosure requirements [~~Listing-Specific Disclosure Requirements~~]. In all preferred provider listings, including any Internet-based postings of information made available by the insurer to provide information to insureds about preferred providers, the insurer must [~~is required to~~] comply with the requirements in paragraphs (1) - (7) [~~(10)~~] of this subsection.

(1) (No change.)

[~~(2) The provider information must include a method for insureds to identify, for each preferred provider hospital, the percentage of the total dollar amount of claims filed with the insurer by or on behalf of facility-based physicians that are not under contract with the insurer. The information must be available by class of facility-based physician, including radiologists, anesthesiologists, pathologists, emergency department physicians, and neonatologists.~~]

[~~(3) In determining the percentages specified in paragraph (2) of this subsection, an insurer may consider claims filed in a 12-month period designated by the insurer ending not more than 12 months before the date the information specified in paragraph (2) of this subsection is provided to the insured.~~]

(2) [~~(4)~~] The provider information must indicate whether each preferred provider is accepting new patients.

[~~(5) The provider information must designate those preferred providers that have notified the insurer of the preferred provider's participation in a regional quality of care peer review program.~~]

(3) [~~(6)~~] The provider information must provide a method by which insureds may notify the insurer of inaccurate information in the listing, with specific reference to:

(A) information about the provider's contract status; and

(B) whether the provider is accepting new patients.

(4) [~~(7)~~] The provider information must provide a method by which insureds may identify preferred provider facility-based physicians able to provide services at preferred provider facilities.

(5) [~~(8)~~] The provider information must be provided in at least 10 point font [~~fonts of not less than 10-point type~~].

(6) [~~(9)~~] The provider information must specifically identify those facilities at which the insurer has no contracts with a class of facility-based provider, specifying the applicable provider class.

(7) [~~(10)~~] The provider information must be dated.

(m) Annual policyholder notice concerning use of a local market access plan [~~Policyholder Notice Concerning Use of Access Plan~~]. An insurer operating a preferred provider benefit plan that relies on a local market [~~upon an~~] access plan as specified in §3.3707 [~~§3.3709~~] of this title (relating to Waiver Due to Failure to Contract in Local Markets) must [~~subchapter is required to~~] provide notice of this fact to each individual and group policyholder participating in the [~~such~~] plan at policy issuance and at least 30 days prior to renewal of an existing policy. The notice must include a link to any webpage listing of regions, counties, or ZIP codes [~~Codes~~] made available pursuant to subsection (e)(2) of this section.

[~~(n) Disclosure of Substantial Decrease in the Availability of Certain Preferred Providers. An insurer is required to provide notice as specified in this subsection of a substantial decrease in the availability of preferred facility-based physicians at a preferred provider facility.~~]

[~~(1) A decrease is substantial if:~~]

[~~(A) the contract between the insurer and any facility-based physician group that comprises 75 percent or more of the preferred providers for that specialty at the facility terminates; or~~]

[~~(B) the contract between the facility and any facility-based physician group that comprises 75 percent or more of the preferred providers for that specialty at the facility terminates, and the insurer receives notice as required under §3.3703(a)(26) of this subchapter (relating to Contracting Requirements).~~]

[~~(2) Notwithstanding paragraph (1) of this subsection, no notice of a substantial decrease is required if the requirements specified in either subparagraph (A) or (B) of this paragraph are met:~~]

[~~(A) alternative preferred providers of the same specialty as the physician group that terminates a contract as specified in paragraph (1) of this subsection are made available to insureds at the facility such that the percentage level of preferred providers of that specialty at the facility is returned to a level equal to or greater than the percentage level that was available prior to the substantial decrease; or~~]

[~~(B) the insurer provides to the Department, by e-mail to hwen@tdi.state.tx.us, a certification of the insurer's determination that the termination of the provider contract has not caused the preferred provider service delivery network for any plan supported by the network to be noncompliant with the adequacy standards specified in §3.3704 of this subchapter (relating to Freedom of Choice; Availability of Preferred Providers), as those standards apply to the applicable provider specialty.~~]

[~~(3) An insurer is required to prominently post notice of any contract termination specified in paragraph (1)(A) or (B) of this subsection and the resulting decrease in availability of preferred providers on the portion of the insurer's website where its provider listing is available to insureds.~~]

[~~(4) Notice of any contract termination specified in paragraph (1)(A) or (B) of this subsection and of the decrease in availability of providers must be maintained on the insurer's website until the earlier of:~~]

[(A) the date on which adequate preferred providers of the same specialty become available to insureds at the facility at the percentage level specified in paragraph (2)(A) of this subsection;]

[(B) six months from the date that the insurer initially posts the notice; or]

[(C) the date on which the insurer provides to the Department, by e-mail to hwcn@tdi.state.tx.us, a certification as specified in paragraph (2)(B) of this subsection indicating the insurer's determination that the termination of provider contract does not cause non-compliance with adequacy standards.]

[(5) An insurer is required to post notice as specified in paragraph (3) of this subsection and to update its Internet-based preferred provider listing as soon as practicable and in no case later than two business days after:]

[(A) the effective date of the contract termination as specified in paragraph (1)(A) of this subsection; or]

[(B) the later of:]

[(i) the date on which an insurer receives notice of a contract termination as specified in paragraph (1)(B) of this subsection; or]

[(ii) the effective date of the contract termination as specified in paragraph (1)(B) of this subsection.]

(n) [(o)] Disclosures concerning reimbursement of out-of-network services [Concerning Reimbursement of Basic Benefit Services]. An insurer must [is required to] make disclosures in all insurance policies, certificates, and outlines of coverage concerning the reimbursement of out-of-network [basic benefit] services as specified in this subsection.

(1) An insurer must [is required to] disclose how reimbursements of nonpreferred providers will be determined.

(2) Except in an exclusive provider benefit plan, if [If] an insurer reimburses nonpreferred providers based directly or indirectly on [upon] data regarding usual, customary, or reasonable charges by providers, the insurer must [is required to] disclose the source of the data, how the data is used in determining reimbursements, and the existence of any reduction that will be applied in determining the reimbursement to nonpreferred providers.

(3) Except in an exclusive provider benefit plan, if [If] an insurer bases reimbursement of nonpreferred providers on any amount other than full billed charges, the insurer must [is required to]:

(A) disclose that the insurer's reimbursement of claims for nonpreferred providers may be less than the billed charge for the service;

(B) disclose that the insured may be liable to the nonpreferred provider for any amounts not paid by the insurer;

(C) provide a description of the methodology by which the reimbursement amount for nonpreferred providers is calculated; and

(D) provide to insureds a method [for insureds] to obtain a real time estimate of the amount of reimbursement that will be paid to a nonpreferred provider for a particular service.

[(p) Plan Designations. A preferred provider benefit plan that utilizes a preferred provider service delivery network that complies with the network adequacy requirements for hospitals under §3.3704 of this subchapter without reliance upon an access plan may be designated by the insurer as having an "Approved Hospital Care Network" (AHCN). If a preferred provider benefit plan utilizes a preferred provider service delivery network that does not comply with the network adequacy requirements for hospitals specified in §3.3704 of this subchapter, the insurer is required to disclose that the plan has a "Limited Hospital Care Network:"]

[(1) on the cover page of any insurance policy, certificate of coverage, or outline of coverage utilizing the network; and]

[(2) on the cover page of any nonelectronic provider listing describing the network.]

[(q) Loss of Status as an AHCN. If a preferred provider benefit plan designated as an AHCN under subsection (p) of this section no longer complies with the network adequacy requirements for hospitals under §3.3704 of this subchapter and does not correct such noncompliant status within 30 days of becoming noncompliant, the insurer is required to:]

[(1) notify the department in writing concerning such change in status at Filings Intake Division, Mail Code 106-1E, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104;]

[(2) cease marketing the plan as an AHCN; and]

[(3) inform all insureds of such change of status at the time of renewal.]

§3.3706. Designation as a Preferred Provider, Decision to Withhold Designation, Termination of a Preferred Provider, Review of Process.

(a) Access to designation as a preferred provider [Designation as a Preferred Provider]. Physicians, practitioners, institutional providers, and health care providers other than physicians, practitioners, and institutional providers, if [such] other health care providers are included by an insurer as preferred providers, that are licensed to treat injuries or illnesses or to provide services covered by the preferred provider benefit plan and that comply with the terms and conditions established by the insurer for designation as preferred providers, are eligible to apply for and must be afforded a fair, reasonable and equitable opportunity to become preferred providers, subject to subsection (b) of this section.

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

(b) Withholding preferred provider designation [Preferred Provider Designation]. An insurer may not unreasonably withhold designation as a preferred provider except that, unless otherwise limited by the Insurance Code or rule promulgated by the department, an insurer may reject an application from a physician or health care provider on the basis that the preferred provider benefit plan has sufficient qualified providers.

(1) (No change.)

(2) An insurer must [is required to] provide a reasonable review mechanism that incorporates, in an advisory role only, a review panel.

(A) (No change.)

(B) At least one of the three individuals on the advisory review panel must [is required to] be a physician or practitioner in the same or similar specialty as the physician or practitioner requesting review unless there is no physician or practitioner in the same or similar specialty contracting with the insurer [insured].

(C) - (E) (No change.)

(c) Credentialing of preferred providers [Preferred Providers]. Insurers must [are required to] have a documented process for selection and retention of preferred providers sufficient to ensure that pre-

ferred providers are adequately credentialed. At a minimum, an insurer's credentialing standards must [~~are required to~~] meet the standards promulgated by the National Committee for Quality Assurance (NCQA) [~~NCQA~~] or URAC to the extent that those standards do not conflict with other laws of this state. Insurers will [~~shall~~] be presumed to be in compliance with statutory and regulatory requirements regarding credentialing if they have received nonconditional accreditation or certification by the NCQA, the Joint Commission, [~~the American Accreditation HealthCare Commission, the~~] URAC, or the Accreditation Association for Ambulatory Health Care.

(d) Notice of termination of a preferred provider contract [~~Termination of a Preferred Provider Contract~~]. Before terminating a contract with a preferred provider, the insurer must [~~is required to~~] provide written notice of termination, which includes:

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

(e) Review of a decision to terminate [~~Decision to Terminate~~]. To obtain a standard review of an insurer's decision to terminate him or her, a physician or practitioner must:

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

(f) Completion of the review process [~~Review Process~~]. The review process, including the recommendation of the advisory review panel and the insurer's determination as required by subsection (b)(2)(E) of this section, must [~~is required to~~] be completed and the results provided to the physician or practitioner within 60 calendar days of the insurer's receipt of the request for review.

(g) Expedited review process [~~Review Process~~]. To obtain an expedited review of an insurer's decision to terminate him or her, a physician or practitioner must:

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

(h) Completion of the expedited review process [~~Expedited Review Process~~]. The expedited review process, including the recommendation of the advisory review panel and the insurer's determination as required by subsection (b)(2)(E) of this section, must [~~shall~~] be completed and the results provided to the physician or practitioner within 30 calendar days of the insurer's receipt of the request for review.

(i) Confidentiality of information concerning the insured [~~Information Concerning the Insured~~].

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

(j) Notice to insureds [~~Insureds~~].

(1) (No change.)

(2) If a physician or provider voluntarily terminates the physician's or provider's relationship with an insurer, the insurer must [~~is required to~~] provide assistance to the physician or provider in assuring that the notice requirements are met as required by §3.3703(a)(18) of this title [~~subchapter~~] (relating to Contracting Requirements).

(3) (No change.)

§3.3707. Waiver Due to Failure to Contract in Local Markets.

(a) In accord [~~accordance~~] with the Insurance Code §1301.0055(3), where necessary to avoid a violation of the network adequacy requirements of §3.3704 of this title (relating to Freedom of Choice; Availability of Preferred Providers) in a portion of the state that the insurer wishes to include in its service area, an insurer may apply for a waiver from one or more of the network adequacy requirements in §3.3704(e) [~~§3.3704~~] of this title [~~subchapter (relating to Freedom of Choice; Availability of Preferred Providers)~~]. The commissioner may grant the waiver if there is good cause based on [~~upon~~] one or more of the criteria specified in this subsection and may impose reasonable conditions on the grant of the [~~such~~] waiver. The commissioner may find good cause to grant the waiver if the insurer demonstrates that providers or physicians necessary for an adequate local market network:

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

(b) At a minimum, each waiver an insurer requests must include either the information specified by paragraph (1) of this subsection or the information specified by paragraph (2) of this subsection, as appropriate.

(1) If providers or physicians are available within the relevant service area for the covered service or services for which the insurer requests a waiver, the insurer's request for waiver must include:

(A) a list of the providers or physicians within the relevant service area that the insurer attempted to contract with, identified by name and specialty or facility type;

(B) a description of how and when the insurer last contacted each provider or physician;

(C) a description of any reason each provider or physician gave for refusing to contract with the insurer;

(D) an estimate of total claims cost savings per year the insurer anticipates will result from using a local market access plan instead of contracting with providers located within the service area, and its impact on premium; and

(E) steps the insurer will take to attempt to improve its network to make future requests to renew the waiver unnecessary.

(2) If no providers or physicians are available within the relevant service area for the covered service or services for which the insurer requests a waiver, the insurer's request for waiver must state this fact.

(c) At the same time an insurer files a request for waiver, it must file a local market access plan, as specified in subsection (i) of this section, to be taken into consideration by the commissioner in deciding whether to grant or deny a waiver request.

(d) [~~(b)~~] An insurer seeking a waiver under subsection (a) of this section must electronically [~~is required to~~] file the request with the department at the Office of the Chief Clerk through the following email address: chiefclerk@tdi.state.tx.us [~~, MC 113-2A, P.O. Box 149104, Austin, TX 78714-9104~~]. The insurer is also required to submit a copy of the request to any provider or physician named in the request for waiver at the same time that the request is filed with the department, but is permitted to redact information from the copy where provision of the information to the provider or physician would violate state or federal law. The insurer may use any reasonable means to submit the copy of the request to the provider or physician. The insurer must [~~and is required to~~] maintain proof of the [~~such~~] submission and include a copy of the redacted version with the waiver request submitted to the department.

(e) [~~(c)~~] Any provider or physician may elect to provide a response to an insurer's request for waiver by filing such response within 30 days after the insurer files the request with the department. Such response, if filed, shall be filed at the same address specified in subsection (d) [~~(b)~~] of this section for filing the request for waiver.

(f) [~~(d)~~] If the department grants a waiver under subsection (a) of this section, the department will [~~shall~~] post on the department's website information relevant to the grant of a waiver, including:

(1) the name of the preferred provider benefit plan for which the request is granted;[~~,~~]

(2) the insurer offering the plan;[,] and

(3) the affected service area.

(g) [(e)] An insurer may [is required to] apply for renewal of a waiver described in subsection (a) of this section annually [and at the same time the insurer files the annual network adequacy report required under §3.3709 of this subchapter (relating to Annual Network Adequacy Report; Access Plan)].

(1) Application for renewal of a waiver must be filed in the manner described in subsection (d) of this section at least 30 days prior to the anniversary of the department's grant of waiver.

(2) At the same time the insurer files an application for renewal of a waiver, the insurer must file any applicable local market access plan the insurer uses pursuant to the waiver, in the manner specified by subsection (i)(2) of this section.

(3) A waiver granted by the department will remain in effect unless the insurer fails to timely file an annual application for renewal of the waiver or the department denies the application for renewal.

(h) A waiver will expire one year after the date the department granted it if an insurer fails to timely request a renewal under subsection (g) of this section or if the department denies the insurer's request for renewal.

(i) If the status of a network utilized in any preferred provider benefit plan changes so that the health benefit plan no longer complies with the network adequacy requirements specified in §3.3704 of this title for a specific service area, the insurer must establish a local market access plan within 30 days of the date on which the network becomes noncompliant and apply for a waiver pursuant to subsection (a) of this section requesting that the department approve use of the local market access plan.

(1) The local market access plan must contain all the information specified in subsection (j) of this section and must be made available to the department on request.

(2) The insurer must file the local market access plan with the department by email at: hwcn@tdi.state.tx.us or through the National Association of Insurance Commissioner's System for Electronic Rate and Form Filing.

(j) A local market access plan required under subsection (i) of this section must specify for each service area that does not meet the network adequacy requirements:

(1) the geographic area within the service area in which a sufficient number of preferred providers are not available as specified in §3.3704 of this title, including a specification of the class of provider that is not sufficiently available;

(2) a map, with key and scale, that identifies the geographic areas within the service area in which the health care services, physicians, or providers are not available;

(3) the reason(s) that the preferred provider network does not meet the adequacy requirements specified in §3.3704 of this title;

(4) procedures that the insurer will utilize to assist insureds in obtaining medically necessary services when no preferred provider is reasonably available, including procedures to coordinate care to limit the likelihood of balance billing; and

(5) procedures detailing how out-of-network benefit claims will be handled when no preferred or otherwise contracted provider is available, including procedures for compliance with §3.3708 of this title (relating to Payment of Certain Basic Benefit Claims and Related Disclosures) and §3.3725 of this title (relating to Payment of Certain Out-of-Network Claims).

(k) An insurer must establish and implement documented procedures, as specified in this subsection, for use in all service areas for which a local market access plan is submitted.

(1) The insurer must utilize a documented procedure to:

(A) identify requests for preauthorization of services for insureds that are likely to require the rendition of services by physicians or providers that do not have a contract with the insurer;

(B) furnish to insureds, prior to the services being rendered, an estimate of the amount the insurer will pay the physician or provider; and

(C) except in the case of an exclusive provider benefit plan, notify insureds that they may be liable for any amounts charged by the physician or provider that are not paid in full by the insurer.

(2) The insurer must utilize a documented procedure to:

(A) identify claims filed by nonpreferred providers in instances in which no preferred provider was reasonably available to the insured; and

(B) make initial and, if required, subsequent payment of the claims in the manner required by this subchapter.

(l) A local market access plan may include a process for negotiating with a nonpreferred provider prior to services being rendered, when feasible.

(m) An insurer must submit a local market access plan established pursuant to this section as a part of the annual report on network adequacy required under §3.3709 of this title (relating to Annual Network Adequacy Report).

[(f) An insurer that is granted a waiver under this section concerning network adequacy requirements for hospital based services is required to comply with §3.3705(p) of this subchapter (relating to Nature of Communications with Insureds; Readability; Mandatory Disclosure Requirements; and Plan Designations. The insurer is required to designate such plan as having a "Limited Hospital Care Network".]

§3.3708. Payment of Certain Basic Benefit Claims and Related Disclosures.

(a) An insurer must comply with the requirements of subsections (b) and (c) [(e)] of this section when a preferred provider is not reasonably available to an insured and services are instead rendered by a nonpreferred provider, including circumstances:

(1) requiring emergency care;

(2) when no preferred provider is reasonably available within the designated service area for which the policy was issued; and

(3) when a nonpreferred provider's services were pre-approved or preauthorized based upon the unavailability of a preferred provider.

(b) When services are rendered to an insured by a nonpreferred provider because no preferred provider is reasonably available to the insured under subsection (a) of this section, the insurer must [is required to]:

(1) pay the claim, at a minimum, at the usual, or customary charge for the service, less any patient coinsurance, copayment, or deductible responsibility under the plan;

(2) [(1)] pay the [such] claim at the preferred benefit coinsurance level; and

(3) [~~(2)~~] in addition to any amounts that would have been credited had the provider been a preferred provider, credit any out-of-pocket amounts shown by the insured to have been actually paid to the nonpreferred provider for covered services in excess of the allowed amount toward the insured's deductible and annual out-of-pocket maximum applicable to in-network services.

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

(e) When services are rendered to an insured by a nonpreferred facility-based physician and the difference between the allowed amount and the billed charge is at least $1,000, the insurer is required to include a notice on the applicable explanation of benefits that the insured may have the right to request mediation of the claim of an uncontracted facility-based provider under the Insurance Code Chapter 1467 and may obtain more information at www.tdi.texas.gov/consumer/cpmmediation.html. An insurer is not in violation of this subsection if it provides the required notice in connection with claims that are not eligible for mediation.

(f) This section does not apply to an exclusive provider benefit plan.

[~~(e) When services are rendered to an insured by a nonpreferred provider because no preferred provider is reasonably available to the insured under subsection (a) of this section, the insurer is required to include a notice on each explanation of benefits that the insured has the right to request information concerning negotiated rates for comparison purposes. Upon the request of an insured, the insurer must furnish the median per-service amount the insurer has negotiated with preferred providers for the service furnished, excluding any cost sharing imposed with respect to the insured, or notification that the claim was paid at this amount.~~]

§3.3709. Annual Network Adequacy Report[; ~~Access Plan~~].

(a) Network adequacy report required [~~Adequacy Report Required~~]. An insurer must [~~is required to~~] file a network adequacy report with the department on or before April 1 [~~April 1st~~] of each year and prior to marketing any plan in a new service area.

(b) General content of report [~~Content of Report~~]. The report required in subsection (a) of this section must specify:

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

(3) whether the preferred provider service delivery network supporting each plan is adequate under the standards set forth in §3.3704 of this title [~~subchapter~~] (relating to Freedom of Choice; Availability of Preferred Providers).

(c) Additional content applicable only to annual reports [~~Content Applicable Only to Annual Reports~~]. As a part of the annual report on network adequacy, each insurer must [~~is required to~~] provide additional demographic data as specified in paragraphs (1) - (6) of this subsection for the previous calendar year. The data must be reported on the basis of each of the geographic regions specified in §3.3711 of this title [~~subchapter~~] (relating to Geographic Regions). If none of the insurer's preferred provider benefit plans includes a service area that is located within a particular geographic region, the insurer must [~~is required to~~] specify in the report that there is no applicable data for that region. The report must include the number of:

(1) claims for out-of-network [~~basic~~] benefits, excluding claims paid at the preferred benefit coinsurance level;

(2) claims for out-of-network [~~basic~~] benefits that were paid at the preferred benefit coinsurance level;

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

[~~(d) Additional Content Applicable if Inadequate Networks are Utilized. As a part of the annual report on network adequacy, an insurer is required to submit a local market access plan as specified in subsection (e) of this section if any of the insurer's preferred provider benefit plans utilize a preferred provider service delivery network that does not comply with the network adequacy requirements specified in §3.3704 of this subchapter.~~]

[~~(e) Content of Local Market Access Plan.~~]

[~~(1) A local market access plan required under subsection (d) of this section must specify for each service area that does not meet the network adequacy requirements:~~]

[~~(A) the geographic area within the service area in which a sufficient number of preferred providers are not available as specified in §3.3704 of this subchapter, including a specification of the class of provider that is not sufficiently available;~~]

[~~(B) a map, with key and scale, that identifies the geographic areas within the service area in which such health care services and/or physicians and providers are not available;~~]

[~~(C) the reason(s) that the preferred provider network does not meet the adequacy requirements specified in §3.3704 of this subchapter;~~]

[~~(D) procedures that the insurer will utilize to assist insureds to obtain medically necessary services when no preferred provider is reasonably available; and~~]

[~~(E) procedures detailing how basic benefit claims will be handled when no preferred or otherwise contracted provider is available, including procedures for compliance with §3.3708 of this subchapter (relating to Payment of Certain Basic Benefit Claims and Related Disclosures; Waiver).~~]

[~~(2) The department may request additional information necessary to assess the local market access plan.~~]

[~~(f) Procedures to Supplement Local Market Access Plan. An insurer is required to establish and implement documented procedures as specified in this subsection for use in all service areas for which a local market access plan is submitted as required in subsection (d) of this section.~~]

[~~(1) The insurer must utilize a documented procedure to:~~]

[~~(A) identify requests for preauthorization of services for insureds that are likely to require, directly or indirectly, the rendition of services by physicians or providers that do not have a contract with the insurer;~~]

[~~(B) furnish to such insureds, prior to such services being rendered, an estimate of the amount the insurer will pay the physician or provider; and~~]

[~~(C) notify the insured that the insured may be liable for any amounts charged by the physician or provider that are not paid in full by the insurer.~~]

[~~(2) The insurer must utilize a documented procedure to:~~]

[~~(A) identify claims filed by nonpreferred providers in instances in which no preferred provider was reasonably available to the insured; and~~]

[~~(B) make initial and, if required, subsequent payment of such claims at the preferred benefit coinsurance level~~].

[~~(g) Negotiation Procedure Permitted in Access Plan. A local market access plan may include a process for negotiating with a nonpreferred provider prior to services being rendered, when feasible.~~]

(d) [(h)] Filing the report [Report]. The annual report required under this section must be submitted electronically in a format acceptable to the department. Acceptable formats include Microsoft Word and Excel documents. The report must be submitted to the following email [e-mail] address: LifeHealth@tdi.state.tx.us [hwcn@tdi.state.tx.us].

[(i) Access Plan Required if Network Adequacy Status Changes. If the status of a preferred provider service delivery network utilized in any preferred provider benefit plan changes such that the plan no longer complies with the network adequacy requirements specified in §3.3704 of this subchapter for a specific service area, the insurer is required to establish an access plan within 30 days of the date on which the network becomes noncompliant. Such access plan must contain all of the information specified in subsection (e) of this section and must be made available to the department upon request.]

§3.3710. Failure to Provide an Adequate Network.

(a) If the commissioner determines, after notice and opportunity for hearing, that the insurer's [preferred provider service delivery] network and any local market access plan supporting the [such] network are inadequate to ensure that preferred provider benefits are reasonably available to all insureds or are inadequate to ensure that all medical and health care services and items covered pursuant to the health insurance policy are provided in a manner ensuring availability of and accessibility to adequate personnel, specialty care, and facilities, the commissioner may order one or more of the following sanctions pursuant to the authority of the commissioner in the Insurance Code Chapters 82 and [Chapter] 83 to issue cease and desist orders:

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

(b) (No change.)

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

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205447
Sara Waitt
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 463-6327

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DIVISION 2. EXCLUSIVE PROVIDER BENEFIT PLAN REQUIREMENTS

28 TAC §§3.3720 - 3.3725

STATUTORY AUTHORITY. The new sections are proposed under the Insurance Code §§1301.003, 1301.0042, 1301.007, and 36.001.

The Insurance Code §1301.003 provides that an exclusive provider benefit plan that meets the requirements of Chapter 1301, relating to Preferred Provider Benefit Plans, is permitted.

The Insurance Code §1301.0042 provides that, except for dental care benefits, a provision of the Insurance Code or other insurance law that applies to a preferred provider benefit plan also applies to an exclusive provider benefit plan unless the provision is determined to be inconsistent with the function and purpose of an exclusive provider benefit plan. The Insurance Code §1301.0042 also authorizes the commissioner to determine whether a provision is inconsistent with the function and purpose of an exclusive provider benefit plan.

The Insurance Code §1301.007 authorizes the commissioner to adopt rules to implement Chapter 1301, relating to Preferred Provider Benefit Plans, and to ensure reasonable accessibility and availability of preferred provider services to residents of this state.

The Insurance Code §36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The following statutes are affected by this proposal: Insurance Code §§401.054, 541.003, 541.051, 751.303, 1251.006, 1301.001, 1301.003, 1301.0041, 1301.0042, 1301.0045, 1301.005, 1301.0051, 1301.0052, 1301.0053, 1301.054, 1301.0055, 1301.0056, 1301.006, 1301.007, 1301.051, 1301.057, 1301.058, 1301.066, 1301.134, 1301.136, 1301.152 - 1301.154, 1301.160, 1301.161, 1456.003, 1456.006, 1661.002, 1701.055, 1701.057, and 1701.060; Insurance Code Chapters 82, 83, 544, 1451, and 1460; and Insurance Code Chapter 1301, Subchapters B and C.

§3.3720. Exclusive Provider Benefit Plan Requirements.

The provisions of this division apply only to exclusive provider benefit plans offered pursuant to the Insurance Code Chapter 1301 in commercial markets.

§3.3721. Exclusive Provider Benefit Plan Network Approval Required.

An insurer may not offer, deliver, or issue for delivery an exclusive provider benefit plan in this state unless the commissioner has completed a qualifying examination to determine compliance with the Insurance Code Chapter 1301 and this subchapter and has approved the insurer's exclusive provider network in the service area.

§3.3722. Application for Exclusive Provider Benefit Plan Approval; Qualifying Examination; Network Modifications.

(a) Where to file application. An insurer that seeks to offer an exclusive provider benefit plan must file an application for approval with the Texas Department of Insurance at the following address: Texas Department of Insurance, Mail Code 106-1A, P.O. Box 149104, Austin, Texas 78714-9104. A form titled Application for Approval of Exclusive Provider Benefit Plan is available on the department's website at www.tdi.texas.gov/forms. An insurer may use this form to prepare the application.

(b) Filing requirements.

(1) An applicant must provide the department with a complete application that includes the elements in the order set forth in subsection (c) of this section.

(2) All pages must be clearly legible and numbered.

(3) If the application is revised or supplemented during the review process, the applicant must submit a transmittal letter describing the revision or supplement plus the specified revision or supplement.

(4) If a page is to be revised, a complete new page must be submitted with the changed item or information clearly marked.

(c) Contents of application. A complete application includes the elements specified in paragraphs (1) - (12) of this subsection.

(1) The applicant must provide a statement that the filing is:

(A) an application for approval; or

(B) a modification to an approved application.

(2) The applicant must provide organizational information for the applicant, including:

(A) the full name of the applicant;

(B) the applicant's Texas Department of Insurance license or certificate number;

(C) the applicant's home office address, including city, state, and ZIP code; and

(D) the applicant's telephone number.

(3) The applicant must provide the name and telephone number of an individual to be the contact person who will facilitate requests from the department regarding the application.

(4) The applicant must provide an attestation signed by the applicant's corporate president, corporate secretary, or the president's or secretary's authorized representative that:

(A) the person has read the application, is familiar with its contents, and asserts that all of the information submitted in the application, including the attachments, is true and complete; and

(B) the network, including any requested or granted waiver and any access plan as applicable, is adequate for the services to be provided under the exclusive provider benefit plan.

(5) The applicant must provide a description and a map of the service area, with key and scale, identifying the area to be served by geographic region(s), county(ies), or ZIP code(s). If the map is in color, the original and all copies must also be in color.

(6) The applicant must provide a list of all plan documents and each document's associated form filing ID number or the form number of each plan document that is pending the department's approval or review.

(7) The applicant must provide the form(s) of physician contract(s) and provider contract(s) that include the provisions required in §3.3703 of this title (relating to Contracting Requirements) or an attestation by the insurer's corporate president, corporate secretary, or the president's or secretary's authorized representative that the physician and provider contracts applicable to services provided under the exclusive provider benefit plan comply with the requirements of the Insurance Code Chapter 1301 and this subchapter.

(8) The applicant must provide a description of the quality improvement program and work plan that includes a process for medical peer review required by the Insurance Code §1301.0051 and that explains arrangements for sharing pertinent medical records between preferred providers and for ensuring the records' confidentiality.

(9) The applicant must provide network configuration information, including:

(A) maps for each specialty demonstrating the location and distribution of the physician and provider network within the proposed service area by geographic region(s), county(ies) or ZIP code(s); and

(B) lists of:

(i) physicians and individual providers who are preferred providers, including license type and specialization and an indication of whether they are accepting new patients; and

(ii) institutional providers that are preferred providers.

(10) The applicant must provide documentation demonstrating that its plan documents and procedures are compliant with §3.3725(a) of this title (relating to Payment of Certain Out-of-Network Claims) and that the policy contains, without regard to whether the physician or provider furnishing the services has a contractual or other arrangement to provide items or services to insureds, the provisions and procedures for coverage of emergency care services as set forth in §3.3725 of this title.

(11) The applicant must provide documentation demonstrating that the insurer maintains a complaint system that provides reasonable procedures to resolve a written complaint initiated by a complainant.

(12) The applicant must provide notification of the physical address of all books and records described in subsection (d) of this section.

(d) Qualifying examinations; documents to be available. The following documents must be available during the qualifying examination at the physical address designated by the insurer pursuant to subsection (c)(12) of this section:

(1) quality improvement--program description and work plan as required by §3.3724 of this title (relating to Quality Improvement Program);

(2) utilization management--program description, policies and procedures, criteria used to determine medical necessity, and examples of adverse determination letters, adverse determination logs, and independent review organization logs;

(3) network configuration information demonstrating adequacy of the exclusive provider network, as outlined in subsection (c)(9) of this section, and all executed physician and provider contracts applicable to the network, which may be satisfied by contract forms and executed signature pages;

(4) credentialing files;

(5) all written materials to be presented to prospective insureds that discuss the exclusive provider network available to insureds under the plan and how preferred and nonpreferred physicians or providers will be paid under the plan;

(6) the policy and certificate of insurance; and

(7) a complaint log that is categorized and completed in accordance with §21.2504 of this title (relating to Complaint Record; Required Elements; Explanation and Instructions).

(e) Network modifications.

(1) An insurer must file an application for approval with the department before the insurer may make changes to network configuration that impact the adequacy of the network, expand an existing service area, reduce an existing service area, or add a new service area.

(2) Pursuant to paragraph (1) of this subsection, if an insurer submits any of the following items to the department and then replaces or materially changes them, the insurer must submit the new item or any amendments to an existing item along with an indication of the changes:

(A) descriptions and maps of the service area, as required by subsection (c)(5) of this section;

(B) forms of contracts, as described in subsection (c) of this section; or

(C) network configuration information, as required by subsection (c)(9) of this section.

(3) Before the department grants approval of a service area expansion or reduction application, the insurer must be in compliance with the requirements of §3.3724 of this title in the existing service areas and in the proposed service areas.

(4) An insurer must file with the department any information other than the information described in paragraph (2) of this subsection that amends, supplements, or replaces the items required under subsection (c) of this section no later than 30 days after the implementation of any change.

§3.3723. Examinations.

(a) The commissioner may conduct an examination relating to an exclusive provider benefit plan as often as the commissioner considers necessary, but no less than once every five years.

(b) On-site financial, market conduct, complaint, or quality of care exams will be conducted pursuant to the Insurance Code Chapter 401, Subchapter B; the Insurance Code Chapter 751; and §7.83 of this title (relating to Appeal of Examination Reports).

(c) An insurer must make its books and records relating to its operations available to the department to facilitate an examination.

(d) On request of the commissioner, an insurer must provide to the commissioner a copy of any contract, agreement, or other arrangement between the insurer and a physician or provider. Documentation provided to the commissioner under this subsection will be maintained as confidential as specified in the Insurance Code §1301.0056.

(e) The commissioner may examine and use the records of an insurer, including records of a quality of care program and records of a medical peer review committee, as necessary to implement the purposes of this subchapter, including commencement and prosecution of an enforcement action under the Insurance Code Title 2, Subtitle B, and §3.3710 of this title (relating to Failure to Provide an Adequate Network). Information obtained under this subsection will be maintained as confidential as specified in the Insurance Code §1301.0056. In this subsection, "medical peer review committee" has the meaning assigned by the Occupations Code §151.002.

(f) The following documents must be available for review at the physical address designated by the insurer pursuant to §3.3722(c)(12) of this title (relating to Application for Exclusive Provider Benefit Plan Approval; Qualifying Examination; Network Modifications):

(1) quality improvement--program description, work plans, program evaluations, and committee and subcommittee meeting minutes;

(2) utilization management--program description, policies and procedures, criteria used to determine medical necessity, and templates of adverse determination letters; adverse determination logs, including all levels of appeal; and utilization management files;

(3) complaints--complaint files and complaint logs, including documentation and details of actions taken. All complaints must be categorized and completed in accordance with §21.2504 of this title (relating to Complaint Record; Required Elements; Explanation and Instructions);

(4) satisfaction surveys--any insured, physician, and provider satisfaction surveys, and any insured disenrollment and termination logs;

(5) network configuration information as required by §3.3722(c)(9) of this title demonstrating adequacy of the exclusive provider network;

(6) credentialing--credentialing files; and

(7) reports--any reports submitted by the insurer to a governmental entity.

§3.3724. Quality Improvement Program.

(a) An insurer must develop and maintain an ongoing quality improvement (QI) program designed to objectively and systematically monitor and evaluate the quality and appropriateness of care and services provided within an exclusive provider benefit plan and to pursue opportunities for improvement. The QI program must be continuous and comprehensive, addressing both the quality of clinical care and the quality of services. The insurer must dedicate adequate resources, like personnel and information systems, to the QI program.

(1) Written description. The QI program must include a written description of the QI program that outlines program organizational structure, functional responsibilities, and meeting frequency.

(2) Work plan. The QI program must include an annual QI work plan designed to reflect the type of services and the population served by the exclusive provider benefit plan in terms of age groups, disease categories, and special risk status. The work plan must:

(A) include objective and measurable goals, planned activities to accomplish the goals, time frames for implementation, responsible individuals, and evaluation methodology; and

(B) address each program area, including:

(i) network adequacy, which includes availability and accessibility of care, including assessment of open and closed physician and individual provider panels;

(ii) continuity of medical and health care and related services;

(iii) clinical studies;

(iv) the adoption and periodic updating of clinical practice guidelines or clinical care standards that:

(I) are approved by participating physicians and individual providers;

(II) are communicated to physicians and individual providers; and

(III) include preventive health services;

(v) insured, physician, and individual provider satisfaction;

(vi) the complaint process, complaint data, and identification and removal of barriers that may impede insureds, physicians, and providers from effectively making complaints against the insurer;

(vii) preventive health care through health promotion and outreach activities;

(viii) claims payment processes;

(ix) contract monitoring, including oversight and compliance with filing requirements;

(x) utilization review processes;

(xi) credentialing;

(xii) insured services; and

(xiii) pharmacy services, including drug utilization.

(3) Evaluation. The QI program must include an annual written report on the QI program, which includes completed activities, trending of clinical and service goals, analysis of program performance, and conclusions.

(4) Credentialing. An insurer must implement a documented process for selection and retention of contracted preferred providers that complies with §3.3706(c) of this title (relating to Designation as a Preferred Provider, Decision to Withhold Designation, Termination of a Preferred Provider, Review of Process).

(5) Peer review. The QI program must provide for a peer review procedure for physicians and individual providers, as required in the Medical Practice Act, Occupations Code Chapters 151 - 164. The insurer must designate a credentialing committee that uses a peer review process to make recommendations regarding credentialing decisions.

(b) The insurer's governing body is ultimately responsible for the QI program.

(1) The governing body must appoint a quality improvement committee (QIC) that:

(A) must include practicing physicians and individual providers;

(B) may include one or more insured(s) from throughout the exclusive provider benefit plan's service area; and

(C) must ensure that any insured appointed to the QIC is not an employee of the insurer.

(2) The governing body must approve the QI program.

(3) The governing body must approve an annual QI plan.

(4) The governing body must meet no less than annually to receive and review reports of the QIC or its subcommittees and take action when appropriate.

(5) The governing body must review the annual written report on the QI program.

(c) The QIC must evaluate the overall effectiveness of the QI program.

(1) The QIC may delegate QI activities to other committees that may, if applicable, include practicing physicians, individual providers, and insureds from the service area.

(A) All committees must collaborate and coordinate efforts to improve the quality, availability, and accessibility of health care services.

(B) All committees must meet regularly and report the findings of each meeting, including any recommendations, in writing to the QIC.

(C) If the QIC delegates any QI activity to any subcommittee, then the QIC must establish a method to oversee each subcommittee.

(2) The QIC must use multidisciplinary teams, when indicated, to accomplish QI program goals.

(d) In reviewing an insurer's quality improvement program, the department will presume that the insurer is in compliance with statutory and regulatory requirements regarding the insurer's quality improvement program if the insurer has received nonconditional accreditation or certification specific to quality improvement by the National Committee for Quality Assurance, the Joint Commission, URAC, or the Accreditation Association for Ambulatory Health Care. However, if the department determines that an accreditation or certification program does not adequately address a material Texas statutory or regulatory requirement, the department will not presume the insurer to be in compliance with that requirement.

§3.3725. Payment of Certain Out-of-Network Claims.

(a) If an insured cannot reasonably reach a preferred provider, the insurer must fully reimburse a nonpreferred provider for the following emergency care services at the usual and customary rate or at a rate agreed to by the insurer and the nonpreferred provider until the insured can reasonably be expected to transfer to a preferred provider:

(1) a medical screening examination or other evaluation required by state or federal law to be provided in a hospital emergency facility of a hospital, freestanding emergency medical care facility, or comparable facility that is necessary to determine whether a medical emergency condition exists;

(2) necessary emergency care services, including the treatment and stabilization of an emergency medical condition; and

(3) following treatment or stabilization of an emergency medical condition, services originating in a hospital emergency facility or freestanding emergency medical care facility or comparable emergency facility.

(b) If medically necessary covered services, excluding emergency care, are not available through a preferred provider upon the request of a preferred provider, the insurer must:

(1) approve a referral to a nonpreferred provider within the time appropriate to the circumstances relating to the delivery of the services and the condition of the patient, but in no event to exceed five business days after receipt of reasonably requested documentation; and

(2) provide for a review by a health care provider with expertise in the same specialty as or a specialty similar to the type of health care provider to whom a referral is requested under paragraph (1) of this subsection before the insurer may deny the referral.

(c) An insurer may facilitate an insured's selection of a nonpreferred provider when medically necessary covered services, excluding emergency care, are not available through a preferred provider and an insured has received a referral from a preferred provider.

(1) If an insurer chooses to facilitate an insured's selection of a nonpreferred provider pursuant to this subsection, the insurer must offer an insured a list of at least three nonpreferred providers with expertise in the necessary specialty who are reasonably available considering the medical condition and location of the insured.

(2) If the insured selects a nonpreferred provider from the list provided by the insurer, subsections (d) - (f) of this section are applicable.

(3) If the insured selects a nonpreferred provider that is not included in the list provided by the insurer, then:

(A) subsections (d) - (f) of this section are not applicable; and

(B) notwithstanding §3.3708(f) of this title (relating to Payment of Certain Basic Benefit Claims and Related Disclosures), the insurer must pay the claim in accordance with §3.3708 of this title.

(d) An insurer reimbursing a nonpreferred provider under subsection (a), (b), or (c)(2) of this section must ensure that the insured is held harmless for any amounts beyond the copayment, deductible, and coinsurance percentage that the insured would have paid had the insured received services from a preferred provider.

(e) Upon determining that a claim from a nonpreferred provider under subsection (a), (b), or (c)(2) of this section is payable, an insurer must issue payment to the nonpreferred provider at the usual and customary rate or at a rate agreed to by the insurer and the nonpreferred provider. When issuing payment, the insurer must provide an explanation of benefits to the insured along with a request that the insured notify the insurer if the nonpreferred provider bills the insured for amounts beyond the amount paid by the insurer.

(1) The insurer must resolve any amounts that the nonpreferred provider bills the insured beyond the amount paid by the insurer in a manner consistent with subsection (d) of this section.

(2) The insurer may require in its policy or certificate issued to an insured that, if a claim is eligible for mediation under the Insurance Code Chapter 1467 and Chapter 21, Subchapter PP of this title (relating to Out-of-Network Claim Dispute Resolution), the insured must request mediation.

(A) The insurer must notify the insured when mediation is available under the Insurance Code Chapter 1467 and Chapter 21, Subchapter PP of this title, and inform the insured of how to request mediation.

(i) The insurer may not require that the insured participate in a mediation requested under the Insurance Code Chapter 1467 and Chapter 21, Subchapter PP of this title.

(ii) The insurer may not penalize the insured for failing to request mediation.

(iii) Notwithstanding clause (ii) of this subparagraph, after the insurer requests that the insured initiate mediation, the insurer is not responsible for any balance bill the insured receives from the provider, until the insured requests mediation.

(B) For purposes of determining eligibility for mediation under the Insurance Code Chapter 1467 and Chapter 21, Subchapter PP of this title the entire unpaid amount of the amount the nonpreferred provider bills should be taken into consideration, less any applicable copayment, deductible, and coinsurance.

(C) If the amount of a claim is changed as a result of mediation required by the insurer, the insurer's payment must be based on the amount that results from the mediation process.

(f) Any methodology utilized by an insurer to calculate reimbursements of nonpreferred providers for services that are covered under the health insurance policy must comply with the following:

(1) if based on usual, reasonable, or customary charges, the methodology must be based on generally accepted industry standards and practices for determining the customary billed charge for a service and fairly and accurately reflect market rates, including geographic differences in costs;

(2) if based on claims data, the methodology must be based on sufficient data to constitute a representative and statistically valid sample;

(3) any claims data underlying the calculation must be updated no less than once per year and not include data that is more than three years old; and

(4) the methodology must be consistent with nationally recognized and generally accepted bundling edits and logic.

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

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205448
Sara Waitt
General Counsel
Texas Department of Insurance
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 463-6327

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SUBCHAPTER X. PREFERRED PROVIDER PLANS

28 TAC §3.3713

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

The Texas Department of Insurance proposes the repeal of 28 TAC §3.3713, which requires an insurer to develop, submit to the department, and implement a plan to collect and analyze information from health care facilities on the effects of undercompensated care.

Undercompensated care issues in Texas are undergoing considerable change as a result of the Patient Protection and Affordable Care Act, Public Law 111-148, as amended by the Health Care and Education Reconciliation Act, Public Law 111-152, and the grant by the federal government of a waiver under Section 1115 of the Social Security Act (Title 42 U.S.C. Section 1315) of certain Medicaid regulations. The many changes will affect how facilities will be reimbursed and may alter the amount of undercompensated care. As changes are implemented, the market in Texas will continue to evolve, substantially reducing the usefulness of the data that would be collected pursuant to §3.3713. Repealing the section will allow insurers and other actors in the health care market to work on maintaining a stable insurance and health care service market. The department will continue to monitor the issue of undercompensated care to determine whether regulatory action is needed.

FISCAL NOTE. Doug Danzeiser, manager, Regulatory Matters, has determined that during each year of the first five years that the proposed repeal is in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the section. There will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Mr. Danzeiser has also determined that for each year of the first five years the repeal of the section is in effect, the public benefit anticipated as a result of the reduction of administration and enforcement efforts caused by repealing the section will be an improved opportunity for insurers and other actors in the health care market to focus on maintaining a stable insurance and health care service market. There is no anticipated economic cost to persons who are required to comply with the proposed repeal. There is no anticipated difference in cost of compliance between small and large businesses.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. In accord with the Government Code §2006.002(c), the depart-

ment has determined that this proposed repeal will not have an adverse economic effect on small or micro business carriers because it is simply a repeal of a data collection and analysis requirement. In accord with the Government Code §2006.002, the department is not required to prepare a regulatory flexibility analysis.

TAKINGS IMPACT ASSESSMENT. The department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR PUBLIC COMMENT. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on December 3, 2012, to Sara Waitt, general counsel, by email at: chiefclerk@tdi.state.tx.us or by mail at: Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be simultaneously submitted to Doug Danzeiser, manager, by email at: LHLcomments@tdi.state.tx.us or by mail at: Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing must be submitted separately to the Office of Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104 before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The repeal of §3.3713 is proposed pursuant to Insurance Code §1301.007 and §36.001. Section 1301.007 provides that the commissioner of insurance must adopt rules as necessary to implement Chapter 1301. Section 36.001 provides that the commissioner of insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTE. The proposed repeal affects regulation pursuant to the following statute: Insurance Code §36.001 and §1301.007

§3.3713. Submission of Plan; Collection and Analysis of Information Concerning the Effects of Undercompensated Care.

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

Filed with the Office of the Secretary of State on October 19, 2012.

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Sara Waitt
General Counsel
Texas Department of Insurance
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For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 101. GENERAL AIR QUALITY RULES

SUBCHAPTER H. EMISSIONS BANKING AND TRADING

DIVISION 4. DISCRETE EMISSION CREDIT BANKING AND TRADING

30 TAC §101.379

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes an amendment to §101.379.

If adopted, amended §101.379 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rule

The Electric Reliability Council of Texas, Inc. (ERCOT) manages the electrical grid within the ERCOT region of Texas, with oversight by the Public Utility Commission of Texas (PUCT). On March 22, 2012, the PUCT repealed 16 TAC §25.507, to replace the Emergency Interruptible Load Service (EILS) program with the Emergency Response Service (ERS) program (new 16 TAC §25.507). Like the EILS program, the new ERS program is designed to help decrease the likelihood of requiring firm load shedding (i.e., rolling black-outs) during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid. Subsequent changes to ERCOT's Nodal Protocols reflecting the new ERS program became effective on June 1, 2012.

On December 10, 2008, the commission adopted the amendment to §101.379 to restrict the use of discrete emissions reduction credits (DERCs) in the Dallas-Fort Worth 1997 eight-hour ozone nonattainment area (DFW area) to a level consistent with the attainment and maintenance of the 1997 eight-hour ozone National Ambient Air Quality Standard (NAAQS). The rule requires an annual review of the DFW area DERC program to determine the flow control limit and apportion available DERCs for potential use. The rule also provides an exemption from the DFW flow control limit for DERCs used in response to an ERCOT-declared emergency situation and references the specific ERCOT protocols that detail the emergency notice. The existing rule references the previous version of the ERCOT protocols, which could potentially cause confusion for regulated entities and delay the processing of DERC usage requests. The proposed rulemaking would update §101.379 to reference the version of the ERCOT protocols effective on June 1, 2012.

The amendment to §101.379 is proposed concurrently with the amendment to 30 TAC §117.10 that will be published in a separate rulemaking in this issue of the *Texas Register.*

Section Discussion

The commission proposes to revise §101.379(c)(2)(D) to reference the version of the ERCOT Protocols effective on June 1, 2012.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Strategic Planning and Assessment Section analyst, has determined that for the first five-year period the proposed rule is in effect, no fiscal implications are anticipated for the TCEQ or other units of state or local government. The

amendment to Chapter 101 is proposed concurrently with an amendment to Chapter 117.

The new ERS program is designed to help decrease the likelihood of rolling black-outs during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid. The proposed amendment in Chapter 101 would merely update a reference in agency rules to reflect the version of the ERCOT Protocols effective on June 1, 2012. The proposed amendment to Chapter 101 does not add or delete administrative or regulatory requirements for the TCEQ or other units of state or local government and, therefore, no fiscal implications are anticipated due to the administration or enforcement of the proposed change.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rules will be the facilitation of the new ERS program administered by ERCOT, which is designed to help decrease the likelihood of rolling black-outs during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid.

The proposed rule is not expected to have a fiscal impact on individuals or businesses. The proposed amendment to Chapter 101 would merely update a reference in agency rules to reflect the version of the ERCOT Protocols effective June 1, 2012, which reflect changes to ERCOT's new ERS program.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. The amendment to §101.379 is proposed concurrently with the amendment to §117.10. Together, the proposed amendments are intended to facilitate the implementation of the new ERS program administered by ERCOT. The new ERS program is designed to help decrease the likelihood of rolling black-outs during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid. The proposed amendment to Chapter 101 would merely update a reference in agency rules to reflect the version of the ERCOT Protocols effective June 1, 2012, which reflect changes to ERCOT's new ERS program.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis

The commission reviewed the proposed rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rulemaking does not meet the definition of a major environmental rule. Texas Government Code, §2001.0225 states that a major environmental rule is a rule for which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Furthermore, while the proposed rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule that 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopts a rule solely under the general powers of the agency instead of under a specific state law. Specifically, it does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the proposed rulemaking is part of the SIP, and as such is designed to meet, not exceed the relevant standard set by federal law; 2) parts of the proposed rulemaking are directly required by state law; 3) no contract or delegation agreement covers the topic that is the subject of this proposed rulemaking; and 4) the proposed rulemaking is authorized by specific sections of Texas Health and Safety Code (THSC), Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble.

The proposed rule implements requirements of the Federal Clean Air Act (FCAA). Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of the FCAA (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs and control measures to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. The specific intent of the proposed rulemaking is to update references to the ERCOT protocols in §101.379 to be consistent with §117.10.

While the proposed rulemaking protects the environment or reduces risks to human health from environmental exposure, it does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3), because it does not adversely affect in a material way the economy, a sector of the economy,

productivity, competition, or jobs, nor would the rulemaking adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. The rulemaking as a result is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225, because it is not a major environmental rule.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633, 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These rules are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program; or are adopted solely under the general powers of the TCEQ. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded: based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application. The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeded a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts revisions to the SIP and rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every revision to the SIP would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the rules have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that, when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation *(Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue,* 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ) *superseded by statute on another point of law,* Tax Code §112.108, Other Actions Prohibited, *as recognized in, First State Bank of Dumas v. Sharp,* 863 S.W.2d 81, 83 (Tex. App. Austin 1993, no writ); *Cf. Humble Oil & Refining Co. v. Calvert,* 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied);* and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of substantial compliance as required in Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has complied with the requirements of Texas Government Code, §2001.0225.

Even if the proposed rulemaking constitutes a major environmental rule under Texas Government Code, §2001.0225(g)(3), a regulatory impact analysis is not required because this exemption is part of the commission's SIP for making progress toward the attainment and maintenance of the NAAQS. Therefore, the proposed rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law, since they are part of an overall regulatory scheme designed to meet, not exceed the relevant standard set by federal law (NAAQS). The commission is charged with protecting air quality within the state and to design and submit a plan to achieve attainment and maintenance of the federally mandated NAAQS. The Third District Court of Appeals upheld this interpretation in *Brazoria County v. Texas Comm'n on Envtl. Quality,* 128 S.W. 3d 728 (Tex. App. - Austin 2004, no writ). The specific intent of the proposed rulemaking is to update references to the ERCOT protocols in §101.379 to be consistent with §117.10. This proposal, therefore, does not exceed an express requirement of federal law. The amendment is needed to implement state law but does exceed those new requirements. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382, which are cited in the Statutory Authority section of this preamble, including THSC, §382.012 and §382.019. Because this proposed rulemaking does not meet any of the four applicability requirements, Texas Government Code, §2001.0225(b) does not apply and a regulatory impact analysis is not required.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007 does not apply.

Under Texas Government Code, §2007.002(5), taking means: "(A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) affects an owner's private real property that is the subject of the

governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect."

Promulgation and enforcement of the rulemaking would be neither a statutory nor a constitutional taking of private real property. The primary purpose of the rulemaking is an update to Chapter 101, Subchapter H to ensure consistency with ERCOT's new ERS program. This rule is not burdensome, restrictive, or limiting of rights to private real property because the rulemaking regulates the use of electric generators in certain limited emergency situations. Furthermore, the rulemaking benefits the public by potentially decreasing the likelihood of requiring firm load shedding (i.e., rolling black-outs) when additional control measures are needed to achieve or maintain attainment of the federal air quality standards through the use of electric generators. The rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, this rule does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rule in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

The CMP goal applicable to the proposed rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The CMP policy applicable to the proposed rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal areas (31 TAC §501.32). The proposed rulemaking would not increase emissions of air pollutants and is therefore consistent with the CMP goal in 31 TAC §501.12(1) and the CMP policy in 31 TAC §501.32.

Promulgation and enforcement of this rule will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rule is consistent with these CMP goals and policies and because this rule does not create or have a direct or significant adverse effect on any coastal natural resource areas. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

The proposed amendment will not require any changes to federal operating permits.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on November 28, 2012, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2012-025-117-AI. The comment period closes December 5, 2012. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Ray Schubert, Air Quality Planning Section, (512) 239-6615.

Statutory Authority

The amendment is proposed under the authority of the following: Texas Water Code (TWC), §5.102, General Powers, §5.103, Rules, and §5.105, General Policy (these provisions authorize the commission to adopt rules necessary to carry out its powers and duties as well as all general policies under the TWC); Texas Health and Safety Code (THSC), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and THSC, §382.051(d), Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under THSC, Chapter 382. Finally, the amendment is also proposed under Federal Clean Air Act (FCAA), 42 United States Code (USC), §§7401, *et seq.,* which requires states to submit state implementation plan revisions that specify the manner in which the National Ambient Air Quality Standard will be achieved and maintained within each air quality control region of the state.

The proposed amended implements TWC, §§5.102, 5.103, and 5.105; THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and FCAA, 42 USC, §§7401 *et seq.*

§101.379. Program Audits and Reports.

(a) No later than three years after the effective date of this section, and every three years thereafter, the executive director will audit this program.

(1) The audit will evaluate the timing of credit generation and use, the impact of the program on the state's attainment demonstration and the emissions of hazardous air pollutants, the availability and cost of credits, compliance by the participants, and any other elements the executive director may choose to include.

(2) The executive director will recommend measures to remedy any problems identified in the audit. The trading of discrete emission credits may be discontinued by the executive director in part or in whole and in any manner, with commission approval, as a remedy for problems identified in the program audit.

(3) The audit data and results will be completed and submitted to the United States Environmental Protection Agency and made available for public inspection within six months after the audit begins.

(b) No later than February 1 of each calendar year, the executive director shall develop and make available to the general public and the United States Environmental Protection Agency a report that includes the following information for the previous calendar year:

(1) the amount of each pollutant emission credits generated under this division;

(2) the amount of each pollutant emission credits used under this division;

(3) a summary of all trades completed under this division; and

(4) the amount of discrete emission reduction credits (DERC) approved for use under subsection (c) of this section.

(c) No later than October 1 of each year, the executive director will complete, and make available to the general public and the United States Environmental Protection Agency, an annual review to determine the number of DERCs available for potential use in the upcoming calendar year for the Dallas-Fort Worth (DFW) eight-hour ozone nonattainment area. The annual review will include the calculation of the flow control limit as specified in subsection (c)(2)(A) of this section to ensure noninterference with attainment and maintenance of the ozone National Ambient Air Quality Standard (NAAQS) and the apportionment of approved DERCs.

(1) For the 2009 control period, the flow control limit for DERCs available for use is the number prescribed in the DFW Eight-Hour Ozone Attainment Demonstration SIP Revision for the 1997 eight-hour ozone standard, in tons per day, not to be exceeded in any day, where a day is a 24-hour period from midnight to midnight.

(2) For any control period after 2009, the annual review will establish a flow control limit for that year, in tons per day, not to be exceeded in any day, where a day is a 24-hour period from midnight to midnight.

(A) The flow control limit for a particular year will be determined using the following equation:
Figure: 30 TAC §101.379(c)(2)(A) (No change.)

(B) If use of the entire DERC bank would not interfere with attainment and maintenance of the 1997 eight-hour ozone NAAQS in the DFW eight-hour ozone nonattainment area, then the number of DERCs potentially available for use is the total number of DERCs in the bank.

(C) If the flow control limit, as calculated in the equation in subparagraph (A) of this paragraph, is greater than the total number of DERCs requested for use in accordance with §101.376(d) of this title (relating to Discrete Emission Credit Use) the executive director:

(i) may approve all requested Notice of Intent to Use Discrete Emission Credits (DEC-2 Form) submittals; and

(ii) will consider any late DEC-2 Forms submitted as provided under §101.376(d)(3) of this title that is not an Electric Reliability Council of Texas, Inc. (ERCOT)-declared emergency situation as defined in subparagraph (D) of this paragraph, but will not otherwise approve a late submittal that would exceed the flow control limit established by the equation under subsection (c)(2)(A) of this section.

(D) If the DEC-2 Forms are submitted in response to an ERCOT-declared emergency situation, the request will not be subject to the flow control limit and may be approved provided all other requirements are met. For the purposes of this subparagraph, an ERCOT-declared emergency situation is defined as the period of time that an ERCOT-issued emergency notice (as defined in *ERCOT Protocols, Section 2: Definitions and Acronyms* (June 1, 2012) and issued as specified in *ERCOT Protocols, Section 6: Adjustment Period and Real-Time Operations* (June 1, 2012))[~~, as defined in *ERCOT Protocols, Section 2: Definitions and Acronyms* (April 25, 2006), issued by ERCOT as specified in *ERCOT Protocols, Section 5: Dispatch* (April 26, 2006),~~] is applicable to the serving electric power generating system. The emergency situation is considered to end upon expiration of the emergency notice issued by ERCOT.

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

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205435
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 239-2141

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CHAPTER 117. CONTROL OF AIR POLLUTION FROM NITROGEN COMPOUNDS

SUBCHAPTER A. DEFINITIONS

30 TAC §117.10

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes an amendment to §117.10.

If adopted, amended §117.10 will be submitted to the United States Environmental Protection Agency (EPA) as a revision to the state implementation plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rule

The Electric Reliability Council of Texas, Inc. (ERCOT) manages the electrical grid within the ERCOT region of Texas, with

oversight by the Public Utility Commission of Texas (PUCT). On March 22, 2012, the PUCT repealed 16 TAC §25.507, to replace the Emergency Interruptible Load Service (EILS) program with the Emergency Response Service (ERS) program (new 16 TAC §25.507). Like the EILS program, the new ERS program is designed to help decrease the likelihood of requiring firm load shedding (i.e., rolling black-outs) during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid. Under the ERS program, participants commit to decrease their power consumption from the electrical grid during a declared energy emergency. ERS program participants might meet this commitment by decreasing overall power use, replacing power consumption from the grid with local generation by operating local emergency backup generators, or a combination of both. However, unlike the EILS program, the new ERS program allows qualified participants to provide power back into the electrical grid for sale during an ERCOT-declared emergency under limited circumstances.

Operating an emergency generator as part of ERCOT's former EILS program meets the existing definition of an emergency situation in §117.10. The existing definition of an emergency situation in §117.10 includes the period of time that an emergency notice issued by ERCOT is applicable to the serving electric power generating system and references the specific ERCOT protocols that detail the emergency notice. However, the Chapter 117 definition of an emergency situation also specifically excludes operation for purposes of supplying power for distribution to the electrical grid. Therefore, operation of an emergency generator that also provides power back to the electrical grid would not be considered an emergency situation under the current Chapter 117 definition even if the operation was at the directive of ERCOT under the ERS program.

While Chapter 117 would not prohibit companies from participating in the new ERS program, the Chapter 117 rules that apply in the Dallas-Fort Worth and Houston-Galveston-Brazoria 1997 eight-hour ozone nonattainment areas have specific provisions that restrict the non-emergency operational hours of emergency generators. For these sources to qualify for an exemption from the rule control requirements, participants in the ERS program would have to count hours of operation during an ERCOT emergency as non-emergency use if power is sold to the grid and might risk losing exemption status under Chapter 117 if the operational hours exceed the exemption criteria.

The proposed rulemaking would update the definition of emergency situation in §117.10 to ensure consistency with ERCOT's new ERS program. The proposed rulemaking would reference the most recent version of the ERCOT protocols. The proposed rulemaking would also revise the definition of emergency situation to reflect changes made by ERCOT to promote reliability during energy emergencies by allowing the operation of generators for purposes of selling power to the electric grid under limited circumstances.

The amendment to §117.10 is proposed concurrently with an amendment to §101.379 that will be published in a separate rulemaking in this issue of the *Texas Register.*

Demonstrating Noninterference under Federal Clean Air Act, Section 110(l)

The commission provides the following information to demonstrate why the proposed change to the definition of emergency situation in Chapter 117 will not negatively impact the status of the state's progress towards attainment with the 1997 eight-hour ozone National Ambient Air Quality Standard (NAAQS), will not interfere with control measures, and will not prevent reasonable further progress toward attainment of the ozone NAAQS.

As mentioned elsewhere in this preamble, the Chapter 117 rules provide exemptions for certain sources in the Dallas-Fort Worth and Houston-Galveston-Brazoria 1997 eight-hour ozone nonattainment areas that operate exclusively during emergency situations or operate for a limited number of hours in non-emergency situations. Under the existing Chapter 117 rules, the period of time during an ERCOT-declared emergency is considered an emergency situation. The commission has interpreted this to mean that when demonstrating compliance with the Chapter 117 exemption criteria, participants in ERCOT's former EILS program were not required to include the hours of operation for generators operated during an ERCOT-declared emergency as non-emergency operation.

ERCOT's new ERS program promotes reliability during energy emergencies by allowing qualified participants to provide power for distribution to the electrical grid during an ERCOT-declared emergency. Under the existing Chapter 117 rules, participants in ERCOT's new ERS program are not required to include the hours of operation for generators operated during an ERCOT-declared emergency when demonstrating compliance with the Chapter 117 exemption criteria as long as these sources do not provide power for distribution to the electrical grid. Because the existing Chapter 117 definition of an emergency situation specifically excludes operation for purposes of supplying power for distribution to the electrical grid, ERS program participants would have to count hours of operation during an ERCOT-declared emergency when demonstrating compliance with the Chapter 117 exemption criteria if power is provided back into the grid. This practice could result in ERS program participants losing exemption status under Chapter 117 if the non-emergency hours exceed the exemption criteria and potentially discourage ERS program participants from supplying excess generation back to the grid during an ERCOT-declared energy emergency. The proposed rulemaking would prevent ERS program participants from potentially losing exemption status under Chapter 117 if they provide power to the electrical grid during an ERCOT-declared emergency. The proposed rulemaking ensures that the changes made to ERCOT's new ERS program do not narrow the scope of what the commission currently considers an emergency situation.

The period of time during an ERCOT-declared emergency is currently considered an emergency situation under the existing Chapter 117 rules. The proposed revisions to the definition of emergency situation would limit the circumstances under which a generator could provide power for distribution to the electrical grid to only those operations that are part of an ERCOT emergency response program and in direct response to an instruction by ERCOT during the period of an ERCOT emergency notice. Therefore, the proposed amendment would not increase the number of sources that could qualify for exemption under the Chapter 117 rules or increase the frequency or duration of the operation during an emergency situation. For these reasons, the commission determined that the proposed rulemaking will not negatively impact the status of the state's attainment with the 1997 eight-hour ozone NAAQS and should not be considered as backsliding under the Federal Clean Air Act.

Section Discussion

The commission proposes to amend the definition of emergency situation in §117.10(15). The commission proposes to revise

§117.10(15)(A)(ii) to reference the version of the ERCOT Protocols effective on June 1, 2012. The commission proposes §117.10(15)(A)(vii) to include operation of an emergency generator as part of an ERCOT emergency response program when the operation is in direct response to an instruction by ERCOT during the period of an ERCOT emergency notice as specified in §117.10(15)(A)(ii). The commission is requesting comment on whether an ERCOT energy emergency alert level should be specified in proposed §117.10(15)(A)(vii).

The commission also proposes to reformat the existing §117.10(15)(B) description of the situations that are not considered emergency situations. Proposed clause (i) incorporates the existing portion of the definition indicating that an emergency situation does not include operation for training purposes or other foreseeable events. Existing §117.10(15)(B) indicates that an emergency situation does not include operation for purposes of supplying power for distribution to the electric grid. Proposed clause (ii) indicates that an emergency situation does not include operation for purposes of supplying power for distribution to the electric grid except as specified under proposed §117.10(15)(A)(vii) regarding emergency generator operation that is part of an ERCOT emergency response program and is in direct response to an instruction by ERCOT during the period of an ERCOT emergency notice. Proposed clause (ii) is necessary to reflect changes made by ERCOT to promote reliability during energy emergencies by allowing the operation of generators for purposes of selling power to the electric grid under limited circumstances.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Strategic Planning and Assessment Section analyst, has determined that for the first five-year period the proposed rule is in effect, no significant fiscal implications are anticipated for the TCEQ. Other state agencies or units of local government that participate in the ERS program may benefit under the proposed rule in that they could more easily maintain their Chapter 117 exemption status while providing power to the electrical grid during an ERCOT-declared emergency.

The proposed rulemaking would revise the Chapter 117 definition of an emergency situation and is intended to facilitate the implementation of the new ERS program administered by ERCOT. The new ERS program is designed to help decrease the likelihood of rolling black-outs during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid. Program participants would commit to decrease their overall power consumption from the electrical grid during a declared energy emergency by decreasing overall power use, replacing power consumption by operating local emergency backup generators, or a combination of both. However, unlike the current emergency program, the new ERS program allows qualified participants to sell power back into the electrical grid during an ERCOT-declared emergency under limited circumstances.

Because the existing Chapter 117 definition of an emergency situation specifically excludes generator operation for purposes of supplying power for distribution to the electrical grid, ERS program participants would have to count generator hours of operation during an ERCOT-declared emergency when demonstrating compliance with the Chapter 117 exemption criteria. This practice could result in ERS program participants losing exemption status under Chapter 117 if the non-emergency hours exceed the exemption criteria. The proposed rulemaking would remedy this situation by allowing ERS program participants to not have to count these generator operational hours as non-emergency hours and to sell power back to the electrical grid during an ERCOT-declared emergency.

The proposed rulemaking does not add additional administrative or regulatory requirements for the TCEQ and, therefore, no significant fiscal implications are anticipated for the TCEQ. Other state agencies or units of local government that participate in the ERS program may benefit under the proposed rule in that they could maintain their Chapter 117 exemption status while providing power to the electrical grid during an ERCOT-declared emergency. These participants may also benefit from the sale of electric power back to the grid during one of these emergencies, but those benefits do not result from this rulemaking.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rule is in effect, the public benefit anticipated from the changes seen in the proposed rules will be the facilitation of the new ERS program administered by ERCOT, which is designed to help decrease the likelihood of rolling black-outs during an ERCOT-declared energy emergency by decreasing the power demand on the electrical grid.

The proposed rule is not expected to have a fiscal impact on individuals or businesses. Businesses who participate in the ERS program may benefit under the proposed rule in that they could maintain their Chapter 117 exemption status while providing power to the electrical grid during an ERCOT-declared emergency. These participants may also benefit from the sale of electric power back to the grid during one of these emergencies, but those benefits do not result from this rulemaking.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rule. The proposed rule would allow ERS program participants to sell power back into the power grid during an ERCOT-declared emergency without having to count those generator operational hours towards Chapter 117 compliance.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rule does not adversely affect a small or micro-business in a material way for the first five years that the proposed rule is in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rule does not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rule in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the proposed rulemaking does not meet the definition of a major environmental rule. Texas Government Code, §2001.0225 states that a major environmental rule is a rule for which the specific intent is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the

state or a sector of the state. Furthermore, while the proposed rulemaking does not constitute a major environmental rule, even if it did, a regulatory impact analysis would not be required because the proposed rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule. Texas Government Code, §2001.0225 applies only to a major environmental rule that 1) exceeds a standard set by federal law, unless the rule is specifically required by state law; 2) exceeds an express requirement of state law, unless the rule is specifically required by federal law; 3) exceeds a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopts a rule solely under the general powers of the agency instead of under a specific state law. Specifically, it does not meet any of the four applicability criteria listed in Texas Government Code, §2001.0225 because: 1) the proposed rulemaking is part of the SIP, and as such is designed to meet, not exceed the relevant standard set by federal law; 2) parts of the proposed rulemaking are directly required by state law; 3) no contract or delegation agreement covers the topic that is the subject of this proposed rulemaking; and 4) the proposed rulemaking is authorized by specific sections of Texas Health and Safety Code (THSC), Chapter 382 (also known as the Texas Clean Air Act), and the Texas Water Code, which are cited in the Statutory Authority section of this preamble.

The proposed rule implements requirements of the Federal Clean Air Act (FCAA). Under 42 United States Code (USC), §7410, each state is required to adopt and implement a SIP containing adequate provisions to implement, attain, maintain, and enforce the NAAQS within the state. While 42 USC, §7410 generally does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of the FCAA (meaning 42 USC, Chapter 85, Air Pollution Prevention and Control). The provisions of the FCAA recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though the FCAA allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of 42 USC, §7410. States are not free to ignore the requirements of 42 USC, §7410, and must develop programs and control measures to assure that their SIPs provide for implementation, attainment, maintenance, and enforcement of the NAAQS within the state. The specific intent of the proposed rulemaking is merely an update to the definition of emergency situation in §117.10, ensuring consistency with ERCOT's new ERS program while also reflecting changes made by ERCOT to promote reliability during energy emergencies throughout the state under limited circumstances.

While the proposed rulemaking protects the environment or reduces risks to human health from environmental exposure, it does not constitute a major environmental rule under Texas Government Code, §2001.0225(g)(3), because it does not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs, nor would the rulemaking adversely affect in a material way the environment, or the public health and safety of the state or a sector of the state. The rulemaking as a result is not subject to a regulatory impact analysis under Texas Government Code, §2001.0225 because it is not a major environmental rule.

The requirement to provide a fiscal analysis of regulations in the Texas Government Code was amended by Senate Bill (SB) 633, 75th Legislature, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis of extraordinary rules. These rules are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program; or are adopted solely under the general powers of the TCEQ. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded: based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application. The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted rules from the full analysis unless the rule was a major environmental rule that exceeded a federal law.

The FCAA does not always require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to help ensure that those areas will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues and to meet the requirements of 42 USC, §7410, the commission routinely proposes and adopts revisions to the SIP and rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every revision to the SIP would require the full regulatory impact analysis contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full regulatory impact analysis for rules that are extraordinary in nature. While the rule has a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules adopted for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law.

The commission has consistently applied this construction to its rules since this statute was enacted in 1997. Since that time, the legislature has revised the Texas Government Code, but left this provision substantially unamended. It is presumed that, when an agency interpretation is in effect at the time the legislature amends the laws without making substantial change in the statute, the legislature is deemed to have accepted the agency's interpretation *(Central Power & Light Co. v. Sharp,* 919 S.W.2d 485, 489 (Tex. App. Austin 1995), *writ denied with per curiam opinion respecting another issue,* 960 S.W.2d 617 (Tex. 1997); *Bullock v. Marathon Oil Co.,* 798 S.W.2d 353, 357 (Tex. App. Austin 1990, no writ) *superseded by statute on another point of law,* Tax Code §112.108, Other Actions Prohibited, *as recognized in, First State Bank of Dumas v. Sharp,* 863 S.W.2d 81, 83 (Tex. App. Austin 1993, no writ); *Cf. Humble Oil & Refining Co.*

v. Calvert, 414 S.W.2d 172 (Tex. 1967); *Dudney v. State Farm Mut. Auto Ins. Co.,* 9 S.W.3d 884, 893 (Tex. App. Austin 2000); *Southwestern Life Ins. Co. v. Montemayor,* 24 S.W.3d 581 (Tex. App. Austin 2000, *pet. denied);* and *Coastal Indust. Water Auth. v. Trinity Portland Cement Div.,* 563 S.W.2d 916 (Tex. 1978)).

The commission's interpretation of the regulatory impact analysis requirements is also supported by a change made to the Texas Administrative Procedure Act (APA) by the legislature in 1999. In an attempt to limit the number of rule challenges based upon APA requirements, the legislature clarified that state agencies are required to meet these sections of the APA against the standard of substantial compliance as required in Texas Government Code, §2001.035. The legislature specifically identified Texas Government Code, §2001.0225 as falling under this standard. The commission has complied with the requirements of Texas Government Code, §2001.0225.

Even if the proposed rulemaking constitutes a major environmental rule under Texas Government Code, §2001.0225(g)(3), a regulatory impact analysis is not required because this exemption is part of the commission's SIP for making progress toward the attainment and maintenance of the NAAQS. Therefore, the proposed rulemaking does not exceed a standard set by federal law or exceed an express requirement of state law, since they are part of an overall regulatory scheme designed to meet, not exceed the relevant standard set by federal law (NAAQS). The commission is charged with protecting air quality within the state and to design and submit a plan to achieve attainment and maintenance of the federally mandated NAAQS. The Third District Court of Appeals upheld this interpretation in *Brazoria County v. Texas Comm'n on Envtl. Quality,* 128 S.W. 3d 728 (Tex. App. - Austin 2004, no writ). The specific intent of the proposed rulemaking is merely an update to the definition of emergency situation in §117.10, ensuring consistency with ERCOT's new ERS program while also reflecting changes made by ERCOT to promote reliability during energy emergencies throughout the state under limited circumstances. This proposal, therefore, does not exceed an express requirement of federal law. The amendment is needed to implement state law but does exceed those new requirements. Finally, this rulemaking was not developed solely under the general powers of the agency, but is authorized by specific sections of THSC, Chapter 382, which are cited in the Statutory Authority section of this preamble, including THSC, §382.012 and §382.019. Because this proposed rulemaking does not meet any of the four applicability requirements, Texas Government Code, §2001.0225(b) does not apply, and a regulatory impact analysis is not required.

Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The commission's preliminary assessment indicates Texas Government Code, Chapter 2007 does not apply.

Under Texas Government Code, §2007.002(5), taking means: "(A) a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; or (B) a governmental action that: (i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and (ii) is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect."

Promulgation and enforcement of the rulemaking would be neither a statutory nor a constitutional taking of private real property. The primary purpose of the rule is an update to Chapter 117, Subchapter A to ensure consistency with ERCOT's new ERS program. This rule is not burdensome, restrictive, or limiting of rights to private real property because the rulemaking regulates the use of electric generators in certain limited emergency situations. Furthermore, the rulemaking benefits the public by potentially decreasing the likelihood of requiring firm load shedding (i.e., rolling black-outs) when additional control measures are needed to achieve or maintain attainment of the federal air quality standards through the use of electric generators. The rulemaking does not affect a landowner's rights in private real property because this rulemaking does not burden, restrict, or limit the owner's right to property, nor does it reduce the value of any private real property by 25% or more beyond that which would otherwise exist in the absence of the regulations. Therefore, this rule does not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found that the proposal is subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act, Texas Natural Resources Code, §§33.201 *et seq.,* and therefore must be consistent with all applicable CMP goals and policies. The commission conducted a consistency determination for the proposed rules in accordance with Coastal Coordination Act Implementation Rules, 31 TAC §505.22 and found the proposed rulemaking is consistent with the applicable CMP goals and policies.

The CMP goal applicable to the proposed rulemaking is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). The CMP policy applicable to the proposed rulemaking is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations to protect and enhance air quality in the coastal areas (31 TAC §501.32). The proposed rulemaking would not increase emissions of air pollutants and is, therefore, consistent with the CMP goal in 31 TAC §501.12(1) and the CMP policy in 31 TAC §501.32.

Promulgation and enforcement of this rule will not violate or exceed any standards identified in the applicable CMP goals and policies because the proposed rule is consistent with these CMP goals and policies and because the rule does not create or have a direct or significant adverse effect on any coastal natural resource areas. Therefore, in accordance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

The proposed amendment will not require any changes to federal operating permits.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on November 28, 2012, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2012-025-117-AI. The comment period closes December 5, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Ray Schubert, Air Quality Planning Section, (512) 239-6615.

Statutory Authority

The amendment is proposed under the authority of the following: Texas Water Code (TWC), §5.102, General Powers, §5.103, Rules, and §5.105, General Policy (these provisions authorize the commission to adopt rules necessary to carry out its powers and duties as well as all general policies under the TWC); Texas Health and Safety Code (THSC), Texas Clean Air Act (TCAA), §382.017, Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA; THSC, §382.002, Policy and Purpose, which establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, General Powers and Duties, which authorizes the commission to control the quality of the state's air; and THSC, §382.012, State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; and THSC, §382.051(d), Permitting Authority of Commission; Rules, which authorizes the commission to adopt rules as necessary to comply with changes in federal law or regulations applicable to permits under THSC, Chapter 382. Finally, the amendment is also proposed under FCAA, 42 USC, §§7401, *et seq.,* which requires states to submit SIP revisions that specify the manner in which the NAAQS will be achieved and maintained within each air quality control region of the state.

The proposed amended implements TWC, §§5.102, 5.103, and 5.105; THSC, §§382.002, 382.011, 382.012, 382.016, 382.017, and 382.021; and FCAA, 42 USC, §§7401 *et seq.*

§117.10. Definitions.

Unless specifically defined in the Texas Clean Air Act or Chapter 101 of this title (relating to General Air Quality Rules), the terms in this chapter have the meanings commonly used in the field of air pollution control. Additionally, the following meanings apply, unless the context clearly indicates otherwise. Additional definitions for terms used in this chapter are found in §3.2 and §101.1 of this title (relating to Definitions).

(1) Annual capacity factor--The total annual fuel consumed by a unit divided by the fuel that could be consumed by the unit if operated at its maximum rated capacity for 8,760 hours per year.

(2) Applicable ozone nonattainment area--The following areas, as designated under the 1990 Federal Clean Air Act Amendments.

(A) Beaumont-Port Arthur ozone nonattainment area--An area consisting of Hardin, Jefferson, and Orange Counties.

(B) Dallas-Fort Worth ozone nonattainment area--An area consisting of Collin, Dallas, Denton, and Tarrant Counties.

(C) Dallas-Fort Worth eight-hour ozone nonattainment area--An area consisting of Collin, Dallas, Denton, Ellis, Johnson, Kaufman, Parker, Rockwall, and Tarrant Counties.

(D) Houston-Galveston-Brazoria ozone nonattainment area--An area consisting of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties.

(3) Auxiliary steam boiler--Any combustion equipment within an electric power generating system, as defined in this section, that is used to produce steam for purposes other than generating electricity. An auxiliary steam boiler produces steam as a replacement for steam produced by another piece of equipment that is not operating due to planned or unplanned maintenance.

(4) Average activity level for fuel oil firing--The product of an electric utility unit's maximum rated capacity for fuel oil firing and the average annual capacity factor for fuel oil firing for the period from January 1, 1990, to December 31, 1993.

(5) Block one-hour average--An hourly average of data, collected starting at the beginning of each clock hour of the day and continuing until the start of the next clock hour.

(6) Boiler--Any combustion equipment fired with solid, liquid, and/or gaseous fuel used to produce steam or to heat water.

(7) Btu--British thermal unit.

(8) Chemical processing gas turbine--A gas turbine that vents its exhaust gases into the operating stream of a chemical process.

(9) Continuous emissions monitoring system (CEMS)--The total equipment necessary for the continuous determination and recordkeeping of process gas concentrations and emission rates in units of the applicable emission limitation.

(10) Daily--A calendar day starting at midnight and continuing until midnight the following day.

(11) Diesel engine--A compression-ignited two- or four-stroke engine that liquid fuel injected into the combustion chamber ignites when the air charge has been compressed to a temperature sufficiently high for auto-ignition.

(12) Duct burner--A unit that combusts fuel and that is placed in the exhaust duct from another unit (such as a stationary gas turbine, stationary internal combustion engine, kiln, etc.) to allow the firing of additional fuel to heat the exhaust gases.

(13) Electric generating facility (EGF)--A unit that generates electric energy for compensation and is owned or operated by a person doing business in this state, including a municipal corporation, electric cooperative, or river authority.

(14) Electric power generating system--One electric power generating system consists of either:

(A) for the purposes of Subchapter C of this chapter (relating to Combustion Control at Major Utility Electric Generation Sources in Ozone Nonattainment Areas), all boilers, auxiliary steam boilers, and stationary gas turbines (including duct burners used in turbine exhaust ducts) at electric generating facility (EGF) accounts that generate electric energy for compensation; are owned or operated by an electric cooperative, municipality, river authority, public utility, or a Public Utility Commission of Texas regulated utility, or any of its successors; and are entirely located in one of the following ozone nonattainment areas:

(i) Beaumont-Port Arthur;

(ii) Dallas-Fort Worth;

(iii) Dallas-Fort Worth eight-hour; or

(iv) Houston-Galveston-Brazoria;

(B) for the purposes of Subchapter E, Division 1 of this chapter (relating to Utility Electric Generation in East and Central Texas), all boilers, auxiliary steam boilers, and stationary gas turbines at EGF accounts that generate electric energy for compensation; are owned or operated by an electric cooperative, independent power producer, municipality, river authority, or public utility, or any of its successors; and are located in Atascosa, Bastrop, Bexar, Brazos, Calhoun, Cherokee, Fannin, Fayette, Freestone, Goliad, Gregg, Grimes, Harrison, Henderson, Hood, Hunt, Lamar, Limestone, Marion, McLennan, Milam, Morris, Nueces, Parker, Red River, Robertson, Rusk, Titus, Travis, Victoria, or Wharton County; or

(C) for the purposes of Subchapter B of this chapter (relating to Combustion Control at Major Industrial, Commercial, and Institutional Sources in Ozone Nonattainment Areas), all units in the Houston-Galveston-Brazoria ozone nonattainment area that generate electricity but do not meet the conditions specified in subparagraph (A) of this paragraph, including, but not limited to, cogeneration units and units owned by independent power producers.

(15) Emergency situation--As follows.

(A) An emergency situation is any of the following:

(i) an unforeseen electrical power failure from the serving electric power generating system;

(ii) the period of time that an Electric Reliability Council of Texas, Inc. (ERCOT)-issued emergency notice (as defined in *ERCOT Protocols, Section 2: Definitions and Acronyms* (June 1, 2012) and issued as specified in *ERCOT Protocols, Section 6: Adjustment Period and Real-Time Operations* (June 1, 2012))[~~, as defined in *ERCOT Protocols, Section 2: Definitions and Acronyms* (April 25, 2006), issued by the Electric Reliability Council of Texas, Inc. (ERCOT) as specified in *ERCOT Protocols, Section 5: Dispatch* (April 26, 2006),~~] is applicable to the serving electric power generating system. The emergency situation is considered to end upon expiration of the emergency notice issued by ERCOT;

(iii) an unforeseen failure of on-site electrical transmission equipment (e.g., a transformer);

(iv) an unforeseen failure of natural gas service;

(v) an unforeseen flood or fire, or a life-threatening situation; [~~or~~]

(vi) operation of emergency generators for Federal Aviation Administration licensed airports, military airports, or manned space flight control centers for the purposes of providing power in anticipation of a power failure due to severe storm activity; or[~~,~~]

(vii) operation of an emergency generator as part of an ERCOT emergency response program if the operation is in direct response to an instruction by ERCOT during the period of an ERCOT emergency notice as specified in clause (ii) of this subparagraph.

(B) An emergency situation does not include: [~~operation for purposes of supplying power for distribution to the electric grid, operation for training purposes, or other foreseeable events.~~]

(i) operation for training purposes or other foreseeable events; or

(ii) operation for purposes of supplying power for distribution to the electric grid, except as specified in subparagraph (A)(vii) of this paragraph.

(16) Functionally identical replacement--A unit that performs the same function as the existing unit that it replaces, with the condition that the unit replaced must be physically removed or rendered permanently inoperable before the unit replacing it is placed into service.

(17) Heat input--The chemical heat released due to fuel combustion in a unit, using the higher heating value of the fuel. This does not include the sensible heat of the incoming combustion air. In the case of carbon monoxide (CO) boilers, the heat input includes the enthalpy of all regenerator off-gases and the heat of combustion of the incoming CO and of the auxiliary fuel. The enthalpy change of the fluid catalytic cracking unit regenerator off-gases refers to the total heat content of the gas at the temperature it enters the CO boiler, referring to the heat content at 60 degrees Fahrenheit, as being zero.

(18) Heat treat furnace--A furnace that is used in the manufacturing, casting, or forging of metal to heat the metal so as to produce specific physical properties in that metal.

(19) High heat release rate--A ratio of boiler design heat input to firebox volume (as bounded by the front firebox wall where the burner is located, the firebox side waterwall, and extending to the level just below or in front of the first row of convection pass tubes) greater than or equal to 70,000 British thermal units per hour per cubic foot.

(20) Horsepower rating--The engine manufacturer's maximum continuous load rating at the lesser of the engine or driven equipment's maximum published continuous speed.

(21) Incinerator--As follows.

(A) For the purposes of this chapter, the term "incinerator" includes both of the following:

(i) a control device that combusts or oxidizes gases or vapors (e.g., thermal oxidizer, catalytic oxidizer, vapor combustor); and

(ii) an incinerator as defined in §101.1 of this title (relating to Definitions).

(B) The term "incinerator" does not apply to boilers or process heaters as defined in this section, or to flares as defined in §101.1 of this title.

(22) Industrial boiler--Any combustion equipment, not including utility or auxiliary steam boilers as defined in this section, fired with liquid, solid, or gaseous fuel, that is used to produce steam or to heat water.

(23) International Standards Organization (ISO) conditions--ISO standard conditions of 59 degrees Fahrenheit, 1.0 atmosphere, and 60% relative humidity.

(24) Large utility system--All boilers, auxiliary steam boilers, and stationary gas turbines that are located in the Dallas-Fort Worth or the Dallas-Fort Worth eight-hour ozone nonattainment area, and were part of one electric power generating system on January 1, 2000, that had a combined electric generating capacity equal to or greater than 500 megawatts.

(25) Lean-burn engine--A spark-ignited or compression-ignited, Otto cycle, diesel cycle, or two-stroke engine that is not capable of being operated with an exhaust stream oxygen concentration equal to or less than 0.5% by volume, as originally designed by the manufacturer.

(26) Low annual capacity factor boiler, process heater, or gas turbine supplemental waste heat recovery unit--An industrial, commercial, or institutional boiler; process heater; or gas turbine supplemental waste heat recovery unit with maximum rated capacity:

(A) greater than or equal to 40 million British thermal units per hour (MMBtu/hr), but less than 100 MMBtu/hr and an annual heat input less than or equal to 2.8 (10^{11}) British thermal units per year (Btu/yr), based on a rolling 12-month average; or

(B) greater than or equal to 100 MMBtu/hr and an annual heat input less than or equal to 2.2 (10^{11}) Btu/yr, based on a rolling 12-month average.

(27) Low annual capacity factor stationary gas turbine or stationary internal combustion engine--A stationary gas turbine or stationary internal combustion engine that is demonstrated to operate less than 850 hours per year, based on a rolling 12-month average.

(28) Low heat release rate--A ratio of boiler design heat input to firebox volume less than 70,000 British thermal units per hour per cubic foot.

(29) Major source--Any stationary source or group of sources located within a contiguous area and under common control that emits or has the potential to emit:

(A) at least 50 tons per year (tpy) of nitrogen oxides (NO_x) and is located in the Beaumont-Port Arthur ozone nonattainment area;

(B) at least 50 tpy of NO_x and is located in the Dallas-Fort Worth or Dallas-Fort Worth eight-hour ozone nonattainment area;

(C) at least 25 tpy of NO_x and is located in the Houston-Galveston-Brazoria ozone nonattainment area; or

(D) the amount specified in the major source definition contained in the Prevention of Significant Deterioration of Air Quality regulations promulgated by the United States Environmental Protection Agency in 40 Code of Federal Regulations §52.21 as amended June 3, 1993 (effective June 3, 1994), and is located in Atascosa, Bastrop, Bexar, Brazos, Calhoun, Cherokee, Comal, Fannin, Fayette, Freestone, Goliad, Gregg, Grimes, Harrison, Hays, Henderson, Hood, Hunt, Lamar, Limestone, Marion, McLennan, Milam, Morris, Nueces, Red River, Robertson, Rusk, Titus, Travis, Victoria, or Wharton County.

(30) Maximum rated capacity--The maximum design heat input, expressed in million British thermal units per hour, unless:

(A) the unit is a boiler, utility boiler, or process heater operated above the maximum design heat input (as averaged over any one-hour period), in which case the maximum operated hourly rate must be used as the maximum rated capacity; or

(B) the unit is limited by operating restriction or permit condition to a lesser heat input, in which case the limiting condition must be used as the maximum rated capacity; or

(C) the unit is a stationary gas turbine, in which case the manufacturer's rated heat consumption at the International Standards Organization (ISO) conditions must be used as the maximum rated capacity, unless limited by permit condition to a lesser heat input, in which case the limiting condition must be used as the maximum rated capacity; or

(D) the unit is a stationary, internal combustion engine, in which case the manufacturer's rated heat consumption at Diesel Equipment Manufacturer's Association or ISO conditions must be used as the maximum rated capacity, unless limited by permit condition to a lesser heat input, in which case the limiting condition must be used as the maximum rated capacity.

(31) Megawatt (MW) rating--The continuous MW output rating or mechanical equivalent by a gas turbine manufacturer at International Standards Organization conditions, without consideration to the increase in gas turbine shaft output and/or the decrease in gas turbine fuel consumption by the addition of energy recovered from exhaust heat.

(32) Nitric acid--Nitric acid that is 30% to 100% in strength.

(33) Nitric acid production unit--Any source producing nitric acid by either the pressure or atmospheric pressure process.

(34) Nitrogen oxides (NO_x)--The sum of the nitric oxide and nitrogen dioxide in the flue gas or emission point, collectively expressed as nitrogen dioxide.

(35) Parts per million by volume (ppmv)--All ppmv emission specifications specified in this chapter are referenced on a dry basis. When required to adjust pollutant concentrations to a specified oxygen (O_2) correction basis, the following equation must be used.
Figure: 30 TAC §117.10(35) (No change.)

(36) Peaking gas turbine or engine--A stationary gas turbine or engine used intermittently to produce energy on a demand basis.

(37) Plant-wide emission rate--The ratio of the total actual nitrogen oxides mass emissions rate discharged into the atmosphere from affected units at a major source when firing at their maximum rated capacity to the total maximum rated capacities for those units.

(38) Plant-wide emission specification--The ratio of the total allowable nitrogen oxides mass emissions rate dischargeable into the atmosphere from affected units at a major source when firing at their maximum rated capacity to the total maximum rated capacities for those units.

(39) Predictive emissions monitoring system (PEMS)--The total equipment necessary for the continuous determination and recordkeeping of process gas concentrations and emission rates using process or control device operating parameter measurements and a

conversion equation or computer program to produce results in units of the applicable emission limitation.

(40) Process heater--Any combustion equipment fired with liquid and/or gaseous fuel that is used to transfer heat from combustion gases to a process fluid, superheated steam, or water for the purpose of heating the process fluid or causing a chemical reaction. The term "process heater" does not apply to any unfired waste heat recovery heater that is used to recover sensible heat from the exhaust of any combustion equipment, or to boilers as defined in this section.

(41) Pyrolysis reactor--A unit that produces hydrocarbon products from the endothermic cracking of feedstocks such as ethane, propane, butane, and naphtha using combustion to provide indirect heating for the cracking process.

(42) Reheat furnace--A furnace that is used in the manufacturing, casting, or forging of metal to raise the temperature of that metal in the course of processing to a temperature suitable for hot working or shaping.

(43) Rich-burn engine--A spark-ignited, Otto cycle, four-stroke, naturally aspirated or turbocharged engine that is capable of being operated with an exhaust stream oxygen concentration equal to or less than 0.5% by volume, as originally designed by the manufacturer.

(44) Small utility system--All boilers, auxiliary steam boilers, and stationary gas turbines that are located in the Dallas-Fort Worth or the Dallas-Fort Worth eight-hour ozone nonattainment area, and were part of one electric power generating system on January 1, 2000, that had a combined electric generating capacity less than 500 megawatts.

(45) Stationary gas turbine--Any gas turbine system that is gas and/or liquid fuel fired with or without power augmentation. This unit is either attached to a foundation or is portable equipment operated at a specific minor or major source for more than 90 days in any 12-month period. Two or more gas turbines powering one shaft must be treated as one unit.

(46) Stationary internal combustion engine--A reciprocating engine that remains or will remain at a location (a single site at a building, structure, facility, or installation) for more than 12 consecutive months. Included in this definition is any engine that, by itself or in or on a piece of equipment, is portable, meaning designed to be and capable of being carried or moved from one location to another. Indicia of portability include, but are not limited to, wheels, skids, carrying handles, dolly, trailer, or platform. Any engine (or engines) that replaces an engine at a location and that is intended to perform the same or similar function as the engine being replaced is included in calculating the consecutive residence time period. An engine is considered stationary if it is removed from one location for a period and then returned to the same location in an attempt to circumvent the consecutive residence time requirement. Nonroad engines, as defined in 40 Code of Federal Regulations §89.2, are not considered stationary for the purposes of this chapter.

(47) System-wide emission rate--The ratio of the total actual nitrogen oxides mass emissions rate discharged into the atmosphere from affected units in an electric power generating system or portion thereof located within a single ozone nonattainment area when firing at their maximum rated capacity to the total maximum rated capacities for those units. For fuel oil firing, average activity levels must be used in lieu of maximum rated capacities for the purpose of calculating the system-wide emission rate.

(48) System-wide emission specification--The ratio of the total allowable nitrogen oxides mass emissions rate dischargeable into the atmosphere from affected units in an electric power generating system or portion thereof located within a single ozone nonattainment area when firing at their maximum rated capacity to the total maximum rated capacities for those units. For fuel oil firing, average activity levels must be used in lieu of maximum rated capacities for the purpose of calculating the system-wide emission specification.

(49) Thirty-day rolling average--An average, calculated for each day that fuel is combusted in a unit, of all the hourly emissions data for the preceding 30 days that fuel was combusted in the unit.

(50) Twenty-four hour rolling average--An average, calculated for each hour that fuel is combusted (or acid is produced, for a nitric or adipic acid production unit), of all the hourly emissions data for the preceding 24 hours that fuel was combusted in the unit.

(51) Unit--A unit consists of either:

(A) for the purposes of §§117.105, 117.205, 117.305, 117.1005, 117.1105, and 117.1205 of this title (relating to Emission Specifications for Reasonably Available Control Technology (RACT)) and each requirement of this chapter associated with §§117.105, 117.205, 117.305, 117.1005, 117.1105, and 117.1205 of this title, any boiler, process heater, stationary gas turbine, or stationary internal combustion engine, as defined in this section;

(B) for the purposes of §§117.110, 117.210, 117.310, 117.1010, 117.1110, and 117.1210 of this title (relating to Emission Specifications for Attainment Demonstration) and each requirement of this chapter associated with §§117.110, 117.210, 117.310, 117.1010, 117.1110, and 117.1210 of this title, any boiler, process heater, stationary gas turbine, or stationary internal combustion engine, as defined in this section, or any other stationary source of nitrogen oxides (NO_x) at a major source, as defined in this section;

(C) for the purposes of §117.2010 of this title (relating to Emission Specifications) and each requirement of this chapter associated with §117.2010 of this title, any boiler, process heater, stationary gas turbine (including any duct burner in the turbine exhaust duct), or stationary internal combustion engine, as defined in this section;

(D) for the purposes of §117.2110 of this title (relating to Emission Specifications for Eight-Hour Attainment Demonstration) and each requirement of this chapter associated with §117.2110 of this title, any stationary internal combustion engine, as defined in this section;

(E) for the purposes of §117.3310 of this title (relating to Emission Specifications for Eight-Hour Attainment Demonstration) and each requirement of this chapter associated with §117.3310 of this title, any stationary internal combustion engine, as defined in this section; or

(F) for the purposes of §117.410 and §117.1310 of this title (relating to Emission Specifications for Eight-Hour Attainment Demonstration) and each requirement of this chapter associated with §117.410 and §117.1310 of this title, any boiler, process heater, stationary gas turbine, or stationary internal combustion engine, as defined in this section, or any other stationary source of NO_x at a major source, as defined in this section.

(52) Utility boiler--Any combustion equipment owned or operated by an electric cooperative, municipality, river authority, public utility, or Public Utility Commission of Texas regulated utility, fired with solid, liquid, and/or gaseous fuel, used to produce steam for the purpose of generating electricity. Stationary gas turbines, including any associated duct burners and unfired waste heat boilers, are not considered to be utility boilers.

(53) Wood--Wood, wood residue, bark, or any derivative fuel or residue thereof in any form, including, but not limited to, saw-

dust, sander dust, wood chips, scraps, slabs, millings, shavings, and processed pellets made from wood or other forest residues.

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

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205434
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2141

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CHAPTER 291. UTILITY REGULATIONS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§291.22, 291.102, 291.105, and 291.113.

Background and Summary of the Factual Basis for the Proposed Rules

In 2011, the 82nd Legislature passed Senate Bill (SB) 573, relating to the granting of certificates of public convenience and necessity (CCNs). SB 573 amended Texas Water Code (TWC), §§13.245, 13.2451, 13.246, and 13.254. TWC, §13.245(b) and (c-1) - (c-3) were amended to specify that if a municipality has not consented to the inclusion of a CCN within its boundaries or extraterritorial jurisdiction (ETJ) before the 180th day after a landowner or retail public utility has made a formal request for service then the TCEQ may grant the CCN to the retail public utility without the municipality's consent under certain conditions. SB 573 also provided additional criteria which the TCEQ shall consider before it grants the CCN to the retail public utility. If the CCN is granted, the TCEQ must include a condition that facilities will be designed and constructed according to the municipality's standards. TWC, §13.245(c-4) and (c-5) were added by SB 573 to specify the counties in which the provisions of the TWC, §13.254(c-1) - (c-3) do not apply.

TWC, §13.2451(b) was amended by SB 573 to specify that the TCEQ may not extend a municipality's CCN beyond its ETJ if a landowner elects to opt-out as allowed by TWC, §13.246(h). TWC, §13.2451(b-1) and (b-2) were added to specify the counties in which the provision does not apply.

TWC, §13.246(h) was amended by SB 573 to stipulate that a CCN applicant that has land removed by landowner election may not be required to provide service to the removed land for any reason.

TWC, §13.254 was amended by SB 573 to change the requirements for when the TCEQ may revoke a CCN, modify the requirements for petitioning for the release of land from a CCN, and also shorten the TCEQ's review period for reviewing a release petition from 90 to 60 calendar days. TWC, §13.254(a-5) and (a-6) created a process allowing a landowner of at least a 25-acre tract to request an expedited release from a CCN in counties meeting specific criteria. TWC, §13.254(a-7) added requirements for notice of utility rate changes. TWC, §13.254(a-8) modified the criteria for reviewing a release petition filed under TWC, §13.254(a-1). TWC, §13.254(a-9) - (a-11) were added to specify the counties in which the modifications to the CCN release process made by TWC, §13.254(a-8) do not apply.

In a corresponding rulemaking published in this issue of the *Texas Register,* the commission also proposes revisions to 30 TAC Chapter 293, Water Districts.

Section by Section Discussion

In addition to implementation of the state law discussed previously, the commission proposes administrative changes to conform with *Texas Register* requirements.

§291.22, Notice of Intent to Change Rates

The commission proposes to amend §291.22(a)(4) to remove the word "and"; adding §291.22(a)(5) - (7); and renumbering existing subsection (a)(5). The proposed amendment specifies that a utility shall include with the statement of intent provided to each landowner or ratepayer: a notice of a proceeding under §291.113, the reason or reasons for the proposed rate change, and any bill payment assistance program available to low-income ratepayers. The commission proposes this amendment to implement the changes made to TWC, §13.254, in SB 573 and for consistency with *Texas Register* requirements.

§291.102, Criteria for Considering and Granting Certificates or Amendments

The commission proposes to amend §291.102(h) to specify that an applicant for a CCN that has land removed from its proposed service area because of a landowner's election under this subsection may not be required to provide service to the removed land for any reason, including the violation of law or commission rules by the water and/or sewer system of another person. The commission proposes this amendment to implement the changes made to TWC, §13.246(h) in SB 573.

§291.105, Contents of Certificate of Convenience and Necessity Applications

The commission proposes to amend §291.105(b)(2) by removing the reference of "paragraph (3)" and replacing it with a reference to "paragraphs (3) - (7)." The proposed amendment specifies that, except as provided by paragraphs (3) - (7), the commission may not grant a CCN to a retail public utility for a service area within the boundaries or ETJ of a municipality without the consent of the municipality. The municipality may not unreasonably withhold its consent. As a condition of the consent, a municipality may require that all water and/or sewer facilities be designed and constructed in accordance with the municipality's standards for facilities. The commission proposes this amendment to implement changes made to TWC, §13.245(b) by SB 573. The commission proposes to add §291.105(b)(4) and its subdivisions to implement changes made to TWC, §13.245(b) by SB 573. The commission proposes adding §291.105(b)(4) to denote that the commission may grant a CCN to a retail public utility without a municipality's consent under certain circumstances as outlined in proposed §291.105(b)(4)(A) - (C) if the municipality has not consented under §291.105(b) before the 180th day after the date a landowner or a retail public utility submits a formal request for service to the municipality. Proposed §291.105(b)(4)(A) specifies that the commission may grant the CCN without the municipality's consent if the commission makes findings required by §291.105(b)(3). Proposed §291.105(b)(4)(B) specifies that the commission may grant the CCN without the municipality's consent if the municipality has not entered into a binding commitment to serve the requested area on or before the 180th day after the date the formal

request was made. In addition, the commission proposes to add §291.105(b)(4)(C) and its subdivisions to specify that the commission may grant the CCN without the municipality's consent if the landowner or retail public utility that submitted the formal request has not unreasonably refused to comply with the municipality's service extension and development process; or if the landowner or retail public utility have not entered into a contract for water and/or sewer services with the municipality. The commission also proposes to add §291.105(b)(5) to denote that if a municipality refuses to provide service in the proposed service area, as evidenced by a formal vote of the municipality's governing body or an official notification from the municipality, the commission is not required to make the findings otherwise required by this section and may grant the CCN to the retail public utility at any time after the date of the formal vote or receipt of the official notification. The commission proposes this addition to implement changes made to TWC, §13.245(b) by SB 573. The commission proposes to add §291.105(b)(6) to implement changes made to TWC, §13.245(b) by SB 573 by stipulating that the commission must include as a condition of a CCN granted under TWC, §13.245(c-1) or (c-2) that all water and sewer facilities shall be designed and constructed in accordance with the municipality's standards for water and sewer facilities. The commission proposes to add §291.105(b)(7) to specify that paragraphs (4) - (6) do not apply in Cameron, Fannin, Grayson, Guadalupe, Hidalgo, Willacy, or Wilson Counties. The commission proposes this addition to implement changes made to TWC, §13.245(b) by SB 573. The commission proposes to renumber existing §291.105(b)(4) and (5) to §291.105(b)(8) and (9) for consistency purposes.

The commission proposes to amend §291.105(c)(1) to specify that, except as provided by paragraph (2), if a municipality extends its ETJ to include an area certificated to a retail public utility, the retail public utility may continue and extend service in its CCN area under the rights granted by its certificate and Chapter 291. The proposed rule changes implement TWC, §13.2451(a) - (b-3) as amended by SB 573. The commission proposes to amend §291.105(c)(2), add subsection (c)(3), and renumber existing subsection (c)(3) to implement changes made to TWC, §13.2451(a) - (b-3) by SB 573. The proposed amendment specifies that the commission may not extend a municipality's CCN beyond its ETJ if an owner of land that is located wholly or partly outside the ETJ elects to exclude some or all of the landowner's property within a proposed service area in accordance with TWC, §13.246(h), this subsection does not apply to a transfer of a certificate as approved by the commission. The amendment also specifies that paragraph (2) does not apply in Cameron, Fannin, Grayson, Guadalupe, Hidalgo, Willacy, or Wilson Counties.

§291.113, Revocation or Amendment of Certificate

The commission proposes to amend §291.113. The commission proposes to amend §291.113(a) - (d) and (h) and add §291.113(r) - (v). Section 291.113(a) is amended to remove a reference to the source of a motion or petition to revoke or amend a CCN. Section 291.113(b) is amended to specify that the fact that the certificate holder is a borrower under a federal loan program is not a bar to a request under this subsection for the release of a petitioner's land and the receipt of services from an alternative provider. The amendment to this subsection also requires that on the day the petitioner submits the petition to the commission, the petitioner shall send a copy of a petition to the certificate holder. The commission proposes these amendments to implement changes made to TWC, §13.245 by SB 573. The commission proposes to amend §291.113(b)(1)(C) to remove the word "and" and to add §291.113(b)(1)(D) and (E) to provide additional criteria that a petitioner must demonstrate when requesting to have the petitioner's land removed from a CCN under §291.112(a). Section 291.113(b)(1)(D) is added to denote that a petitioner shall provide a written request for service to the certificate holder identifying the approximate cost for the alternative provider to provide the service at the same level and manner that is requested from the certificate holder. Section 291.113(b)(1)(E) is added to specify that the petitioner shall also identify the flow and pressure requirements and specific infrastructure needs, including line size and system capacity for the required level of fire protection requested. In addition, the commission proposes to renumber existing §291.113(b)(1)(D) to §291.113(b)(1)(F) for consistency purposes. The proposed rule changes implement TWC, §13.245(a-1) as amended by SB 573. Furthermore, the commission proposes to amend §291.113(b)(3)(B) to clarify that the commission shall consider whether the certificate holder is capable of providing the service at the approximate cost and that the alternative provider is capable of providing a comparable level of service. The proposed rule changes implement TWC, §13.245(a-1) as amended by SB 573. Moreover, the commission proposes to amend §291.113(b)(4) to remove the phrase "is capable of providing" and instead specify that the alternate service provider must possess the financial, managerial, and technical capability to provide continuous and adequate service to the area being removed from the certificate. Also, the proposed amendment specifies that service must be provided at a reasonable cost to support the existing and projected service demands in the area. The commission proposes this amendment to implement changes made to TWC, §13.245(a-1) by SB 573. The commission proposes to amend §291.113(c) to update cross-references to other subsections. The commission proposes this amendment to implement changes made to TWC, §13.254 by SB 573. Additionally, the commission proposes to amend §291.113(d) by changing the time frame from 90 to 60 calendar days for which the commission or executive director shall grant or deny the petition to remove the property from the certificated area to implement changes made to TWC by SB 573. The commission also proposes to amend §291.113(h) to clarify that a retail public utility may not provide retail water and/or sewer service in an area that has been decertified under this section unless the retail public utility or petitioner provides compensation for any property rendered useless or valueless. The commission proposes this amendment to implement changes made to TWC, §13.254 by SB 573. The commission proposes to add §291.113(r) to denote that an owner of a tract of land that is at least 25 acres and that is not receiving water or sewer service may petition for the expedited release of the area from a CCN and is entitled to that release if the landowner's property is located in a county with a population of a least one million, a county adjacent to a county with a population of at least one million (except for Medina or Smith Counties), and is not in a county that has a population of more than 45,500 and less than 47,500. The commission proposes this amendment to implement changes made to TWC, §13.254 by SB 573. The commission proposes to add §291.113(s) to require the petitioner to provide a copy of the petition to the CCN holder, specify that the CCN holder may file a response to the petition, and to indicate that the commission or the executive director shall grant a petition received under proposed subsection (r) no later than 60 calendar days after the date the landowner files the petition. The commission or the executive director may not deny a petition filed under proposed

subsection (r) based on the fact that a certificate holder is a borrower of federal debt. The commission may require an award of compensation by the petitioner to a decertified retail public utility. The commission proposes this amendment to implement changes made to TWC, §13.254 by SB 573. Additionally, the commission proposes to add §291.113(t) to specify that the commission is not required to find that the proposed alternative provider is capable of providing better service than the CCN holder, but only that the alternative provider is capable of providing service to the area that a petitioner seeks to have released from a CCN under subsection (b) if the CCN holder has never made service available through planning, design, construction of facilities, or contractual obligations. The commission proposes this amendment to implement changes made to TWC, §13.254 by SB 573. The commission proposes to add §291.113(u) to specify that subsection (t) does not apply in Cameron, Fannin, Grayson, Guadalupe, Hidalgo, Willacy, or Wilson Counties. The commission proposes this amendment to implement changes made to TWC, §13.254 by SB 573. Lastly, the commission proposes to add §291.113(v) to indicate that a certificate holder that has land removed in accordance with this section may not be required to provide service to the removed land for any reason, including the violation of law or commission rules by a water or sewer system of another person. The commission proposes this amendment to implement changes made to TWC, §13.254 by SB 573.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules since the agency would use currently available resources when administering or enforcing the provisions. Other state agencies would not experience fiscal implications as a result of the proposed rules. In counties where the proposed expedited release from a CCN applies, municipalities and other retail public utilities with CCNs are not expected to experience significant fiscal impacts unless they have already incurred costs to provide future service to a landowner and multiple areas apply for release.

The proposed rules amend Chapter 291 to implement the provisions of SB 573 relating to the administration and criteria for CCNs. The proposed rules would create an expedited CCN release process for landowners in Atascosa, Bandera, Bastrop, Bexar, Blanco, Brazoria, Burnet, Caldwell, Chambers, Collin, Comal, Dallas, Denton, Ellis, Fort Bend, Galveston, Guadalupe, Harris, Hays, Johnson, Kaufman, Kendall, Liberty, Montgomery, Parker, Rockwall, Smith, Tarrant, Travis, Waller, Williamson, Wilson, and Wise Counties. All retail public utilities (cities, counties, investor-owned utilities (IOUs), water supply corporations, and water districts) in these counties would be impacted by the proposed rules if a CCN exemption is requested where there is no current water and/or sewer service. The proposed rules would also shorten the agency's review period from 90 to 60 days and require the agency to approve all petitions for release. The proposed rules also would include a limitation that the agency may not deny a petition based on the fact that a CCN holder is a borrower under a federal loan program. The agency could grant a release from a municipality's CCN without the municipality's consent under certain conditions in specific counties. The proposed rules would also stipulate that once land is removed from a CCN under these procedures, the holder of that CCN would not be required to provide service to the removed land for any reason including violations of law or agency rules. The proposed rules also include changes that are administrative in nature and do not have a fiscal impact on regulated entities.

The proposed rules would affect certain municipalities and retail public utilities and grant more flexibility to obtain water and sewer service to certain landowners. The proposed rules would also require IOUs to provide additional notice when applying for a rate change and communicate availability of programs for bill payment assistance to low-income ratepayers.

The agency would be required to grant expedited release from a CCN to landowners that petition for release and that own a land tract of at least 25 acres that is not receiving water or sewer service in the following counties: Atascosa, Bandera, Bastrop, Bexar, Blanco, Brazoria, Burnet, Caldwell, Chambers, Collin, Comal, Dallas, Denton, Ellis, Fort Bend, Galveston, Guadalupe, Harris, Hays, Johnson, Kaufman, Kendall, Liberty, Montgomery, Parker, Rockwall, Smith, Tarrant, Travis, Waller, Williamson, Wilson, and Wise.

Except for municipalities in Cameron, Fannin, Grayson, Guadalupe, Hidalgo, Willacy, or Wilson Counties, municipalities with CCNs would be required to comply with certain deadlines and conditions to respond for a formal request for service by a landowner or retail public utility. If there is no compliance with the deadlines, the agency could grant a new CCN without the consent of the municipality under the proposed rules. The agency could not extend a municipality's CCN beyond its ETJ when a landowner elects to exclude land either wholly or partly outside the ETJ from a proposed service area under the proposed rules. However, the agency could extend a municipality's CCN beyond its ETJ in Cameron, Fannin, Grayson, Guadalupe, Hidalgo, Willacy, or Wilson Counties.

In counties where the proposed expedited release from a CCN applies, municipalities and other retail public utilities with CCNs are not expected to experience significant fiscal impacts unless they have already incurred costs to provide future service to a landowner and multiple areas apply for release from a municipality's CCN. The fiscal impact of a release from a CCN would depend on multiple factors in a particular area and whether a petitioner for land removal provides compensation to a municipality. Staff estimates that there are 1,215 incorporated municipalities that could be impacted by the proposed rules.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and more flexibility for certain landowners in certain counties to obtain water and/or sewer service.

The proposed rules would not have a significant fiscal impact on individual ratepayers in a CCN. Individuals that are customers of IOUs would receive additional information in the notice of a rate change, including information about bill payment assistance programs for low-income ratepayers.

The proposed rules are not expected to adversely affect landowners with 25 acres or more because they would provide additional flexibility and options to these individuals and businesses, in certain areas of the state, to develop their land. These landowners are not expected to petition for expedited release from a CCN unless it would be economically advantageous for them to do so. The fiscal impact of the proposed rules

would be highly variable and depend on the circumstances of each petition.

Large businesses that supply water or sewer service would not experience any fiscal impacts under the proposed rules where they currently provide service. A landowner could only request a CCN exemption on land that does not receive service.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses that currently provide water and/or sewer service as a result of the proposed rules. There may be as many as 579 water and 140 sewer IOUs affected by the proposed rules, and most of these are typically small businesses. The proposed rules would not have a fiscal impact on IOUs that currently provide service to land. A landowner could only request a CCN exemption on land that does not receive water and/or sewer service.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission has reviewed these proposed amendments to Chapter 291 in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking project is not a "major environmental rule" as defined in the Texas Administrative Procedure Act and thus is not subject to the other provisions of Texas Government Code, §2001.0225.

A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state (See Texas Government Code, §2001.0225(g)(3)). Here, the proposed amendments do not meet those qualifications where the primary purpose of this rulemaking initiative is to create and amend other rules in Chapter 291 to remain consistent with the statutory changes set forth in SB 573. This rulemaking initiative proposes to modify rules within Chapter 291 to accomplish the following: (1) altering the conditions under which the TCEQ may grant CCNs within a municipality's ETJ without consent from that municipality; (2) specify that the TCEQ may not extend a municipality's CCN beyond its ETJ if a landowner elects to opt-out as allowed by the TWC; (3) stipulate that a CCN applicant that has land removed by landowner election may not be required to provide service to the removed land for any reason; (4) change the requirements for when the TCEQ may revoke a CCN and shorten the review period for an expedited release from 90 to 60 calendar days; (5) create a process allowing a landowner of at least a 25-acre tract to request expedited release in counties meeting specific criteria; and (6) add additional requirements for a utility rate change notice. While the commission has jurisdiction over retail public utilities and authority to draft rules impacting those utilities, these changes to the operating processes of water and/or sewer utilities are not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Therefore, the proposed rulemaking project does not constitute a major environmental rule and is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225.

The commission invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of this proposed rulemaking action is to keep the commission's rules consistent with the changes in TWC, Chapter 13 made by the legislature in SB 573. The proposed rules would substantially advance this stated purpose because these changes impact the abilities of municipalities and retail public utilities to obtain a CCN or have a CCN revoked, and impact the requirements for notice of rate changes by IOUs.

Promulgation and enforcement of these proposed rules regarding the operation of water and/or sewer utilities would be neither a statutory nor a constitutional taking of private real property. The proposed regulations do not affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because this rulemaking does not burden, restrict, or limit the owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The statutory changes set forth in SB 573 also do not impact private real property rights. Specifically, private real property rights do not pertain to certification of retail water and/or sewer service areas by the commission. Thus, these proposed rules do not impose a burden on private real property but instead benefit society by improving and streamlining the process by which certain areas are certified for water and/or sewer service, which should ultimately improve the quality of service that is provided to utility customers. Therefore, the proposed amendments do not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 4, 2012, at 2:00 p.m. in Room 201S, Building E, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral

statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-055-293-OW. The comment period closes December 10, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Kent Steelman, Utilities and Districts Section, (512) 239-5143.

SUBCHAPTER B. RATES, RATE-MAKING, AND RATES/TARIFF CHANGES

30 TAC §291.22

Statutory Authority

The amendment is proposed under the authority of Texas Water Code (TWC), §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas.

The proposed amendment implements TWC, §13.254(a-7).

§291.22. Notice of Intent to Change Rates.

(a) Administrative requirements. In order to change rates, which are subject to the commission's original jurisdiction, the applicant utility shall file with the commission an original completed application for rate change with the number of copies specified in the application form and shall give notice of the proposed rate change by mail, e-mail, or hand delivery to all affected utility customers at least 60 days prior to the proposed effective date. Notice must be provided on the notice form included in the commission's rate application package and must contain the following information:

(1) the utility name and address, current rates, the proposed rates, the effective date of the proposed rate change, the increase or decrease requested over test year revenues as adjusted for test year customer growth and annualization of test year rate increases, stated as a dollar amount, and the classes of utility customers affected. The effective date of the new rates must be the first day of a billing period, which should correspond to the day of the month when meters are typically read, and the new rates may not apply to service received before the effective date of the new rates;

(2) information on how to protest the rate change, the required number of protests to ensure a hearing, the address of the commission, and the time frame for protests;

(3) a billing comparison showing the existing rate and the new computed water rate using 10,000 gallons of water and 30,000 gallons of water;

(4) a billing comparison showing the existing sewer rate and the new sewer rate for the use of 10,000 gallons, unless the utility proposes a flat rate for sewer services; [~~and~~]

(5) disclosure of an ongoing proceeding under §291.113 of this title (relating to Revocation or Amendment of Certificate), if any;

(6) the reason or reasons for the proposed rate change;

(7) any bill payment assistance program available to low-income ratepayers; and

(8) [~~(5)~~] any other information that is required by the executive director in the rate change application form.

(b) Notice requirements. The governing body of a municipality or a political subdivision that provides retail water or sewer service to customers outside the boundaries of the municipality or political subdivision shall mail, e-mail, or hand deliver individual written notice to each affected ratepayer eligible to appeal who resides outside the boundaries within 60 days after the date of the final decision on a rate change. The governing body of a municipally owned utility or political subdivision may provide the notice electronically if the municipality or political subdivision has access to a ratepayer's e-mail address. The commissioners court of an affected county that provides water or sewer service shall mail or hand deliver individual written notice to each affected ratepayer eligible to appeal within 30 days after the date of the final decision on a rate change. The notice must include, at a minimum, the effective date of the new rates, the new rates, and the location where additional information on rates can be obtained.

(c) Notice delivery requirements. Notices may be mailed separately, e-mailed, or may accompany customer billings. Notice of a proposed rate change by a utility must be mailed, e-mailed, or hand delivered to the customers at least 60 days prior to the effective date of the rate increase.

(d) Notice and statement of intent. The applicant utility shall mail, e-mail, or deliver a copy of the statement of intent to change rates to the appropriate officer of each affected municipality at least 60 days prior to the effective date of the proposed change. If the utility is requesting a rate change from the commission for customers residing outside the municipality, it shall also provide a copy of the rate application filed with the commission to the municipality. The commission may also require that notice be mailed, e-mailed, or delivered to other affected persons or agencies.

(e) Proof of notice. Proof of notice in the form of an affidavit stating that proper notice was mailed, e-mailed, or delivered to customers and affected municipalities and stating the dates of such delivery, shall be filed with the commission by the applicant utility as part of the rate change application. Notice to customers is sufficient if properly stamped and addressed to the customer and deposited in the United States mail at least 60 days before the effective date.

(f) Standby fees. A utility may request in a rate change application that standby fees be approved for property or lots for which the utility has previously entered into an agreement to serve or construction of water or sewer utility facilities has already begun or been completed if the developer owning the property at the time the rate change application is filed is given individual written notice by certified mail of the request and an opportunity to protest.

(g) Emergency rate increase in certain circumstances. After receiving a request, the commission or executive director may authorize an emergency rate increase under Texas Water Code (TWC), §5.508 and §13.4133 and Chapter 35 of this title (relating to Emergency and Temporary Orders and Permits; Temporary Suspension or Amendment of Permit Conditions) for a utility:

(1) for which a person has been appointed under TWC [~~Texas Water Code~~], §13.4132; or

(2) for which a receiver has been appointed under TWC [~~Texas Water Code~~], §13.412; and

(3) if the increase is necessary to ensure the provision of continuous and adequate services to the utility's customers.

(h) Line extension and construction charges. A utility shall request in a rate change application that its extension policy be approved or amended. The application must include the proposed tariff and other information requested by the executive director. The request may be made with a request to change one or more of the utility's other rates.

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

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205436
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 239-2548

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SUBCHAPTER G. CERTIFICATES OF CONVENIENCE AND NECESSITY

30 TAC §§291.102, 291.105, 291.113

Statutory Authority

The amendments are proposed under the authority of Texas Water Code (TWC), §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas.

The proposed amendments implement TWC, §§13.245(b) - (c-5), 13.2451(a) - (b-3), 13.246(h), and 13.254(a-1) - (a-3), (a-5), (a-6), (a-8) - (a-11), and (h).

§291.102. Criteria for Considering and Granting Certificates or Amendments.

(a) In determining whether to grant or amend a certificate of public convenience and necessity (CCN), the commission shall ensure that the applicant possesses the financial, managerial, and technical capability to provide continuous and adequate service.

(1) For water utility service, the commission shall ensure that the applicant is capable of providing drinking water that meets the requirements of Texas Health and Safety Code, Chapter 341 and commission rules and has access to an adequate supply of water.

(2) For sewer utility service, the commission shall ensure that the applicant is capable of meeting the commission's design criteria for sewer treatment plants, commission rules, and the Texas Water Code (TWC).

(b) Where a new CCN [~~certificate of convenience and necessity~~] is being issued for an area which would require construction of a physically separate water or sewer system, the applicant must demonstrate that regionalization or consolidation with another retail public utility is not economically feasible. To demonstrate this, the applicant must at a minimum provide:

(1) a list of all public drinking water supply systems or sewer systems within a two-mile radius of the proposed system;

(2) copies of written requests seeking to obtain service from each of the public drinking water supply systems or sewer systems or demonstrate that it is not economically feasible to obtain service from a neighboring public drinking water supply system or sewer system;

(3) copies of written responses from each of the systems from which written requests for service were made or evidence that they failed to respond;

(4) a description of the type of service that a neighboring public drinking water supply system or sewer system is willing to provide and comparison with service the applicant is proposing;

(5) an analysis of all necessary costs for constructing, operating, and maintaining the new system for at least the first five years, including such items as taxes and insurance;

(6) an analysis of all necessary costs for acquiring and continuing to receive service from the neighboring public drinking water supply system or sewer system for at least the first five years.

(c) The commission may approve applications and grant or amend a certificate only after finding that the certificate or amendment is necessary for the service, accommodation, convenience, or safety of the public. The commission may issue or amend the certificate as applied for, or refuse to issue it, or issue it for the construction of a portion only of the contemplated system or facility or extension thereof, or for the partial exercise only of the right or privilege and may impose special conditions necessary to ensure that continuous and adequate service is provided.

(d) In considering whether to grant or amend a certificate, the commission shall also consider:

(1) the adequacy of service currently provided to the requested area;

(2) the need for additional service in the requested area, including, but not limited to:

(A) whether any landowners, prospective landowners, tenants, or residents have requested service;

(B) economic needs;

(C) environmental needs;

(D) written application or requests for service; or

(E) reports or market studies demonstrating existing or anticipated growth in the area;

(3) the effect of the granting of a certificate or of an amendment on the recipient of the certificate or amendment, on the landowners in the area, and on any retail public utility of the same kind already serving the proximate area, including, but not limited to, regionalization, compliance, and economic effects;

(4) the ability of the applicant to provide adequate service, including meeting the standards of the commission, taking into consideration the current and projected density and land use of the area;

(5) the feasibility of obtaining service from an adjacent retail public utility;

(6) the financial ability of the applicant to pay for the facilities necessary to provide continuous and adequate service and the financial stability of the applicant, including, if applicable, the adequacy of the applicant's debt-equity ratio;

(7) environmental integrity;

(8) the probable improvement in service or lowering of cost to consumers in that area resulting from the granting of the certificate or amendment; and

(9) the effect on the land to be included in the certificated area.

(e) The commission may require an applicant for a certificate or for an amendment to provide a bond or other financial assurance to ensure that continuous and adequate utility service is provided. The commission shall set the amount of financial assurance. The form of the financial assurance will be as specified in Chapter 37, Subchapter O of this title (relating to Financial Assurance for Public Drinking Water Systems and Utilities).

(f) Where applicable, in addition to the other factors in this section the commission shall consider the efforts of the applicant to extend service to any economically distressed areas located within the service areas certificated to the applicant. For purposes of this subsection, "economically distressed area" has the meaning assigned in TWC [~~Texas Water Code~~], §15.001.

(g) For two or more retail public utilities that apply for a CCN [~~certificate of convenience and necessity~~] to provide water or sewer utility service to an uncertificated area located in an economically distressed area as defined in TWC [~~Texas Water Code~~], §15.001, the executive director shall conduct an assessment of the applicants to determine which applicant is more capable financially, managerially and technically of providing continuous and adequate service. The assessment shall be conducted after the preliminary hearing and only if the parties are unable to resolve the service area dispute. The assessment shall be conducted using a standard form designed by the executive director and will include:

(1) all criteria from subsections (a) - (f) of this section;

(2) source water adequacy;

(3) infrastructure adequacy;

(4) technical knowledge of the applicant;

(5) ownership accountability;

(6) staffing and organization;

(7) revenue sufficiency;

(8) credit worthiness;

(9) fiscal management and controls;

(10) compliance history; and

(11) planning reports or studies by the applicant to serve the proposed area.

(h) Except as provided by subsection (i) of this section, a landowner who owns a tract of land that is at least 25 acres and that is wholly or partially located within the proposed service area may elect to exclude some or all of the landowner's property from the proposed service area by providing written notice to the commission before the 30th day after the date the landowner receives notice of a new application for a CCN [~~certificate of public convenience and necessity~~] or for an amendment to an existing CCN [~~certificate of public convenience and necessity~~]. The landowner's election is effective without a further hearing or other process by the commission. If a landowner makes an election under this subsection, the application shall be modified so that the electing landowner's property is not included in the proposed service area. An applicant for a CCN that has land removed from its proposed certificated service area because of a landowner's election under this subsection may not be required to provide service to the removed land for any reason, including the violation of law or commission rules by the water or sewer system of another person.

(i) A landowner is not entitled to make an election under subsection (h) of this section but is entitled to contest the inclusion of the landowner's property in the proposed service area at a hearing held by the commission regarding the application if the proposed service area is located within the boundaries or extraterritorial jurisdiction of a municipality with a population of more than 500,000 and the municipality or a utility owned by the municipality is the applicant.

§291.105. Contents of Certificate of Convenience and Necessity Applications.

(a) Application. To obtain a certificate of public convenience and necessity (CCN) or an amendment to a certificate, a public utility or water supply or sewer service corporation shall submit to the commission an application for a certificate or for an amendment as provided by this section. Applications for CCNs or for an amendment to a certificate must contain an original and three copies of the following materials, unless otherwise specified in the application:

(1) the appropriate application form prescribed by the commission, completed as instructed and properly executed;

(2) a map and description of only the proposed service area by:

(A) metes and bounds survey certified by a licensed state land surveyor or a registered professional land surveyor;

(B) the Texas State Plane Coordinate System or any standard map projection and corresponding metadata;

(C) verifiable landmarks, including a road, creek, or railroad line; or

(D) a copy of the recorded plat of the area, if it exists, with lot and block number; and

(E) maps as described in §291.119 of this title (relating to Filing of Maps);

(F) a general location map; and

(G) other maps as requested by the executive director or required by §281.16 of this title (relating to Applications for Certificates of Convenience and Necessity);

(3) a description of any requests for service in the proposed service area;

(4) any evidence as required by the commission to show that the applicant has received the necessary consent, franchise, permit, or license from the proper municipality or other public authority;

(5) an explanation of the applicant's reasons for contending that issuance of a certificate as requested is necessary for the service, accommodation, convenience, or safety of the public;

(6) a capital improvements plan, including a budget and estimated time line for construction of all facilities necessary to provide full service to the entire proposed service area, keyed to maps showing where such facilities will be located to provide service;

(7) a description of the sources of funding for all facilities;

(8) for utilities or water supply or sewer service corporation previously exempted for operations or extensions in progress as of September 1, 1975, a list of all current customer locations which were being served on September 1, 1975, and an accurate location of them on the maps submitted. Current customer locations which were not be-

ing served on that date should also be located on the same map in a way which clearly distinguishes the two groups;

(9) disclosure of all affiliated interests as defined by §291.3 of this title (relating to Definitions of Terms);

(10) to the extent known, a description of current and projected land uses, including densities;

(11) a current financial statement of the applicant;

(12) according to the tax roll of the central appraisal district for each county in which the proposed service area is located, a list of the owners of each tract of land that is:

(A) at least 25 acres; and

(B) wholly or partially located within the proposed service area;

(13) if dual certification is being requested, and an agreement between the affected utilities exists, a copy of the agreement;

(14) for a water CCN for a new or existing system, a copy of:

(A) the approval letter for the commission-approved plans and specifications for the system or proof that the applicant has submitted either a preliminary engineering report or plans and specification for the first phase of the system unless §290.39(j)(1)(D) of this title (relating to General Provisions) applies;

(B) other information that indicates the applicant is in compliance with §291.93 of this title (relating to Adequacy of Water Utility Service) for the system; or

(C) a contract with a wholesale provider that meets the requirements in §291.93 of this title;

(15) for a sewer CCN for a new or existing facility, a copy of:

(A) a wastewater permit or proof that a wastewater permit application for that facility has been filed with the commission;

(B) other information that indicates that the applicant is in compliance with §291.94 of this title (relating to Adequacy of Sewer Service) for the facility; or

(C) a contract with a wholesale provider that meets the requirements in §291.94 of this title; and

(16) any other item required by the commission or executive director.

(b) Application within the municipal boundaries or extraterritorial jurisdiction of certain municipalities.

(1) This subsection applies only to a municipality with a population of 500,000 or more.

(2) Except as provided by paragraphs (3) - (7) [~~paragraph (3)~~] of this subsection, the commission may not grant to a retail public utility a CCN for a service area within the boundaries or extraterritorial jurisdiction of a municipality without the consent of the municipality. The municipality may not unreasonably withhold the consent. As a condition of the consent, a municipality may require that all water and sewer facilities be designed and constructed in accordance with the municipality's standards for facilities.

(3) If a municipality has not consented under paragraph (2) of this subsection before the 180th day after the date the municipality receives the retail public utility's application, the commission shall grant the CCN without the consent of the municipality if the commission finds that the municipality:

(A) does not have the ability to provide service; or

(B) has failed to make a good faith effort to provide service on reasonable terms and conditions.

(4) If a municipality has not consented under this subsection before the 180th day after the date a landowner or a retail public utility submits to the municipality a formal request for service according to the municipality's application requirements and standards for facilities on the same or substantially similar terms as provided by the retail public utility's application to the commission, including a capital improvements plan required by Texas Water Code (TWC), §13.244(d)(3) or a subdivision plat, the commission may grant the CCN without the consent of the municipality if:

(A) the commission makes the findings required by paragraph (3) of this subsection;

(B) the municipality has not entered into a binding commitment to serve the area that is the subject of the retail public utility's application to the commission before the 180th day after the date the formal request was made; and

(C) the landowner or retail public utility that submitted the formal request has not unreasonably refused to:

(i) comply with the municipality's service extension and development process; or

(ii) enter into a contract for water or sewer services with the municipality.

(5) If a municipality refuses to provide service in the proposed service area, as evidenced by a formal vote of the municipality's governing body or an official notification from the municipality, the commission is not required to make the findings otherwise required by this section and may grant the CCN to the retail public utility at any time after the date of the formal vote or receipt of the official notification.

(6) The commission must include as a condition of a CCN granted under paragraph (4) or (5) of this subsection that all water and sewer facilities be designed and constructed in accordance with the municipality's standards for water and sewer facilities.

(7) Paragraphs (4) - (6) of this subsection do not apply in the following counties: Cameron, Fannin, Grayson, Guadalupe, Hidalgo, Willacy, or Wilson.

(8) [~~(4)~~] A commitment by a city to provide service must, at a minimum, provide that the construction of service facilities will begin within one year and will be substantially completed within two years after the date the retail public utility's application was filed with the municipality.

(9) [~~(5)~~] If the commission makes a decision under paragraph (3) of this subsection regarding the granting of a CCN without the consent of the municipality, the municipality or the retail public utility may appeal the decision to the appropriate state district court.

(c) Extension beyond extraterritorial jurisdiction.

(1) Except as provided by paragraph (2) of this subsection, if [~~If~~] a municipality extends its extraterritorial jurisdiction to include an area certificated to a retail public utility, the retail public utility may continue and extend service in its area of public convenience and necessity under the rights granted by its certificate and this chapter.

(2) The commission may not extend a municipality's CCN beyond its extraterritorial jurisdiction if an owner of land that is located wholly or partly outside the extraterritorial jurisdiction elects to exclude some or all of the landowner's property within a proposed service area in accordance with TWC, §13.246(h). This subsection does not apply to a transfer of a certificate as approved by the commission. [~~A municipality that seeks to extend a certificate of public convenience and necessity beyond the municipality's extraterritorial jurisdiction must ensure that the municipality complies with Texas Water Code (TWC), §13.241, in relation to the area covered by the portion of the certificate that extends beyond the municipality's extraterritorial jurisdiction.~~]

(3) Paragraph (2) of this subsection does not apply to an extension of extraterritorial jurisdiction in Cameron, Fannin, Grayson, Guadalupe, Hidalgo, Willacy, or Wilson Counties.

(4) [~~(3)~~] To the extent of a conflict between this subsection and TWC, §13.245, TWC, §13.245 prevails.

(d) Area within municipality.

(1) If an area is within the boundaries of a municipality, all retail public utilities certified or entitled to certification under this chapter to provide service or operate facilities in that area may continue and extend service in its area of public convenience and necessity within the area under the rights granted by its certificate and this chapter, unless the municipality exercises its power of eminent domain to acquire the property of the retail public utility under this subsection. Except as provided by TWC [~~Texas Water Code~~], §13.255, a municipally owned or operated utility may not provide retail water and sewer utility service within the area certificated to another retail public utility without first having obtained from the commission a CCN that includes the areas to be served.

(2) This subsection may not be construed as limiting the power of municipalities to incorporate or extend their boundaries by annexation, or as prohibiting any municipality from levying taxes and other special charges for the use of the streets as are authorized by Texas Tax Code, §182.025.

(3) In addition to any other rights provided by law, a municipality with a population of more than 500,000 may exercise the power of eminent domain in the manner provided by Texas Property Code, Chapter 21, to acquire a substandard water or sewer system if all the facilities of the system are located entirely within the municipality's boundaries. The municipality shall pay just and adequate compensation for the property. In this subsection, substandard water or sewer system means a system that is not in compliance with the municipality's standards for water and wastewater service.

(A) A municipality shall notify the commission no later than seven days after filing an eminent domain lawsuit to acquire a substandard water or sewer system and also notify the commission no later than seven days after acquiring the system.

(B) With the notification of filing its eminent domain lawsuit, the municipality, in its sole discretion, shall either request that the commission cancel the CCN of the acquired system or transfer the certificate to the municipality and the commission shall take such requested action upon notification of acquisition of the system.

§291.113. Revocation or Amendment of Certificate.

(a) A certificate or other order of the commission does not become a vested right and the commission at any time after notice and hearing may [~~on its own motion or on receipt of a petition~~] revoke or amend any certificate of public convenience and necessity (CCN) with the written consent of the certificate holder or if it finds that:

(1) the certificate holder has never provided, is no longer providing service, is incapable of providing service, or has failed to provide continuous and adequate service in the area or part of the area covered by the certificate;

(2) in an affected county, the cost of providing service by the certificate holder is so prohibitively expensive as to constitute denial of service, provided that, for commercial developments or for residential developments started after September 1, 1997, in an affected county, the fact that the cost of obtaining service from the currently certificated retail public utility makes the development economically unfeasible does not render such cost prohibitively expensive in the absence of other relevant factors;

(3) the certificate holder has agreed in writing to allow another retail public utility to provide service within its service area, except for an interim period, without amending its certificate;

(4) the certificate holder has failed to file a cease and desist action under Texas Water Code (TWC), §13.252 within 180 days of the date that it became aware that another retail public utility was providing service within its service area, unless the certificate holder demonstrates good cause for its failure to file such action within the 180 days; or

(5) in an area certificated to a municipality outside the municipality's extraterritorial jurisdiction, the municipality has not provided service to the area on or before the fifth anniversary of the date the CCN [~~certificate of public convenience and necessity~~] was granted for the area, except that an area that was transferred to a municipality on approval of the commission or the executive director and in which the municipality has spent public funds may not be revoked or amended under this paragraph.

(b) As an alternative to decertification under subsection (a) of this section, the owner of a tract of land that is at least 50 acres and that is not in a platted subdivision actually receiving water or sewer service may petition the commission under this subsection for expedited release of the area from a CCN [~~certificate of public convenience and necessity~~] so that the area may receive service from another retail public utility. The fact that a certificate holder is a borrower under a federal loan program is not a bar to a request under this subsection for the release of the petitioner's land and the receipt of services from an alternative provider. On the day the petitioner submits the petition to [~~Prior to the petition being filed with~~] the commission, the petitioner shall send [~~deliver~~], via certified mail, a copy of the petition to the certificate holder, who may submit information to the commission to controvert information submitted by the petitioner. The petitioner must demonstrate that:

(1) a written request for service, other than a request for standard residential or commercial service, has been submitted to the certificate holder, identifying:

(A) the area for which service is sought shown on a map with descriptions according to §291.105(a)(2)(A) - (G) of this title (relating to Contents of Certificate of Convenience and Necessity Applications);

(B) the time frame within which service is needed for current and projected service demands in the area;

(C) the level and manner of service needed for current and projected service demands in the area; [~~and~~]

(D) the approximate cost for the alternative provider to provide the service at the same level and manner that is requested from the certificate holder;

(E) the flow and pressure requirements and specific infrastructure needs, including line size and system capacity for the required level of fire protection requested; and

(F) [~~(D)~~] any additional information requested by the certificate holder that is reasonably related to determination of the capacity or cost for providing the service;

(2) the certificate holder has been allowed at least 90 calendar days to review and respond to the written request and the information it contains;

(3) the certificate holder:

(A) has refused to provide the service;

(B) is not capable of providing the service on a continuous and adequate basis within the time frame, at the level, at the approximate cost that the alternative provider is capable of providing for a comparable level of service, or in the manner reasonably needed or requested by current and projected service demands in the area; or

(C) conditions the provision of service on the payment of costs not properly allocable directly to the petitioner's service request, as determined by the commission; and

(4) the alternate retail public utility from which the petitioner will be requesting service possesses the financial, managerial, and technical capability to provide [~~is capable of providing~~] continuous and adequate service within the time frame, at the level, at the cost, and in the manner reasonably needed or requested by current and projected service demands in the area. An alternate retail public utility is limited to:

(A) an existing retail public utility; or

(B) a district proposed to be created under Texas Constitution, Article 16, §59 or Article 3, §52. If an area is decertificated under a petition filed in accordance with subsection (d) of this section in favor of such a proposed district, the commission may order that final decertification is conditioned upon the final and unappealable creation of the district and that prior to final decertification the duty of the certificate holder to provide continuous and adequate service is held in abeyance.

(c) A landowner is not entitled to make the election described in subsections (b) or (r) [~~subsection (b)~~] of this section but is entitled to contest under subsection (a) of this section the involuntary certification of its property in a hearing held by the commission if the landowner's property is located:

(1) within the boundaries of any municipality or the extraterritorial jurisdiction of a municipality with a population of more than 500,000 and the municipality or retail public utility owned by the municipality is the holder of the certificate; or

(2) in a platted subdivision actually receiving water or sewer service.

(d) Within 60 [~~90~~] calendar days from the date the commission determines the petition filed under subsection (b) of this section to be administratively complete, the commission or executive director shall grant the petition unless the commission or executive director makes an express finding that the petitioner failed to satisfy the elements required in subsection (b) of this section and supports its finding with separate findings and conclusions for each element based solely on the information provided by the petitioner and the certificate holder. The commission or executive director may grant or deny a petition subject to terms and conditions specifically related to the service request of the petitioner and all relevant information submitted by the petitioner and the certificate holder. In addition, the commission may require an award of compensation as otherwise provided by this section.

(e) Texas Government Code, Chapter 2001, does not apply to any petition filed under subsection (b) of this section. The decision of the commission or executive director on the petition is final after any reconsideration authorized under §50.139 of this title (relating to Motion to Overturn Executive Director's Decision) and may not be appealed.

(f) Upon written request from the certificate holder, the executive director may cancel the certificate of a utility or water supply corporation authorized by rule to operate without a CCN [~~certificate of public convenience and necessity~~] under TWC [~~Texas Water Code~~], §13.242(c).

(g) If the certificate of any retail public utility is revoked or amended, the commission may require one or more retail public utilities to provide service in the area in question. The order of the commission shall not be effective to transfer property.

(h) A retail public utility may not in any way render retail water or sewer service directly or indirectly to the public in an area that has been decertified under this section unless the retail public utility, or a petitioner under subsection (r) of this section, provides [~~without providing~~] compensation for any property that the commission determines is rendered useless or valueless to the decertified retail public utility as a result of the decertification.

(i) The determination of the monetary amount of compensation, if any, shall be determined at the time another retail public utility seeks to provide service in the previously decertified area and before service is actually provided but no later than the 90th calendar day after the date on which a retail public utility notifies the commission of its intent to provide service to the decertified area.

(j) The monetary amount shall be determined by a qualified individual or firm serving as independent appraiser agreed upon by the decertified retail public utility and the retail public utility seeking to serve the area. The determination of compensation by the independent appraiser shall be binding on the commission. The costs of the independent appraiser shall be borne by the retail public utility seeking to serve the area.

(1) If the retail public utilities cannot agree on an independent appraiser within ten calendar days after the date on which the retail public utility notifies the commission of its intent to provide service to the decertified area, each retail public utility shall engage its own appraiser at its own expense, and each appraisal shall be submitted to the commission within 60 calendar days after the date on which the retail public utility notified the commission of its intent to provide service to the decertified area.

(2) After receiving the appraisals, the commission or executive director shall appoint a third appraiser who shall make a determination of the compensation within 30 days after the commission receives the appraisals. The determination may not be less than the lower appraisal or more than the higher appraisal. Each retail public utility shall pay one-half of the cost of the third appraisal.

(k) For the purpose of implementing this section, the value of real property owned and utilized by the retail public utility for its facilities shall be determined according to the standards set forth in Texas Property Code, Chapter 21, governing actions in eminent domain and the value of personal property shall be determined according to the factors in this subsection. The factors ensuring that the compensation to a retail public utility is just and adequate shall include: the amount of the retail public utility's debt allocable for service to the area in question; the value of the service facilities of the retail public utility located within the area in question; the amount of any expenditures for plan-

ning, design, or construction of service facilities that are allocable to service to the area in question; the amount of the retail public utility's contractual obligations allocable to the area in question; any demonstrated impairment of service or increase of cost to consumers of the retail public utility remaining after the decertification; the impact on future revenues lost from existing customers; necessary and reasonable legal expenses and professional fees; and other relevant factors.

(l) As a condition to decertification or single certification under TWC [~~Texas Water Code~~], §13.254 or §13.255, and on request by a retail public utility that has lost certificated service rights to another retail public utility, the commission may order:

(1) the retail public utility seeking to provide service to a decertified area to serve the entire service area of the retail public utility that is being decertified; and

(2) the transfer of the entire CCN [~~certificate of public convenience and necessity~~] of a partially decertified retail public utility to the retail public utility seeking to provide service to the decertified area.

(m) The commission shall order service to the entire area under subsection (l) of this section if the commission finds that the decertified retail public utility will be unable to provide continuous and adequate service at an affordable cost to the remaining customers.

(n) The commission shall require the retail public utility seeking to provide service to the decertified area to provide continuous and adequate service to the remaining customers at a cost comparable to the cost of that service to its other customers and shall establish the terms under which the service must be provided. The terms may include:

(1) transferring debt and other contract obligations;

(2) transferring real and personal property;

(3) establishing interim service rates for affected customers during specified times; and

(4) other provisions necessary for the just and reasonable allocation of assets and liabilities.

(o) The retail public utility seeking decertification shall not charge the affected customers any transfer fee or other fee to obtain service other than the retail public utility's usual and customary rates for monthly service or the interim rates set by the commission, if applicable.

(p) The commission shall not order compensation to the decertificated retail public utility if service to the entire service area is ordered under this section.

(q) Within ten calendar days after receipt of notice that a decertification process has been initiated, a retail public utility with outstanding debt secured by one or more liens shall:

(1) submit to the executive director a written list with the names and addresses of the lienholders and the amount of debt; and

(2) notify the lienholders of the decertification process and request that the lienholder provide information to the executive director sufficient to establish the amount of compensation necessary to avoid impairment of any debt allocable to the area in question.

(r) As an alternative to decertification under subsection (a) of this section and expedited release under subsection (b) of this section, the owner of a tract of land that is at least 25 acres and that is not receiving water or sewer service may petition for expedited release of the area from a CCN and is entitled to that release if the landowner's property is located in Atascosa, Bandera, Bastrop, Bexar, Blanco, Brazoria, Burnet, Caldwell, Chambers, Collin, Comal, Dallas, Denton, Ellis, Fort Bend, Galveston, Guadalupe, Harris, Hays, Johnson, Kaufman, Kendall, Liberty, Montgomery, Parker, Rockwall, Smith, Tarrant, Travis, Waller, Williamson, Wilson, or Wise County.

(s) On the same day the petitioner submits the petition to the commission, the petitioner shall send, via certified mail, a copy of the petition to the CCN holder. The CCN holder may submit a response to the commission. The commission or the executive director shall grant a petition received under subsection (r) of this section not later than the 60th calendar day after the date the landowner files the petition. The commission or the executive director may not deny a petition received under subsection (r) of this section based on the fact that a certificate holder is a borrower under a federal loan program. The commission may require an award of compensation by the petitioner to a decertified retail public utility that is the subject of a petition filed under subsection (r) of this section as otherwise provided by this section. An award of compensation required by a retail public utility seeking to serve the decertified area is governed by subsections (h) - (k) of this section.

(t) If a certificate holder has never made service available through planning, design, construction of facilities, or contractual obligations to serve the area a petitioner seeks to have released under subsection (b) of this section, the commission is not required to find that the proposed alternative provider is capable of providing better service than the certificate holder, but only that the proposed alternative provider is capable of providing the requested service.

(u) Subsection (t) of this section does not apply in Cameron, Fannin, Grayson, Guadalupe, Hidalgo, Willacy, or Wilson Counties.

(v) A certificate holder that has land removed from its certificated service area in accordance with this section may not be required, after the land is removed, to provide service to the removed land for any reason, including the violation of law or commission rules by a water or sewer system of another person.

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

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205437
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 239-2548

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CHAPTER 293. WATER DISTRICTS

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes amendments to §§293.11, 293.32, 293.41, 293.51, and 293.81.

Background and Summary of the Factual Basis for the Proposed Rules

The 82nd Legislature, 2011, passed House Bill (HB) 679 and HB 1901 and Senate Bill (SB) 18, SB 512, SB 914, and SB 1234. HB 679 increased the allowable district change order amount and amended Texas Water Code (TWC), §49.273(i). HB 1901 applies to the executive director's bond approval provisions. HB 1901 amended TWC, §§49.181(a) and (h), 49.052(f), and 49.183(d) to allow an exemption from executive director approval for bonds issued by a public utility agency. SB 18

amended TWC, §54.209 to place additional limits on eminent domain power of a municipal utility district (MUD) outside of its corporate boundary. SB 512 amended TWC, §53.063, to redefine the qualifications of supervisors of a fresh water supply district (FWSD). SB 914 amended TWC, §49.181, to allow an exemption from executive director approval for bonds issued by a conservation and reclamation district located in at least three counties that has the rights, powers, privileges and functions applicable to a river authority. SB 1234 amended Local Government Code, §375.022, to allow a municipal management district (MMD) to include, within its creation petition, a boundary description using verifiable landmarks and a descriptive name followed by the phrase "improvement district."

The commission has the statutory responsibility and authority to create, supervise, and dissolve certain water and water-related districts and to review the sale and issuance of bonds for district improvements in accordance with TWC, Chapters 12, 36, and 49 - 67. The commission oversees approximately 1,500 active water districts in Texas. Chapter 293 of the commission's rules governs the creation, supervision, and dissolution of most general and special law districts and the conversion of certain districts. Chapter 293 also governs the commission's review of bond applications by districts relating to engineering standards and economic feasibility of district construction, project design, and completion.

The proposed rulemaking would add or amend requirements relating to the administration of water districts and the commission's supervision over districts' actions under TWC, Chapters 49, 53, and 54, and Local Government Code, Chapter 375. The proposed revisions amend and clarify commission rule language to conform with the statutory changes made to TWC, Chapters 49, 53, and 54, and Local Government Code, Chapter 375 from HB 679, HB 1901, SB 18, SB 512, SB 914, and SB 1234. Specifically, the proposed rules would increase the amount of construction project change orders exempt from commission review from $25,000 to $50,000 (HB 679); provide special provisions which exempt bonds issued by a public utility agency from executive director approval (HB 1901); place additional limits on the eminent domain power of a MUD outside of its corporate boundary (SB 18); provide an alternative election qualification for an FWSD director (SB 512); provide for the exemption of a conservation and reclamation district located in at least three counties that has the rights, powers, privileges, and functions applicable to a river authority from the requirement of obtaining prior bond approval from the commission (SB 914); and allow an MMD to include within its creation petition a boundary description using verifiable landmarks and a descriptive name followed by the phrase "improvement district" (SB 1234).

In a corresponding rulemaking published in this issue of the *Texas Register,* the commission also proposes revisions to 30 TAC Chapter 291, Utility Regulations.

Section by Section Discussion

In addition to implementation of the state laws discussed previously, the commission proposes administrative changes to conform with *Texas Register* requirements.

§293.11, Information Required to Accompany Applications for Creation of Districts

The commission proposes to amend §293.11(j)(1)(A) and (D) to stipulate that a MMD may include, within its creation petition, a boundary description using verifiable landmarks and a descriptive name followed by the phrase "improvement district." This proposed rule change is consistent with Local Government Code, Chapter 375, as amended by SB 1234 and with TWC, Chapters 49 and 54.

§293.32, Qualifications of Directors

The commission proposes to amend §293.32(a)(1)(B) to reflect a modification for election qualifications of an FWSD director. This proposed rule change is consistent with TWC, §53.063, as amended by SB 512.

§293.41, Approval of Projects and Issuance of Bonds

The commission proposes to amend §293.41(a) and (d) to reflect that a district is not required to obtain commission approval of its bonds if the district is a river authority as defined by TWC, Chapter 30, located entirely in at least three counties; or a public utility agency having at least one of the participating public entities being a MUD located entirely in only two counties, outstanding long-term indebtedness that is rated BBB or better by a nationally recognized rating agency for municipal securities, and has at least 5,000 active water connections. The proposed amendment is consistent with Local Government Code, Chapter 572; TWC, Chapter 30; and TWC, §49.181, as amended by HB 1901 and SB 914.

§293.51, Land and Easement Acquisition

The commission proposes to amend §293.51(e)(2) - (4) to reduce potential confusion by reflecting a MUD's restriction in the use of eminent domain powers outside of its boundaries. The proposed amendment is consistent with TWC, §54.209, as amended by SB 18. The commission also proposes an amendment to §293.51(g) to correct a misspelling.

§293.81, Change Orders

The commission proposes to amend §293.81(2) and (3) to reflect an increase to $50,000 to an allowable change order consistent with TWC, §49.273(i), as amended by HB 679.

Fiscal Note: Costs to State and Local Government

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local government as a result of administration or enforcement of the proposed rules. The agency would use existing resources to implement the proposed rules.

The proposed rules would amend Chapter 293 to incorporate provisions of HB 679, HB 1901, SB 18, SB 512, SB 914, and SB 1234. Specifically, the proposed rules would increase the amount of construction project change orders exempt from commission review from $25,000 to $50,000 (HB 679); provide special provisions which would exempt public utility bond issuances from executive director approval (HB 1901); place additional limits on the eminent domain power of a MUD outside of its corporate boundary (SB 18); provide an alternative election qualification for an FWSD director (SB 512); provide for the exemption of a conservation and reclamation district located in at least three counties that has the rights, powers, privileges, and functions applicable to a river authority from the requirement of obtaining prior bond approval from the commission (SB 914); and allow an MMD to include, within its creation petition, a boundary description using verifiable landmarks and a descriptive name followed by the phrase "improvement district" (SB 1234).

The agency oversees approximately 1,500 active water districts in Texas. The proposed rules are administrative in nature and afford additional flexibility and efficiency to water districts regarding their administration and operation. The proposed rules could reduce water district costs, but any cost reductions are not expected to be significant. The significance of any fiscal impact of the proposed rules would vary among water districts and would depend on the unique operating environment of each district.

Public Benefits and Costs

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law and greater operating flexibility for water districts while protecting the environment and public health and safety.

The proposed rules would not have a significant fiscal impact on individuals or large businesses. The proposed rules are administrative in nature and afford additional flexibility and efficiency to water districts regarding their administration and operation. Developers could experience benefits from the efficiency gains under the proposed rules. However, the significance of any fiscal impact of the proposed rules would vary among water districts and would depend on the unique operating environment of each district and each developer.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses under the proposed rules.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with state law and do not adversely affect a small or micro-business in a material way for the first five years that the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission has reviewed these proposed amendments to Chapter 293 in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that this rulemaking project is not a "major environmental rule" as defined in the Texas Administrative Procedure Act and thus is not subject to the other provisions of Texas Government Code, §2001.0225.

A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state (See Texas Government Code, §2001.0225(g)(3)). The proposed amendments do not meet those qualifications where the primary purpose of this rulemaking initiative is to create and amend rules in Chapter 293 to remain consistent with the statutory changes set forth in HB 679, HB 1901, SB 18, SB 512, SB 914, and SB 1234. As to these six enacted bills, this rulemaking initiative proposes to modify rules within Chapter 293 to accomplish the following: (1) providing authority to approve a change order that involves an increase or decrease of $50,000 or less; (2) providing exemption from the executive director's approval of bonds issued by a public utility agency having at least one of the participating public entities being a MUD located entirely in only two counties, outstanding long-term indebtedness that is rated BBB or better by a nationally recognized rating agency for municipal securities, and has at least 5,000 active water connections; (3) limiting the circumstances under which a district may exercise its authority to exercise the power of eminent domain outside the district's boundaries; (4) modifying the qualifications to be a supervisor of an FWSD; (5) providing exemption from the executive director's approval of bonds issued by a district that is a river authority as defined by TWC, Chapter 30, located entirely in at least three counties; and (6) allowing in the creation petition of an MMD a description of its boundaries by verifiable landmarks and including its name that is generally descriptive of its location followed by "Management District" or "Improvement District." While the commission has general jurisdiction over districts and authority to propose rules impacting districts, these proposed changes to the operating processes of districts are not specifically intended to protect the environment or reduce risks to human health from environmental exposure. Therefore, the proposed rulemaking does not constitute a major environmental rule and is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225.

The commission invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007. The purpose of this proposed rulemaking action is to keep the commission's rules consistent with the changes in TWC, Chapters 12, 36, and 49 - 67 made in HB 679, HB 1901, SB 18, SB 512, SB 914, and SB 1234. The proposed rules would substantially advance this stated purpose because these proposed changes impact a district's ability to increase the allowable change order amount, exempt bonds issued by a public utility agency from executive director approval, further limit eminent domain powers of a MUD outside its boundary, modify the election qualifications for an FWSD director, and exempt bonds issued by certain multi-county districts from the executive director's approval.

Promulgation and enforcement of these proposed rules regarding the operations of districts would be neither a statutory nor a constitutional taking of private real property. The proposed regulations do not affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because this rulemaking does not burden, restrict or limit the owner's right to property or reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. The statutory changes set forth in HB 679, HB 1901, SB 18, SB 512, SB 914, and SB 1234 also do not impact private real property rights. Specifically, private real property rights do not pertain to a district's ability to increase the allowable change order amount, exempt bonds issued by a public utility agency from the executive director's approval, further limit eminent domain powers of a MUD outside its boundary, modify the election

qualifications for an FWSD director, or exempt bonds issued by certain multi-county districts from commission approval. In addition, while the issue of eminent domain may pertain to private real property rights, the proposed rule changes implementing SB 18 do not impact these property rights where the rules reduce the circumstances when a district can exercise this power. Thus, these proposed rules do not impose a burden on private real property but instead benefit society by improving the process for districts to operate and for the commission to supervise, which should ultimately improve the quality of service that is provided to their customers. Therefore, the proposed amendments do not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(4), relating to rules subject to the Coastal Management Program, and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on December 4, 2012, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2011-055-293-OW. The comment period closes December 10, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html*. For further information, please contact Kent Steelman, Utilities and Districts Section, (512) 239-5143.

SUBCHAPTER B. CREATION OF WATER DISTRICTS

30 TAC §293.11

Statutory Authority

The amendment is proposed under the authority of Texas Water Code (TWC), §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas.

The proposed amendment implements TWC, §49.052(f) and §49.181(a) and (h).

§293.11. Information Required to Accompany Applications for Creation of Districts.

(a) Creation applications for all types of districts, excluding groundwater conservation districts, shall contain the following:

(1) $700 nonrefundable application fee;

(2) if a proposed district's purpose is to supply fresh water for domestic or commercial use or to provide wastewater services, roadways, or drainage, a certified copy of the action of the governing body of any municipality in whose extraterritorial jurisdiction the proposed district is located, consenting to the creation of the proposed district, under Local Government Code, §42.042. If the governing body of any such municipality fails or refuses to grant consent, the petitioners must show that the provisions of Local Government Code, §42.042, have been followed;

(3) if city consent was obtained under paragraph (2) of this subsection, provide the following:

(A) evidence that the application conforms substantially to the city consent; provided, however, that nothing herein shall prevent the commission from creating a district with less land than included in the city consent;

(B) evidence that the city consent does not place any conditions or restrictions on a district other than those permitted by Texas Water Code (TWC), §54.016(e) and (i);

(4) a statement by the appropriate secretary or clerk that a copy of the petition for creation of the proposed district was received by any city in whose corporate limits any part of the proposed district is located;

(5) evidence of submitting a creation petition and report to the appropriate commission regional office;

(6) if substantial development is proposed, a market study and a developer's financial statement;

(7) if the petitioner is a corporation, trust, partnership, or joint venture, a certificate of corporate authorization to sign the petition, a certificate of the trustee's authorization to sign the petition, a copy of the partnership agreement or a copy of the joint venture agreement, as appropriate, to evidence that the person signing the petition is authorized to sign the petition on behalf of the corporation, trust, partnership, or joint venture;

(8) a vicinity map;

(9) unless waived by the executive director, for districts where substantial development is proposed, a certification by the petitioning landowners that those lienholders who signed the petition or a separate document consenting to the petition, or who were notified by certified mail, are the only persons holding liens on the land described in the petition;

(10) if the petitioner anticipates recreational facilities being an intended purpose, a detailed summary of the proposed recreational facility projects, projects' estimated costs, and proposed financing methods for the projects as part of the preliminary engineering report; and

(11) other related information as required by the executive director.

(b) Creation application requirements and procedures for TWC, Chapter 36, Groundwater Conservation Districts, are provided in Subchapter C of this chapter (relating to Special Requirements for Groundwater Conservation Districts).

(c) Creation applications for TWC, Chapter 51, Water Control and Improvement Districts, within two or more counties shall contain items listed in subsection (a) of this section and the following:

(1) a petition as required by TWC, §51.013, requesting creation signed by the majority of persons holding title to land representing a total value of more than 50% of value of all land in the proposed district as indicated by tax rolls of the central appraisal district, or if there are more than 50 persons holding title to land in the proposed district, the petition can be signed by 50 of them. The petition shall include the following:

(A) name of district;

(B) area and boundaries of district;

(C) constitutional authority;

(D) purpose(s) of district;

(E) statement of the general nature of work and necessity and feasibility of project with reasonable detail; and

(F) statement of estimated cost of project;

(2) evidence that the petition was filed with the office of the county clerk of the county(ies) in which the district or portions of the district are located;

(3) a map showing the district boundaries, metes and bounds, area, physical culture, and computation sheet for survey closure;

(4) a preliminary plan (22 - 24 inches by 36 inches or digital data in electronic format) showing the location of existing facilities including highways, roads, and other improvements, together with the location of proposed utility mains and sizing, general drainage patterns, principal drainage ditches and structures, utility plant sites, recreational areas, commercial and school sites, areas within the 100-year flood plain and 100-year floodway, and any other information pertinent to the project including an inventory of any existing water, wastewater, or drainage facilities;

(5) a preliminary engineering report including the following as applicable:

(A) a description of existing area, conditions, topography, and proposed improvements;

(B) land use plan;

(C) 100-year flood computations or source of information;

(D) existing and projected populations;

(E) tentative itemized cost estimates of the proposed capital improvements and itemized cost summary for anticipated bond issue requirement;

(F) projected tax rate and water and wastewater rates;

(G) an investigation and evaluation of the availability of comparable service from other systems including, but not limited to, water districts, municipalities, and regional authorities;

(H) an evaluation of the effect the district and its systems and subsequent development within the district will have on the following:

(i) land elevation;

(ii) subsidence;

(iii) groundwater level within the region;

(iv) recharge capability of a groundwater source;

(v) natural run-off rates and drainage; and

(vi) water quality;

(I) a table summarizing overlapping taxing entities and the most recent tax rates by those entities; and

(J) complete justification for creation of the district supported by evidence that the project is feasible, practicable, necessary, will benefit all of the land and residents to be included in the district, and will further the public welfare;

(6) a certificate by the central appraisal district indicating the owners and tax valuation of land within the proposed district as reflected on the county tax rolls as of the date of the petition or any amended petition. If the tax rolls do not show the petitioner(s) to be the owners of the majority of value of the land within the proposed district, then the petitioner(s) shall submit to the executive director a certified copy of the deed(s) tracing title from the person(s) listed on the central appraisal district certificate as owners of the land to the petitioner(s) and any additional information required by the executive director necessary to show accurately the ownership of the land to be included in the district;

(7) affidavits by those persons desiring appointment by the commission as temporary or initial directors, showing compliance with applicable statutory requirements of qualifications and eligibility for temporary or initial directors, in accordance with TWC, §49.052 and §51.072;

(8) if the application includes a request for approval of a fire plan, information meeting the requirements of §293.123 of this title (relating to Application Requirements for Fire Department Plan Approval), except for a certified copy of a district board resolution, references to a district board having adopted a plan, and the additional $100 filing fee; and

(9) other information as required by the executive director.

(d) Creation applications for TWC, Chapter 54, Municipal Utility Districts, shall contain items listed in subsection (a) of this section and the following:

(1) a petition containing the matters required by TWC, §54.014 and §54.015, signed by persons holding title to land representing a total value of more than 50% of the value of all land in the proposed district as indicated by tax rolls of the central appraisal district. If there are more than 50 persons holding title to land in the proposed district, the petition can be signed by 50 of them. The petition shall include the following:

(A) name of district;

(B) area and boundaries of district described by metes and bounds or lot and block number, if there is a recorded map or plat and survey of the area;

(C) necessity for the work;

(D) statement of the general nature of work proposed; and

(E) statement of estimated cost of project;

(2) evidence that the petition was filed with the office of the county clerk of the county(ies) in which the district or portions of the district are located;

(3) a map showing the district boundaries in metes and bounds, area, physical culture, and computation sheet for survey closure;

(4) a preliminary plan (22 - 24 inches by 36 inches or digital data in electronic format) showing the location of existing facilities including highways, roads, and other improvements, together with the location of proposed utility mains and sizing, general drainage patterns, principal drainage ditches and structures, utility plant sites, recreational areas, commercial and school sites, areas within the 100-year flood plain and 100-year floodway, and any other information pertinent to the project including an inventory of any existing water, wastewater, or drainage facilities;

(5) a preliminary engineering report including as appropriate:

(A) a description of existing area, conditions, topography, and proposed improvements;

(B) land use plan;

(C) 100-year flood computations or source of information;

(D) existing and projected populations;

(E) tentative itemized cost estimates of the proposed capital improvements and itemized cost summary for anticipated bond issue requirement;

(F) projected tax rate and water and wastewater rates;

(G) an investigation and evaluation of the availability of comparable service from other systems including, but not limited to, water districts, municipalities, and regional authorities;

(H) an evaluation of the effect the district and its systems and subsequent development within the district will have on the following:

(i) land elevation;

(ii) subsidence;

(iii) groundwater level within the region;

(iv) recharge capability of a groundwater source;

(v) natural run-off rates and drainage; and

(vi) water quality;

(I) a table summarizing overlapping taxing entities and the most recent tax rates by those entities; and

(J) complete justification for creation of the district supported by evidence that the project is feasible, practicable, necessary, and will benefit all of the land to be included in the district;

(6) a certificate by the central appraisal district indicating the owners and tax valuation of land within the proposed district as reflected on the county tax rolls as of the date of the petition. If the tax rolls do not show the petitioner(s) to be the owners of the majority of value of the land within the proposed district, then the petitioner(s) shall submit to the executive director a certified copy of the deed(s) tracing title from the person(s) listed on the central appraisal district certificate as owners of the land to the petitioner(s) and any additional information required by the executive director necessary to show accurately the ownership of the land to be included in the district;

(7) a certified copy of the action of the governing body of any municipality in whose corporate limits or extraterritorial jurisdiction that the proposed district is located, consenting to the creation of the proposed district under TWC, §54.016. For districts to be located in the extraterritorial jurisdiction of any municipality, if the governing body of any such municipality fails or refuses to grant consent, the petitioners must show that the provisions of TWC, §54.016 have been followed;

(8) for districts proposed to be created within the corporate boundaries of a municipality, evidence that the city will rebate to the district an equitable portion of city taxes to be derived from the residents of the area proposed to be included in the district if such taxes are used by the city to finance elsewhere in the city services of the type the district proposes to provide. If like services are not to be provided, then an agreement regarding a rebate of city taxes is not necessary. Nothing in this subsection is intended to restrict the contracting authorization provided in Local Government Code, §402.014;

(9) affidavits by those persons desiring appointment by the commission as temporary directors, showing compliance with applicable statutory requirements of qualifications and eligibility for temporary directors, in accordance with TWC, §49.052 and §54.102;

(10) if the application includes a request for approval of a fire plan, information meeting the requirements of §293.123 of this title, except for a certified copy of a district board resolution, references to a district board having adopted a plan, and the additional $100 filing fee;

(11) if the petition within the application includes a request for road powers, information meeting the requirements of §293.202(b) of this title (relating to Application Requirements for Commission Approval); and

(12) other data and information as the executive director may require.

(e) Creation applications for TWC, Chapter 55, Water Improvement Districts, within two or more counties shall contain items listed in subsection (a) of this section and the following:

(1) a petition containing the matters required by TWC, §55.040, signed by persons holding title to more than 50% of all land in the proposed district as indicated by county tax rolls, or by 50 qualified property taxpaying electors. The petition shall include the following:

(A) name of district; and

(B) area and boundaries of district;

(2) a map showing the district boundaries in metes and bounds, area, physical culture, and computation sheet for survey closure;

(3) a preliminary plan (22 - 24 inches by 36 inches or digital data in electronic format) showing the location of existing facilities including highways, roads, and other improvements, together with the

location of proposed utility mains and sizing, general drainage patterns, principal drainage ditches and structures, utility plant sites, recreational areas, commercial and school sites, areas within the 100-year flood plain and 100-year floodway, and any other information pertinent to the project including an inventory of any existing water, wastewater, or drainage facilities;

(4) a preliminary engineering report including as appropriate:

(A) a description of existing area, conditions, topography, and proposed improvements;

(B) land use plan;

(C) 100-year flood computations or source of information;

(D) existing and projected populations;

(E) tentative itemized cost estimates of the proposed capital improvements and itemized cost summary for anticipated bond issue requirement;

(F) projected tax rate and water and wastewater rates;

(G) an investigation and evaluation of the availability of comparable service from other systems including, but not limited to, water districts, municipalities, and regional authorities;

(H) an evaluation of the effect the district and its systems and subsequent development within the district will have on the following:

(i) land elevation;

(ii) subsidence;

(iii) groundwater level within the region;

(iv) recharge capability of a groundwater source;

(v) natural run-off rates and drainage; and

(vi) water quality;

(I) a table summarizing overlapping taxing entities and the most recent tax rates by those entities; and

(J) complete justification for creation of the district supported by evidence that the project is practicable, would be a public utility, and would serve a beneficial purpose;

(5) a certificate by the central appraisal district indicating the owners and tax valuation of land within the proposed district as reflected on the county tax rolls as of the date of the petition. If the tax rolls do not show the petitioner(s) to be the owners of the majority of the land within the proposed district, then the petitioner(s) shall submit to the executive director a certified copy of the deed(s) tracing title from the person(s) listed on the central appraisal district certificate as owners of the land to the petitioner(s) and any additional information required by the executive director necessary to show accurately the ownership of the land to be included in the district;

(6) if the application includes a request for approval of a fire plan, information meeting the requirements of §293.123 of this title, except for a certified copy of a district board resolution, references to a district board having adopted a plan, and the additional $100 filing fee; and

(7) other data and information as the executive director may require.

(f) Creation applications for TWC, Chapter 58, Irrigation Districts, within two or more counties, shall contain items listed in subsection (a) of this section and the following:

(1) a petition containing the matters required by TWC, §58.013 and §58.014, signed by persons holding title to land representing a total value of more than 50% of the value of all land in the proposed district as indicated by county tax rolls, or if there are more than 50 persons holding title to land in the proposed district, the petition can be signed by 50 of them. The petition shall include the following:

(A) name of district;

(B) area and boundaries;

(C) provision of the Texas Constitution under which district will be organized;

(D) purpose(s) of district;

(E) statement of the general nature of the work to be done and the necessity, feasibility, and utility of the project, with reasonable detail; and

(F) statement of the estimated costs of the project;

(2) evidence that the petition was filed with the office of the county clerk of the county(ies) in which the district or portions of the district are located;

(3) a map showing the district boundaries in metes and bounds, area, physical culture, and computation sheet for survey closure;

(4) a preliminary plan (22 - 24 inches by 36 inches or digital data in electronic format) showing as applicable the location of existing facilities including highways, roads, and other improvements, together with the location of proposed irrigation facilities, general drainage patterns, principal drainage ditches and structures, sites, areas within the 100-year flood plain and 100-year floodway, and any other information pertinent to the project;

(5) a preliminary engineering report including the following as applicable:

(A) a description of existing area, conditions, topography, and proposed improvements;

(B) land use plan, including a table showing irrigable and non-irrigable acreage;

(C) copies of any agreements, meeting minutes, contracts, or permits executed or in draft form with other entities including, but not limited to, federal, state, or local entities or governments or persons;

(D) tentative itemized cost estimates of the proposed capital improvements and itemized cost summary for anticipated bond issue requirement;

(E) proposed budget including projected tax rate and/or fee schedule and rates;

(F) an investigation and evaluation of the availability of comparable service from other systems including, but not limited to, water districts, municipalities, and regional authorities;

(G) an evaluation of the effect the district and its systems will have on the following:

(i) land elevation;

(ii) subsidence;

(iii) groundwater level within the region;

(iv) recharge capability of a groundwater source;

(v) natural run-off rates and drainage; and

(vi) water quality;

(H) a table summarizing overlapping taxing entities and the most recent tax rates by those entities; and

(I) complete justification for creation of the district supported by evidence that the project is feasible, practicable, necessary, and will benefit all of the land and residents to be included in the district and will further the public welfare;

(6) a certificate by the central appraisal district indicating the owners and tax valuation of land within the proposed district as reflected on the county tax rolls as of the date of the petition or any amended petition. If the tax rolls do not show the petitioner(s) to be the owners of the majority of value of the land within the proposed district, then the petitioner(s) shall submit to the executive director a certified copy of the deed(s) tracing title from the person(s) listed on the central appraisal district certificate as owners of the land to the petitioner(s) and any additional information required by the executive director necessary to show accurately the ownership of the land to be included in the district;

(7) affidavits by those persons desiring appointment by the commission as temporary or initial directors, showing compliance with applicable statutory requirements of qualifications and eligibility for temporary or initial directors, in accordance with TWC, §58.072; and

(8) other data as the executive director may require.

(g) Creation applications for TWC, Chapter 59, Regional Districts, shall contain items listed in subsection (a) of this section and the following:

(1) a petition, as required by TWC, §59.003, signed by the owner or owners of 2,000 contiguous acres or more; or by the county commissioners court of one, or more than one, county; or by any city whose boundaries or extraterritorial jurisdiction the proposed district lies within; or by 20% of the municipal districts to be included in the district. The petition shall contain:

(A) a description of the boundaries by metes and bounds or lot and block number, if there is a recorded map or plat and survey of the area;

(B) a statement of the general work, and necessity of the work;

(C) estimated costs of the work;

(D) name of the petitioner(s);

(E) name of the proposed district; and

(F) if submitted by at least 20% of the municipal districts to be included in the regional district, such petition shall also include:

(i) a description of the territory to be included in the proposed district; and

(ii) endorsing resolutions from all municipal districts to be included;

(2) evidence that a copy of the petition was filed with the city clerk in each city where the proposed district's boundaries cover in whole or part;

(3) if land in the corporate limits or extraterritorial jurisdiction of a city is proposed, documentation of city consent or documentation of having followed the process outlined in TWC, §59.006;

(4) a preliminary engineering report including as appropriate:

(A) a description of existing area, conditions, topography, and proposed improvements;

(B) land use plan;

(C) 100-year flood computations or source of information;

(D) existing and projected populations;

(E) tentative itemized cost estimates of the proposed capital improvements and itemized cost summary for anticipated bond issue requirement;

(F) projected tax rate and water and wastewater rates; and

(G) an investigation and evaluation of the availability of comparable service from other systems including, but not limited to, water districts, municipalities, and regional authorities;

(5) affidavits by those persons desiring appointment by the commission as temporary or initial directors, showing compliance with applicable statutory requirements of qualifications and eligibility for temporary or initial directors, as required by TWC, §49.052 and §59.021;

(6) if the application includes a request for approval of a fire plan, information meeting the requirements of §293.123 of this title, except for a certified copy of a district board resolution, references to a district board having adopted a plan, and the additional $100 filing fee; and

(7) other information as the executive director may require.

(h) Creation applications for TWC, Chapter 65, Special Utility Districts, shall contain items listed in subsection (a) of this section and the following:

(1) a certified copy of the resolution requesting creation, as required by TWC, §65.014 and §65.015, signed by the president and secretary of the board of directors of the water supply or sewer service corporation, and stating that the corporation, acting through its board of directors, has found that it is necessary and desirable for the corporation to be converted into a district. The resolution shall include the following:

(A) a description of the boundaries of the proposed district by metes and bounds or by lot and block number, if there is a recorded map or plat and survey of the area, or by any other commonly recognized means in a certificate attached to the resolution executed by a licensed engineer;

(B) a statement regarding the general nature of the services presently performed and proposed to be provided, and the necessity for the services;

(C) name of the district;

(D) the names of not less than five and not more than 11 qualified persons to serve as the initial board;

(E) a request specifying each purpose for which the proposed district is being created; and

(F) if the proposed district also seeks approval of an impact fee, a request for approval of an impact fee and the amount of the requested fee;

(2) the legal description accompanying the resolution requesting conversion of a water supply or sewer service corporation, as defined in TWC, §65.001(10), to a special utility district that conforms to the legal description of the service area of the corporation as such service area appears in the certificate of public convenience and necessity held by the corporation. Any area of the corporation that overlaps another entity's certificate of convenience and necessity must be excluded unless the other entity consents in writing to the inclusion of its dually certified area in the district;

(3) a plat showing boundaries of the proposed district as described in the petition;

(4) a preliminary plan (22 - 24 inches by 36 inches or digital data in electronic format) showing the location of existing facilities including highways, roads, and other improvements, together with the location of proposed utility mains and sizing, general drainage patterns, principal drainage ditches and structures, utility plant sites, recreational areas, commercial and school sites, areas within the 100-year flood plain and 100-year floodway, and any other information pertinent to the project including an inventory of any existing water or wastewater facilities;

(5) a preliminary engineering report including the following information unless previously provided to the commission:

(A) a description of existing area, conditions, topography, and any proposed improvements;

(B) existing and projected populations;

(C) for proposed system expansion:

(i) tentative itemized cost estimates of any proposed capital improvements and itemized cost summary for any anticipated bond issue requirement;

(ii) an investigation and evaluation of the availability of comparable service from other systems including, but not limited to, water districts, municipalities, and regional authorities;

(D) water and wastewater rates;

(E) projected water and wastewater rates;

(F) an evaluation of the effect the district and its system and subsequent development within the district will have on the following:

(i) land elevation;

(ii) subsidence;

(iii) groundwater level within the region;

(iv) recharge capability of a groundwater source;

(v) natural run-off rates and drainage; and

(vi) water quality; and

(G) complete justification for creation of the district supported by evidence that the project is feasible, practicable, necessary, and will benefit all of the land to be included in the district;

(6) a certified copy of a certificate of convenience and necessity held by the water supply or sewer service corporation applying for conversion to a special utility district;

(7) a certified copy of the most recent financial report prepared by the water supply or sewer service corporation;

(8) if requesting approval of an existing capital recovery fee or impact fee, supporting calculations and required documentation regarding such fee;

(9) certified copy of resolution and an order canvassing election results, adopted by the water supply or sewer service corporation, which shows:

(A) an affirmative vote of a majority of the membership to authorize conversion to a special utility district operating under TWC, Chapter 65; and

(B) a vote by the membership in accordance with the requirements of TWC, Chapter 67, and the Texas Non-Profit Corporation Act, Texas Civil Statutes, Articles 1396-1.01 to 1396-11.01, to dissolve the water supply or sewer service corporation at such time as creation of the special utility district is approved by the commission and convey all the assets and debts of the corporation to the special utility district upon dissolution;

(10) affidavits by those persons named in the resolution for appointment by the commission as initial directors, showing compliance with applicable statutory requirements of qualifications and eligibility for temporary or initial directors, in accordance with TWC, §49.052 and §65.102, where applicable;

(11) affidavits indicating that the transfer of the assets and the certificate of convenience and necessity has been properly noticed to the executive director and customers in accordance with §291.109 of this title (relating to Report of Sale, Merger, Etc.; Investigation; Disallowance of Transaction) and §291.112 of this title (relating to Transfer of Certificate of Convenience and Necessity);

(12) if the application includes a request for approval of a fire plan, nformation meeting the requirements of §293.123 of this title, except for a certified copy of a district board resolution, references to a district board having adopted a plan, and the additional $100 filing fee; and

(13) other information as the executive director requires.

(i) Creation applications for TWC, Chapter 66, Stormwater Control Districts, shall contain items listed in subsection (a) or this section and the following:

(1) a petition as required by TWC, §§66.014 - 66.016, requesting creation of a storm water control district signed by at least 50 persons who reside within the boundaries of the proposed district or signed by a majority of the members of the county commissioners court in each county or counties in which the district is proposed. The petition shall include the following:

(A) a boundary description by metes and bounds or lot and block number if there is a recorded map or plat and survey;

(B) a statement of the general nature of the work proposed and an estimated cost of the work proposed; and

(C) the proposed name of the district;

(2) a map showing the district boundaries in metes and bounds, area, physical culture, and computation sheet for survey closure;

(3) a preliminary engineering report including:

(A) a description of the existing area, conditions, topography, and proposed improvements;

(B) preliminary itemized cost estimate for the proposed improvements and associated plans for financing such improvements;

(C) a listing of other entities capable of providing same or similar services and reasons why those are unable to provide such services;

(D) copies of any agreements, meeting minutes, contracts, or permits executed or in draft form with other entities including, but not limited to, federal, state, or local entities or governments or persons;

(E) an evaluation of the effect the district and its projects will have on the following:

(i) land elevations;

(ii) subsidence/groundwater level and recharge;

(iii) natural run-off rates and drainage; and

(iv) water quality;

(F) a table summarizing overlapping taxing entities and the most recent tax rates by those entities; and

(G) complete justification for creation of the district supported by evidence that the project is feasible, practical, necessary, and will benefit all the land to be included in the district;

(4) affidavits by those persons desiring appointment by the commission as temporary or initial directors, showing compliance with applicable statutory requirements of qualifications and eligibility for temporary or initial directors, in accordance with TWC, §49.052 and §66.102, where applicable; and

(5) other data as the executive director may require.

(j) Creation applications for Local Government Code, Chapter 375, Municipal Management Districts in General, shall contain the items listed in subsection (a) of this section and the following:

(1) a petition requesting creation signed by owners of a majority of the assessed value of real property in the proposed district, or 50 persons who own property in the proposed district, if more than 50 people own real property in the proposed district. The petition shall include the following:

(A) a boundary description by metes and bounds, by verifiable landmarks, including a road, creek, or railroad line, or by lot and block number if there is a recorded map or plat and survey;

(B) purpose(s) for which district is being created;

(C) general nature of the work, projects or services proposed to be provided, the necessity for those services, and an estimate of the costs associated with such;

(D) name of proposed district, which must be generally descriptive of the location of the district, followed by "Management District" or "Improvement District";

(E) list of proposed initial directors and experience and term of each; and

(F) a resolution of municipality in support of creation, if inside a city;

(2) a preliminary plan or report providing sufficient details on the purpose and projects of district as allowed in Local Government Code, Chapter 375, including budget, statement of expenses, revenues, and sources of such revenues;

(3) a certificate by the central appraisal district indicating the owners and tax valuation of land within the proposed district as reflected on the county tax rolls as of the date of the petition or any amended petition. If the tax rolls do not show the petitioner(s) to be the owners of the majority of value of the land within the proposed district, then the petitioner(s) shall submit to the executive director a certified copy of the deed(s) tracing title from the person(s) listed on the central appraisal district certificate as owners of the land to the petitioner(s) and any additional information required by the executive director necessary to show accurately the ownership of the land to be included in the district;

(4) affidavits by those persons desiring appointment by the commission as initial directors, showing compliance with applicable statutory requirements of qualifications and eligibility for initial directors, in accordance with Local Government Code, §375.063; and

(5) if the application includes a request for approval of a fire plan, information meeting the requirements of §293.123 of this title, except for a certified copy of a district board resolution, references to a district board having adopted a plan, and the additional $100 filing fee.

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

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205438
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 239-2548

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SUBCHAPTER D. APPOINTMENT OF DIRECTORS

30 TAC §293.32

Statutory Authority

The amendment is proposed under the authority of Texas Water Code (TWC), §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas.

The proposed amendment implements TWC, §53.063.

§293.32. Qualifications of Directors.

(a) Unless otherwise provided, an applicant for appointment as a director must be at least 18 years old, a resident citizen of Texas, and either own land subject to taxation in the district or be a qualified voter within the district.

(1) A director of a fresh water supply district created under Texas Water Code (TWC), Chapter 53:

(A) must be:

(i) a resident of this state;

(ii) an owner of taxable property in the district; and

(iii) at least 18 years of age; or

(B) [~~if the district is located wholly or partly within Denton County~~] must be a registered voter of the district [~~but need not own land subject to taxation in the district~~].

(2) A director of a regional district created for the purposes defined under TWC [~~Texas Water Code~~], §59.004 must be at least 18 years old and a resident of this state, but need not be a landowner or qualified voter within the district.

(3) A director of a special utility district created for the purposes defined under TWC [~~Texas Water Code~~], §65.012, must be a resident citizen of this state and either own land subject to taxation in the district, or be a user of the facilities of the district or be a qualified voter in the district.

(4) A director of a stormwater control district created for the purposes defined under TWC [~~Texas Water Code~~], §66.012, must reside within the boundaries of the proposed district but need not be a landowner or qualified voter within the district.

(5) A director of a groundwater conservation district must be a registered voter in the precinct that the person represents pursuant to TWC [~~Texas Water Code~~], §36.059(b).

(6) A person cannot be appointed to fill a vacancy on the board of a municipal utility district, under TWC [~~Texas Water Code~~], Chapter 54, if the person:

(A) resigned from that board:

(i) within two years preceding the vacancy date; or

(ii) on or after the vacancy date but before the vacancy is filled; or

(B) was defeated in a directors election held by that district in the two years preceding the vacancy date.

(7) A director shall not be a developer of property in the district, or be related within the third degree of affinity or consanguinity to a developer of property in the district, any other member of the governing board of the district, or the manager, engineer, or attorney for the district, or other person providing professional services to the district.

(8) A director shall not be an employee of any developer of property in the district, or any director, manager, engineer, attorney, or other person providing professional services to the district, or a developer of property in the district in connection with the district or property located in the district.

(b) As used in this section, a developer of property in the district means any person who owns land located within a district covered under this section and who has divided or proposes to divide the land into two or more parts for the purpose of laying out any subdivision or any tract of land or any addition to any town or city, or for laying out suburban lots or building lots, or any lots, streets, alleys, or parks or other portions intended for public use, or the use of purchasers or owners of lots fronting thereon or adjacent thereto. (See TWC [~~Texas Water Code~~], §49.052(d).)

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

Filed with the Office of the Secretary of State on October 19, 2012.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-2548

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SUBCHAPTER E. ISSUANCE OF BONDS

30 TAC §293.41, §293.51

Statutory Authority

The amendments are proposed under the authority of Texas Water Code (TWC), §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas.

The proposed amendments implement TWC, §49.181(h) and §54.209.

§293.41. Approval of Projects and Issuance of Bonds.

(a) Bonds, as referred to in this subchapter, include any bonds authorized to be issued by the Texas Water Code (TWC) or special statute, and are represented by an instrument issued in bearer or registered form. This section does not apply to:

(1) refunding bonds, if the commission issued an order approving the issuance of the bonds or notes that originally financed the project;

(2) refunding bonds that are issued by a district under an agreement between the district and a municipality allowing the issuance of the district's bonds to refund bonds issued by the municipality to pay the cost of financing facilities;

(3) bonds issued to and approved by the Farmers Home Administration, the United States Department of Agriculture, the North American Development Bank, or the Texas Water Development Board, or successor agencies; [~~or~~]

(4) refunding bonds issued to refund bonds described by paragraph (3) of this subsection; or[.]

(5) bonds issued by a public utility agency created under Local Government Code, Chapter 572, any of the public entities participating in which are districts, if at least one of those districts is a district described by subsection (d)(1)(E) of this section.

(b) This subchapter does apply to revenue notes to the extent described in §293.80(d) of this title (relating to Revenue Notes) and contract tax obligations to the extent described in §293.89 of this title (relating to Contract Tax Obligations).

(c) The commission has the statutory responsibility to approve projects relating to the issuance and sale of bonds for districts as defined in TWC, §49.001(1), and other districts where specifically required by law.

(d) This subchapter does not apply to:

(1) a district if:

(A) [~~(1)~~] the boundaries include one entire county;

(B) [~~(2)~~] the district was created by a special act of the legislature; and

(i) [~~(A)~~] the district is located entirely within one county and entirely within one or more home-rule municipalities;

(ii) [~~(B)~~] the total taxable value of the real property and improvements to the real property, zoned by one or more home-rule municipalities for residential purposes and located within the district, does not exceed 25% of the total taxable value of all taxable property in the district, as shown by the most recent certified appraisal tax roll prepared by the appraisal district for the county; and

(iii) [~~(C)~~] the district was not required by law to obtain commission approval of its bonds before September 1, 1995;

(C) [~~(3)~~] the district is a special water authority as defined by TWC, §49.001(8);

(D) [~~(4)~~] the district is governed by a board of directors appointed in whole or part by the governor, a state agency, or the governing body or chief elected official of a municipality or county and does not provide, or propose to provide, water, wastewater, drainage, reclamation, or flood control services to residential retail or commercial customers as its principal function; or

(E) [~~(5)~~] the district:

(i) [~~(A)~~] is a municipal utility district operating under TWC, Chapter 54, that includes territory in only two counties;

(ii) [~~(B)~~] has outstanding long-term indebtedness that is rated BBB or better by a nationally recognized rating agency for municipal securities; and

(iii) [~~(C)~~] has at least 5,000 active water connections; or [~~.~~]

(F) the district:

(i) is a conservation and reclamation district created under the Texas Constitution, Article 16, §59, that includes territory in at least three counties; and

(ii) has the rights, privileges, and functions applicable to a river authority under TWC, Chapter 30; or

(2) a public utility agency created under Local Government Code, Chapter 572, any of the public entities participating in which are districts, if at least one of those districts is a district described by paragraph (1)(E) of this subsection.

(e) A district located within Bastrop, Bexar, Brazoria, Fort Bend, Galveston, Harris, Montgomery (except for a district all or part of which is located in Montgomery County and includes land within a planned community of at least 15,000 acres, of which a majority of the developed acreage is subject to restrictive covenants containing ad valorem assessments), Travis, Waller, or Williamson Counties may submit bond applications, which include recreational facilities that are supported by taxes, in accordance with TWC, §49.4645.

(1) Bond applications submitted under this subsection must include a copy of a district's park plan as required under TWC, §49.4645(b), in addition to other application requirements under §293.43 of this title (relating to Application Requirements). The park plan is to be signed and sealed by a registered landscape architect, a registered professional engineer, or any other design professional allowed by law to engage in landscape architecture.

(2) Bond applications submitted under this subsection may include:

(A) forests, greenbelts, open spaces, and native habitat;

(B) sidewalks, trails, paths, boardwalks, and fitness trail equipment, subject to the following restrictions:

(i) the sidewalks, trails, paths, boardwalks, and fitness trail equipment unrelated to golf courses;

(ii) the sidewalks, trails, paths, boardwalks, and fitness trail equipment located outside of the right-of-way required by applicable government agencies for streets, unless a district has completed and financed at least 90% of its projected water, wastewater, and drainage facilities to serve residential development within the district; and

(iii) if a district has completed and financed at least 90% of its projected water, wastewater, and drainage facilities to serve residential development within the district prior to the annexation of land, the location restriction in clause (ii) of this subparagraph only applies to annexed land;

(C) pedestrian bridges and underpasses that are less than 200 feet in length and not related to golf courses;

(D) outdoor ballfields, including, but not limited to, soccer, football, baseball, softball, and lacrosse, outdoor skate/roller blade facilities, associated scoreboards, and bleachers designed for less than 500 people per field or per skate/roller blade facility;

(E) parks (outdoor playground facilities and associated ground surface material, picnic tables, benches, barbeque grills, fire pits, fireplaces, trash receptacles, drinking water fountains, open-air pavilions/gazebos, open-air amphitheaters/assembly facilities designed for less than 500 people, open-air shade structures, restrooms and changing rooms, concession stands, water playgrounds, recreational equipment storage facilities, and emergency call boxes);

(F) amenity lakes, and associated water features, docks, piers, overlooks, and non-motorized boat launches subject to §293.44(a)(24) of this title (relating to Special Considerations);

(G) amenity/recreation centers, outdoor tennis courts, and outdoor basketball courts if the district has funded water, wastewater, and drainage facilities to serve at least 90% of the residential development within the district;

(H) fences no higher than eight feet that are located within public right-of-way or district sites/easements and are along streets if the district has funded water, wastewater, and drainage facilities to serve at least 90% of the residential development within the district; and

(I) landscaping (including, but not limited to, trees, shrubs, and berms) and associated irrigation, fences, information signs/kiosks, lighting (except street lighting), and parking related to items listed in subparagraphs (A) through (G) of this paragraph.

(3) Bond applications submitted under this subsection shall not include:

(A) indoor or outdoor swimming pools, pool decks, and associated equipment or storage facilities;

(B) golf courses, clubhouses, and related structures or facilities;

(C) air conditioned buildings, gymnasiums, spas, fitness centers, and habitable structures, except as allowed in paragraph (2) of this subsection;

(D) sound barrier walls;

(E) retaining walls used for roadway purposes;

(F) fences, such as for subdivisions and lots, which are not related to district facilities, except as allowed in paragraph (2) of this subsection;

(G) signs and monuments, such as for subdivisions and developments, which are not related to district facilities; and

(H) street lighting.

(4) A district's outstanding principal debt (bonds, notes, and other obligations), payable from any source, for recreational facilities must not exceed 1% of the taxable value of property in the district, as supported by a certificate from the central appraisal district, at the

time of issuance of the debt or exceed the estimated cost provided in the park plan required under TWC, §49.4645(b), whichever is smaller.

(5) A district may submit a bond application that proposes to fund recreational facilities only after or at the same time a district has funded water, wastewater, and/or drainage facilities, depending on a district's authorized functions, to serve the section that includes the recreational facilities or to serve areas along roads that are either adjacent to the recreational facilities or are necessary to provide access to the recreational facilities.

(6) Plans and specifications for recreational facilities must be signed and sealed by a registered landscape architect, a registered professional engineer, or any other design professional allowed by law to engage in landscape architecture.

§293.51. Land and Easement Acquisition.

(a) Water, sanitary sewer, storm sewer, drainage, and recreational facilities easements. All easements required within a district's boundaries for water lines; sanitary sewer lines; storm sewer lines; sanitary control at water plants; noise and odor control at wastewater treatment plants; the right-of-way necessary for a drainage swale or ditch constructed generally along a street or road in lieu of a storm sewer; recreational facilities; and the right-of-way area required by governmental jurisdictions for streets that are used for recreational facilities, shall be dedicated to the district or the public by the developer without payment or reimbursement from the district. If any easements are required for such facilities on land not owned by a developer in the district, the district may acquire such land at its appraised market value, and may also pay legal, engineering, surveying, or court fees and expenses incurred in acquiring such land, and §293.47 of this title (relating to Thirty Percent of District Construction Costs to be [~~To Be~~] Paid by Developer) shall not apply to such acquisition.

(b) Land acquisition. A district may acquire the following in fee simple from any person, including the developer, in accordance with this section, and §293.47 of this title shall not apply to such acquisition:

(1) plant sites, including required sanitary control at water plants and noise and odor control at wastewater treatment plants;

(2) lift or pump station sites;

(3) drainage channels other than those described in subsection (a) of this section and other than those which are natural waterways with defined bed and banks;

(4) detention/retention pond sites;

(5) levees;

(6) mitigation sites for compliance with flood plain regulation and wetlands regulation or payments in lieu of mitigation;

(7) mitigation sites for compliance with endangered species permits or payments in lieu of mitigation, the cost of which shall be shared between the district and the developer as provided in §293.44(a)(22) of this title (relating to Special Considerations); or

(8) recreational facility sites that are outside of the right-of-way required by governmental jurisdictions to be dedicated for streets and roads.

(c) Price of land acquisition.

(1) If a district acquires such a site, as described in subsection (b) of this section, which is outside of the 100-year floodplain, from a developer within the district or subsequent owner of developer reimbursables, the price shall be determined by adding to the price paid by the developer for such land or easement in a bona fide transaction between unrelated parties the developer's actual taxes and interest paid to the date of acquisition by the district. The interest rate shall not exceed the net effective interest rate on the bonds sold, or the interest rate actually paid by the developer for loans obtained for this purpose, whichever is less. If a developer uses its own funds rather than borrowed funds, the net effective interest rate on the bonds sold shall be applied. Provided, however, if the executive director determines that such price appears to exceed the fair market value of such land or easement, the executive director may require an appraisal to be obtained by the district from a qualified independent appraiser and payment to the seller may be limited to the fair market value of such land as shown by the appraisal; if the seller acquired the land after the improvements to be financed by the district were constructed, the price shall be limited to the fair market value of such land or easement established without the improvements being constructed; or if the seller acquired the land more than five years before the creation of the district and the records relating to the actual price paid and the taxes and interest costs are impossible or difficult to obtain, the district, upon executive director approval, may purchase such site at fair market value based on an appraisal prepared by a qualified, independent appraiser. If the land or easement needed by the district is being acquired based on the appraised value, the application to the commission for approval to purchase such a site must contain a request by the district to acquire the site in such manner and must explain the reason that the seller is unable to provide the price and carrying cost records.

(2) If a district acquires such a site, as described in subsection (b) of this section, which is within the 100-year floodplain, from a developer within the district or subsequent owner of developer reimbursables, the price shall be the lesser of the amount as determined by subsection (c)(1) of this section or fair market value based on an appraisal prepared by a qualified, independent appraiser hired by the district's board upon their initiative.

(3) If the land or easement needed by the district is being acquired from an entity other than a developer or subsequent owner of developer reimbursables in the district, the district may pay the fair market value established by a qualified, independent appraiser, and may also pay legal, engineering, surveying, or court fees and expenses incurred in acquiring such land or easement.

(d) Joint storm water detention/water amenity facilities. If a detention or retention pond is also being used as an amenity by the developer or as a recreational facility as described in §293.44(a)(24) of this title, payment to the developer shall be limited to that cost that is associated only with the drainage or recreational function of the facility. The land costs of combined water amenity and detention facilities should be shared with the developer on the basis of the volume of water storage attributable to each use, with the water amenity portion subject to reimbursement as a recreational facility in the percentage described in §293.44(a)(24) of this title.

(e) Land or easements outside the district's boundaries. Land or easements needed for any district facilities outside the district's boundaries may be purchased by the district as part of the district project at a price not to exceed the fair market value thereof. The district may also pay legal, engineering, surveying, or court fees and expenses spent in acquiring such land. If the land or easements are purchased from a developer who owns land within the district, the price paid by the district shall be determined in accordance with subsection (c) of this section and such purchase price shall be subject to the provisions of §293.47 of this title unless the facilities constructed in, on, or over such land, easements, or rights-of-way are exempt from such contribution or the district is exempt from such contribution under the terms of §293.47 of this title. Districts operating under Texas Water Code (TWC), Chapter 54, except one affected by House

Bill 2965, 76th Legislature, 1999, are prohibited from exercising the power of eminent domain outside the district's boundaries to acquire:

(1) a site for a water treatment plant, water storage facility, wastewater treatment plant, or wastewater disposal plant;

(2) a site for a park, swimming pool, or other recreational facility, as defined by TWC, §49.462 [~~except a trail~~];

(3) an exclusive easement through a county regional park; or [~~a site for a trail on real property designated as a homestead as defined by Texas Property Code, §41.002; or~~]

(4) a site or easement for a road project [~~an exclusive easement through a county regional park~~].

(f) Shared land or easements outside the district's boundaries. If the out-of-district land or easement is required for a drainage channel downstream of the district and a portion of such land or easement is or will be needed by another district(s), whether upstream or downstream, for development, the district shall only pay for its proportionate share of the land costs based upon the acreage of the drainage area contributing drainage to such drainage channel at full development. However, in the event there is no developer in another district(s) to dedicate the district's pro rata share of the required land, the district may pay the entire cost to acquire such land, but the commission shall order the other district(s) to reimburse the district at such time as development occurs in the other district that requires such drainage right-of-way.

(g) Regional facilities. A district may use bond proceeds to acquire the entire site for any regional plant, lift or pump station [~~sation~~], detention pond, drainage channel, levee, or recreational facility if the commission determines that regionalization will be promoted and the district will recover the appropriate pro rata share of the site costs, carrying costs, and bond issuance costs from future participants. The district may pay the fair market value based on an appraisal for such regional site and also may pay legal, engineering, surveying, or court fees and expenses incurred in acquiring such land. The commission shall, by separate order, order other districts participating in such regional facility to reimburse the acquiring district a proportionate share of such site costs, carrying costs, and bond issuance costs at such time as development occurs in such other districts requiring such regional site.

(h) Certification by registered professional engineer. Prior to the district purchasing or obligating district funds for the purchase of sites for water plants, wastewater plants, or lift or pump stations, the district must have a registered professional engineer certify that the site is suitable for the purposes for which it intended and identify what areas will need to be designated as buffer zones to satisfy all entities with jurisdictional authority.

(i) Joint recreational and drainage/detention sites without a constant level lake. If a drainage/detention site will also be used for recreational facility purposes, the costs are allocated 50% to drainage/detention and 50% to recreational purposes. If the recreational facility site includes an existing drainage/detention easement, then the area used to determine the reimbursement amount for the site excludes the area of the existing easement.

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

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205440

Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 239-2548

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SUBCHAPTER G. OTHER ACTIONS REQUIRING COMMISSION CONSIDERATION FOR APPROVAL

30 TAC §293.81

Statutory Authority

The amendment is proposed under the authority of Texas Water Code (TWC), §5.103, which provides the commission's authority to adopt any rules necessary to carry out its powers and duties under the laws of Texas.

The proposed amendment implements TWC, §49.273(i).

§293.81. Change Orders.

A change order is a change in plans and specifications for construction work that is under contract. For purposes of this section, a variation between estimated quantities and actual quantities or use of supplemental items included in the bid where no change in plans and specifications has occurred is not a change order.

(1) Districts are authorized to issue change orders subject to the following conditions.

(A) Except as provided in this subparagraph, change orders, in aggregate, shall not be issued to increase the original contract price more than 10%. Additional change orders may be issued only in response to:

(i) unanticipated conditions encountered during construction;

(ii) changes in regulatory criteria; or

(iii) coordination with construction of other political subdivisions or entities.

(B) All change orders must be in writing and executed by the district and the contractor and approved by the district's engineer.

(2) No commission approval is required if the change order is $50,000 [~~$25,000~~] or less. If the change order is more than $50,000 [~~$25,000~~], the executive director or his designated representative may approve the change order. For purposes of this section, if either the total additions or total deletions contained in the change order exceed $50,000 [~~$25,000~~], even though the net change in the contract price will be $50,000 [~~$25,000~~] or less, approval by the executive director is required.

(3) If the change order is $50,000 [~~$25,000~~] or less, a copy of the change order signed by the contractor and an authorized representative of the district shall be submitted to the executive director within ten days of the execution date of the change order, together with any revised construction plans and specifications approved by all agencies and entities having jurisdictional responsibilities, i.e. city, county, state, other, if required.

(4) Applications for change orders requiring approval shall include:

(A) a copy of the change order signed by an authorized officer or employee of the district and the contractor, and a resolution

or letter signed by the board president indicating concurrence in the proposed change;

(B) revised construction plans and specifications approved by all agencies and entities having jurisdictional responsibilities, i.e., city, county, state, other, if required;

(C) a detailed explanation for the change;

(D) a detailed cost summary showing additions and/or deletions to the approved plans and specifications, and new contract price or cost estimate;

(E) a statement indicating amount and source of funding for the change in plans including how the available funds were generated;

(F) the number of utility connections added or deleted by the change, if any;

(G) certification as to the availability and sufficiency of water supply and wastewater treatment capacities to serve such additional connections;

(H) filing fee in the amount of $100; and

(I) other information as the executive director or the commission may require.

(5) Copies of all changes in plans, specifications and supporting documents for all water district projects will be sent directly to the appropriate commission field office, simultaneously with the submittal of the documents to the executive director.

(6) Requirements relating to change orders shall also apply to construction carried out in accordance with §293.46 of this title (relating to Construction Prior to Commission Approval), except commission approval or disapproval will not be given. Change orders which are subject to executive director approval will be evaluated during the bond application review.

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

Filed with the Office of the Secretary of State on October 19, 2012.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 239-2548

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING

SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

31 TAC §15.29

The General Land Office (GLO) proposes amendments to 31 TAC §15.29, relating to Certification Status of City of the Village of Jamaica Beach Dune Protection and Beach Access Plan.

The intent of this rulemaking is to certify the inclusion of the Erosion Response Plan (ERP) as an appendix to the City of Jamaica Beach's Dune Protection and Beach Access Plan (Plan).

Copies of the City's Plan and the ERP can be obtained by contacting the City of Jamaica Beach at 16628 San Luis Pass Road, City of Jamaica Beach, Texas 77554, calling (409) 737-1142, or emailing cityadmin@ci.jamaicabeach.tx.us and from the GLO's Archives Division, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711-2873, phone number (512) 463-5277.

BACKGROUND AND ANALYSIS OF PROPOSED AMENDMENTS

Section 15.29 (relating to Certification Status of City of the Village of Jamaica Beach Dune Protection and Beach Access Plan) adopts the ERP as an appendix to the City's Plan. The ERP establishes a Dune Conservation Area Line from the line of vegetation and establishes construction requirements for properties and structures located seaward of the Dune Conservation Area Line.

FISCAL AND EMPLOYMENT IMPACTS

Ms. Helen Young, Deputy Commissioner for the GLO's Coastal Resources Program Area, has determined that for each year of the first five years the amended section as proposed is in effect there will be no additional cost to state government as a result of enforcing or administering the amended section.

Ms. Young has determined that there may be fiscal implications to local governments or additional costs of compliance for large and small businesses or individuals resulting from implementation of the amendment to the Plan to include the City of Jamaica Beach's ERP. However, these fiscal impacts cannot be estimated with certainty at this time, since impacts of the plan are determined on a case-by-case basis depending on the characteristics of the permittee, property, and type of construction. In addition, it is the opinion of the GLO that the costs to local governments of implementation of the provisions for construction in the ERP will be offset by a reduction in public expenditures for erosion and storm damage losses to private and public property.

Likewise, the costs of compliance for businesses or individuals will be offset by the reduction in losses to businesses and individuals due to storm damage. Implementation of the ERP will preserve beach dunes and delay erosion by reducing the intensity of storm surge. Additionally, the enhanced dune restoration and construction standards will result in increased protection for structures which are located landward of the dune conservation area. Structures will also be protected by improvements in storm protection through upgrades to access points and the dune system. In addition, the presumption of compliance with the dune mitigation sequence requirements for avoidance and minimization of impacts to dunes and dune vegetation will simplify and reduce the cost to developers for crafting mitigation plans for construction seaward of the dune protection line.

GLO has determined that the proposed rulemaking will have no adverse local employment impact that requires an impact statement pursuant to Texas Government Code §2001.022.

PUBLIC BENEFIT

Ms. Young has determined that the public will benefit from the proposed amendment because the GLO will be able to admin-

ister the coastal public land program more efficiently, providing the public more certainty and clarity in the process. The public will also benefit because coastal public land, and therefore the permanent school fund, will be protected with the certification of the amendments to the City's Plan by reducing the possibility of structures becoming located on state-owned submerged lands which increases expenditure of public funds for removal of the unauthorized structures.

In addition, the public will benefit from the adoption of the City's ERP because of reduced public expenditures associated with loss of structures and public infrastructure due to storm damage and erosion, disaster response costs, and loss of life. The City of Jamaica Beach proposes to adopt an ERP as part of its Dune Protection and Beach Access Plan.

The City of Jamaica Beach is proposing to establish a Dune Conservation Area Line from the line of vegetation and establish construction requirements for properties and structures located seaward of the Dune Conservation Area Line. New construction and existing habitable structures with damage of more than 50% for which there is no practicable alternative to construction seaward of the Dune Conservation Area Line must adhere to specific construction standards. Existing structures are exempt from the construction requirements. Among other things, the construction standards specify where structures can be located, elevation requirements, enclosure limitations, and that construction must be certified by a registered professional engineer as being compliant with the ERP requirements. The ERP also proposes modifications to access points and storm water drainage. Compliance with the construction standards and implementation of modification to access points will reduce hazards created by storm surge and reduce coastal vulnerability to storm tide and erosion without the costs of constructing hard erosion control structures, which increases public expenses.

The ERP also includes enhanced dune protections and identifies priority restoration areas, specifically construction of an enhanced dune system. Dune protections are important because natural dune processes are allowed to continue with minimal disturbance and the risk to life and property from storm damage and public expenses for disaster relief will be reduced by maintaining a natural buffer against normal storm tides. Identifying areas where restoration is needed will assist the local government in focusing mitigation and restoration in areas that may be vulnerable to storm inundation and are potential avenues for flood waters that may cause damage to public infrastructure and private properties. Additionally, existing structures and properties will be protected by local government implementation of plans to improve foredune ridges and beach access points to protect against storm surge. Scientific and engineering studies considered by the GLO noted that during Hurricane Alicia in 1983, vegetation line retreat and landward extent of storm washover deposits were greater for developed areas than for natural areas (Bureau of Economic Geology Circular 85-5). This difference is attributed in part to the fact that naturally occurring vegetated dunes in underdeveloped areas are stronger than reconstructed dunes that do not meet minimum height, width, and material requirements (Circular 85-5).

ENVIRONMENTAL REGULATORY ANALYSIS

GLO has evaluated the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendments to §15.29 are not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the proposed rulemaking implements legislative requirements in Texas Natural Resources Code §§33.101 - 33.136 relating to the board's ability to grant rights in coastal public land.

TAKINGS IMPACT ASSESSMENT

GLO has evaluated the proposed rulemaking in accordance with Texas Government Code §2007.043(b) and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines to determine whether a detailed takings impact assessment is required. GLO has determined that the proposed rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, §17 and §19 of the Texas Constitution. Furthermore, GLO has determined that the proposed rulemaking would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule amendment. The ERP does not establish a setback line but, instead defines a dune conservation area line that includes guidelines providing exemptions for property for which the owner has demonstrated that no practicable alternatives to construction seaward of the dune conservation line exists. The definition of the term "practicable" in 31 TAC §15.2(55) of the Beach/Dune Rules allows a local government to consider the cost of implementing a technique such as the setback provisions in determining whether it is "practicable" in a particular application for development. In applying its regulation, the City will determine on a case-by-case basis whether to permit construction of habitable structures in the area seaward of the building setback line if certain construction conditions are met, thereby avoiding severe and unavoidable economic impacts and thus an unconstitutional taking. In addition, building setback lines adopted by local governments under that section would not constitute a statutory taking under the Private Real Property Rights Preservation Act inasmuch as Texas Natural Resources Code §33.607(h) as added by HB 2819 provides that Chapter 2007, Government Code, does not apply to a rule or local government order or ordinance authorized by §33.607.

CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM

The proposed rulemaking is subject to the Coastal Management Program (CMP), 31 TAC §505.11(a)(1)(E) - (I) and §505.11(c), relating to the Actions and Rules Subject to the CMP. GLO has reviewed these proposed actions for consistency with the CMP's goals and policies. The applicable goals and policies are found at 31 TAC §501.12 (relating to Goals) and §501.26 (relating to Policies for Construction of in the Beach/Dune System). Because all requests for the use of coastal public land must continue to meet the same criteria for GLO approval, GLO has determined that the proposed actions are consistent with applicable CMP goals and policies. The proposed amendments will be distributed to the Commissioner in order to provide him an op-

portunity to provide comment on the consistency of the proposed amendments during the comment period.

The amended rule provides certification that the City of Jamaica Beach's ERP is consistent with the CMP goals outlined in 31 TAC §501.12(1), (2), (3), and (6). These goals seek protection of Coastal Natural Resource Areas (CNRA), compatible economic development and multiple uses of the coastal zone, minimization of the loss of human life and property due to the impairment and loss of CNRA functions, and coordination of GLO and local government decision-making through the establishment of clear, effective policies for the management of CNRAs. The Erosion Response Plan is tailored to the unique natural features, degree of development, storm, and erosion exposure potential for the City of Jamaica Beach. The City's ERP is also consistent with the CMP policies outlined in 31 TAC §501.26(a)(1) and (2) that prohibit construction within a critical dune area that results in the material weakening of dunes and dune vegetation or adverse effects on the sediment budget. The City of Jamaica Beach's ERP will provide reduced impacts to critical dunes and dune vegetation by establishing requirements for construction in the Dune Conservation Area, reduce dune area habitat and biodiversity loss, and reduce structure encroachment on the beach which leads to interruption of the natural sediment cycle.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking or its consistency with the CMP goals and policies, please send a written comment to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY

The amendment is proposed under Texas Natural Resources Code §33.607, relating to GLO's authority to adopt rules for the preparation and implementation by a local government of a plan for reducing public expenditures for erosion and storm damage losses to public and private property.

Texas Natural Resources Code §§33.601 - 33.613 are affected by the proposed amendments.

§15.29. Certification Status of City of the Village of Jamaica Beach Dune Protection and Beach Access Plan.

(a) The City of the Village of Jamaica Beach has submitted to the General Land Office a dune protection and beach access plan which is certified as consistent with state law. The City's [~~Village's~~] plan was adopted on August 16, 1993 and amended December 6, 1993, [~~and~~] September 17, 2007 and July 16, 2012.

(b) The General Land Office certifies as consistent with state law the Erosion Response Plan for the City of the Village of Jamaica Beach as an amendment to the City's Dune Protection and Beach Access Plan. The Erosion Response Plan was adopted by the City Council on July 16, 2012.

~~[(b) The General Land Office certifies as consistent with state law the following variances from §§15.4(c)(8), 15.5(b)(3), and 15.6(f)(3) of this title (relating to Dune Protection Standards, Beachfront Construction Standards, and Concurrent Dune Protection and Beachfront Construction Standards) in the Village's plan. The plan establishes special standards for eroding areas providing that:]~~

~~[(1) paving or altering the grade below the lowest habitable floor is prohibited in the area between the line of vegetation and 25 feet landward of the north toe of the dune;]~~

~~[(2) paving used under the habitable structure and for a driveway connecting the habitable structure and the street is limited to the use of unreinforced fibercrete in maximum of 4 foot x 4 foot sections, which shall be a maximum of four inches thick with sections separated by expansion joists or pervious materials approved by the City Building Official, in that area 25 feet from the north toe of the dune to 200 feet landward of the line of vegetation, with driveway width limited to no more width than necessary to service two vehicles;]~~

~~[(3) a "Fibercrete Maintenance fee" of $200.00 shall be assessed to be used to pay for the clean-up of fibercrete from the public beaches should the need arise; and]~~

~~[(4) reinforced concrete may used under the habitable structure and for a driveway connecting the habitable structure and the street in that area landward of 200 feet from the line of vegetation.]~~

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

Filed with the Office of the Secretary of State on October 22, 2012.

TRD-201205482
Larry Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 475-1859

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31 TAC §15.31

The General Land Office (GLO) proposes an amendment to 31 TAC §15.31, relating to Certification Status of City of Corpus Christi Dune Protection and Beach Access Plan.

The intent of this rulemaking is to fully certify the inclusion of the Joint Erosion Response Plan for Nueces County and the City of Corpus Christi (Joint Erosion Response Plan) as an amendment to the City of Corpus Christi Dune Protection and Beach Access Plan. The Joint Erosion Response Plan was adopted by the Corpus Christi City Council by Ordinance No. 029541 on June 26, 2012.

Copies of the City of Corpus Christi Dune Protection and Beach Access Plan and the Joint Erosion Response Plan are available from the City of Corpus Christi Department of Planning and Environmental Services, 1201 Leopard Street, Corpus Christi, Texas 78401, phone number (361) 826-2489 or on the internet at http://www.cctexas.com/planning, and from the GLO's Archives Division, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711-2873, phone number (512) 463-5277.

BACKGROUND AND ANALYSIS OF PROPOSED AMENDMENT

The proposed amendment to §15.31 adds a new subsection (e) certifying as consistent with state law the inclusion of the Joint Erosion Response Plan in the City of Corpus Christi Dune Protection and Beach Access Plan. In accordance with Texas Natural Resources Code §33.607 and associated regulations, the Joint Erosion Response Plan incorporates several elements to

reduce public expenditures due to erosion and storm damage to public and private property. Among other provisions, the Joint Erosion Response Plan: (1) establishes a building setback line located 350 feet landward of the line of vegetation; (2) allows for exemptions to the setback criteria for existing structures or where there is no practicable alternative to building seaward of the setback line; (3) provides construction conditions for exempt structures; (4) enhances dune protections by identifying priority dune mitigation areas and by setting goals for foredune depth, elevation, and vegetation coverage; (5) defines the minimum width of the public beach for provision of public beach access; (6) preserves and enhances public beach access by addressing improvements that will minimize storm damage to public access ways and by establishing procedures for inspecting and repairing access ways following hurricanes; and (7) provides criteria for voluntary acquisition of property seaward of the setback line.

FISCAL AND EMPLOYMENT IMPACTS

Ms. Helen Young, Deputy Commissioner for the General Land Office's Coastal Resources Program Area, has determined that for each year of the first five years the amended section as proposed is in effect there will be no additional cost to state government as a result of enforcing or administering the amended section.

Ms. Young has determined that there may be fiscal implications to local governments or additional costs of compliance for large and small businesses or individuals resulting from proposed amendment or implementation of the Joint Erosion Response Plan. These fiscal impacts cannot be estimated with certainty at this time, since development plans for construction seaward of the setback line and the specific content of these plans are determined on a case-by-case basis depending on the type of construction. It is the opinion of the GLO that the costs of implementation of the provisions for construction in the Joint Erosion Response Plan will be offset by a reduction in public expenditures for erosion and storm damage losses to private and public property.

Likewise, costs of compliance for businesses or individuals will be offset by reduction in losses due to storm damage. New structures that are constructed behind the building setback line will have reduced losses because of a reduction in the intensity of storm surge and a delayed exposure to erosion. Existing structures and exempt structures built seaward of the setback line will have reduced losses because of stricter building standards and improvements in storm protection through upgrades to access points and foredune ridges. Private and public properties and infrastructure will also have reduced losses as a result of preserving, restoring and enhancing critical sand dunes that provide natural storm protection and prevent erosion.

GLO has determined that the proposed rulemaking will have no adverse local employment impact that requires an impact statement pursuant to Texas Government Code §2001.022.

PUBLIC BENEFIT

Ms. Young has determined that the public will benefit from the amendment because the General Land Office will be able to administer the coastal public land program more efficiently, providing the public more certainty and clarity in the process. The public will also benefit because the Joint Erosion Response Plan will reduce public expenditures associated with loss of structures and public infrastructure due to storm damage and erosion, disaster response costs, and loss of life. The Joint Erosion Response Plan establishes a setback line located 350 feet landward of the line of vegetation. This will minimize storm damage to structures by preserving the area seaward of the setback line and by minimizing the number of structures in the area. By encouraging the placement of structures further landward, the additional hazards created by buildings when subjected to storm surge will reduce their vulnerability to storm tide and erosion. In addition, large structures are more difficult to move and create increased pressure on the state and local government for the construction of hard erosion control structures, further increasing public expenses.

The Joint Erosion Response Plan also includes enhanced dune protections and identifies priority restoration areas. Enhancing dune protections and protecting the foredune ridge will allow natural dune processes to continue with minimal disturbance. A healthy dune system serves as a natural buffer against normal storm tides. This natural buffer helps reduce the risk to life and property from storm damage and helps reduce the public expenses of disaster relief. By identifying areas where restoration is needed, the Joint Erosion Response Plan will assist the local government in focusing mitigation and restoration in areas that may be vulnerable to storm inundation and are potential avenues for flood waters that may cause damage to public infrastructure and private properties.

The public will further benefit from the construction conditions that apply to properties that have no practicable alternative to building seaward of the setback line and are exempted from that requirement. In particular, the construction conditions for exempted properties will reduce public expenses due to erosion and storm damage by: requiring that the structures be elevated an additional two feet about base flood elevation; limiting enclosures under the footprint of the habitable structure; and ensuring that all elevated structures are consistent with the latest edition of specifications outlined in the American Society of Civil Engineers, Structural Engineering Institute, Flood Resistant Design and Construction, ASCE 24-05. These conditions will also require that all designs minimize impacts to natural hydrology and that construction on the exempted properties be located landward of the landward toe of the foredune ridge and as far landward as practicable.

Existing structures and properties constructed seaward of the building setback line will also be protected by local government implementation of plans to improve foredune ridges and beach access points to protect against storm surge. Scientific and engineering studies considered by the GLO noted that during Hurricane Alicia in 1983, vegetation line retreat and landward extent of storm washover deposits were greater for developed areas than for natural areas (Bureau of Economic Geology Circular 85-5). This difference is attributed in part to the fact that naturally occurring vegetated dunes are stronger than reconstructed dunes due to greater root depths of dune vegetation (Circular 85-5).

ENVIRONMENTAL REGULATORY ANALYSIS

GLO has evaluated the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public

health and safety of the state or a sector of the state. The proposed amendment to §15.31 is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the proposed rulemaking implements legislative requirements in Texas Natural Resources Code §§33.101 - 33.136 relating to the board's ability to grant rights in coastal public land.

TAKINGS IMPACT ASSESSMENT

GLO has evaluated the proposed rulemaking in accordance with Texas Government Code §2007.043(b) and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines to determine whether a detailed takings impact assessment is required. GLO has determined that the proposed rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, §17 and §19 of the Texas Constitution. Furthermore, GLO has determined that the proposed rulemaking would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule amendment. The Joint Erosion Response Plan establishes and implements a building setback line that includes guidelines providing exemptions for property for which the owner has demonstrated that no practicable alternatives to construction seaward of the building setback line exist. The definition of the term "practicable" in 31 TAC §15.2(55) of the Beach/Dune Rules allows a local government to consider the cost of implementing a technique such as the setback provisions in determining whether it is "practicable" in a particular application for development. In applying its regulation, the City of Corpus Christi will determine on a case-by-case basis whether to permit construction of habitable structures in the area seaward of the building setback line if certain construction conditions are met and by requiring that such construction be located landward of the landward toe of the foredune ridge and as far landward as practicable thereby avoiding severe and unavoidable economic impacts and thus an unconstitutional taking. In addition, building setback lines adopted by local governments under that section would not constitute a statutory taking under the Private Real Property Rights Preservation Act inasmuch as Texas Natural Resources Code §33.607(h) as added by HB 2819 provides that Chapter 2007, Government Code, does not apply to a rule or local government order or ordinance authorized by §33.607.

CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM

The proposed rulemaking is subject to the Coastal Management Program (CMP), 31 TAC §505.11(a)(1)(E) - (I) and §505.11(c), relating to the Actions and Rules Subject to the CMP. GLO has reviewed these proposed actions for consistency with the CMP's goals and policies. The applicable goals and policies are found at 31 TAC §501.12 (relating to Goals) and §501.26 (relating to Policies for Construction in the Beach/Dune System). Because all requests for the use of coastal public land must continue to meet the same criteria for GLO approval, GLO has determined that the proposed actions are consistent with applicable CMP goals and policies. The proposed amendment will be distributed to the Commissioner in order to provide him an opportunity to provide comment on the consistency of the proposed amendment during the comment period.

The amended rule provides certification that the Joint Erosion Response Plan is consistent with the CMP goals outlined in 31 TAC §501.12(1), (2), (3), and (6). These goals seek protection of CNRAs, compatible economic development and multiple uses of the coastal zone, minimization of the loss of human life and property due to the impairment and loss of CNRA functions, and coordination of GLO and local government decision-making through the establishment of clear, effective policies for the management of CNRAs. The Joint Erosion Response Plan is tailored to the unique natural features, degree of development, storm, and erosion exposure potential for the City of Corpus Christi. The Joint Erosion Response Plan is also consistent with the CMP policies outlined in 31 TAC §501.26(a)(1) and (2) that prohibit construction within a critical dune area that results in the material weakening of dunes and dune vegetation or adverse effects on the sediment budget. The Joint Erosion Response Plan will provide reduced impacts to critical dunes and dune vegetation by placement of structures further landward, reduce dune area habitat and biodiversity loss, and reduce structure encroachment on the beach which leads to interruption of the natural sediment cycle.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking or its consistency with the CMP goals and policies, please send a written comment to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY

The amendment is proposed under Texas Natural Resources Code §33.607, relating to GLO's authority to adopt rules for the preparation and implementation by a local government of a plan for reducing public expenditures for erosion and storm damage losses to public and private property.

Texas Natural Resources Code §§33.601 - 33.613 are affected by the proposed amendment.

§15.31. Certification Status of City of Corpus Christi Dune Protection and Beach Access Plan.

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

(e) The General Land Office certifies as consistent with state law the Joint Erosion Response Plan for Nueces County and the City of Corpus Christi as an amendment to City's plan. The Joint Erosion Response Plan for Nueces County and the City of Corpus Christi was adopted by the City Council on June 26, 2012 by Ordinance No. 029541.

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

Filed with the Office of the Secretary of State on October 24, 2012.

TRD-201205513
Larry Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 475-1859

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31 TAC §15.33

The General Land Office (GLO) proposes an amendment to 31 TAC §15.33, relating to Certification Status of Nueces County Dune Protection and Beach Access Plan.

The intent of this rulemaking is to fully certify the inclusion of the Joint Erosion Response Plan for Nueces County and the City of Corpus Christi (Joint Erosion Response Plan) as an amendment to the Nueces County Dune Protection and Beach Access Plan. The Joint Erosion Response Plan was adopted by the Nueces County Commissioners Court on June 27, 2012.

Copies of the Nueces County Dune Protection and Beach Access Plan and the Joint Erosion Response Plan are available from the Nueces County Department of Public Works, 901 Leopard Street, Room 103, Corpus Christi, Texas 78401, phone number (361) 888-0490, or on the internet at http://www.co.nueces.tx.us/pw/dunes, and from the GLO's Archives Division, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711-2873, phone number (512) 463-5277.

BACKGROUND AND ANALYSIS OF PROPOSED AMENDMENT

The proposed amendment to §15.33 adds a new subsection (l) certifying as consistent with state law the inclusion of the Joint Erosion Response Plan in the Nueces County Dune Protection and Beach Access Plan. In accordance with Texas Natural Resources Code §33.607 and associated regulations, the Joint Erosion Response Plan incorporates several elements to reduce public expenditures due to erosion and storm damage to public and private property. Among other provisions, the Joint Erosion Response Plan: (1) establishes a building setback line located 350 feet landward of the line of vegetation; (2) allows for exemptions to the setback criteria for existing structures or where there is no practicable alternative to building seaward of the setback line; (3) provides construction conditions for exempt structures; (4) enhances dune protections by identifying priority dune mitigation areas and by setting goals for foredune depth, elevation, and vegetation coverage; (5) defines the minimum width of the public beach for provision of public beach access; (6) preserves and enhances public beach access by addressing improvements that will minimize storm damage to public access ways and by establishing procedures for inspecting and repairing access ways following hurricanes; and (7) provides criteria for voluntary acquisition of property seaward of the setback line.

FISCAL AND EMPLOYMENT IMPACTS

Ms. Helen Young, Deputy Commissioner for the General Land Office's Coastal Resources Program Area, has determined that for each year of the first five years the amended section as proposed is in effect there will be no additional cost to state government as a result of enforcing or administering the amended section.

Ms. Young has determined that there may be fiscal implications to local governments or additional costs of compliance for large and small businesses or individuals resulting from proposed amendment and for implementation of the Joint Erosion Response Plan. These fiscal impacts cannot be estimated with certainty at this time, since development plans for construction seaward of the setback line and the specific content of these plans are determined on a case-by-case basis depending on the type of construction. It is the opinion of the GLO that the costs of implementation of the provisions for construction in the Joint Erosion Response Plan will be offset by a reduction in public expenditures for erosion and storm damage losses to private and public property.

Likewise, costs of compliance for businesses or individuals will be offset by reduction in losses due to storm damage. New structures that are constructed behind the building setback line will have reduced losses because of a reduction in the intensity of storm surge and a delayed exposure to erosion. Existing structures and exempt structures built seaward of the setback line will have reduced losses because of stricter building standards and improvements in storm protection through upgrades to access points and foredune ridges. Private and public properties and infrastructure will also have reduced losses as a result of preserving, restoring and enhancing critical sand dunes that provide natural storm protection and prevent erosion.

GLO has determined that the proposed rulemaking will have no adverse local employment impact that requires an impact statement pursuant to Texas Government Code §2001.022.

PUBLIC BENEFIT

Ms. Young has determined that the public will benefit from amendment because the General Land Office will be able to administer the coastal public land program more efficiently, providing the public more certainty and clarity in the process. The public will also benefit because the Joint Erosion Response Plan will reduce public expenditures associated with loss of structures and public infrastructure due to storm damage and erosion, disaster response costs, and loss of life.

The Joint Erosion Response Plan establishes a setback line located 350 feet landward of the line of vegetation. This will minimize storm damage to structures by preserving the area seaward of the setback line and by minimizing the number of structures in the area. By encouraging the placement of structures further landward, the additional hazards created by buildings when subjected to storm surge will reduce their vulnerability to storm tide and erosion. In addition, large structures are more difficult to move and create increased pressure on the state and local government for the construction of hard erosion control structures, further increasing public expenses.

The Joint Erosion Response Plan also includes enhanced dune protections and identifies priority restoration areas. Enhancing dune protections and protecting the foredune ridge will allow natural dune processes to continue with minimal disturbance. A healthy dune system serves as a natural buffer against normal storm tides. This natural buffer helps reduce the risk to life and property from storm damage and helps reduce the public expenses of disaster relief. By identifying areas where restoration is needed, the Joint Erosion Response Plan will assist the local government in focusing mitigation and restoration in areas that may be vulnerable to storm inundation and are potential avenues for flood waters that may cause damage to public infrastructure and private properties.

The public will further benefit from the construction conditions that apply to properties that have no practicable alternative to building seaward of the setback line and are exempted from that requirement. In particular, the construction conditions for exempted properties will reduce public expenses due to erosion and storm damage by: requiring that the structures be elevated an additional two feet about base flood elevation; limiting enclosures under the footprint of the habitable structure; and ensuring that all elevated structures are consistent with the latest edition of specifications outlined in the American Society of Civil Engineers, Structural Engineering Institute, Flood Resistant Design and Construction, ASCE 24-05. These conditions will also require that all designs minimize impacts to natural hydrology and

that construction on the exempted properties be located landward of the landward toe of the foredune ridge and as far landward as practicable.

Existing structures and properties constructed seaward of the building setback line will also be protected by local government implementation of plans to improve foredune ridges and beach access points to protect against storm surge. Scientific and engineering studies considered by the GLO noted that during Hurricane Alicia in 1983, vegetation line retreat and landward extent of storm washover deposits were greater for developed areas than for natural areas (Bureau of Economic Geology Circular 85-5). This difference is attributed in part to the fact that naturally occurring vegetated dunes are stronger than reconstructed dunes due to greater root depths of dune vegetation (Circular 85-5).

ENVIRONMENTAL REGULATORY ANALYSIS

GLO has evaluated the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendment to §15.33 is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the proposed rulemaking implements legislative requirements in Texas Natural Resources Code §§33.101 - 33.136 relating to the board's ability to grant rights in coastal public land.

TAKINGS IMPACT ASSESSMENT

GLO has evaluated the proposed rulemaking in accordance with Texas Government Code §2007.043(b) and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines to determine whether a detailed takings impact assessment is required. GLO has determined that the proposed rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, §17 and §19 of the Texas Constitution. Furthermore, GLO has determined that the proposed rulemaking would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the rule amendment. The Joint Erosion Response Plan establishes and implements a building setback line that includes guidelines providing exemptions for property for which the owner has demonstrated that no practicable alternatives to construction seaward of the building setback line exist. The definition of the term "practicable" in 31 TAC §15.2(55) of the Beach/Dune Rules allows a local government to consider the cost of implementing a technique such as the setback provisions in determining whether it is "practicable" in a particular application for development. In applying its regulation, Nueces County will determine on a case-by-case basis whether to permit construction of habitable structures in the area seaward of the building setback line if certain construction conditions are met and by requiring that such construction be located landward of the landward toe of the foredune ridge and as far landward as practicable thereby avoiding severe and unavoidable economic impacts and thus an unconstitutional taking. In addition, building setback lines adopted by local governments under that section would not constitute a statutory taking under the Private Real Property Rights Preservation Act inasmuch as Texas Natural Resources Code §33.607(h) as added by HB 2819 provides that Chapter 2007, Government Code, does not apply to a rule or local government order or ordinance authorized by §33.607.

CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM

The proposed rulemaking is subject to the Coastal Management Program (CMP), 31 TAC §505.11(a)(1)(E) - (I) and §505.11(c), relating to the Actions and Rules Subject to the CMP. GLO has reviewed these proposed actions for consistency with the CMP's goals and policies. The applicable goals and policies are found at 31 TAC §501.12 (relating to Goals) and §501.26 (relating to Policies for Construction of in the Beach/Dune System). Because all requests for the use of coastal public land must continue to meet the same criteria for GLO approval, GLO has determined that the proposed actions are consistent with applicable CMP goals and policies. The proposed amendment will be distributed to the Commissioner in order to provide him an opportunity to provide comment on the consistency of the proposed amendment during the comment period.

The amended rule provides certification that the Joint Erosion Response Plan is consistent with the CMP goals outlined in 31 TAC §501.12(1), (2), (3), and (6). These goals seek protection of CNRAs, compatible economic development and multiple uses of the coastal zone, minimization of the loss of human life and property due to the impairment and loss of CNRA functions, and coordination of GLO and local government decision-making through the establishment of clear, effective policies for the management of CNRAs. The Joint Erosion Response Plan is tailored to the unique natural features, degree of development, storm, and erosion exposure potential for Nueces County. The Joint Erosion Response Plan is also consistent with the CMP policies outlined in 31 TAC §501.26(a)(1) and (2) that prohibit construction within a critical dune area that results in the material weakening of dunes and dune vegetation or adverse effects on the sediment budget. The Joint Erosion Response Plan will provide reduced impacts to critical dunes and dune vegetation by placement of structures further landward, reduce dune area habitat and biodiversity loss, and reduce structure encroachment on the beach which leads to interruption of the natural sediment cycle.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking or its consistency with the CMP goals and policies, please send a written comment to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY

The amendment is proposed under Texas Natural Resources Code §33.607, relating to GLO's authority to adopt rules for the preparation and implementation by a local government of a plan for reducing public expenditures for erosion and storm damage losses to public and private property.

Texas Natural Resources Code §§33.601 - 33.613 are affected by the proposed amendment.

§15.33. Certification Status of Nueces County Dune Protection and Beach Access Plan.

(a) - (k) (No change.)

(l) The General Land Office certifies as consistent with state law the Joint Erosion Response Plan for Nueces County and the City of Corpus Christi as an amendment to the Nueces County plan. The Joint Erosion Response Plan for Nueces County and the City of Corpus Christi was adopted by the Nueces County Commissioners Court on June 27, 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 October 24, 2012.

TRD-201205512
Larry Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 475-1859

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31 TAC §15.35

The General Land Office (GLO) proposes amendments to 31 TAC §15.35, relating to Certification Status of Galveston County's Dune Protection and Beach Access Plan (Plan).

The intent of this rulemaking is to fully certify the inclusion of the Erosion Response Plan (ERP) as an amendment to Galveston County's Dune Protection and Beach Access Plan.

Copies of the Galveston County Plan and ERP are available from the Galveston County, County Engineer's Office, 722 Moody, Galveston, Texas 77550, phone number (409) 770-5399, and from the GLO's Archives Division, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711-2873, phone number (512) 463-5277.

BACKGROUND AND ANALYSIS OF PROPOSED AMENDMENTS

The proposed amendment of §15.35 (relating to Certification Status of the Galveston County Plan) adds the ERP as an appendix to the County's Plan. The ERP establishes a building setback line that is 200 feet landward of the line of vegetation but contains an exception to the prohibition on construction by demonstrating to the satisfaction of Galveston County that no practicable alternative to construction seaward of the landward extent of the building setback area exists and by adhering to stricter construction requirements.

FISCAL AND EMPLOYMENT IMPACTS

Ms. Helen Young, Deputy Commissioner for the General Land Office's Coastal Resources Program Area, has determined that for each year of the first five years the amended section as proposed is in effect there will be no additional cost to state government as a result of enforcing or administering the amended section.

Ms. Young has determined that there may be fiscal implications to local governments or additional costs of compliance for large and small businesses or individuals resulting from the proposed amendment and implementation of the ERP. However, these fiscal impacts cannot be estimated with certainty at this time, since development plans for construction seaward of the setback lines and the specific content of these plans vary depending on the type and location of the construction. In addition, it is the opinion of the GLO that the costs of implementation of the provisions for construction in the ERP will be offset by a reduction in public expenditures for erosion and storm damage losses to private and public property. Likewise, costs of compliance for businesses or individuals will be offset by reduction in losses due to storm damage. New structures that are constructed behind the building setback line will have reduced losses because of a reduction in the intensity of storm surge and a delayed exposure to erosion. Additionally, implementation of the critical dune preservation, restoration and enhancement goals will result in increased protection for structures which are located landward of the dune conservation area. New structures constructed seaward of the building setback line will also have reduced losses because of stricter building standards.

GLO has determined that the proposed rulemaking will have no adverse local employment impact that requires an impact statement pursuant to Texas Government Code §2001.022.

PUBLIC BENEFIT

Ms. Young has determined that the public will benefit from the proposed amendments because the GLO will be able to administer the coastal public land program more efficiently and be able to provide the public more certainty and clarity in the process. The public will also benefit from the adoption of the ERP because coastal public land, and therefore the permanent school fund, will be protected by reducing the possibility of structures becoming located on state-owned submerged lands, which increases expenditure of public funds for removal of the unauthorized structures.

In addition, the public will benefit from the adoption of the ERP because of reduced public expenditures associated with storm damage and erosion, such as loss of structures and public infrastructure and disaster response costs. Galveston County is proposing to establish a building setback line that is equal to the Galveston County's current Dune Protection Line. Galveston County's current Dune Protection Line is located 200 feet landward of the line of vegetation beginning from a point on the Galveston County and Chambers County line, and traveling southwesterly continuously thereafter along a line 200 feet landward of the line of vegetation to a point near the southwest end of Bolivar Peninsula on Magnolia lane. Under Galveston County's ERP, landowners are allowed to obtain an exception to the prohibition on construction by demonstrating to the satisfaction of Galveston County that no practicable alternative to construction seaward of the landward extent of the building setback area exists and by adhering to stricter construction requirements. However, no exceptions may be granted for construction in the dune conservation area, which is defined as the area beginning at the line of vegetation and moving landward for a distance of 50 feet. By encouraging the placement of structures further landward, there will be a reduction in the hazards created by buildings that are subjected to storm surge and a reduction in the vulnerability of buildings to storm tide and erosion.

The ERP also includes enhanced dune protections and identifies priority restoration areas. Establishing enhanced dune pro-

tections and protecting the foredune ridge are important because natural dune processes are allowed to continue with minimal disturbance. In addition, by enhancing dunes, a natural storm buffer is formed, which helps reduce the risks to life, helps reduce public expenses for disaster relief, and helps protect property from storm damage. Furthermore, identifying areas where restoration is needed will assist the local government in focusing mitigation and restoration in areas that may be vulnerable to storm inundation and are potential avenues for flood waters that may cause damage to public infrastructure and private properties.

The public will also benefit due to reduced storm damage loss to properties exempted from construction landward of the building setback line with the establishment of enhanced building requirements in the setback area. The construction standards require that construction be designed to create no erosion to adjacent properties, to critical dune areas or to the public beach, to minimize impacts on natural hydrology, and to preserve, to the greatest extent practicable, the natural dune line and vegetation. In addition, all structures must be located as far landward as possible and must be constructed in accordance with IRC 2009 building codes and local floodplain regulations. Further, an engineer must certify that all structures are designed for feasible, above-site relocation and, for large-scale construction, financial assurance must be provided prior to construction to fund relocation or demolition and removal. Additionally, existing structures and properties constructed seaward of the building setback line will be protected by local government implementation of plans to improve foredune ridges and beach access points to protect against storm surge. Scientific and engineering studies considered by the GLO noted that during Hurricane Alicia in 1983, vegetation line retreat and landward extent of storm washover deposits were greater for developed areas than for natural areas (Bureau of Economic Geology Circular 85-5). This difference is attributed in part to the fact that naturally occurring vegetated dunes are stronger than reconstructed dunes that do not meet minimum height, width and material requirements (Circular 85-5).

ENVIRONMENTAL REGULATORY ANALYSIS

GLO has evaluated the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225 and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed amendment to §15.35 is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the proposed rulemaking implements legislative requirements in Texas Natural Resources Code §§33.101 - 33.136 relating to the board's ability to grant rights in coastal public land.

TAKINGS IMPACT ASSESSMENT

GLO has evaluated the proposed rulemaking in accordance with Texas Government Code §2007.043(b) and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines to determine whether a detailed takings impact assessment is required. GLO has determined that the proposed rulemaking does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, §17 and §19 of the Texas Constitution. Furthermore, GLO has determined that the proposed rulemaking contains exceptions to the building setback line, so that a private real property is not affected in a manner that restricts or limits the owner's right to the property that would not otherwise exist in the absence of the rule amendments.

Galveston County's ERP establishes and implements a building setback line that includes guidelines providing exemptions for property for which the owner has demonstrated that no practicable alternative to construction seaward of the building setback line exists. The definition of the term "practicable" in 31 TAC §15.2(55) of the Beach/Dune Rules allows a local government to consider the cost of implementing a technique such as the setback provisions in determining whether it is "practicable" in a particular application for development. In applying its regulation Galveston County will allow construction in the area seaward of the building setback line if certain construction standards are met and by requiring that such construction not be located in the Dune Protection Area. In addition, building setback lines adopted by local governments under that section would not constitute a statutory taking under the Private Real Property Rights Preservation Act inasmuch as Texas Natural Resources Code §33.607(h) as added by HB 2819 provides that Chapter 2007, Government Code, does not apply to a rule or local government order or ordinance authorized by §33.607.

CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM

The proposed rulemaking is subject to the Coastal Management Program (CMP), 31 TAC §505.11(a)(1)(E) - (I) and §505.11(c), relating to the Actions and Rules Subject to the CMP. GLO has reviewed these proposed actions for consistency with the CMP's goals and policies. The applicable goals and policies are found at 31 TAC §501.12 (relating to Goals) and §501.26 (relating to Policies for Construction of in the Beach/Dune System). Because all requests for the use of coastal public land must continue to meet the same criteria for GLO approval, GLO has determined that the proposed actions are consistent with applicable CMP goals and policies. The proposed amendments will be distributed to the Commissioner in order to provide him an opportunity to provide comment on the consistency of the proposed amendment during the comment period.

The amended rule provides certification that the ERP is consistent with the CMP goals outlined in 31 TAC §501.12(1), (2), (3), and (6). These goals seek protection of CNRAs, compatible economic development and multiple uses of the coastal zone, minimization of the loss of human life and property due to the impairment and loss of CNRA functions, and coordination of GLO and local government decision-making through the establishment of clear, effective policies for the management of CNRAs. The ERP is tailored to the unique natural features, degree of development, storm, and erosion exposure potential for Galveston County. Galveston County's ERP is also consistent with the CMP policies outlined in 31 TAC §501.26(a)(1) and (2) that prohibit construction within a critical dune area that results in the material weakening of dunes and dune vegetation or adverse effects on the sediment budget. Galveston County's ERP will provide reduced impacts to critical dunes and dune vegetation by placement of structures further landward, reduce dune area habitat and biodiversity loss, and reduce structure encroachment

on the beach which leads to interruption of the natural sediment cycle.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking or its consistency with the CMP goals and policies, please send a written comment to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, P.O. Box 12873, Austin, Texas 78711, facsimile number (512) 463-6311 or email to walter.talley@glo.texas.gov. Written comments must be received no later than 5:00 p.m., thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY

The amendments are proposed under the Texas Natural Resources Code §33.607, relating to GLO's authority to adopt rules for the preparation and implementation by a local government of a plan for reducing public expenditures for erosion and storm damage losses to public and private property.

Texas Natural Resources Code §§33.601 - 33.613 are affected by the proposed amendments.

§15.35. Certification Status of Galveston County's Beach Dune Protection and Beach Access Plan.

(a) Galveston County (County) has submitted to the General Land Office a dune protection and beach access plan, which was adopted on August 16, 1993, and amended on October 25, 2004, [~~and~~] January 18, 2006 and August 7, 2012. The County's plan is certified as consistent with state law.

[~~(b) The General Land Office certifies as consistent with state law the following variances from §§15.4(c)(8), 15.5(b)(3), and 15.6(f)(3) of this title (relating to Dune Protection Standards, Beachfront Construction Standards, and Concurrent Dune Protection and Beachfront Construction Standards) in the County's plan. The plan establishes special standards for eroding areas providing that:~~]

[~~(1) paving or altering the grade below the lowest habitable floor is prohibited in the area between the line of vegetation and 25 feet landward of the landward toe of the back dune;~~]

[~~(2) paving used under the habitable structure and for a driveway connecting the habitable structure and the street is limited to the use of unreinforced fibercrete in maximum of 4 foot x 4 foot sections, which shall be a maximum of four inches thick with sections separated by expansion joists or pervious materials approved by the County Building Official, in that area 25 feet from the landward toe of the back dune to 200 feet landward of the line of vegetation;~~]

[~~(3) a "Fibercrete Maintenance fee" of $200.00 shall be assessed to be used to pay for the clean-up of fibercrete from the public beaches should the need arise; and~~]

[~~(4) reinforced concrete may be used in that area landward of 200 feet from the line of vegetation to alter or pave only the ground within the footprint of the habitable structure.~~]

(b) [~~(c)~~] The General Land Office certifies as consistent with state law the following variances from §15.4(c)(10) of the this title (relating to Dune Protection Standards) in the County's plan. The plan prohibits the construction of cisterns, septic tanks, and septic fields seaward of any structure serviced by the cisterns, septic tanks, and septic fields, except that:

(1) cisterns, septic tanks, and septic fields that are in existence prior to the effective date of the County's plan may be repaired or replaced;

(2) cisterns, septic tanks, and septic fields that are located in subdivisions platted before the effective date of the County's plan and permitted before the effective date of the County's plan may be constructed, repaired, or replaced; and

(3) cisterns, septic tanks, and septic fields that are located in subdivisions platted before the effective date of the County's plan may be constructed, repaired, or replaced in a location seaward of the structure they are to serve provided that the applicant shows that it is not practicable to locate the cisterns, septic tanks, and septic fields landward of the structure they are to serve.

(c) The General Land Office certifies as consistent with state law Galveston County's ERP as an amendment to Galveston County's Plan. Galveston County's ERP was adopted by the Galveston County Commissioner's Court on August 7, 2012 by adding the ERP as Appendix 9 to Galveston County's Plan.

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

Filed with the Office of the Secretary of State on October 24, 2012.

TRD-201205514
Larry Laine
Chief Clerk, Deputy Land Commissioner
General Land Office
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 475-1859

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TITLE 34. PUBLIC FINANCE

PART 11. OFFICE OF THE FIRE FIGHTERS' PENSION COMMISSIONER

CHAPTER 310. ADMINISTRATION OF THE TEXAS EMERGENCY SERVICES RETIREMENT SYSTEM

34 TAC §310.7

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the Office of the Fire Fighters' Pension Commissioner or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The State Board of Trustees of the Texas Emergency Services Retirement System (System) proposes the repeal of 34 TAC §310.7, regarding contracts between the Commissioner and a political subdivision for the Commissioner to administer, and recover the cost of administering, certain benefits payable under the *Texas Local Fire Fighters Retirement Act* (Article 6243e, Vernon's Texas Civil Statutes).

The board proposes to repeal §310.7 on the ground that the contract practice authorized by the rule has been replaced by contracts under 34 TAC §306.2, effective January 12, 2012. As a result of a merger under §306.2, annuities that were previously under the *Texas Local Fire Fighters Retirement Act* become System annuities.

Sherri Walker, Commissioner, has determined that the public benefit for the first five years that the rule is repealed will be to conform the System's rules to the practices now being employed when an existing local pension plan is merged into the System.

There would be no quantifiable revenue gain or cost to the state or local governments in the first five years that the repeal is in effect.

Small businesses or individuals would not be affected by the repeal of the rule.

Comments on the proposed repeal may be submitted in writing to Sherri Walker, Commissioner, Office of the Fire Fighters' Pension Commissioner, P.O. Box 12577, Austin, Texas 78711-2577, not later than 5:00 p.m., Central Standard Time, on December 10, 2012. Comments may also be submitted electronically to rules@ffpc.state.tx.us or faxed to (512) 936-3480.

The repeal is proposed under the statutory authority of Texas Government Code, Title 8, Subtitle H, Texas Emergency Services Retirement System, Chapter 865, §865.006(b).

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

§310.7. Administration of Local Fire Fighter Pension Benefits.

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

Filed with the Office of the Secretary of State on October 22, 2012.

TRD-201205477
Sherri Walker
Commissioner
Office of the Fire Fighters' Pension Commissioner
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 936-3464

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34 TAC §310.8

The State Board of Trustees of the Texas Emergency Services Retirement System (System) proposes an amendment to 34 TAC §310.8 for the sole purpose of removing a reference to the contract currently authorized under 34 TAC §310.7.

The proposed amendment to §310.8 merely conforms the rule to the repeal of §310.7.

Sherri Walker, Commissioner, has determined that the public benefit for the first five years that the amended rule is in effect will be to conform the System's rules to the practices now being employed when an existing local pension plan is merged into the System.

There would be no quantifiable revenue gain or cost to the state or local governments for the first five years that the amended rule is in effect.

Small businesses or individuals would not be affected by the amendment of the rule.

Comments on the proposed amendment may be submitted in writing to Sherri Walker, Commissioner, Office of the Fire Fighters' Pension Commissioner, P.O. Box 12577, Austin, Texas 78711-2577, not later than 5:00 p.m., Central Standard Time, on December 10, 2012. Comments may also be submitted electronically to rules@ffpc.state.tx.us or faxed to (512) 936-3480.

The amendment is proposed under the statutory authority of Texas Government Code, Title 8, Subtitle H, Texas Emergency Services Retirement System, Chapter 865, §865.006(b).

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

§310.8. Billings.

(a) The commissioner shall bill governing bodies of participating departments and governing bodies of municipalities for which the commissioner is administering pensions under the Texas Local Fire Fighters Retirement Act quarterly on the last business day of November, February, May, and August.

(b) Each billing shall include, as appropriate, charges for:

(1) monthly contributions for participating members;

(2) prior service contributions;

~~[(3) the cost of, and any administrative fee for administering pensions under the Texas Local Fire Fighters Retirement Act;]~~

(3) [~~(4)~~] late-payment interest charges; and

(4) [~~(5)~~] unpaid administrative penalties.

(c) At least 30 days before the last day of each quarter, the commissioner shall send to the chair of the local board of each participating department a pension roster report that includes the name of each person who performs emergency services for the department and is identified as a member of the pension system.

(d) The chair of the local board or the administrative head of the department shall verify the accuracy of the report, make needed changes in the roster, and return the report to the commissioner not later than the fifth day before the last day of the quarter.

(e) Payments under a billing issued under this section become due within 30 days of the invoice date. Late payments accrue interest at the current actuarially assumed rate of investment return on fund assets.

(f) In this section:

(1) The term "ACH" (Automated Clearing House) means the legal framework of rules and operational procedures adopted by financial institutions for the electronic transfer of funds.

(2) The term "ACH Credit" means an ACH transaction initiated by the governing body of a participating department for the electronic transfer of funds from the account of the governing body to the account of the pension system.

(3) The term "ACH Debit" means an ACH transaction initiated by the pension system for the electronic transfer of funds from the account of the governing body of a participating department to the account of the pension system.

(4) The term "electronic transfer of funds" means the transfer of funds, other than by check, draft or similar paper instrument, that is initiated electronically to order, instruct, or authorize a financial institution to debit or to credit an account.

(5) The term "pre-authorized direct debit" means the method available to the governing body of a participating department for electronically paying required contributions by granting a continuing authorization to the pension system to initiate an ACH Debit each quarter for the electronic transfer of funds from the designated bank account of the governing body to the account of the pension system in

an amount equal to the contributions required to be paid based on the quarterly report as filed.

(6) The term "wire transfer" generally means a single transaction, initiated by the governing body of a participating department, in which funds are electronically transferred to the account of the pension system using the Federal Reserve Banking System rather than the ACH.

(g) Amounts required to be contributed to the pension system in accordance with Chapter 865 of the Texas Government Code may be made by preauthorized direct debits (ACH Debits). ACH Credits and wire transfers may not be used to transfer funds to the pension system except as authorized under subsection (j) of this section.

(h) The governing body of a participating department may elect to use the preauthorized direct debit method of payment by filing a signed authorization agreement with the pension system in which the governing body has designated a single bank account from which all transfers will be made.

(i) The authorization agreement entered into for this purpose constitutes continuing authority for the pension system to initiate a direct debit of the governing body's designated bank account each quarter and is effective with respect to each quarterly report of the governing body, whether filed by mail or by electronic transmission.

(j) An authorization agreement remains in effect until the pension system receives either a written revocation of the agreement, or a subsequent written agreement, which automatically revokes the existing authorization. A new authorization agreement must be filed if there is any change in the designated bank account. The pension system, in its sole discretion, may terminate the authorization agreement by mailing written notice to the governing body. Thereafter, the governing body must remit all contributions by check or other monetary means approved by the commissioner. The alternative method of payment may include a fee to recover the cost of administering this subsection.

(k) Following receipt of a roster report filed under an unrevoked authorization agreement, the pension system will initiate an ACH Debit in the amount required to be contributed for that period based on the report; however the actual transfer of funds from the governing body's designated account will not occur before the due date of the report.

(l) The receipt of a quarterly roster report filed under an unrevoked authorization agreement is considered to be receipt by the pension system of the amount required to be contributed for the period based on that report if there are sufficient funds available for transfer from the governing body's designated account on the later of the due date of the report or the date the report is received. An ACH Debit that is reversed by a governing body or that fails because sufficient funds are not available for transfer constitutes nonpayment of the required contributions with respect to that report and, thereafter, the required contributions will not be considered to have been received until the day the funds are actually transferred to the account of the pension system. A governing body failing to timely file the required information or remit the required contributions by the due date of the report is subject to a penalty for late reporting in accordance with §310.9 of this title.

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

Filed with the Office of the Secretary of State on October 22, 2012.

TRD-201205479

Sherri Walker
Commissioner
Office of the Fire Fighters' Pension Commissioner
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 936-3464

34 TAC §310.11

The State Board of Trustees of the Texas Emergency Services Retirement System (System) proposes new 34 TAC §310.11, regarding methods by which payments by the System are made to retirees and other beneficiaries of the System.

The proposed rule would provide that payments by the System of a service or disability retirement annuity, survivor annuity, or lump-sum benefit, that first becomes payable on or after February 1, 2013, be made by electronic transfer of funds to the recipient's account in a financial institution, unless the person requests otherwise in a timely manner. The proposed rule would also allow a benefit recipient to choose that future payments be made by check or, if the person has previously made that choice, to choose that they be made by electronic transfer of funds. A majority of current beneficiaries of the System have already chosen to receive payments by electronic transfer of funds. The proposed rule would simply make this the payment method unless a beneficiary chooses otherwise.

Sherri Walker, Commissioner, has determined that the public benefit for the first five years that the proposed new rule is in effect will be to increase the speed with which benefit payments will become available to beneficiaries who do not opt out of payment by electronic transfer of funds.

There would be an estimated slight decrease in costs to the state (the System) in the first five years that the proposed rule is in effect, because of estimated savings in postage and the cost of issuing replacement checks. There would be no cost to local governments.

Small businesses or individuals would not be affected by the adoption of the proposed rule.

Comments on the proposed rule may be submitted in writing to Sherri Walker, Commissioner, Office of the Fire Fighters' Pension Commissioner, P.O. Box 12577, Austin, Texas 78711-2577, not later than 5:00 p.m., Central Standard Time, on December 10, 2012. Comments may also be submitted electronically to rules@ffpc.state.tx.us or faxed to (512) 936-3480.

The new rule is proposed under the statutory authority of Texas Government Code, Title 8, Subtitle H, Texas Emergency Services Retirement System, Chapter 865, §865.006(b).

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

§310.11. Payments by Pension System.

(a) Unless otherwise requested timely in a manner provided by the pension system, payments of a benefit, including a service or disability retirement annuity, survivor annuity, or lump-sum benefit, that first becomes payable on or after February 1, 2013, shall be made by electronic transfer of funds to the recipient's account in a banking, credit, or savings institution chartered by the federal or state government, as determined by the recipient.

(b) At any time, a member, retiree, or other beneficiary of the pension system may elect to have a future payment of a benefit paid to the person or the person's beneficiaries, in a manner provided by

the pension system, by check, or as provided under subsection (a) of this section. The pension system shall notify all persons who apply for service or disability retirement to take effect on or after February 1, 2013, of this option and provide a method for electing this option.

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

Filed with the Office of the Secretary of State on October 22, 2012.

TRD-201205476
Sherri Walker
Commissioner
Office of the Fire Fighters' Pension Commissioner
Earliest possible date of adoption: December 2, 2012
For further information, please call: (512) 936-3464

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 3. ADMINISTRATIVE RESPONSIBILITIES OF STATE FACILITIES

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §3.101, concerning definitions, and new §§3.601, 3.602, 3.603, 3.604, 3.605, 3.606, 3.607, and 3.608, concerning general provisions; mechanical devices; evaluation and assessment; imminent harm resulting from a behavioral crisis; imminent harm resulting from a medical or dental procedure; imminent harm resulting from documented self-injurious behavior; release; and reporting, tracking, and documentation in new Subchapter F, Restraints, in Chapter 3, Administrative Responsibilities of State Facilities.

BACKGROUND AND PURPOSE

The purpose of the amendment and new sections is to implement Senate Bill (SB) 41, 82nd Legislature, Regular Session, 2011. SB 41 prescribes limits for the use of restraints on an individual residing in a state supported living center (SSLC) or the Rio Grande State Center. The proposed repeal of current rules related to restraint in Chapter 5, Subchapter H, is published elsewhere in this issue of the *Texas Register.*

SECTION-BY-SECTION SUMMARY

The proposed amendment to §3.101 adds definitions for "behavioral crisis," "chemical restraint," "crisis intervention," "crisis intervention plan," "legally adequate consent," "legally authorized representative," "mechanical restraint," "medical emergency," "medical intervention," "medical restraint," "medical restraint plan," "physical restraint," "primary care provider," "prone restraint," "protective mechanical restraint for self-injurious behavior," "protective mechanical restraint plan for self-injurious behavior," "restraint monitor," and "supine restraint" to the list of defined terms used in Chapter 3.

Proposed new §3.601 delineates expectations, allowed uses, and prohibitions governing the use of restraint.

Proposed new §3.602 describes requirements specific to mechanical restraints, including a list of prohibited devices.

Proposed new §3.603 describes requirements for evaluation and assessment of individuals specific to the use of restraint.

Proposed new §3.604 describes requirements for the application of restraint in response to imminent harm resulting from a behavioral crisis.

Proposed new §3.605 describes requirements for the application of restraint in response to imminent harm resulting from a medical or dental procedure.

Proposed new §3.606 describes requirements for the application of restraint in response to imminent harm resulting from documented self-injurious behavior.

Proposed new §3.607 describes requirements governing an individual's release from restraint.

Proposed new §3.608 delineates reporting, tracking, and documentation requirements regarding the application of restraints.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for each year of the first five years the proposed amendment and new sections are in effect, enforcing or administering the amendment and new sections does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendment and new sections will not have an adverse economic effect on small businesses or micro-businesses, because the amendment and new sections apply only to state supported living centers and Rio Grande State Center, which are not small businesses or micro-businesses.

PUBLIC BENEFIT AND COSTS

Chris Adams, DADS Assistant Commissioner for State Supported Living Centers, has determined that, for each year of the first five years the amendment and new sections are in effect, the public benefit expected as a result of enforcing the amendment and new sections is increased independence and quality of life for facility residents resulting from clear parameters for the use of restraint.

Mr. Adams anticipates that there will not be an economic cost to persons who are required to comply with the amendment and new sections. The amendment and new sections will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Diana Williams at (512) 438-3169 in DADS State Supported Living Centers/Quality Assurance. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-11R08, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street

address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 11R08" in the subject line.

SUBCHAPTER A. DEFINITIONS

40 TAC §3.101

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Health and Safety Code, §592.102, which requires the HHSC executive commissioner to adopt rules regarding restraints in state facilities; and 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.

The amendment implements Texas Government Code, §531.0055; Texas Health and Safety Code, §592.102; and Texas Human Resources Code, §161.021.

§3.101. Definitions.

The following words and terms, when used in this chapter (relating to Administrative Responsibilities of State Facilities), have the following meanings, unless the context clearly indicates otherwise:

(1) Administrative death review--An administrative, quality-assurance activity related to the death of an individual to identify non-clinical problems requiring correction and opportunities to improve the quality of care at a facility.

(2) Allegation--A report by a person suspecting or having knowledge that an individual has been or is in a state of abuse, neglect, or exploitation as defined in this chapter.

(3) [~~(2)~~] Alleged offender--An individual who was committed or transferred to a facility:

(A) under Code of Criminal Procedure, Chapters 46B or 46C, as a result of being charged with or convicted of a criminal offense; or

(B) under Family Code, Chapter 55, as a result of being alleged by petition or having been found to have engaged in delinquent conduct constituting a criminal offense.

[~~(3) Allegation--A report by a person suspecting or having knowledge that an individual has been or is in a state of abuse, neglect, or exploitation as defined in this chapter.~~]

(4) Applicant--A person who has applied to be an employee, volunteer, or unpaid professional intern.

(5) Attending physician--The physician who has primary responsibility for the treatment and care of an individual.

(6) Behavioral crisis--An imminent safety situation that places an individual or others at serious risk of violence or injury if no intervention occurs.

(7) [~~(6)~~] CANRS--The client abuse and neglect reporting system maintained by DADS Consumer Rights and Services.

(8) Chemical restraint--Any drug prescribed or administered to sedate an individual or to temporarily restrict an individual's freedom of movement for the purpose of managing the individual's behavior.

(9) [~~(7)~~] Child--An individual less than 18 years of age who is not and has not been married and who has not had the disabilities of minority removed pursuant to the Texas Family Code, Chapter 31.

(10) [~~(8)~~] Clinical death review--A clinical, quality-assurance, peer review activity related to the death of an individual and conducted in accordance with statutes that authorize peer review in Texas to identify clinical problems requiring correction and opportunities to improve the quality of care at a facility.

(11) [~~(9)~~] Clinical practice--The demonstration of professional competence in nursing, dental, pharmacy, or medical practice as described in the relevant chapter of the Texas Occupations Code.

(12) [~~(10)~~] Confirmed--Term used to describe an allegation that DFPS determines is supported by a preponderance of the evidence.

(13) [~~(11)~~] Contractor--A person who contracts with a facility to provide services to an individual, including an independent school district that provides educational services at the facility.

(14) [~~(12)~~] Conviction--The adjudication of guilt for a criminal offense.

(15) Crisis intervention--The use of interventions, including physical, mechanical, or chemical restraint, in a behavioral crisis.

(16) Crisis intervention plan--A component of the individual support plan (ISP) action plan that provides instructions for staff on how to effectively and safely use restraint procedures, as long as they are needed to prevent imminent physical harm in a behavioral crisis when less restrictive prevention or de-escalation procedures have failed and the individual's behavior continues to present an imminent threat of violence or injury. The plan is developed with input from direct support professionals familiar with the individual and the individual or LAR and includes a description of how the individual behaves during a behavioral crisis, along with information about the types of restraints that have been most effective with the individual, staff actions to be avoided because they have been ineffective in the past, the restraint's maximum duration, a description of the behavioral criteria for releasing the restraint, and reporting requirements. A crisis intervention plan is not considered a therapeutic intervention. It is implemented only to ensure that restraint procedures are carried out effectively and safely and may be adjusted depending upon the individual's progress in the ISP action plan.

(17) [~~(13)~~] DADS--Department of Aging and Disability Services.

(18) [~~(14)~~] Deferred adjudication--Has the meaning given to "community supervision" in Texas Code of Criminal Procedure, §42.12, Section 2.

(19) [~~(15)~~] Designated representative--A person designated by an individual or an individual's LAR to be a spokesperson or advocate for the individual.

(20) [~~(16)~~] DFPS--Department of Family and Protective Services.

(21) [~~(17)~~] Director--The director of a facility or the director's designee.

(22) [~~(18)~~] Direct support professional--An unlicensed employee who directly provides services to an individual.

(23) [~~(19)~~] Employee--A person employed by DADS whose assigned duty station is at a facility.

(24) [~~(20)~~] Facility--A state supported living center or the ICF/ID component of the Rio Grande State Center.

(25) [~~(21)~~] Family member--An individual's parent, spouse, children, or siblings.

(26) [~~(22)~~] Forensic facility--A facility designated under Texas Health and Safety Code (THSC), §555.002(a) for the care of high-risk alleged offenders.

(27) [~~(23)~~] Guardian--An individual appointed and qualified as a guardian of the person under the Texas Probate Code, Chapter XII.

(28) [~~(24)~~] High-risk alleged offender--An alleged offender who has been determined to be at risk of inflicting substantial physical harm to another person in accordance with THSC §555.003.

(29) [~~(25)~~] Inconclusive--Term used to describe an allegation leading to no conclusion or definite result by DFPS due to lack of witnesses or other relevant evidence.

(30) [~~(26)~~] Independent mortality review organization--An independent organization designated in accordance with Texas Government Code, Chapter 531, Subchapter U, to review the death of an individual.

(31) [~~(27)~~] Individual--A person with a developmental disability receiving services from a facility.

(32) [~~(28)~~] Individual support plan (ISP)--An integrated, coherent, person-directed plan that reflects an individual's preferences, strengths, needs, and personal vision, as well as the protections, supports, and services the individual will receive to accomplish identified goals and objectives.

(33) [~~(29)~~] Interdisciplinary team (IDT)--An interdisciplinary team with the active participation of the individual and LAR, that is responsible for assessing the individual's treatment, training, and habilitation needs and making recommendations for services based on the personal goals and preferences of the individual using a person-directed planning process, including recommendations on whether the individual is best served in a facility or community setting.

(34) Legally adequate consent--Consent received from a person who has legal status that meets the statutory requirements for comprehension of information and voluntariness as specified in THSC §591.006.

(35) [~~(30)~~] Legally authorized representative (LAR)--A person authorized by law to act on behalf of an individual, including a parent, guardian, or managing conservator of a minor individual, or a guardian of an adult individual.

(36) [~~(31)~~] Life-sustaining medical treatment--Treatment that, based on reasonable medical judgment, sustains the life of an individual and without which the individual will die. The term includes both life-sustaining medications and artificial life support such as mechanical breathing machines, kidney dialysis treatment, and artificial nutrition and hydration. The term does not include the administration of pain management medication or the performance of a medical procedure considered necessary to provide comfort care or any other medical care provided to alleviate an individual's pain.

(37) Mechanical restraint--Any device attached or adjacent to an individual's body that he or she cannot easily remove that restricts freedom of movement or normal access to his or her body. The term does not include a protective device.

(38) Medical emergency--Any illness or injury that requires immediate assessment and treatment by medical staff for conditions considered to be life threatening, including, but not limited to, respiratory or cardiac arrest, choking, extreme difficulty in breathing, status epilepticus, allergic reaction to an insect sting, snake bite, extreme pain in the chest or abdomen, poisoning, hemorrhage, loss of consciousness, sudden loss of function of a body part, injuries resulting in broken bones, possible neck or back injuries, or severe burns.

(39) Medical intervention--Treatment by a licensed medical doctor, osteopath, podiatrist, dentist, physician assistant, or advanced practice nurse in accordance with general acceptable clinical practice.

(40) Medical restraint--A health-related protection prescribed by a primary care provider (PCP) or dentist that is necessary for the conduct of a specific medical or dental procedure, or is only necessary for protection during the time that a medical or dental condition exists, for the purpose of preventing an individual from inhibiting or undoing medical or dental treatment. Medical restraint includes pre-treatment sedation.

(41) Medical restraint plan--A component of the ISP action plan that provides instructions for staff on how to effectively and safely carry out medical restraint procedures. The plan is developed with input from the PCP or dentist and includes a description of the individual's behaviors that do not allow for a safe and effective implementation of needed medical or dental procedures, information about the types of restraints that have been most effective with the individual, a description of the behavioral criteria for releasing the restraint, and reporting requirements. A medical restraint plan is not considered a therapeutic intervention and may be adjusted depending upon the individual's progress in the ISP action plan.

(42) [~~(32)~~] Mental health services provider--Has the meaning assigned in the Texas Civil Practice and Remedies Code, Chapter 81.

(43) [~~(33)~~] Peer review--A review of clinical or professional practice of a doctor, pharmacist, licensed vocational nurse, or registered nurse conducted by his or her professional peers.

(44) [~~(34)~~] Perpetrator--A person who has committed an act of abuse, neglect, or exploitation.

(45) [~~(35)~~] Person--Includes a corporation, organization, governmental subdivision or agency, or any other legal entity.

(46) Physical restraint--Any manual method that restricts freedom of movement or normal access to one's body, including hand or arm holding to escort an individual over his or her resistance to being escorted. Physical restraint does not include brief and limited use of physical guidance, positioning, or prompting techniques used to redirect an individual or assist, support, or protect the individual during a functional therapeutic or physical exercise activity; response blocking and brief redirection used to interrupt an individual's limbs or body without the use of force so that the occurrence of challenging behavior is prevented; holding an individual, without the use of force, to calm or comfort, or hand holding to escort an individual from one area to

another; and response interruption used to interrupt an individual's behavior, using facility-approved techniques.

(47) [~~(36)~~] Physician on duty--The physician designated by the facility's medical director to provide medical care or respond to emergencies outside regular working hours.

(48) [~~(37)~~] Positive behavior support plan (PBSP)--A comprehensive, individualized plan that contains intervention strategies designed to modify the environment, teach or increase adaptive skills, and reduce or prevent the occurrence of target behaviors through interventions that build on an individual's strengths and preferences, without using aversive or punishment contingencies.

(49) [~~(38)~~] Preponderance of the evidence--The greater weight of evidence, or evidence that is more credible and convincing to the mind.

(50) Primary care provider (PCP)--A physician, advanced practice nurse, or physician assistant who provides primary care to a defined population of patients. The PCP is involved in health promotion, disease prevention, health maintenance, and diagnosis and treatment of acute and chronic illnesses.

(51) [~~(39)~~] Primary contact--The person designated as the primary contact of an alleged victim of abuse, neglect, or exploitation, if the alleged victim is an adult with an intellectual disability who is unable to authorize the disclosure of protected health information and does not have a guardian.

(52) Prone restraint--Any physical or mechanical restraint that places the individual in a face-down position. Prone restraint does not include when an individual is placed in a face-down position as a necessary part of a medical intervention, or when an individual moves into a prone position during an incident of physical restraint, if staff restores the individual to a standing, sitting, or side-lying position immediately or as soon as possible, and if that is not possible, immediately releases the person. Prone restraint is prohibited.

(53) [~~(40)~~] Protection and advocacy organization--The protection and advocacy agent for Texas designated in accordance with the Code of Federal Regulations, Title 45, §1386.20.

(54) Protective mechanical restraint for self-injurious behavior--A type of mechanical restraint applied before an individual engages in self-injurious behavior, for the purpose of preventing or mitigating the danger of the self-injurious behavior because there is evidence that the targeted behavior can result in serious self-injury when it occurs and intensive, one-to-one supervision and treatment have not yet reduced the danger of self-injury. Examples include, but are not limited to, protective head gear for head banging, arm splints for eye gouging, or mittens for hand-biting. The term does not include medical restraints.

(55) Protective mechanical restraint plan for self-injurious behavior--A component of the ISP action plan that provides instructions for staff on how to effectively and safely apply the protective mechanical restraint that is used to prevent or mitigate the effects of serious self-injurious behavior. The plan is developed with input from direct support professionals familiar with the individual and includes a description of the individual's self-injurious behaviors, the type of restraint to be used, the restraint's maximum duration, and the circumstances to apply and remove the restraint. The plan must identify any low-risk situations when the restraint may be safely removed, what staff should do during those situations to continue to protect the individual from harm, and adjustments in staff instructions as progress is made for gradually eliminating the use of the restraints, including details on any specialized staff training and reporting. The plan is not considered a therapeutic intervention and is adjusted depending upon the individual's progress in the ISP action plan and an evaluation by the PCP that the individual's behavior is no longer at the dangerous level that is producing serious self-injury.

(56) [~~(41)~~] Registered nurse--A nurse licensed by the Texas Board of Nursing to practice professional nursing in Texas.

(57) [~~(42)~~] Registries--

(A) the Nurse Aide Registry maintained by DADS in accordance with §94.10 of this title (relating to Registry, Findings, and Inquiries); and

(B) the Employee Misconduct Registry maintained by DADS in accordance with Chapter 93 of this title (relating to Employee Misconduct Registry (EMR)).

(58) [~~(43)~~] Reporter--A person who reports an allegation of abuse, neglect, or exploitation.

(59) Restraint monitor--A designated facility employee who has been trained in the application and assessment of restraints, who has experience working directly with individuals with developmental disabilities, and who is trained to conduct a face-to-face assessment of the individual who was restrained and the staff involved in the restraint to review the application and results of the restraint.

(60) [~~(44)~~] Retaliation--An action intended to inflict emotional or physical harm or inconvenience on a person including harassment, disciplinary action, discrimination, reprimand, threat, and criticism.

(61) [~~(45)~~] SSLC--A state supported living center.

(62) [~~(46)~~] State office mortality review--A quality assurance activity to review data related to the death of an individual to identify trends, best practices, training needs, policy changes, or facility or systemic issues that need to be addressed to improve services at facilities.

(63) Supine restraint--Any physical or mechanical restraint that places the individual on his or her back. Supine restraint does not include when an individual is placed in a supine position as a necessary part of a medical restraint, or when an individual moves into a supine position during an incident of physical restraint, if staff restores the individual to a standing, sitting, or side-lying position immediately or as soon as possible, and if that is not possible, immediately releases the person. Supine restraint does not include persons who have freedom of movement in a hospital bed or dental chair that is at a reclined position. Supine restraint is prohibited.

(64) [~~(47)~~] Unconfirmed--Term used to describe an allegation that DFPS determines is not supported by the preponderance of evidence.

(65) [~~(48)~~] Unfounded--Term used to describe an allegation that DFPS determines is spurious or patently without factual basis.

(66) [~~(49)~~] Unusual incident--An event or situation that seriously threatens the health, safety, or life of an individual.

(67) [~~(50)~~] Volunteer--A person who is not part of a visiting group, who has active, direct contact with an individual, and who does not receive compensation from DADS other than reimbursement for actual expenses.

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

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-4466

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SUBCHAPTER F. RESTRAINTS

40 TAC §§3.601 - 3.608

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and 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.

The new sections implement Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021.

§3.601. General Provisions.

(a) Expectations.

(1) A facility must implement and operationalize statewide policy addressing the use of restraint.

(2) At least one person trained as a restraint monitor must be on duty at all times to respond to the initiation of restraint procedures in a behavioral crisis, immediately if possible but in no case in more than 15 minutes. If data suggests a high number of incidents of restraint, additional restraint monitors may be required.

(3) If an individual is in restraint at the time of shift change, staff must communicate and coordinate between shifts to provide continuity of care.

(4) A mechanical or physical restraint administered to an individual must:

(A) be the least restrictive restraint effective to prevent imminent physical harm in a behavioral crisis, or to safely and effectively implement a medical or dental procedure, or to prevent or mitigate the documented danger of self-injurious behavior;

(B) be used for the shortest period of time necessary to prevent imminent physical injury, to safely and effectively implement a medical or dental procedure, or to prevent or mitigate the documented danger of self-injurious behavior;

(C) end immediately once the imminent risk of physical injury abates;

(D) be applied with the minimum amount of force or pressure necessary to prevent harm to the individual and others; and

(E) be used in the safest, least restrictive, most humane, and most respectful manner possible.

(5) Staff must attempt to provide an environment that safeguards the individual's personal dignity and well-being while ensuring safety.

(6) Staff must provide continuous one-to-one supervision to individuals while in restraint. Individuals receiving medical restraints must receive supervision as ordered by the PCP or dentist in accordance with facility procedures. The director may approve an alternate level of supervision based on the IDT's clinical justification and recommendation.

(7) Staff must respond appropriately to restraint-related injuries or distress.

(8) If an emergency evacuation or an evacuation drill occurs while an individual is in restraint, staff must respond as described in the facility's policies and procedures to ensure the individual's safety.

(9) Staff must allow an individual who has been released from restraint time to recover and return to regular activities, including the opportunity to relax and exercise restrained limbs, to drink fluids, to toilet, to complete a snack or meal, and to receive prescribed medications.

(10) Staff must take all necessary steps to avoid causing undue physical discomfort, harm, or pain to the individual while initiating and implementing restraint.

(11) A facility must obtain legally adequate consent for a crisis intervention plan, medical restraint plan, or protective mechanical restraint plan for self-injurious behavior. A plan must be reviewed by the Behavior Support Committee and the facility director and approved by the Human Rights Committee before implementation.

(12) An authorization to use or extend physical restraints in response to a behavioral crisis may be in effect no longer than 12 consecutive hours.

(b) Allowed uses. Restraints may only be used to protect an individual or others from imminent physical injury resulting from:

(1) a behavioral crisis;

(2) a medical or dental procedure; or

(3) documented self-injurious behavior.

(c) Prohibitions.

(1) A restraint may not be used on an individual unless the restraint is necessary to prevent imminent physical injury to the individual or another person.

(2) A restraint may not be used for punishment, disciplinary purposes, retaliation, retribution, or convenience or as a substitute for treatment or habilitation.

(3) A restraint may not be used on an individual as part of a positive behavior support plan.

(4) Prone or supine restraint may not be used.

(5) A restraint may not be used if it:

(A) secures the individual to a stationary object while he or she is in a standing position;

(B) obstructs the individual's airway, including the placement of anything in, on, or over his or her mouth or nose;

(C) impairs the individual's breathing by putting pressure on his or her torso;

(D) interferes with the individual's ability to communicate;

(E) extends muscle groups away from each other;

(F) uses hyperextension of joints;

(G) uses pressure points or pain; or

(H) is prohibited by the individual's medical orders or ISP or is medically contraindicated.

(6) A standing order for restraint may not be used.

§3.602. Mechanical Devices.

(a) Safety and maintenance.

(1) Only commercially available mechanical restraint devices designed specifically for the safe and relatively comfortable use of restraint may be used. The director must approve any modifications to a mechanical restraint to accommodate an individual's specific physical needs.

(2) Staff must inspect a mechanical device before and after each use to ensure that the device is in good repair and without tears or protrusions that may cause injury. Staff must have a damaged mechanical device repaired before it can be used to restrain an individual.

(3) Staff must ensure that a mechanical device is applied correctly.

(b) Prohibited devices. The following mechanical devices may not be used:

(1) metal wrist or ankle cuffs;

(2) rubber bands, ropes, and cords, unless part of an approved device;

(3) long ties and leashes, including halter leashes;

(4) restraining sheets attached to any stationary object other than a bed;

(5) padlocks;

(6) papoose or restraint boards;

(7) restraint chairs;

(8) camisoles;

(9) transport jackets;

(10) strait jackets; and

(11) barred enclosures with tops, including crib-style beds with mesh tops.

§3.603. Evaluation and Assessment.

(a) The IDT must develop and implement person-centered proactive supports, training, and treatment with the goal of making the use of restraints unnecessary.

(b) When evidence indicates that the individual's behaviors result in a behavioral crisis or sustained self-injury or make it difficult to provide needed medical or dental care, the IDT, with the involvement of a PCP and other relevant professional staff, must assess and identify any issues or contraindications for the use of restraint, including:

(1) any physical or medical conditions that constitute a risk; and

(2) any considerations in the use of restraint due to the individual's communication level, cognitive functioning level, height, weight, emotional condition (including whether the individual has a history of having been physically or sexually abused), and age.

(c) The IDT must ensure that a PCP reviews and updates, as necessary in response to changes in condition and at IDT meetings, but at least annually, any conditions, factors, or limitations on specific physical techniques, drugs, or mechanical devices used for restraint.

(d) For individuals participating in a program outside the facility, the IDT must coordinate with staff from the outside program to assess and develop interventions consistent with the ISP and any action plans and invite staff from the outside program to participate in IDT meetings at which interventions are discussed.

(e) An ISP action plan must:

(1) be developed to decrease and ultimately eliminate the use of restraint for the individual, with consideration of protection from harm and safety issues;

(2) include an interdisciplinary analysis that identifies the circumstances that contribute to causing the dangerous behaviors that result in the use of restraint;

(3) identify actions, data collection, and the responsible persons for implementing the actions;

(4) address a broad range of changes, which may include changing living arrangements, implementing calming procedures, and incorporating preferences in programs;

(5) include a PBSP and other therapeutic plans, as applicable; and

(6) contain individualized instructions to direct support professionals in the safe and effective use of restraint procedures.

(f) A facility must develop or revise an interdisciplinary ISP action plan in response to significant events, including but not limited to, the following:

(1) more than three behavioral crises in a 30-day rolling period have required the use of restraints;

(2) restraint use has not decreased over time and may be likely to continue at a stable rate unless an action plan is developed;

(3) the individual's characteristics require that standard restraint procedures be adapted to meet his or her needs;

(4) a pattern of injuries to the individual or others is observed as restraint procedures are carried out;

(5) an individual has sustained, self-injurious behavior, and supervision and treatment have not been successful in reducing harm; and

(6) an individual's behavior is presenting a risk to medical or dental treatment or to healing.

(g) A facility must develop and implement an ISP action plan by:

(1) reviewing the individual's relevant adaptive skills and biological, medical, and psychosocial factors;

(2) reviewing possible contributing environmental conditions;

(3) completing or revising structural and functional assessments of the behavior leading to use of restraint;

(4) developing or revising a PBSP based on the structural and functional assessments of the behavior leading to the use of restraint that identifies the individual's particular strengths, specifies the behavior to be addressed, prescribes alternative, positive adaptive behaviors to be taught or strengthened to replace the dangerous behavior that requires the use of restraint, and describes prevention procedures

to be followed as the individual's behavior indicates an escalation of behaviors that are dangerous and likely to result in restraint;

(5) as applicable, developing or revising other programs to reduce or eliminate the use of restraint that are not part of the PBSP, such as treatment or strategies to minimize or eliminate the need for medical restraints;

(6) as applicable, developing or revising a crisis intervention plan or medical restraint plan, including staff instructions on how to safely and appropriately use a recommended restraint procedure with a specific individual, any changes in the type of restraint used, the maximum duration of the restraint, and the criteria for terminating the restraint;

(7) as applicable, developing or revising a protective mechanical restraint plan for self-injurious behavior, including procedures for gradually increasing the time the individual is able to stay safe but not be in restraints and any changes in the type of restraint used; and

(8) specifying the persons responsible for activities, including obtaining informed consent from the individual or LAR before implementing the plan, providing required staff training, monitoring activities, evaluating effectiveness, and ensuring any necessary reviews by the Human Rights Committee.

(h) The IDT must review, assess, and revise an ISP action plan at least annually and more frequently as necessary. The IDT must review, at least quarterly and more frequently as necessary, an individual who was restrained for a behavioral crisis or for whom medical restraint was used. The IDT must review a protective mechanical restraint plan for self-injurious behavior at least monthly and more frequently as necessary.

(i) The IDT may consult with a facility discipline director, state office discipline coordinator, or outside consultant to explore alternative treatment strategies.

§3.604. Imminent Harm Resulting from a Behavioral Crisis.

(a) Only staff who have successfully completed competency-based training on the use of restraints may implement restraint procedures. Staff who implement restraint procedures must also complete training on person-specific instructions and other measures regarding restraints contained in an individual's crisis intervention plan or other plan.

(b) The following conditions must be met before a PCP may order a restraint in response to a behavioral crisis:

(1) the individual's behavior constitutes an imminent safety situation that places the individual or others at serious risk of violence or injury if no intervention occurs;

(2) if no PBSP, desensitization plan, or other preventive measures are in place, staff have considered the level of imminent risk of violence or injury and have applied a graduated range of less-restrictive approved procedures as safety permits and the measures have not reduced the risk of imminent physical harm to the individual or others;

(3) if a PBSP, desensitization plan, or other preventive measures are in place, the individualized procedures for prevention, de-escalation and a graduated range of less restrictive measures have been followed, as safety permits, but have not reduced the risk of imminent physical harm to the individual or others;

(4) a helmet, mittens with ties, wristlets, or other mechanical restraints may be used only if their use is:

(A) specified in any component of the ISP; or

(B) approved by the individual's psychologist or board certified behavior analyst (BCBA) or the psychologist or BCBA on call; the administrator on duty; and the director of psychology or behavioral services.

(5) If a mechanical restraint initiated in response to a behavioral crisis continues more than 24 hours, the Human Rights Committee must approve its continued use.

(c) A psychotropic medication may be ordered as a chemical restraint in response to a behavioral crisis, but only if immediate use of the medication is essential to prevent or mitigate the danger of the individual's harmful behavior and the following conditions have been met:

(1) the individual is experiencing a behavioral crisis;

(2) a graduated range of less restrictive alternatives to stop the behavior and protect the individual and others has been attempted, as safety permits, but has not reduced the risk of imminent physical harm to the individual or others;

(3) the requirements of any component of the ISP have been followed but have not reduced the risk of imminent harm to the individual or others;

(4) a psychiatrist or PCP has determined that early administration of a regularly prescribed psychotropic medication instead of chemical restraint is not a reasonable option; and

(5) a psychiatrist or PCP approves and orders the use of the chemical restraint.

§3.605. Imminent Harm Resulting from a Medical or Dental Procedure.

(a) Only a PCP, dentist, or psychiatrist may order a medical restraint. Medical restraint orders must include a specific start and stop date or time. If the time limit on the original order is exceeded, the PCP must write a new order.

(b) Only staff who have successfully completed competency-based training on the use of restraints may implement restraint procedures. Staff who implement restraint procedures must also complete training on person-specific instructions and other measures regarding restraints contained in an individual's medical restraint plan or other plan.

(c) If restraint is used before or during intervention for routine medical or dental care, a medical restraint plan must be developed to describe the rationale for use of the restraint and to provide specific individualized instructions on how to safely implement the restraint.

§3.606. Imminent Harm Resulting from Documented Self-Injurious Behavior.

(a) Only staff who have successfully completed competency-based training on the use of restraints may implement restraint procedures. Staff who implement restraint procedures must also complete training on person-specific instructions and other measures regarding restraints contained in an individual's protective mechanical restraint plan for self-injurious behavior or other plan.

(b) Staff may implement restraint to protect an individual from imminent harm resulting from documented self-injurious behavior if the following conditions have been met:

(1) the IDT has developed an ISP action plan for the individual that describes the need for protective mechanical restraint for self-injurious behavior; includes the procedures that will be employed to reduce the need for restraint, including a PBSP; and provides specific individualized instructions for staff on how to apply the restraints

safely and the periods of time and the conditions under which the restraints can be safely removed;

(2) a structural and functional assessment has been completed or revised that identifies possible functions of the self-injurious behavior;

(3) the IDT has considered developing other clinical plans, such as habilitation plans supported by an assessment or evaluation, to reduce the need for protective mechanical restraint;

(4) a PBSP, based on a structural and functional assessment, has been implemented that includes procedures, as appropriate, for teaching and strengthening alternative behaviors to self-injurious behaviors and teaching procedures that will help prevent self-injurious behavior as the time without the use of protective mechanical restraints increases.

(5) the instructions for applying the protective mechanical restraint for self-injurious behavior have been developed, including a schedule for removing and replacing the mechanical restraint that safely increases the time out of protective mechanical restraint;

(6) a PCP has assessed the individual and determined that the self-injurious behavior is at an intensity and frequency that causes imminent risk of serious physical injury and there is a need for protective mechanical restraints for self-injurious behavior; and

(7) a system for monthly reviews of data by the IDT has been established, including the PCP's continued reevaluation as to whether the intensity and frequency of the self-injurious behavior warrants continuing the restraint plan.

§3.607. Release.

(a) An individual who is restrained as a result of a behavioral crisis must be released from restraint as soon as he or she no longer poses an imminent risk of physical harm to self or others.

(b) Within 15 minutes after being released from a restraint, a licensed nurse must assess the individual for injuries or other negative health effects, determine if the individual's vital signs are stable, and document the individual's mental status. Staff must continuously monitor the individual until the licensed nurse arrives.

(c) The PCP or appropriate provider must determine the release criteria for an individual restrained in response to imminent harm resulting from a medical or dental procedure.

(d) For mechanical restraints used for protection from self-injurious behavior, removal of restraints must follow the individual's protective mechanical restraint plan for self-injurious behavior. A fading schedule, designed to phase out the use of a restraint device, must be reviewed by the IDT, including the PCP and appropriate therapists, each month and adjusted to permit the maximum safe time out of restraints.

(e) If an individual experiences a medical emergency while in restraint, staff must release the individual from the restraint immediately and ensure that the medical emergency is promptly addressed according to statewide and facility policies and procedures.

§3.608. Reporting, Tracking, and Documentation.

(a) Staff must report and investigate a serious injury or death occurring during restraint or within 24 hours after the release from a restraint in accordance with statewide policy on incident management.

(b) The facility must review the use of restraint to determine whether the application of restraint was justified, the restraint was applied correctly, injuries occurred, or factors exist that, if modified, may prevent the future use of restraint.

(c) A pharmacist and psychiatrist must conduct a clinical review of each chemical restraint to determine whether the restraint was used in a clinically justified manner, to identify any potential medication-related risks, and to make any applicable recommendations to the IDT.

(d) The IDT, with a determination of risk of physical harm made by the PCP, must review the continued application of restraint in response to risk from documented self-injurious behavior monthly to determine whether current risk warrants continuing the restraint, to analyze the effectiveness of the fading plan, and to adjust the time without restraint, if possible to safely do so.

(e) The IDT must review an individual restrained in response to a behavioral crisis or medical or dental intervention at least quarterly to assess progress in changing the circumstances that lead to the use of restraint.

(f) A facility must track, trend, and analyze data regarding the application of restraints in accordance with statewide policy on the use of restraints to identify issues or emerging trends and to develop appropriate responses.

(g) DADS must report the restraint of an individual to the executive commissioner.

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

Filed with the Office of the Secretary of State on October 19, 2012.

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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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CHAPTER 5. PROVIDER CLINICAL RESPONSIBILITIES--INTELLECTUAL DISABILITY SERVICES

SUBCHAPTER H. USE OF RESTRAINT IN STATE FACILITIES

40 TAC §§5.351 - 5.362, 5.364 - 5.366

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Aging and Disability Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), the repeal of Subchapter H, Use of Restraint in State Facilities, consisting of §§5.351, 5.352, 5.353, 5.354, 5.355, 5.356, 5.357, 5.358, 5.359, 5.360, 5.361, 5.362, 5.364, 5.365, and 5.366, concerning purpose, application, definitions, general provisions, general principles for the use of restraint, use of restraint in a behavioral emergency, use of restraint in a behavior therapy program, use of restraint during medical or dental procedures and to promote healing, use of restraint with

a mechanical device to prevent involuntary self-injury, use of restraint with a mechanical device to provide postural support, mechanical devices for use in restraint, additional reporting and documentation requirements, enforcement, references, and distribution, in Chapter 5, Provider Clinical Responsibilities--Intellectual Disability Services.

BACKGROUND AND PURPOSE

The purpose of the repeal is to remove state supported living center (SSLC) requirements for restraints from the Chapter 5 rules. New rules in Chapter 3, published elsewhere in this issue of the *Texas Register,* consolidate requirements for the use of restraints on an individual residing in a state supported living center (SSLC) or the Rio Grande State Center.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years after the proposed repeal is adopted, enforcing or administering the repeal does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed repeal will not have an adverse economic effect on small businesses or micro-businesses, because the repeal applies only to state supported living centers, which are not small businesses or micro-businesses.

PUBLIC BENEFIT AND COSTS

Chris Adams, DADS Assistant Commissioner for State Supported Living Centers, has determined that, for each year of the first five years after the repeal is adopted, the public benefit expected as a result of the repeal is increased independence and quality of life for facility residents resulting from clear parameters for the use of restraint.

Mr. Adams anticipates that there will not be an economic cost to persons who are required to comply with the repeal. The repeal will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Diana Williams at (512) 438-3169 in DADS State Supported Living Centers/Quality Assurance. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-11R08, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030 or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 11R08" in the subject line.

STATUTORY AUTHORITY

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and 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.

The repeal implements Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021.

§5.351. Purpose.

§5.352. Application.

§5.353. Definitions.

§5.354. General Provisions.

§5.355. General Principles for the Use of Restraint.

§5.356. Use of Restraint in a Behavioral Emergency.

§5.357. Use of Restraint in a Behavior Therapy Program.

§5.358. Use of Restraint During Medical or Dental Procedures and To Promote Healing.

§5.359. Use of Restraint with a Mechanical Device to Prevent Involuntary Self-injury.

§5.360. Use of Restraint with a Mechanical Device to Provide Postural Support.

§5.361. Mechanical Devices for Use in Restraint.

§5.362. Additional Reporting and Documentation Requirements.

§5.364. Enforcement.

§5.365. References.

§5.366. Distribution.

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

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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 28. INSURANCE

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PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER X. PREFERRED AND EXCLUSIVE PROVIDER PLANS

DIVISION 1. GENERAL REQUIREMENTS

28 TAC §§3.3701 - 3.3710

The Texas Department of Insurance withdraws the proposed amendments to §§3.3701 - 3.3710 which appeared in the June 29, 2012, issue of the *Texas Register* (37 TexReg 4783).

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205449
Sara Waitt
General Counsel
Texas Department of Insurance
Effective date: October 19, 2012
For further information, please call: (512) 463-6327

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DIVISION 2. EXCLUSIVE PROVIDER BENEFIT PLAN REQUIREMENTS

28 TAC §§3.3720 - 3.3725

The Texas Department of Insurance withdraws the proposed new §§3.3720 - 3.3725 which appeared in the June 29, 2012, issue of the *Texas Register* (37 TexReg 4802).

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205450
Sara Waitt
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Texas Department of Insurance
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Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 7. BANKING AND SECURITIES

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 15. CORPORATE ACTIVITIES

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), adopts amendments to Chapter 15 (Corporate Activities), Subchapter A, §§15.2, 15.3, 15.5 and 15.7, concerning Fees and Other Provisions of General Applicability; Subchapter C, §15.41 and §15.42, concerning Bank Offices; Subchapter E, §15.81, concerning Change of Control Applications; and Subchapter F, §§15.101, 15.103 - 15.108, 15.110 and 15.113, concerning Applications for Merger, Conversion, and Purchase or Sale of Assets, without changes to the proposed text as published in the August 31, 2012, issue of the *Texas Register* (37 TexReg 6845).

The amendments are adopted to: update statutory and Texas Administrative Code references; reorganize, clarify, and eliminate unnecessary text; provide consistency with statutory provisions; expand options for public notice regarding applications; revise requirements for expedited handling of applications; and allow extension of application processing deadlines for some situations.

The amendment to §15.2(b)(6) clarifies and identifies which sale transactions require a fee to be paid for processing an application for approval. The previous language was not clear and could be read to conflict with the statute. The language has been clarified by tracking the language used in Finance Code §32.405.

The amendment to §15.5(a) provides for an alternative form of publication acceptable to the banking commissioner in lieu of publication in a newspaper. Newspaper publication can be expensive and in some areas few newspapers remain in business. The current language of the rule prevents the use of non-newspaper media which is often more readily available and more effective. The amendment allows the applicant more flexibility in choosing a method of publishing notice that fits the particular circumstance, as long as it is acceptable to the commissioner.

The amendments to §15.103 add two additional requirements with regard to applications submitted to the department requesting expedited processing. These additional requirements involve completion of two worksheets that are already being used in expedited filings. The amendments also add two additional reasons the banking commissioner may deny a request for expedited filing and processing of an application or withdraw an application from expedited processing. These are situations where the application presents an issue of regulatory concern and/or requires a conversion examination. Such situations typically require longer than 30 days to resolve and therefore are not candidates for expedited application processing.

The amendments to §15.106 reorganize the previous text of the rule for clarity and consistency with Finance Code §32.405, to delete outdated reference to the Texas Business Corporation Act and replace it with reference to the Texas Business Organizations Code, and to correct references to other sections of the Texas Administrative Code. The amendments also delete application requirements that were made obsolete by the passage of the Riegle-Neal Interstate Banking and Branching Act of 1994.

The amendment to §15.113 allows the commissioner to extend the time frames for processing any application, when the specific conditions listed in §15.103(d) exist. This change adds needed flexibility for institutions that are large or have particularly complex transactions that must be reviewed. This extended processing time is also needed for applications that require an examination of the institution.

All other amendments are non-substantive changes that delete outdated references to the Texas Business Corporation Act and replace them with references to the Texas Business Organizations Code, correct title references to other sections of the Texas Administrative Code, and conform the rule to *Texas Register* format.

The Department received no comments regarding the proposed amendments.

SUBCHAPTER A. FEES AND OTHER PROVISIONS OF GENERAL APPLICABILITY

7 TAC §§15.2, 15.3, 15.5, 15.7

The amendments are adopted pursuant to Finance Code, §31.003, which authorizes the Finance Commission to adopt banking rules.

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

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205418
A. Kaylene Ray
General Counsel
Texas Department of Banking
Effective date: November 8, 2012
Proposal publication date: August 31, 2012
For further information, please call: (512) 475-1300

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SUBCHAPTER C. BANK OFFICES

7 TAC §15.41, §15.42

The amendments are adopted pursuant to Finance Code, §31.003, which authorizes the Finance Commission to adopt banking rules.

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

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TRD-201205419
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SUBCHAPTER E. CHANGE OF CONTROL APPLICATIONS

7 TAC §15.81

The amendments are adopted pursuant to Finance Code, §31.003, which authorizes the Finance Commission to adopt banking rules.

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

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A. Kaylene Ray
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SUBCHAPTER F. APPLICATIONS FOR MERGER, CONVERSION, AND PURCHASE OR SALE OF ASSETS

7 TAC §§15.101, 15.103 - 15.108, 15.110, 15.113

The amendments are adopted pursuant to Finance Code, §31.003, which authorizes the Finance Commission to adopt banking rules.

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

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Proposal publication date: August 31, 2012
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PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 84. MOTOR VEHICLE INSTALLMENT SALES

The Finance Commission of Texas (commission) adopts amendments to 7 TAC Chapter 84, §§84.102, 84.105, 84.203 - 84.205, 84.301, 84.308, 84.504, 84.601 - 84.605, 84.607 - 84.611, 84.613, 84.614, 84.702, 84.704 - 84.709, 84.801 - 84.803, 84.805, and 84.806, concerning Motor Vehicle Installment Sales. Sections 84.102, 84.105, 84.203, 84.301, 84.308, 84.504, 84.601 - 84.605, 84.607 - 84.611, 84.613, 84.614, 84.702, 84.704 - 84.709, 84.801 - 84.803, 84.805, and 84.806 are adopted without changes to the proposed text as published in the August 31, 2012, issue of the *Texas Register* (37 TexReg 6851) and will not be republished. Section 84.204 and §84.205 are adopted with technical changes and will be republished. The amendments affect rules contained Subchapter A, concerning General Provisions; Subchapter B, concerning Retail Installment Contract; Subchapter C, concerning Insurance and Debt Cancellation Agreements; Subchapter E, concerning Holder's Rights, Duties, and Limitations; Subchapter F, concerning Licensing; Subchapter G, concerning Examinations; and Subchapter H, concerning Retail Installment Sales Contract Provisions.

The commission received no written comments on the proposal.

The majority of the rules in Chapter 84 are being amended. Any Chapter 84 rule not included in this proposal will be maintained in its current form.

In general, the purpose of the amendments to 7 TAC Chapter 84 is to implement changes resulting from the commission's review of the chapter under Texas Government Code, §2001.039. The notice of intention to review 7 TAC Chapter 84 was published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 6097). The agency did not receive any comments on the notice of intention to review. The agency circulated an early draft of these proposed changes to interested stakeholders and has incorporated certain revisions to address issues raised by stakeholders.

Most of the changes are technical in nature and relate to improvements in consistency, grammar, punctuation, capitalization, and formatting. Additional changes provide clarification, more precise legal citations, and improved references to other state agencies. These technical corrections have been modeled after improvements made during the rule review of Chapter 89, Property Tax Lenders. The major formatting changes serve to implement streamlining improvements in the licensing process

similar to those used for the newly licensed credit access businesses.

The individual purposes of the amendments to each section are provided in the following paragraphs. Specific explanation is included with regard to new language, changes in language, and significant formatting amendments. The remaining changes throughout all sections consist of minor technical revisions and will be summarized more generally.

Section 84.102 contains general definitions used throughout Chapter 84. Revisions have been made to paragraphs (15) "Scheduled installment earnings method," (20) "True daily earnings method," and (21) "U.S. Rule." These amendments provide updated citations for Regulation Z in accordance with the relocation and renumbering of these provisions by the Consumer Financial Protection Bureau (CFPB). Similar changes are adopted in the recordkeeping rules to these and other federal regulations as reorganized by the CFPB. In addition, in paragraph (17) "Sales tax deferred transaction," "Texas" has been inserted at the beginning of the agency title to more accurately refer to the "Texas Comptroller of Public Accounts."

Technical corrections have been made to §84.105, Indigency Affidavit for Appeal of Conditional Delivery Determination; §84.203, Deferment Charge; and §84.204, Disclosure of Equity in Retail Buyer's Trade-in Motor Vehicle. In particular, these changes provide a corrected statutory citation and improved grammar and punctuation.

Also in §84.204 regarding disclosure of equity, additional readable typefaces for the standard form have been added to subsection (e). This revision offers greater flexibility to retail sellers when formatting the disclosure. Since the proposal, the titles of §84.204 and §84.205 have been changed in order to maintain their current titles: "§84.204, Disclosure of Equity in Retail Buyer's Trade-in Motor Vehicle"; and "§84.205, Documentary Fee Reasonableness Standards."

In §84.205 concerning documentary fees, a clarifying change has been made to subsection (e) concerning reasonableness standards. The revision adopts a new sentence to be included as the next to last one in paragraph (3), as follows: "A retail seller has the burden of showing that all included costs are specified and supported by adequate documentation." This change conforms the rule to current agency practice and provides better clarity and guidance to licensees.

The following sections contain technical corrections: §84.301, Definitions; §84.308, Debt Cancellation Agreements Not Requiring Insurance; and §84.504, Collection Contacts. Of note, the revisions provide consistent terminology, remove unnecessary language, provide clarification, and update federal legal citations.

Section 84.601, which contains the licensing definitions, has experienced several minor revisions relating to grammar and punctuation. Two of these changes are recurring throughout the rules. First, the verb "shall" has been changed to "will" in the introductory paragraph and to "must" in paragraph (7)(E). Similar changes have been made to numerous rules in Chapter 84 by replacing "shall" with either "will" or "must," as appropriate, since the latter language is reflective of a more modern and plain language approach in regulations. Second, the hyphens have been removed from the phrases "privately held" and "publicly held," as these hyphens are deemed unnecessary by modern usage guides.

Also in §84.601, two definitions have been added in new paragraphs (3) "Commissioner" and (6) "OCCC." These additions provide clarification on basic terminology used throughout the subchapter and afford consistency with the regulations of other licensed industries. The agency believes that references to the OCCC or OCCC staff taking certain actions or requiring certain items provides better clarity and a more plain language approach in regulations. Additionally, the remaining definitions have been renumbered accordingly.

Section 84.602 regarding the filing of new applications has been revised and reorganized to increase the efficiency of the licensing process and to better align the rules with the streamlined application forms prepared by the agency. First, the provisions that have been relocated to provide proper alignment with the revised licensing forms are as follows: former §84.602(1)(E) concerning statutory or registered agent has been relocated to adopted paragraph (1)(A)(iii), former paragraph (2)(C)(vii)(II) concerning statement of records has been relocated to adopted paragraph (1)(D)(iii), former paragraph (1)(A)(iii) concerning authorized signatures has been renamed "Consent form" and relocated to adopted paragraph (1)(E), and former paragraph (1)(L) concerning assumed names has been relocated to adopted paragraph (2)(D).

In particular, one of the relocated provisions relates to the creation of a new separate licensing form, which is the consent form. This provision involves some minor wording changes in addition to its relocation. In adopted §84.602(1)(E), the following new language relating to the term "authorized individual" has been added: "Each applicant must submit a consent form signed by an authorized individual. . . . The following are authorized individuals . . . ."

Second, the wording and format of several taglines or form titles have been revised to correspond with the new licensing forms. These title changes are found in the following adopted provisions: §84.602(1)(A), (1)(A)(iii) - (v), (1)(B), (1)(C), (1)(C)(i) - (iii), (1)(D), (1)(D)(i) - (iii), (1)(E), (1)(F), and (2)(D). Other changes relating to form titles may be found in §84.603(a) and (b) and §84.604(d). Additionally, any surrounding provisions affected by the relocations have been renumbered or relettered as appropriate, along with other technical corrections.

In conjunction with the reorganization of §84.602, certain provisions have experienced revised language to improve clarity and flexibility. In §84.602(1)(A)(iii), the term "statutory agent" has been replaced with "registered agent" throughout this clause. Parallel changes have also been made to §84.602(2)(C)(ii) and (iv). In reference to agents who are natural persons, a "physical residential address" is no longer required and has been replaced with a requirement for "a different address than the licensed location address." In addition, for registered agents not matching those on file with the Office of the Texas Secretary of State, an applicant must only submit "a certification from the secretary of the company identifying the registered agent" as opposed to the former language requiring certified minutes of the appointment.

In §84.602(1)(A)(v)(III) concerning disclosure of partners for limited partnerships, the first sentence had been inconsistent with the requirements outlined in the related items. Accordingly, to clarify and resolve this issue, the first sentence has been revised as per Texas Register guidelines: "Each partner, general and limited, fulfilling the requirements of items (-a-) - (-c-) of this subclause must be listed and the percentage of ownership stated."

Section 84.602(1)(C)(iii) concerning employment history has been revised by removing the phrase "with no gaps." As the rule still requires "a continuous 10-year [employment] history," the deleted language is not necessary.

Section 84.602(2)(A)(iv) relates to the fingerprints of individuals who have previously been licensed by the agency and who are principal parties of currently licensed entities. In response to an audit finding, the agency has clarified that while fingerprints are not generally required for these individuals, they may be required under certain circumstances. Fingerprints are not required if "fingerprints are on record with the OCCC, are less than 10 years old, and have been processed by both the Texas Department of Public Safety and the Federal Bureau of Investigation." Fingerprints may be requested in order to complete the agency's records.

Regarding the entity documents under §84.602(2)(C), several changes have been made in order to increase the efficiency of the licensing process. The provisions under former (2)(C)(ii)(II) and (III), and (2)(C)(iv)(II) and (III) required that applicants provide copies of the relevant portions of bylaws, operating agreements, and minutes addressing the number and election of officers and directors. The agency recognizes that these documents are only necessary in limited situations. Thus, these provisions have been shifted to the end of each respective requirement and language has been added to reflect that such documents should only be provided upon request. The relocated provisions are adopted in §84.602(2)(C)(ii)(IV) and (V), and (2)(C)(iv)(IV) and (V).

To further streamline the licensing process, the former requirements in §84.602(2)(C)(ii)(IV)(-a-) and (2)(C)(iv)(IV)(-a-) have been deleted. Those provisions had required applicants to provide minutes electing the statutory agent. Upon review of the licensing process, the agency can streamline the process for verification of the registered agent by certification from the secretary of the company. Additionally, the verification of good standing may be obtained either directly from the Texas Comptroller of Public Accounts or upon request to the licensee if the Comptroller does not have an online record of the company. Thus, the phrase "if requested" has been added to adopted §84.602(2)(C)(ii)(VI) and (2)(C)(iv)(VI).

Updates have been made to §84.602(2)(D) to include revised citations to the Texas Business and Commerce Code provisions concerning assumed name certificates, as relocated during the 2009 legislative session. Parallel changes have been made to update the citations contained in §84.603 concerning registered offices.

Technical corrections have been made to §84.603, New Registered Offices; §84.604, Transfer of License; and to §84.607, Reportable Actions After Application. In particular, these changes provide parallel formatting and improve grammar, punctuation, and internal references.

Revisions have been made to §84.605, Change in Form or Proportionate Ownership, and §84.609, Relocation of Licensed Offices, to minimize unnecessary transfer applications and revise the procedure to notify the agency of certain business changes. In cases involving changes in organizational form and mergers resulting in different parent entities, the former language in §84.605(a) and (b) requiring a transfer has been revised to instead only require a license amendment and payment of the accompanying fee under §84.611. Similarly, a license amendment and fee requirement have been added to §84.605(c) when a change in proportionate ownership results in the exact same owners still owning the business (absent an owner crossing the 10% ownership threshold), as well as §84.609(c) when a licensed office is relocated.

In §84.605 and §84.607, the deadlines for licensees to notify the agency of certain actions have been revised. In both sections the deadline for notifying the agency has been extended to 14 days rather than the former 10 days after the date of the event.

Section 84.608 describes how an application for a motor vehicle sales finance license is processed, including a description of when an application is complete, as well as an explanation of what may occur if an applicant fails to complete an application. Subsection (a) has been revised for this adoption to clarify when a response will be provided by the agency, as follows: "A response to an incomplete application will ordinarily be made within 14 calendar days of receipt stating that the application is incomplete and specifying the information required for acceptance." In addition, technical corrections to improve grammar and citations have been made to §84.608.

Section 84.610, License Status, includes technical amendments to improve clarity and grammar. Clarification has been added with regard to license expiration in §84.610(d) in order to better track the statutory provisions found in Texas Finance Code, §348.507.

As discussed earlier, changes have been made to other sections requiring that a license amendment be filed in certain situations. Accordingly, these situations have been added to the fee provision concerning license amendments. Thus, §84.611(d) has been amended with the following phrases added before "or relocating a licensed location": "changing the organizational form or proportionate ownership, providing notification of a new parent entity." In subsection (e), the phrase "not to exceed" has been added so that annual fees may be discounted when appropriate. Additionally, technical corrections to §84.611 include changes to improve punctuation and grammar.

The following sections contain technical corrections: §84.613, Effect of Criminal History Information on Applicants and Licensees; §84.614, Crimes Directly Related to Fitness for License; Mitigating Factors; §84.702, Prohibited Advertising; §84.704, Correction of Errors or Violations; §84.705, Unclaimed Funds; and §84.706, Follow-up Examination Fees. Of note, the revisions remove unnecessary language, revise internal regulation references, provide updated federal legal citations, provide clarification, and improve grammar and punctuation.

Several parallel changes have been made throughout the recordkeeping rules, §§84.707 - 84.709. In §84.707 (applicable to dealers that assign their contracts) and §84.708 (applicable to dealers that collect on their contracts), a clarification regarding the retention of certain retail installment contracts has been added at the end of each respective subsection (b). The addition as adopted reads as follows: "This requirement includes any retail installment sales contract signed by a retail buyer for a vehicle that has been delivered, including contracts that are subsequently voided or canceled after a seller regains possession and ownership of the vehicle."

The new language refers to situations where a buyer has signed the contract and the vehicle has already been delivered, but an event occurs resulting in the seller regaining possession and ownership of the vehicle and voiding or canceling the contract. In other words, this amendment is intended to capture situations where a retail installment transaction must be "unwound."

The addition clarifies that these consummated contracts should be maintained, regardless of any subsequent actions that later void or cancel them. When conducting prior investigations or examinations, the agency has often not had access to these "unwound" contracts, which are frequent sources of complaints. Thus, the agency believes by clarifying which contracts must be available during the investigation and examination process, it will benefit the agency's ability to resolve complaints and other compliance-related concerns.

Also in §§84.707 - 84.709, updates have been made to replace any references to the Texas Department of Transportation with the recently created Texas Department of Motor Vehicles. The remaining technical corrections throughout the recordkeeping rules include the following: citations as revised by the CFPB, more consistent references to the Texas Comptroller of Public Accounts, form title revised by the Texas Department of Public Safety, updated statutory and regulation references, streamlining of duplicated language, and improved grammar and punctuation.

Technical corrections have been made to §84.801, Purpose; §84.802, Non-Standard Contract Filing Procedures; §84.803, Relationship with Federal Law; and §84.805, Other Disclosures Required by Commission Rule. In particular, these changes provide updated federal legal citations, clarification, and improved grammar and punctuation.

In §84.806 regarding the format of the model motor vehicle retail installment contract, additional readable typefaces have been added to subsection (b). This revision is parallel to the one made in §84.204 and offers greater flexibility when formatting the contracts.

SUBCHAPTER A. GENERAL PROVISIONS

7 TAC §84.102, §84.105

The amendments are adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The statutory provisions affected by the adopted amendments are contained in Texas Finance Code, Chapter 348.

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

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205452
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Effective date: November 8, 2012
Proposal publication date: August 31, 2012
For further information, please call: (512) 936-7621

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SUBCHAPTER B. RETAIL INSTALLMENT CONTRACT

7 TAC §§84.203 - 84.205

The amendments are adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The statutory provisions affected by the adopted amendments are contained in Texas Finance Code, Chapter 348.

§84.204. Disclosure of Equity in Retail Buyer's Trade-in Motor Vehicle.

(a) Purpose and delivery. The purpose of this section is to provide a standard form for the disclosure of equity that a retail seller must provide to the retail buyer before accepting a trade-in motor vehicle for an ordinary motor vehicle sold under a retail installment sales contract. The disclosure of equity standard form is not required for transactions where a single cash payment is made for the sale of the motor vehicle. This section prescribes the form and content of the standard form under Texas Finance Code, §348.0091. This section does not apply to retail installment sales transactions for commercial vehicles.

(b) Required elements. A disclosure of equity standard form to be provided to the retail buyer before accepting a trade-in motor vehicle for a motor vehicle sold under a retail installment sales contract must contain the required elements as provided in Texas Finance Code, §348.0091(c).

(c) Single page required. The disclosure of equity standard form must fit on one standard-size sheet of paper (8 1/2 by 11 inches).

(d) Font. The disclosure of equity standard form must be printed in an easily readable font and type size. If other state or federal law requires a different type size for a specific disclosure or contractual provision, the type size specified by the other law should be used.

(e) Typeface. The text of the disclosure of equity standard form must be set in an easily readable typeface. Typefaces considered to be readable include: Arial, Calibri, Caslon, Century Schoolbook, Garamond, Helvetica, Scala, and Times New Roman.

(f) Typeface size. Typeface size is referred to in points. Because different typefaces in the same point size are not of equal size, typeface is not strictly defined but is expressed as a minimum size in the Times New Roman typeface for visual comparative purposes. Generally, the typeface for the text of the disclosure of equity standard form must be at least as large as 10 point in the Times New Roman typeface. A point is generally viewed as 1/72nd of an inch.

(g) Co-buyers. If the motor vehicle being sold under a retail installment sales contract is being purchased by co-buyers, the signature of one co-buyer will verify delivery of a disclosure under this section.

(h) Required standard form. The required disclosure of equity standard form under Texas Finance Code, §348.0091 to be provided to the retail buyer before accepting a trade-in motor vehicle for a motor vehicle sold under a retail installment sales contract is presented in the following figure.
Figure: 7 TAC §84.204(h) (No change.)

(i) Permissible changes. A retail seller must use the required disclosure of equity standard form, but may consider making only limited technical changes in the disclosure paragraph required by Texas Finance Code, §348.0091(c)(1)(H), as provided by the following exclusive list:

(1) substituting the following for the words "the dealer":

(A) the retail seller's name;

(B) the pronoun "we"; or

(C) "the seller";

(2) substituting the following words for the pronoun "you":

(A) "the buyer";

(B) "the retail buyer"; or

(C) "the retail buyer(s)";

(3) substituting the article "the" for the pronoun "your";

(4) appropriate changes to verbs in order to maintain proper grammar.

§84.205. Documentary Fee Reasonableness Standards.

(a) Generally. When reviewing a seller's documentary fee increase for reasonableness under Texas Finance Code, §348.006(e), the commissioner may consider the resources required by the seller to perform the seller's duties under state and federal law with respect to the handling and processing of documents relating to the sale and financing of a motor vehicle. This section only applies to retail sales as defined by the Texas Transportation Code. A documentary fee may only include costs that are imposed uniformly in cash and credit transactions.

(b) Permissible documentary fee costs. For a cost to be included in a documentary fee, a cost must directly relate to the retail seller's handling and processing of documents for the sale and financing of a motor vehicle in compliance with state and federal law.

(c) Costs relating to sale of motor vehicle. For a cost to be included in a documentary fee, the cost must be incurred either concurrently or after the negotiation and preparation of the buyer's order, the bill of sale, or the purchase agreement and must directly relate to the sale of a motor vehicle. Any costs or resources expended prior to the negotiation and preparation of the buyer's order, the bill of sale, or the purchase agreement may not be included in the documentary fee. The cost may also directly relate to the evaluation by the retail seller of the creditworthiness of the retail buyer, the completion of the retail installment sales contract by the retail seller, or the perfection of the lien against a motor vehicle.

(d) Costs excluded.

(1) Generally. A documentary fee may not include any costs or resources expended after the title of a purchased motor vehicle is actually transferred or when the title is legally obligated to have been transferred, whichever is earlier. If the sale includes a trade-in vehicle, the documentary fee may not include costs or resources expended after the title of the trade-in is actually transferred or when the title is legally obligated to have been transferred, whichever is earlier.

(2) Costs associated with negotiation or assignment of contract. The retail seller cannot include any costs associated with either the negotiation of or the assignment of the retail installment sales contract to another financial institution or related finance company.

(3) Costs of credit evaluation by other parties. A retail seller may not include the cost of any resource or expense in the documentary fee analysis that relates to the evaluation of the creditworthiness of the prospective retail buyer by an entity that may purchase the underlying retail installment sales contract.

(4) Other excluded costs. The retail seller may not include any costs associated with advertising, the retail seller's credit arrangements for the purchase of its inventory, the processing of manufacturer or distributor's rebates, the compensation of a person for the sale of the motor vehicle, the price of any report on the condition or history of the motor vehicle to be purchased or traded-in, or the cost associated with the disbursement of money (i.e., certified checks or capital expenses). A retail seller cannot increase any authorized charge or expense from a third party associated with the documentary fee. A documentary fee may not include the cost of preparing the Truth in Lending disclosure statement or any other cost that would be considered a finance charge under the Truth in Lending Act (15 U.S.C. §§1601-1667f).

(e) Reasonable documentary fee.

(1) To be reasonable, a documentary fee cannot exceed the amount necessary to cover the cost of performing the processing and handling of the documents required for the sale and financing of a motor vehicle.

(2) To be considered reasonable, proposed costs must meet three critical tests:

(A) Allowable. For a cost to be allowable, it must meet the following criteria:

(i) be necessary for the proper and efficient sale and financing of a motor vehicle;

(ii) be authorized or not prohibited under local, state, or federal laws or regulations or be necessary in order to comply with a local, state, or federal law or regulation;

(iii) be determined in accordance with generally accepted accounting principles; and

(iv) be adequately documented, including any applicable credits.

(B) Allocable. Allocable costs are logically related to, or required in the performance of the handling and processing of documents relating to the sale and financing of a motor vehicle. In determining whether a cost is allocable, consideration will be given to whether the goods or services involved are chargeable or assignable to the objective of processing and handling of the documents required for the sale and financing of a motor vehicle in accordance with relative benefits received.

(C) Prudent business person. The prudent business person standard is the amount a prudent business person would pay in a competitive marketplace. A cost can be allowable and allocable, and still not be what a prudent business person would pay (e.g., hiring a limousine to deliver documents). In determining whether a given cost is prudent, consideration will be given to:

(i) whether the cost is of a type generally recognized as ordinary, customary, and necessary for the processing and handling of the documents for the sale and financing of a motor vehicle;

(ii) the restraints or requirements imposed by such factors as sound business practices, arms-length bargaining, and federal, state and other laws and regulations;

(iii) market prices for comparable goods or services; and

(iv) the necessity for the cost.

(3) The Office of Consumer Credit Commissioner will review any written notice of an increased documentary fee over $125 provided by a seller. The review may include an analysis of the resources required by the seller to perform the seller's duties under state and federal law with respect to the handling and processing of documents relating to the sale and financing of a motor vehicle. The review may result in a determination of the maximum amount of a documentary fee that a specific seller may charge. A retail seller has the burden of showing that all included costs are specified and supported by adequate documentation. A retail seller must comply with the Truth in

Lending Act when disclosing a documentary fee in cash and financed transactions.

(f) Reduction or suspension of unreasonable documentary fee. The commissioner may order a seller to reduce its documentary fee to a reasonable amount retroactively. The order to reduce a documentary fee retroactively will require the seller to provide restitution to all retail buyers who were charged a fee in excess of the amount the commissioner determines to be reasonable over $125. The commissioner may also suspend by order a seller's ability to charge any documentary fee above $50 for a specified period of time.

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-201205453
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
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Proposal publication date: August 31, 2012
For further information, please call: (512) 936-7621

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SUBCHAPTER C. INSURANCE AND DEBT CANCELLATION AGREEMENTS

7 TAC §84.301, §84.308

The amendments are adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The statutory provisions affected by the adopted amendments are contained in Texas Finance Code, Chapter 348.

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

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SUBCHAPTER E. HOLDER'S RIGHTS, DUTIES, AND LIMITATIONS

7 TAC §84.504

The amendments are adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The statutory provisions affected by the adopted amendments are contained in Texas Finance Code, Chapter 348.

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

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SUBCHAPTER F. LICENSING

7 TAC §§84.601 - 84.605, 84.607 - 84.611, 84.613, 84.614

The amendments are adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The statutory provisions affected by the adopted amendments are contained in Texas Finance Code, Chapter 348.

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. EXAMINATIONS

7 TAC §§84.702, 84.704 - 84.709

The amendments are adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The statutory provisions affected by the adopted amendments are contained in Texas Finance Code, Chapter 348.

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. RETAIL INSTALLMENT SALES CONTRACT PROVISIONS

7 TAC §§84.801 - 84.803, 84.805, 84.806

The amendments are adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

The statutory provisions affected by the adopted amendments are contained in Texas Finance Code, Chapter 348.

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 7. STATE SECURITIES BOARD

CHAPTER 115. SECURITIES DEALERS AND AGENTS

7 TAC §115.1

The State Securities Board adopts an amendment to §115.1, concerning general provisions, without changes to the proposed text as published in the June 8, 2012, issue of the *Texas Register* (37 TexReg 4116).

A change to the title of §115.11, which is concurrently adopted, is reflected in the rule.

A cross-reference in the rule is updated.

No comments were received regarding adoption of the amendment.

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

The adopted amendment affects Texas Civil Statutes, Article 581-12.

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

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205426
John Morgan
Securities Commissioner
State Securities Board
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Proposal publication date: June 8, 2012
For further information, please call: (512) 305-8304

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7 TAC §115.4

The State Securities Board adopts an amendment to §115.4, concerning evidences of registration, without changes to the proposed text as published in the June 8, 2012, issue of the *Texas Register* (37 TexReg 4116).

The process for certain succession filings by a registered securities dealer has been streamlined and coordinates with the treatment of these succession filings (as a succession by application or as a succession by amendment) at the federal level; the fees to be paid for each type of succession are clarified; and the renewal filing requirements are updated.

Uniformity is promoted by more closely mirroring the treatment of succession filings by the Securities and Exchange Commission and the Financial Industry Regulatory Authority.

No comments were received regarding adoption of the amendment.

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

The adopted amendment affects Texas Civil Statutes, Articles 581-12, 581-13, 581-15, 581-17, and 581-19.

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 Morgan
Securities Commissioner
State Securities Board
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For further information, please call: (512) 305-8304

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7 TAC §115.11

The State Securities Board adopts an amendment to §115.11, concerning finder registration and activities, without changes to the proposed text as published in the June 8, 2012, issue of the *Texas Register* (37 TexReg 4118).

Finder applicants will be able to more easily identify those portions of Form BD and Form U-4 that are applicable to their finder activities and will no longer be required to provide a personal balance sheet with their application. Registered finders will be required to maintain a copy of both the Form BD and the Form U-4 used to register as well as any amendments thereto.

Finder applicants will be provided specific guidance on the registration filing requirements, and recordkeeping required of registered finders will correspond to their filing requirements.

No comments were received regarding adoption of the amendment.

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

The adopted amendment affects Texas Civil Statutes, Articles 581-12, 581-13, and 581-13-1.

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 Morgan
Securities Commissioner
State Securities Board
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CHAPTER 116. INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES

7 TAC §116.4

The State Securities Board adopts an amendment to §116.4, concerning evidences of registration, without changes to the proposed text as published in the June 8, 2012, issue of the *Texas Register* (37 TexReg 4119).

The process for certain succession filings of a registered investment adviser has been streamlined and coordinates with the treatment of these succession filings (as a succession by application or as a succession by amendment) at the federal level; the fees to be paid for each type of succession are clarified; and the renewal and termination filing requirements are updated.

Uniformity is promoted by more closely mirroring the treatment of succession filings at the federal level and guidance is provided on submission of renewal and termination notices.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Articles 581-28-1 and 581-12-1.B. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes. Section 12-1.B provides the Board with authority to make rules authorizing a federal covered investment adviser or a representative of a federal covered investment adviser to engage in rendering services as an investment adviser in this state on submission to and receipt by the Commissioner of a notice filing, a consent to service of process, and fee.

The adopted amendment affects Texas Civil Statutes, Articles 581-12, 581-12-1, 581-13, 581-15, 581-17, and 581-19.

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 Morgan
Securities Commissioner
State Securities Board
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For further information, please call: (512) 305-8304

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CHAPTER 139. EXEMPTIONS BY RULE OR ORDER

7 TAC §139.16

The State Securities Board adopts an amendment to §139.16, concerning sales to individual accredited investors, without changes to the proposed text as published in the June 8, 2012, issue of the *Texas Register* (37 TexReg 4121).

The limited use advertisement that can be used by issuers utilizing this exemption has been updated to reflect changes made to

the definition of an accredited investor by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

The limited use advertisement authorized by the section correctly identifies the net worth criteria for natural person accredited investors.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Articles 5.T and 581-28-1. Section 5.T provides that the Board may prescribe new exemptions by rule. Section 28-1 provides the Board with the authority to adopt rules and regulations necessary to carry out and implement the provisions of the Texas Securities Act, including rules and regulations governing registration statements and applications; defining terms; classifying securities, persons, and matters within its jurisdiction; and prescribing different requirements for different classes.

The adopted amendment affects Texas Civil Statutes, Article 581-7.

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 Morgan
Securities Commissioner
State Securities Board
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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 22. PROCEDURAL RULES
SUBCHAPTER M. PROCEDURES AND FILING REQUIREMENTS IN PARTICULAR COMMISSION PROCEEDINGS

16 TAC §22.246

The Public Utility Commission of Texas (commission) adopts amendments to §22.246, relating to Administrative Penalties, with changes to the proposed text as published in the May 11, 2012, issue of the *Texas Register* (37 TexReg 3512). The purpose of these amendments, coupled with substantive amendments adopted in §25.503, is to establish procedures to return excess revenues to affected wholesale electricity market participants when the commission has ordered disgorgement of those excess revenues in an enforcement proceeding. The passage of House Bill (HB) 2133 in the 82nd legislative session required the commission to adopt rules to establish such a procedure. The amendments constitute a competition rule subject to judicial review as specified in PURA §39.001(e). Project Number 40073 is assigned to this proceeding.

The commission received comments on the proposed amendments from the Alliance for Retail Markets (ARM); City of Austin d/b/a Austin Energy (Austin Energy); Luminant Energy Company LLC and Luminant Generation Company LLC (Luminant); NRG Energy, Inc. (NRG); Steering Committee of Cities Served by Oncor (Cities); Texas Competitive Power Advocates (TCPA); Texas Electric Cooperatives, Inc. (TEC); Texas Industrial Energy Consumers (TIEC); and TXU Energy Retail Company LLC (TXU Energy).

ARM was composed of Constellation NewEnergy, Inc./StarTex Power; Direct Energy, LP; and Gexa Energy, LP.

Proposed Subsection (b)

TEC requested that the commission consider whether the definition of affected wholesale electric market participants in proposed subsection (b)(1) would enable the return of disgorged excess revenues to other wholesale market participants on a case by case basis as contemplated by proposed subsection (j). TEC noted that the restrictive definition proposed refers only to entities that sell energy to retail customers; such entities are referred to as load serving entities (LSE) in the ERCOT Protocols. TEC stated that there may be wholesale market participants other than LSEs who are adversely affected by wholesale market violations and thus, it may be appropriate in certain circumstances for the commission to recognize non-LSE wholesale market participants when returning disgorged revenues to the market. TEC believed that recognizing such non-LSE wholesale market participants would be possible under the case by case approach, but the definition proposed in subsection (b)(1) may constrain the commission's ability when refunding disgorged revenues as PURA §15.025 only allows refunds to affected wholesale electric market participants and the commission has defined such as LSEs. TEC recommended that the commission clarify how other wholesale market participants that are properly entitled to receive disgorged revenues will be determined and defined.

Commission Response

The commission understands that market participants beyond the scope of the proposed definition in subsection (b)(1) may be affected by wholesale electric market violations. Therefore, the commission clarifies, as requested by TEC, that the rule allows the commission to recognize wholesale electric market participants that do not serve retail load when allocating disgorged excess revenues in a subsequent proceeding. HB 2133 requires excess revenues ordered disgorged to be returned to affected wholesale market participants to be used to reduce costs or fees incurred by retail electric customers. The commission believes that proposed subsection (j) grants the commission broad flexibility to open a subsequent proceeding when it determines other wholesale electric market participants are affected or a non-standard distribution method is appropriate. Other wholesale market participants that are properly entitled to receive disgorged revenues will be determined in the subsequent proceeding. However, market participants who do not serve load at retail are not eligible to receive disgorged funds if they are unable to use such funds to reduce costs or fees incurred by retail electric customers. Parties in the subsequent proceeding would not be limited to the parties in the penalty or disgorgement proceeding. The commission believes the definition of affected wholesale electric market participants is appropriate as proposed and declines to adopt amendments to the definition based on the comments of TEC.

Luminant requested that the commission revise the definition of affected wholesale electric market participant in proposed subsection (b)(1) to remove the affiliate exclusion. Luminant stated that HB 2133 is clear in that any excess revenue ordered disgorged shall be returned to the affected wholesale electric market participants to be used to reduce costs or fees incurred by retail electric customers. Excluding affiliates would unreasonably discriminate against certain retail electric customers merely because they choose a REP affiliate of a company ordered to disgorge excess revenue. Luminant stated that so long as affiliated companies are able to demonstrate that the refunded monies have been used to reduce costs or fees incurred by retail electric customers, the statutory mandate is achieved. Luminant noted that implementation and monitoring of such a commitment could be overseen by the independent organization charged with distributing the disgorged excess revenues. Luminant recommended striking the affiliate exclusion from proposed subsection (b)(1).

Cities commented that Luminant's request to remove the affiliate restriction from the definition of affected wholesale market participant underscores the importance of its recommendation that the rule expressly require disgorged funds to be used to reduce the fees and charges paid by retail electric customers. Cities stated that otherwise, disgorged funds may stay within the corporate family of the entity from which funds are disgorged, making a disgorgement penalty completely ineffectual. Cities commented that it did not object to Luminant's proposed language, provided that its own language regarding the use of the disgorged funds as provided in comment regarding substantive amendments to §25.503 are also adopted.

Commission Response

The commission agrees with Luminant that the definition of affected wholesale electric market participants should include affiliates of the person found in violation and that HB 2133 is clear that any excess revenue ordered disgorged shall be used to reduce customer costs and fees. HB 2133 requires the commission to adopt rules prescribing how disgorged excess revenues should be returned to affected wholesale electric market participants. The commission agrees with Cities that disgorged funds should not stay within the corporate family of the person from which excess revenue is disgorged, as such would render a disgorgement order partially ineffectual. However, the commission believes that the requirement in HB 2133, that any excess revenue ordered disgorged shall be used to reduce customer costs and fees, prevents the excess revenues given to affiliate from remaining within the corporate structure. Therefore, the commission believes the exclusion of affiliates from the definition of affected wholesale electric market participants is unnecessary and amends the proposed definition of "affected wholesale electric market participant."

Proposed Subsection (e)

NRG noted that under the proposed rule, the report regarding a violation or continuing violation can be issued at any time after the action or decision precipitating the investigation has occurred. NRG stated that the competitive market is harmed by the regulatory uncertainty surrounding a pending investigation as market participants do not know whether certain actions would be considered abuse of market power. NRG stated that regulatory certainty is critical to the success of the competitive market and allows for more reasonable ERCOT fees and market participant costs, as well as encourages capital market investment. NRG noted that regulatory certainty also serves to inform market participants of the rules under which they may operate and allows them to conduct business with as few qualifications as possible. An investigation into market power abuse by definition disrupts market certainty. NRG feared that years after an action or decision by a market participant, the commission could commence an investigation which would potentially lead to disgorgement of revenues. As proposed, once an investigation begins there is no timetable to notice the market participant of when the investigation may have concluded or what would lead to further action. NRG commented that open ended timelines would require market participants to keep their books and records open, which could impact the ability and cost of participants to transact business.

NRG recommended a sufficient but finite timeframe within which the Executive Director Report must be issued and proposed that the report be issued within two years of the decision or action that lead to the investigation. NRG commented that two years is sufficient time to conduct an in-depth analysis for the purpose of deciding whether penalties will be proposed and it is only fair to affected parties to know within some finite point in time that actions taken and decisions made are no longer actionable. NRG stated that should the report of violation recommend formal proceedings and an administrative penalty or disgorgement of excess revenue, the ensuing investigation and hearing process would not be subject to time constraints. NRG provided language amending subsection (e) with its proposed time constraints.

In the reply period, Luminant supported NRG's proposal to limit the issuance of a report of violation to within two years of the date of the alleged violation or start of the continuing violation. Luminant agreed with NRG that a two-year limitation is reasonable.

Cities disagreed with Luminant and NRG. Cities noted that HB 2133 did not contain language imposing a time limit on the executive director in which it must be reported that a violation has occurred and such a time limit could present implementation problems. Cities commented that it is unclear exactly when the two years would apply if the violation at issue is a continuing violation or was difficult to identify. Further, Cities noted that there is no showing that the proceedings anticipated in HB 2133 will drag on inexorably and, if extensive proceedings become a problem in the future, the commission may address the issue at that time. Cities stated that NRG's proposal should be rejected but, if the commission determines that such a limitation is appropriate, recommended that the two year window start at the time the executive director is made or becomes aware of a violation taking place. Cities proposed alternative language that would clarify this intent, but reiterated that such a time limit is unnecessary and not supported by statute.

Commission Response

The commission disagrees with Luminant and NRG that the executive director should face time limitations when issuing a report of violation or continuing violation. The commission agrees with Cities that HB 2133 did not impose a time limit on reporting that a violation has occurred and such a time limit could present implementation problems. Regulatory certainty for the market as a whole should not be challenged by a pending investigation into either market power abuse, or wholesale electric market violations of other PURA sections, commission rules, or wholesale electric market protocols. Market participants are responsible for understanding the rules under which they may operate and conduct business. HB 2133 granted the commission authority

and discretion to pursue disgorgement without limiting such authority based on a presupposed timeframe. The commission will use discretion to determine, on a case-by-case basis, whether disgorgement is an appropriate remedy for any applicable wholesale electric market violation. The commission declines to adopt the amendments proposed by NRG.

TEC recommended that changes be made throughout proposed subsection (e) to maintain consistent terminology throughout the section. TEC specifically identified several necessary changes that would conform the reference to a penalty in the report of violation to an administrative penalty separate from a recommendation that excess revenue be disgorged.

Commission Response

The commission agrees with TEC and adopts the clarifying amendments to subsection (e) as proposed.

Proposed Subsection (f)

Luminant recommended clarifying proposed subsection (f)(3) so that a person may submit a written request for hearing on any or all of the following, including the occurrence of the violation or continuing violation, the amount of the administrative penalty, and the amount of disgorged revenue, if applicable.

Commission Response

The commission agrees with Luminant and adopts the recommended clarifications to subsection (f)(3) as proposed.

Proposed Subsection (h)

Luminant recommended that proposed subsection (h) be revised to require that the SOAH administrative law judge, in issuing a proposal for decision, make specific fact findings establishing whether the market entity acted with the requisite intent and thus whether disgorgement is appropriate. Luminant's proposed language was consistent with conforming recommendations made under proposed subsections (b), (i) and (j), along with similar comments made in regards to proposed amendments to §25.503.

Commission Response

The commission disagrees with Luminant that a wholesale electric market violation of PURA sections other than as mandated by statute for PURA §39.157, commission rules, or wholesale electric maker protocols should require a specific fact finding establishing affirmative intent or reckless disregard prior to establishing whether disgorgement is appropriate. The commission maintains that HB 2133 granted the commission the discretion to determine, on a case-by-case basis, whether disgorgement is an appropriate remedy for any applicable wholesale electric market violation. The commission therefore declines to adopt the amendments proposed by Luminant.

Proposed Subsection (i)

Luminant recommended language that would amend proposed subsection (i) so that parties to a proceeding are limited to the person who is alleged to have committed the violation or continuing violation and the commission, including the independent market monitor.

Commission Response

The commission agrees with Luminant. A market participant is alleged to have committed a violation or continuing violation pending the approval of settlement documents or a decision following an administrative hearing. The recommendation also conforms proposed subsection (i) to similar language previously adopted by the commission under §22.246(e)(2). The commission adopts the amendments proposed by Luminant in subsection (i).

Austin Energy and TIEC requested clarifications regarding the limitations of parties to participate in a subsequent proceeding to determine an alternative allocation under proposed subsection (j) should the commission determine such a proceeding is appropriate. Austin Energy stated that intervention in a subsequent proceeding should not be restricted in the same manner as the original administrative proceeding. Austin Energy proposed language under a new subsection (k) that would explicitly allow any affected market participant to intervene to protect its interest in a proceeding relating to the distribution of disgorged excess revenues.

Though it opposed permitting the commission the ability to open a subsequent proceeding to determine a method of returning disgorged revenues, TIEC stated that clarifications to proposed subsection (i) are needed if the provision is retained. TIEC commented that all affected wholesale market participants should be able to intervene in the subsequent proceeding to determine the distribution methodology under proposed subsection (j) and recommended language to make the clarification.

Commission Response

The commission agrees with Austin Energy and TIEC that clarifications are needed regarding participation in a possible subsequent allocation proceeding as contemplated by proposed subsection (j). HB 2133 amended PURA §15.024(f) to limit the parties to a proceeding under that subchapter to the alleged violator and the commission, including the independent market monitor. HB 2133 also required the commission to adopt rules describing how any disgorged excess revenues shall be returned to affected wholesale electric market participants. The commission believes that the limitation on participation in the administrative proceeding in which disgorgement may be ordered is separate from any separate proceeding the commission could open to decide on the allocation of such funds to the wholesale electric market. The commission appreciates the clarifying amendments proposed by both Austin Energy and TIEC. The commission believes that clarifications recommended by TIEC best reflect the intent of subsection (i) and therefore adopts its amendments in subsection (i) as proposed.

Proposed Subsection (j)

NRG, TCPA, and TIEC requested that the provision allowing a subsequent proceeding to determine if other wholesale electric market participants are affected or a non-standard distribution method is appropriate be struck.

TCPA stated that, as proposed, subsection (j) adds a layer of unnecessary complexity and delay to the disgorgement process. TCPA commented that the proposed rule does not comport with the intent of HB 2133 as the independent system operator is only required to distribute disgorged revenues to LSEs. TCPA believed that revenues returned to LSEs are unlikely, or at the very least, highly uncertain to reduce costs or fees to retail customers as the LSE is under no obligation to credit such customers any of the returned funds. Further, TCPA noted that LSEs do not constitute all affected wholesale electric market participants. In a situation where generator purchased replacement power during an interval in which a violation occurred, the generator would not be eligible to receive any of disgorged funds. TCPA stated that allowing the commission to open a subsequent proceed-

ing should it determine other wholesale electric market participants are affected, or a different distribution method is appropriate, is an inadequate and unworkable remedy. Specifically, TCPA commented that because PURA explicitly excludes affected parties other than the accused from participating in an administrative penalty proceeding, other market participants who may have been affected by the violation would have no opportunity to assert or demonstrate that they have been affected. The commission would have to come to the conclusion such parties were affected without any direct input from the parties, and the subsequent proceeding would likely be long, drawn out, and expensive. TCPA stated that a subsequent proceeding would discourage participation by some affected wholesale market participants, delay the return of the disgorged revenues to affected parties, and delay relief to retail customers.

Cities commented that TCPA's suggestion that an affected generator buying replacement power from ERCOT qualifies to receive disgorged funds should not be taken into consideration as it is unclear how disgorgement of funds to generators could ensure that retail electric customers receive a reduction in the costs or fees they pay for electric service.

NRG stated that the load ratio share allocation is a fair and expedient method of distributing disgorged revenues. NRG commented that the possibility of straying from this allocation in order to track specific market participants to the time the violation occurred would be administratively cumbersome, expensive and would not necessarily accomplish a more exact allocation. NRG stated that with a subsequent proceeding, the independent system operator would have to research and reconfigure its allocation based on whatever method was ultimately selected by the commission, increasing administrative costs. Further, NRG commented that the subsequent proceeding and hearing would likely be a waste of resources with little or no benefit to the market and would delay conclusion of the matter. Since hearings would be limited to the alleged violator and the commission, wholesale market participants that could have been affected by the violation may not be able to participate in any proceeding initiated under the pertinent subchapter. NRG questioned how a subsequent proceeding could be accomplished under HB 2133 and recommended the use of load ratio share allocation in all circumstances. NRG provided language amending subsection (j) to remove the option for a subsequent proceeding.

Similarly, TIEC stated that the load ratio share allocation in proposed subsection (j) is both appropriate and consistent with requirements adopted under HB 2133. TIEC commented that this allocation would properly remit disgorged revenues to LSEs in proportion to the harm each sustained as a result of the violation, consistent with the requirement that disgorged revenues flow back to retail customers (through their LSEs). TIEC stated that a subsequent proceeding would be a contentious, cumbersome, and complex administrative process and result in an unnecessary expenditure of time and resources. TIEC noted that statute requires that disgorged revenues flow back to retail customers and therefore no other wholesale market participants should be entitled to the disgorged revenues except for those entities in the market during the violation. TIEC recommended that the proposed rule remove any reference to a subsequent proceeding.

Commission Response

The commission clarifies that the provision in subsection (j) concerning a subsequent proceeding grants the commission broad flexibility to open a separate proceeding to address the situation in which it determines other wholesale electric market participants are affected or a non-standard distribution method is appropriate. As discussed above regarding proposed subsection (i), parties in a subsequent proceeding would not be limited to the parties in the administrative penalty and disgorgement proceedings. Other wholesale market participants that are properly entitled to receive disgorged revenues could be determined and all affected parties would have the ability to participate in the subsequent proceeding.

The commission disagrees with NRG, TCPA, and TIEC that the commission should be denied by rule the flexibility to consider the issues concerning the distribution of disgorged excess revenues in a separate proceeding. The commission appreciates the concerns raised by parties regarding the expense and administrative burden a subsequent proceeding could incur. The commission will consider such factors when determining if a subsequent proceeding is appropriate. The commission therefore declines to adopt the amendments proposed by NRG, TCPA, and TIEC.

ARM and TCPA stated that a more efficient and effective means of distributing disgorged revenues would be to simply direct the independent organization to apply the disgorged funds as an offset to the System Administration Fee. TCPA commented that this would be a more rational, equitable and expeditious way to meet the statute's intent and would completely eliminate any need for multiple hearings. Further, TCPA noted that an offset to the System Administration Fee would also solve the inherent competitive inequities created by distributing disgorged funds only to LSEs without a requirement to reduce fees or costs incurred by their retail customers. ARM stated that while proposed subsection (j) is an appropriate mechanism for implementing HB 2133, using the disgorged excess revenues to reduce the System Administrative Fee would also appropriately implement the statutory requirements.

In the reply period, ARM, NRG, and TXU agreed with TCPA and requested the commission consider the System Administrative Fee offset as an alternative to the methodology originally proposed in §22.246. ARM stated that it would support the System Administrative Fee offset as an alternative to its own initial recommendations regarding proposed subsection (j). ARM commented that either option would provide a relatively simple and straightforward approach to executing the directive of HB 2133 relating to the return of disgorged excess revenue to affected wholesale electric market participants without imposing unnecessary burdens on affected market participants, the commission, or the independent system operator. ARM stated that it interprets the TCPA System Administrative Fee offset to include use of those monies to offset the costs recovered through the fee if the disgorged excess revenues are not sufficient to reduce the fee by at least one cent. ARM provided alternative language should the commission move to adopt the System Administrative Fee offset allocation methodology clarifying that the independent organization shall use the excess revenue to reduce the costs recovered through its fee authorized and approved by the commission pursuant to PURA §39.151 or to reduce the fee.

NRG commented that while it agrees with the load ratio share allocation, the possibility of a subsequent proceeding initiated by the commission at its discretion creates a number of concerns that would be avoided if TCPA's recommendation were adopted. NRG stated that it was unclear whether parties other than those defined under proposed subsection (i) could participate in a subsequent proceeding. NRG also questioned if wholesale market participants did have standing to appear in the subsequent pro-

ceeding, that hearing would cause market participants to incur additional regulatory expenses to litigate an alternative allocation methodology. NRG stated that TCPA's recommendation would eliminate the debate on whether a subsequent proceeding is necessary and would instead establish a process of billing QSEs, who in turn would reduce the charges to LSEs. NRG noted that this would support the intent of HB 2133 to reduce fees incurred by retail electric customers.

TXU supported the System Administrative Fee offset in lieu of any alternative allocation methodology. TXU believed that the System Administrative Fee offset would effectuate the intent of HB 2133 to ensure that retail customers realize the benefits of disgorgement. As stated above in comments regarding proposed subsection (b), TXU provided an alternative proposal should the commission choose not to adopt TCPA's proposal.

Luminant did not oppose TCPA's suggestion to apply disgorged funds as an offset to the System Administrative Fee as the means for using disgorged revenues to reduce the costs and fees incurred by retail electric customers.

Cities and TIEC disagreed and asked the commission to reject the System Administrative Fee offset proposal. Cities believed that TCPA's suggestion would not ensure that disgorged funds reach retail electric customers because the System Administrative Fee is charged to QSEs rather than retail electric customers. Disbarment of the disgorged funds through the reduction of such fee is not a certain way to ensure the statutory mandate that disgorged funds reduce fees and costs for retail customers.

TIEC noted that no other commentators opposed the methodology in the proposed rule or supported the approach recommended by TCPA, including the consumers who would ultimately be entitled to the disgorged revenues. TIEC commented that there is no guarantee if and how the fee would be passed through to a given retail customer as retail contracts treat the System Administration Fee in various ways. Specifically, TIEC commented that the TCPA proposal failed to allocate disgorged revenues to LSEs in proportion to the harm suffered as a result of the violation and instead distributed the funds to all market participants regardless of whether or not they were affected. The System Administrative Fee offset allocation would be based on load ratio share at the time of distribution rather than the actual violation. TIEC maintained that the offset does not follow cost-causation principles and bears no relationship to the level of additional costs incurred by a given LSE as a result of the violation.

Commission Response

The commission disagrees with ARM, NRG, TCPA, and TXU that applying disgorged excess revenues as an offset to the independent system operator's System Administrative Fee is an appropriate means of allocating disgorged funds. While a System Administrative Fee offset might be simple and straightforward, the commission agrees with Cities and TIEC that an offset does not best reflect the statutory intent of HB 2133. Specifically, the System Administrative Fee allocation would not necessarily allocate the disgorged funds only to affected wholesale electric market participants. The System Administrative Fee offset would be applied across the board to all wholesale market participants active at the time the disgorged revenues are distributed in proportion to current load ratio share. This does not reflect the harm caused to affected parties at the time of the violation. Additionally, the commission agrees that the System Administrative Fee offset would not ensure compliance with the requirement in PURA §15.025(e) that any disgorged revenues be returned only to the affected wholesale electric market participants to be used to reduce costs or fees incurred by retail electric customers.

The commission believes that disgorged excess revenues should be allocated to affected wholesale electric market participants based on the load ratio share of affected parties at the time of the violation or during the affected intervals of a continuing violation. The proposed load ratio share allocation methodology best reflects the intent of HB 2133 that disgorged excess revenues be returned to affected wholesale electric market participants. The commission therefore declines to adopt the amendments proposed by ARM and TCPA.

ARM requested clarification on any ambiguity regarding the manner in which an independent organization fulfills the requirement to distribute disgorged excess revenues. ARM stated that a literal reading of proposed subsection (j) may suggest that the independent organization is required to directly distribute excess revenues to affected wholesale electric market participants as defined in proposed subsection (b)(1). ARM noted that in the ERCOT region, qualified scheduling entities (QSE) represent LSEs in all communications and other interactions involved with the independent organization, including settlement invoicing and remittance of payments. LSEs, including REPs, MOUs, and electric cooperatives, are not directly or actively participate in ERCOT administrative functions. ARM specifically noted that the ERCOT System Administrative Fee is assessed to QSEs based on the load it represents, rather than directly assessed to each LSE. ARM stated that ERCOT lacks ready access to load information specific to LSEs, which would hinder its ability to allocate excess revenues based on an LSE's load ratio share for each relevant interval. ARM commented that proposed subsection (j) should be read to allow the independent organization to allocate and distribute disgorged excess revenues at the QSE level and proposed language clarifying this intent. ARM stated that this would allow ERCOT to calculate the allocation of funds for a QSE representing one or more REPs based on the total load served by those REPs during the relevant intervals and would leave any further allocation of such funds to the contractual arrangements between the QSE and REPs. This would be consistent with the current market operations of QSEs serving multiple REPs, but would occur through the separate process contemplated by proposed subsection (j). If the commission does not adopt the language proposed by ARM, it requested that the intent of subsection (j) be fully explained in the preamble of the adopted rule.

TEC agreed that the proposed method of returning disgorged revenues to LSEs is not entirely clear. Specifically, TEC noted that ERCOT, as the current independent organization, has no protocols for returning disgorged revenues and it is not certain whether ERCOT would choose to pay disgorged revenues to QSEs or would make payment directly to LSEs. TEC commented that if disgorged revenues are returned to QSEs, it questioned how the commission could assure that the monies are ultimately returned to LSEs and how entities that buy or sell in the wholesale market but do not serve retail load would be affected. TEC commented that it may not be appropriate to allocated funds to QSEs as they do not serve load. Further, QSEs might have contractual relationships allowing them to retain disgorged revenues that would otherwise go to affected wholesale market participants. TEC stated that these questions could be avoided if the independent organization was required to pay disgorged revenues directly to LSEs.

Commission Response

The commission disagrees with ARM's statement that an independent organization will lack ready access to load information specific to LSEs. ERCOT, the current independent organization, has the ability to determine the load ratio share of individual loads and to specify the appropriate allocation of funds to the affected wholesale market participants. Although the commission declines to adopt the language proposed by ARM, the commission clarifies that disgorged funds should be distributed to the QSEs by ERCOT with an instruction detailing the amounts owed to each LSE within the QSE's portfolio.

While the commission appreciates TEC's concern that disgorged revenues may not end up with the LSEs, the commission notes that any failure to comply with the obligations of the statute and rule to reduce fees and costs to customers would be a violation of PURA and commission rules.

TIEC stated that the proposed rule should clarify how the independent organization will treat disgorged revenues allocated to a market participant that is no longer active. As proposed, a disparity between the total amount of revenues to be disgorged and the total amount owed to active market participants would exist if an affected market participant is no longer active at the time disgorged funds are allocated to the market. TIEC recommended removing the load of market participants that are no longer active at the time of distribution from the total load prior to the independent system operator calculating the load ratio share allocation of the active affected market participants. TIEC provided language amending subsection (j) to express that intent.

In the reply period, Cities supported TIEC's recommendation and urged the commission to adopt TIEC's proposed language.

Commission Response

The commission agrees with TIEC that inactive market participants should not be allocated disgorged excess revenues. The intent of HB 2133 was for affected wholesale electric market participants to use the funds to reduce costs or fees incurred by retail electric customers. Inactive market participants do not serve load and therefore may not be able to utilize the funds to the benefit of retail customers. The commission believes that the language proposed by TIEC clarifies the intent of proposed subsection (j) that the independent organization shall distribute the monies to affected wholesale electric market participants active at the time of distribution. The commission adopts TIEC's relevant amendments to subsection (j) as proposed.

Cities recommended that proposed subsection (j) expressly state that the independent organization shall distribute the excess revenue to affected wholesale electric market participants to be used to reduce costs or fees incurred by retail electric customers. Cities also proposed requiring the independent organization to include with the distributed monies a communication that explains instructions that the disgorged monies must be used to reduce costs or fees incurred by retail electric customers. Cities provided more extensive comments regarding the legislative intent of the disgorged excess revenues in comment to the proposed substantive amendments under §25.503.

Commission Response

The commission agrees with Cities. HB 2133 expressed the clear intent that affected wholesale electric market participants who receive an allocation of disgorged funds should use such funds to reduce costs or fees incurred by retail electric customers. The commission adopts Cities' recommendation by amending subsection (j) to mirror the intent of the statute that the independent organization shall distribute the excess revenue to affected wholesale electric market participants in proportion to their load during the intervals when the violation occurred to be used to reduce costs or fees incurred by retail electric customers and include such instruction in a communication with distributed monies.

Luminant recommended that a REP of an affiliated generation company be required, at the commission's discretion, to demonstrate to the commission that any disgorged excess revenues it received were applied to reduce the costs and fees incurred by its retail electric customers. Luminant clarified that its proposal was meant to apply only to REPs affiliated with the entity subject to the disgorgement order.

TXU agreed and stated that if the commission does not adopt the distribution methodology recommended by TCPA under proposed subsection (j), it would be reasonable to require an affiliate REP in receipt of disgorged revenues, on request, to demonstrate that the funds were actually applied to reduce the costs and fees of its retail customers. TXU agreed with Luminant that such a demonstration would ensure that the affiliated REP's affected retail customers receive benefits to which they are entitled under the statute. TXU also agreed that this requirement should not be imposed on unaffiliated REPs, as imposing any additional administrative requirements would be both unnecessary and unjustifiably burdensome.

ARM stated that while the limited impact of Luminant's proposal is markedly different from the harm Cities' reporting proposal would inflict, it also opposes Luminant's recommendations. Specifically, ARM commented that it opposed Luminant based on its reading of PURA §15.025(e) and its arguments filed in response to proposed substantive amendments to §25.503 regarding a REP's ability to recover the increased wholesale costs from customers prior to its receipt of disgorged excess revenues.

Commission Response

The commission recognizes Cities' point that it may be beneficial to require all entities receiving disgorged funds to demonstrate to the commission that the funds were actually used to reduce customers' costs and fees. However, the commission recognizes in some cases non-affiliates receiving disgorged excess revenues may find reporting overly burdensome and costly. Therefore, the commission adopts Luminant's language under subsection (j) as originally suggested, which allows the commission the discretion to require a demonstration of how funds were used, but does not require it.

The commission agrees with TXU and Luminant that it is reasonable to require an affiliate REP in receipt of disgorged revenues to demonstrate that the funds were actually applied to reduce the costs and fees of its retail customers. This would ensure that the affiliate's corporate family would not retain the disgorged revenue. Thus, the commission amends subsection (j) to include a requirement that affiliates in receipt of disgorged excess revenues shall distribute all of the disgorged excess revenues directly to its retail customers and shall provide certification under oath to the commission that the entirety of the revenues were distributed to its retail electric customers.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes changes for the purpose of clarifying its intent.

The amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (West 2007 and Supp. 2012) (PURA), which provide the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure. Specifically, PURA §15.023 requires the commission to order disgorgement of excess revenues acquired by a market participant by violation of PURA §39.157 and grants the commission discretion to order disgorgement of excess revenues for wholesale electricity market violations of other PURA sections, commission rules, or wholesale electricity market protocols. Also, PURA §15.024 limits the parties to an administrative penalty proceeding to the person alleged to have committed the violation and the commission. PURA §15.025 requires the commission to adopt rules to return excess revenues ordered disgorged to affected wholesale electric market participants to be used to reduce costs or fees incurred by retail electric customers. PURA §35.004 requires that the commission ensure that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, predatory, or anti-competitive. PURA §39.001 establishes the Legislative policy to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry. PURA §39.101 establishes that customers are entitled to protection from unfair, misleading, or deceptive practices and directs the commission to adopt and enforce rules to carry out this provision and to ensure that retail customer protections are established that afford customers safe, reliable, and reasonably priced electricity. PURA §39.151 requires the commission to oversee and review the procedures established by an independent organization, directs market participants to comply with such procedures, and authorizes the commission to enforce such procedures. PURA §39.157 directs the commission to monitor market power associated with the generation, transmission, distribution, and sale of electricity and provides enforcement power to the commission to address any market power abuses. PURA §39.356 allows the commission to revoke certain certifications and registrations for violation of an independent organization's procedures, statutory provisions, or the commission's rules. Finally, PURA §39.357 authorizes the commission to impose administrative penalties in addition to revocation, suspension, or amendment of certificates and registrations.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 15.023, 15.024, 15.025, 35.004, 39.001, 39.101, 39.151, 39.157, 39.356, and 39.357.

§22.246. Administrative Penalties.

(a) Scope. This section is intended to address enforcement actions related to administrative penalties or disgorgement of excess revenues only and does not apply to any other enforcement actions that may be undertaken by the commission or the commission staff.

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

(1) Affected Wholesale Electric Market Participant--An entity, including a retail electric provider (REP), municipally owned utility (MOU), or electric cooperative, that sells energy to retail customers and served load during the period of the violation.

(2) Excess Revenue--As defined in §25.503 of this title (relating to Oversight of Wholesale Market Participants).

(3) Executive director--The executive director of the commission or the executive director's designee.

(4) Person--Includes a natural person, partnership of two or more persons having a joint or common interest, mutual or cooperative association, and corporation.

(5) Violation--Any activity or conduct prohibited by the Public Utility Regulatory Act (PURA), commission rule or commission order.

(6) Continuing violation--Except for a violation of PURA Chapter 17, 55, or 64, and commission rules or commission orders pursuant to those chapters, any instance in which the person alleged to have committed a violation attests that a violation has been remedied and was accidental or inadvertent and subsequent investigation reveals that the violation has not been remedied or was not accidental or inadvertent.

(c) Amount of administrative penalty.

(1) Each day a violation continues or occurs is a separate violation for which an administrative penalty can be levied, regardless of the status of any administrative procedures that are initiated under this subsection.

(2) The administrative penalty for each separate violation may be in an amount not to exceed $25,000 per day, provided that an administrative penalty in an amount that exceeds $5,000 may be assessed only if the violation is included in the highest class of violations in the classification system.

(3) The amount of the administrative penalty shall be based on:

(A) the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited acts, and the hazard or potential hazard created to the health, safety, or economic welfare of the public;

(B) the economic harm to property or the environment caused by the violation;

(C) the history of previous violations;

(D) the amount necessary to deter future violations;

(E) efforts to correct the violation; and

(F) any other matter that justice may require, including, but not limited to, the respondent's timely compliance with requests for information, completeness of responses, and the manner in which the respondent has cooperated with the commission during the investigation of the alleged violation.

(d) Initiation of investigation. Upon receiving an allegation of a violation or of a continuing violation, the executive director shall determine whether an investigation should be initiated.

(e) Report of violation or continuing violation. If, based on the investigation undertaken pursuant to subsection (d) of this section, the executive director determines that a violation or a continuing violation has occurred, the executive director may issue a report to the commission.

(1) Contents of the report. The report shall state the facts on which the determination is based and a recommendation on the imposition of an administrative penalty, including a recommendation on the amount of the administrative penalty and, if applicable pursuant to §25.503 of this title, a recommendation that excess revenue be disgorged.

(2) Notice of report. Within 14 days after the report is issued, the executive director shall, by certified mail, return receipt requested, give written notice of the report to the person who is alleged to have committed the violation or continuing violation which is the subject of the report. The notice must include:

(A) a brief summary of the alleged violation or continuing violation;

(B) a statement of the amount of the recommended administrative penalty;

(C) a statement recommending disgorgement of excess revenue, if applicable, pursuant to §25.503 of this title;

(D) a statement that the person who is alleged to have committed the violation or continuing violation has a right to a hearing on the occurrence of the violation or continuing violation, the amount of the administrative penalty, or both the occurrence of the violation or continuing violation and the amount of the administrative penalty;

(E) a copy of the report issued to the commission pursuant to this subsection; and

(F) a copy of this section, §22.246 of this title (relating to Administrative Penalties).

(f) Options for response to notice of violation or continuing violation.

(1) Opportunity to remedy.

(A) This paragraph does not apply to a violation of PURA Chapters 17, 55, or 64, or of a commission rule or commission order pursuant to those chapters.

(B) Within 40 days of the date of receipt of a notice of violation set out in subsection (e)(2) of this section, the person against whom the administrative penalty or disgorgement may be assessed may file with the commission proof that the alleged violation has been remedied and that the alleged violation was accidental or inadvertent. A person who claims to have remedied an alleged violation has the burden of proving to the commission both that an alleged violation was remedied before the 31st day after the date the person received the report of violation and that the alleged violation was accidental or inadvertent. Proof that an alleged violation has been remedied and that the alleged violation was accidental or inadvertent shall be evidenced in writing, under oath, and supported by necessary documentation.

(C) If the executive director determines that the alleged violation has been remedied, was remedied within 30 days, and that the alleged violation was accidental or inadvertent, no administrative penalty will be assessed against the person who is alleged to have committed the violation.

(D) If the executive director determines that the alleged violation was not remedied or was not accidental or inadvertent, the executive director shall make a determination as to what further proceedings are necessary.

(E) If the executive director determines that the alleged violation is a continuing violation, the executive director shall institute further proceedings, including referral of the matter for hearing pursuant to subsection (h) of this section.

(2) Payment of administrative penalty and/or disgorged excess revenue. Within 30 days after the date the person receives the notice set out in subsection (e)(2) of this section, the person may accept the determination and recommended administrative penalty and, if applicable, the recommended excess revenue to be disgorged through a written statement sent to the executive director. If this option is selected, the person shall take all corrective action required by the commission. The commission by written order shall approve the determination and impose the recommended administrative penalty and, if applicable, recommended disgorged excess revenue.

(3) Request for hearing. Not later than the 20th day after the date the person receives the notice set out in subsection (e)(2) of this section, the person may submit to the executive director a written request for a hearing on any or all of the following:

(A) the occurrence of the violation or continuing violation;

(B) the amount of the administrative penalty; and

(C) the amount of disgorged excess revenue, if applicable.

(g) Settlement conference. A settlement conference may be requested by any party to discuss the occurrence of the violation or continuing violation, the amount of the administrative penalty, disgorged excess revenue, if applicable, and the possibility of reaching a settlement prior to hearing. A settlement conference is not subject to the Texas Rules of Evidence or the Texas Rules of Civil Procedure; however, the discussions are subject to Texas Rules of Civil Evidence 408, concerning compromise and offers to compromise.

(1) If a settlement is reached:

(A) the parties shall file a report with the executive director setting forth the factual basis for the settlement;

(B) the executive director shall issue the report of settlement to the commission; and

(C) the commission by written order will approve the settlement.

(2) If a settlement is reached after the matter has been referred to SOAH, the matter shall be returned to the commission. If the settlement is approved, the commission shall issue an order memorializing commission approval and setting forth commission orders associated with the settlement agreement.

(h) Hearing. If a person requests a hearing under subsection (f)(3) of this section, or fails to respond timely to the notice of the report of violation or continuing violation provided pursuant to subsection (e)(2) of this section, or if the executive director determines that further proceedings are necessary, the executive director shall set a hearing, provide notice of the hearing to the person, and refer the case to SOAH pursuant to §22.207 of this title (relating to Referral to State Office of Administrative Hearings). The case shall then proceed as set forth in paragraphs (1) - (5) of this subsection.

(1) The commission shall provide the SOAH administrative law judge a list of issues or areas that must be addressed.

(2) The hearing shall be conducted in accordance with the provisions of this chapter.

(3) The SOAH administrative law judge shall promptly issue to the commission a proposal for decision, including findings of fact and conclusions of law, about:

(A) the occurrence of the alleged violation or continuing violation;

(B) whether the alleged violation was cured and was accidental or inadvertent for a violation of any chapter other than PURA Chapters 17, 55, or 64, or of a commission rule or commission order pursuant to those chapters; and

(C) the amount of the proposed administrative penalty and, if applicable, disgorged excess revenue.

(4) Based on the SOAH administrative law judge's proposal for decision, the commission may:

(A) determine that a violation or continuing violation has occurred and impose an administrative penalty and, if applicable, disgorged excess revenue;

(B) determine that a violation occurred but that, pursuant to subsection (f)(1) of this section, the person remedied the violation within 30 days and proved that the violation was accidental or inadvertent, and that no administrative penalty will be imposed; or

(C) determine that no violation or continuing violation has occurred.

(5) Notice of the commission's order issued pursuant to paragraph (4) of this subsection shall be provided under the Government Code, Chapter 2001 and §22.263 of this title (relating to Final Orders) and shall include a statement that the person has a right to judicial review of the order.

(i) Parties to a proceeding. The parties to a proceeding relating to administrative penalties or disgorgement of excess revenue shall be limited to the person who is alleged to have committed the violation or continuing violation and the commission, including the independent market monitor. This does not apply to a subsequent proceeding under subsection (j) of this section.

(j) Distribution of Disgorged Excess Revenues. Disgorged excess revenues shall be remitted to an independent organization, as defined in PURA §39.151. The independent organization shall distribute the excess revenue to affected wholesale electric market participants in proportion to their load during the intervals when the violation occurred to be used to reduce costs or fees incurred by retail electric customers. The load of any market participants that are no longer active at the time of the distribution shall be removed prior to calculating the load proportions of the affected wholesale electric market participants that are still active. However, if the commission determines other wholesale electric market participants are affected or a different distribution method is appropriate, the commission may direct commission staff to open a subsequent proceeding to address those issues.

(1) No later than 90 days after the disgorged excess revenues are remitted to the independent organization, the monies shall be distributed to affected wholesale electric market participants active at the time of distribution, or the independent organization shall, by that date, notify the commission of the date by which the funds will be distributed. The independent organization shall include with the distributed monies a communication that explains the docket number in which the commission ordered the disgorged excess revenues, an instruction that the monies shall be used to reduce costs or fees incurred by retail electric customers, and any other information the commission orders.

(2) The commission may require any affected wholesale electric market participants receiving disgorged funds to demonstrate how the funds were used to reduce the costs or fees incurred by retail electric customers.

(3) Any affected wholesale electric market participant receiving disgorged funds that is affiliated with the person from whom the excess revenue is disgorged shall distribute all of the disgorged excess revenues directly to its retail customers and shall provide certification under oath to the commission that the entirety of the revenues were distributed to its retail electric customers.

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

Filed with the Office of the Secretary of State on October 19, 2012.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7223

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CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER C. INFRASTRUCTURE AND RELIABILITY

16 TAC §25.52

The Public Utility Commission of Texas (commission) adopts amendments to §25.52, relating to Reliability and Continuity of Service, without changes to the proposal as published in the June 29, 2012, issue of the *Texas Register* (37 TexReg 4776). The amendment implements recently enacted Public Utility Regulatory Act (PURA) §38.072, which establishes priorities for restoration of electric service following an extended power outage. This amendment is adopted under Project Number 40269.

The commission received comments on the proposed amendments from AEP Texas Central Company (TCC), AEP Texas North Company (TNC), and Southwestern Electric Power Company (SWEPCO) (collectively AEP Companies), the City of Houston (Houston), and Oncor Electric Delivery Company, LLC (Oncor).

General comments

Houston commented on its concern that the implementation of PURA §38.072 will create a misunderstanding within the non-hospital community that the facilities outlined will be guaranteed timely restoration. They commented that non-hospital healthcare facilities must be made aware of the practical limitations on utility restoration priorities so that they can properly prepare to protect vulnerable populations during extended power outages.

Commission response

The commission appreciates the comments of Houston. While this rule does not modify the specific practices of the utilities, the commission encourages the utilities to work with customers to inform them about the utilities' priority restoration procedures, which vary from utility to utility, to manage the expectations of customers covered by this rule.

Houston commented that they urged the commission to continue exploring effective solutions to improve electric reliability and power outage preparedness for vulnerable populations, including those served by the non-hospital healthcare communities.

Commission response

The commission appreciates the comments of Houston. The commission may explore this issue in a future rulemaking proceeding.

Subsection (f)(1)(B)

AEP Companies stated that they believed the definition of hospice services under the Texas Health and Safety Code §142.001 is too broad for the purposes of addressing priorities for restoration. They believed that this definition would include residences where hospice services were being provided and that identifying and monitoring facilities at the residential level would be extremely complicated, especially considering that services are usually provided for a period of less than 30 days.

Commission response

PURA §38.072(a)(3) states that: "Hospice services has the meaning assigned by §142.001, Health and Safety Code." Section 142.001(15)(c) of the Health and Safety Code states that hospice services "may be provided in a home, nursing home, residential unit, or inpatient unit according to need." Since the definition specifically provides for service provided in a patient's home, utilities will need to take this into account when amending their restoration procedures.

Subsection (f)(2)

AEP Companies and Oncor commented on their support of both the statute and the rule's authority to clarify an electric utility's discretion to prioritize restoration for a facility after an extended power outage. Houston also supported discretionary authority, but noted that the proposed amendment will have little effect on the actual protection afforded to entities covered under this rule and the utilities' restoration practices following extended outages. Houston further noted that a utility's restoration efforts are constrained by the nature of the grid infrastructure and operations, as well as the unique circumstances of each extended power outage. Utilities have typically prioritized hospitals and facilities critical to public safety for restoration after extended outages. Houston emphasized that adding more facilities to the priority list will have little practical impact. The utility cannot realistically prioritize every circuit on which one of these facilities is located.

Commission response

The commission appreciates the comments of AEP Companies, Houston, and Oncor regarding their support of the rule amendments. With regard to Houston's comment regarding the impact on restoration practices, the commission is implementing the plain language of the statute. The commission believes this rule establishes a baseline requirement for the utilities and encourages proactive communication with assisted living facilities, nursing facilities, and facilities that provide hospice services, as outlined in PURA §38.072.

All comments, including any not specifically referenced herein, were fully considered by the commission.

The amendment is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.001 (West 2007 & Supp. 2012) (PURA), which gives the commission the general power to regulate and supervise the business of each public utility; §14.002, which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; §38.005, which requires the commission to implement service quality and reliability standards relating to the delivery of electricity to customers by electric utilities; and §38.072, which requires an electric utility to give nursing facilities, assisted living facilities, and hospice facilities the same priority that it gives to a hospital in the utility's emergency operations plan for restoring power after an extended outage.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.001, 14.002, 38.005, and 38.072.

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

Filed with the Office of the Secretary of State on October 17, 2012.

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SUBCHAPTER S. WHOLESALE MARKETS

16 TAC §25.503

The Public Utility Commission of Texas (commission) adopts amendments to §25.503, relating to Oversight of Wholesale Market Participants, with changes to the proposed text as published in the May 11, 2012, issue of the *Texas Register* (37 TexReg 3514). The purpose of these amendments, coupled with procedural amendments adopted in §22.246, is to establish procedures to return excess revenues to affected wholesale electricity market participants when the commission has ordered disgorgement of those excess revenues in an enforcement proceeding. The passage of HB 2133 in the 82nd legislative session required the commission to adopt rules to establish such a procedure. The amendments constitute a competition rule subject to judicial review as specified in PURA §39.001(e). Project Number 40073 is assigned to this proceeding.

The commission received comments on the proposed amendments from the Alliance for Retail Markets (ARM); City of Austin d/b/a Austin Energy (Austin Energy); Luminant Energy Company LLC and Luminant Generation Company LLC (Luminant); NRG Energy, Inc. (NRG); Steering Committee of Cities Served by Oncor (Cities); Texas Competitive Power Advocates (TCPA); Texas Electric Cooperatives, Inc. (TEC); Texas Industrial Energy Consumers (TIEC); and TXU Energy Retail Company LLC (TXU Energy).

ARM was composed of Constellation NewEnergy, Inc./StarTex Power; Direct Energy, LP; and Gexa Energy, LP.

General Comments

Cities stated that while it generally supports the proposed rule as published, it believes that the proposed amendments to §25.503 and §22.246 could more accurately track the language and intent of HB 2133, which it supported during the 2011 Legislative Session. Specifically, Cities commented that the essence of HB 2133 is the provision that disgorged excess profits must be used to reduce fees and charges for the ultimate retail customer. Cities noted that prior to the legislation, any administrative penal-

ties collected by the commission were sent to the state's General Revenue Fund and HB 2133 provided that any excess revenues ordered disgorged would instead be returned to affected wholesale market participants to be used to reduce costs or fees incurred by retail electric customers. The proposed rule omits that disgorged funds are to be used in such a manner.

Cities stated that it recognizes that distribution of disgorged funds to customers may require different approaches based on the particular wholesale market participant and the amount of funds disgorged. Cities commented that it intends its proposed amendments to give market participants the discretion to lower bill charges and fees for electric customers in a manner tailored to the individual circumstance of the wholesale market participant and recommended a reporting requirement to ensure that the funds are actually used for this purpose. Cities proposed a new subsection (n) and provided language to require market participants to file a report at the commission within 60 days of disbursement of disgorged funds to detail how the affected party intends to distribute the funds to retail customers. These amendments included a requirement that the wholesale market participant apportion disgorged funds in a reasonable manner across all customer classes and clearly label the funds on customers' bills. Cities proposed holding any party who fails to comply with the recommended new provisions subject to enforcement proceedings. Cities also provided amendments in comments under §22.246 that would conform the procedural rule to this intent.

ARM disagreed with Cities' recommendation and stated that Cities' proposed billing and reporting requirements would subvert the disgorgement process, contrary to the interests of the affected market participants that the legislation intended to serve. ARM commented that such requirements would be onerous and unjustified. ARM requested that the commission reject Cities' proposed revisions to both §22.246 and §25.503 on three principal grounds.

First, ARM noted that PURA §15.025(e) directs the commission to adopt rules prescribing the process for returning excess revenue to affected market participants, but does not include a directive requiring the commission to prescribe affected market participants' use of the excess revenue in those rules. If the legislature had intended REPs to simply act as a vessel to pass through disgorged excess revenue to retail customers, it would have directed the commission to adopt rules prescribing how revenue should be returned to affected retail customers rather than affected wholesale electric market participants. ARM stated that the narrow interpretation of §15.025(e) used by Cities ignores the statute's emphasis on this distinction, and fails to reference that the term "costs" generally refers to the capital and other expenses underlying the provision of retail service. PURA uses the term "credit" to describe an offset to a bill or price similar to the mechanism contemplated by Cities. ARM stated that the statute is reasonably interpreted to reflect a legislative presumption regarding the use of the disgorged amount to directly or indirectly reduce the costs borne by retail customers, rather than an enforceable obligation as proposed by Cities.

Second, ARM commented that the billing and reporting requirements proposed by Cities are based on a flawed assumption that presupposes that a REP has recovered an amount equal to or greater than its allocated share of excess revenue from its retail customers. ARM stated that REPs have limited ability to recover increased wholesale costs attributable to the unlawful action upon which disgorgement is based. ARM noted that a REP's ability to change retail prices is limited by contract terms and parameters establishing the degree to which a REP can or may recover an increase in wholesale costs attributable to the unlawful exercise of market power upon which a disgorgement order is based. Specifically, a REP cannot adjust the price of a fixed price product to recover such incremental amounts as a matter of law; indexed products may not to be tied to information that will fully capture the increase in wholesale costs attributable to unlawful conduct. Variable price products may give REPs greater latitude to recover increased wholesale costs, but competitive market risks limit the ability to recover such increases due to customer churn following a price increase. ARM noted that similar restrictions regarding price adjustments could limit the ability of REPs to recover incrementally higher wholesale costs from commercial or industrial customers; if the terms of service on a particular product allow the recovery of such increases, it may also require the REP to pass through a portion of any excess revenues to the customer. ARM stated that Cities' proposed billing and reporting requirements could actually worsen the financial harm experienced as a result of the market power violation by requiring a REP to liquidate any restitution provided.

Finally, ARM stated that compliance costs associated with the billing and reporting requirements proposed by Cities would further exacerbate the financial harm experienced by REPs as a result of a disgorgement allocation. ARM commented that the reports proposed would require a detailed compliance plan and statement of compliance. Given the possibility of a violation leading to disgorgement affecting a large number of usage intervals and a REP offering numerous different retail products, such reports would require REPs to spend an extensive amount of time and resources to formulate the reports. ARM stated that Cities' proposal frames the allocation of excess revenues in traditional ratemaking terms, treating the affected market participant like a regulated utility rather than acknowledging the fluid nature of energy costs in the competitive wholesale market. ARM noted that these requirements could compel REPs to incur costs when modifying their billing systems in order to pass through excess revenues in a clearly labeled manner; these costs may not differ greatly from the amount passed through to the customers in the case of small or moderate disgorgements. ARM commented that it was also unclear if anyone would in turn review the reports in a commensurate manner, or at all.

Commission Response

The commission agrees with Cities in part. HB 2133 intended the commission to adopt rules prescribing how disgorged excess revenues should be returned to affected wholesale electric market participants. The commission agrees with Cities that market entities allocated disgorged excess revenues shall utilize such funds to reduce costs or fees incurred by retail electric customers as was the express intent of the Legislature when amending PURA §15.025(e). The commission considered the relationship between wholesale market participants and retail customers when proposing the amendments to both §25.503 and §22.246. Therefore, the definition of affected wholesale electric market participants proposed under §22.246(b)(1) reflects the intent that retail entities that served load during the period of the violation would be eligible to receive funds.

The commission disagrees with Cities that a mandatory reporting requirement is necessary to ensure that disbursed excess revenues are actually used to reduce costs or fees. The commission agrees with ARM that the statute does not include a directive requiring the commission to specifically prescribe affected market

participants' use of the excess revenue by rule. The commission also agrees that the restrictive reporting and billing requirements proposed by Cities could be burdensome and costly for affected parties' allocated funds. The commission appreciates the intention of Cities in its comments to give market participants the discretion to lower bill charges and fees for electric customers in a manner tailored to the individual circumstance of the wholesale market participant.

For the above mentioned reasons, the commission declines to adopt new subsection (n) as proposed. However, the commission does believe that it should have the flexibility to require affected wholesale electric market participants to report on how any disgorged excess funds received were used to benefit retail electric customers on a case-by-case basis. In certain cases, the commission may conclude reporting is warranted and order such upon the conclusion of the proceedings. The commission believes that reporting standards are better suited in the procedural amendments proposed under §22.246. The commission further discusses discretionary reporting and Cities' proposed amendments in response to comments filed regarding §22.246(j).

Proposed Subsection (m)

Luminant stated that the commission's new disgorgement authority should invest a reasonable degree of regulatory discretion with the agency, but it believed some guidelines or standards of application to be appropriate and beneficial. Luminant noted that standards are especially appropriate as applied to wholesale market violations outside of PURA §39.157 when the commission is given to discretion of when to use the drastic and extraordinary remedy. Luminant specifically recommended that the rule include a requirement that the violation giving rise to disgorgement was intentional or reckless, and establish a dollar threshold of excess revenue that must be met in order for disgorgement to become available in an enforcement action. Luminant stated that disgorgement functions as a means of achieving specific restitution, restoring misappropriated property to the rightful owner and depriving the misappropriator of his unjust gain; disgorgement is a concept of restitution built to fill the gap of the rest of the law. Luminant noted that even when courts possess the authority to exercise their inherent equitable powers, they commonly recognize that disgorgement is not appropriate or necessary if the conduct was not intentional, knowing, or in bad faith, if disgorgement will only serve a punitive purpose, or if other remedies are sufficient to compensate the wrong. Agencies, unlike courts, do not have broad remedial powers or inherent equitable jurisdiction.

Luminant cited similar administrative authority possessed by the Federal Energy Regulation Commission (FERC) and the relationship between §25.503 and FERC's corresponding rule, which is derived from section 222 of the Federal Power Act. The FERC anti-manipulation rule has been interpreted to proscribe knowing or intentional misconduct, based on the understanding that such conduct inherently requires a culpable mental state. Luminant noted that FERC has determined disgorgement to be appropriate only when entities intentionally engaged in gaming practices or offered energy into the market although it knew units could not provide energy if dispatched. Luminant commented that HB 2133 requires disgorgement for similar market abuse violations of the same intentional or knowing character as those recognized by FERC, but that other wholesale electric market violations do not necessarily merit the same remedy. FERC directs its enforcement resources at only flagrant misconduct and Luminant requested similar prosecutorial discretion from the commission when directing enforcement resources to pursue disgorgement. Luminant stated that incorporating standards into the commission's rules would ensure that disgorgement is sought in appropriate cases, and would provide predictability to market participants, ensuring that disgorgement remains an extraordinary remedy to be used only in the rare cases when it is necessary to achieve a just result. Luminant provided language under proposed subsection (m) that would amend the rule to include a requirement that the violator acted with the necessary culpable mental state, either affirmative intent or reckless disregard.

Further, Luminant proposed establishing a monetary threshold for market impact before a disgorgement action could be triggered. Luminant noted that a disgorgement ruling would impose a considerable administrative burden and incorporating a monetary threshold into the rule would narrow the number of cases eligible for disgorgement to only those where the costs associated with returning money to the affected market participants could be justified. Luminant recommended a threshold of $1,000,000.00 as a sensible amount in view of prior enforcement actions at the commission. Luminant stated that in otherwise small penalty cases, benefits realized after a complex disgorgement proceeding would outweigh the costs of retuning the money to customers.

Cities and TIEC disagreed with Luminant and requested that the commission reject suggestions to revise the proposed rule in a manner that is inconsistent with the Legislature's directive. Cities stated that such restriction on the imposition of disgorgement and threshold of violation are not contained in HB 2133, nor do they give effect to the language of HB 2133. Cities stated that Luminant's suggested language would frustrate the intent of the legislation to ensure that retail customers are made whole after a commission finding that market power abuse has occurred. Cities further questioned how the commission could ever prove that the entity accused of market power abuse acted with the requisite subjective intent.

TIEC similarly stated that Luminant's request to limit the commission's ability to order disgorgement for non-PURA §39.157 violations has no statutory basis or other support. HB 2133 provided the commission with discretion to determine, on a case-by-case basis, whether disgorgement is an appropriate remedy for any violation of the statute, commission rules, or protocols relating to wholesale markets beyond PURA §39.157 for which disgorgement is mandatory. TIEC commented that the proposed subsection (m) tracks this language by generally providing that disgorgement may be ordered for violations of wholesale market requirements without restriction and allows the commission to determine whether disgorgement is appropriate based on the particular circumstances of a violation. TIEC noted that as proposed, the commission would be able to take into consideration factors raised by Luminant along with other fact-specific circumstances to determine whether disgorgement should be ordered.

Commission Response

The commission disagrees with Luminant that a culpable mental state, either affirmative intent or reckless disregard, should be a necessary qualification for disgorgement and also disagrees that a specific monetary threshold should be reached as a result of a violation prior to disgorgement becoming an available tool to the commission in an enforcement action. Such restrictions are not required by HB 2133. HB 2133 granted the commission both authority and discretion to pursue disgorgement for wholesale electric market violations of PURA sections other than

PURA §39.157 or commission rules, or wholesale electric market protocols. The legislature did not limit the authority of the commission to pursue disgorgement based on the monetary size of a violation or require that the market entity act intentionally or recklessly. The commission will use discretion to determine, on a case-by-case basis, whether disgorgement is an appropriate remedy for any applicable wholesale electric market violation. The commission therefore declines to adopt the amendments proposed by Luminant.

All comments, including any not specifically referenced herein, were fully considered by the commission.

The amendments are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §14.052 (West 2007 and Supp. 2012) (PURA), which provide the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules of practice and procedure. Specifically, PURA §15.023 requires the commission to order disgorgement of excess revenues acquired by a market participant by violation of PURA §39.157 and grants the commission discretion to order disgorgement of excess revenues for wholesale electricity market violations of other PURA sections, commission rules, or wholesale electricity market protocols. Also, PURA §15.024 limits the parties to an administrative penalty proceeding to the person alleged to have committed the violation and the commission. PURA §15.025 requires the commission to adopt rules to return excess revenues ordered disgorged to affected wholesale electric market participants to be used to reduce costs or fees incurred by retail electric customers. PURA §35.004 requires that the commission ensure that ancillary services necessary to facilitate the transmission of electric energy are available at reasonable prices with terms and conditions that are not unreasonably preferential, prejudicial, predatory, or anti-competitive. PURA §39.001 establishes the Legislative policy to protect the public interest during the transition to and in the establishment of a fully competitive electric power industry. PURA §39.101 establishes that customers are entitled to protection from unfair, misleading, or deceptive practices and directs the commission to adopt and enforce rules to carry out this provision and to ensure that retail customer protections are established that afford customers safe, reliable, and reasonably priced electricity. PURA §39.151 requires the commission to oversee and review the procedures established by an independent organization, directs market participants to comply with such procedures, and authorizes the commission to enforce such procedures. PURA §39.157 directs the commission to monitor market power associated with the generation, transmission, distribution, and sale of electricity and provides enforcement power to the commission to address any market power abuses. PURA §39.356 allows the commission to revoke certain certifications and registrations for violation of an independent organization's procedures, statutory provisions, or the commission's rules. Finally, PURA §39.357 authorizes the commission to impose administrative penalties in addition to revocation, suspension, or amendment of certificates and registrations.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 15.023, 15.024, 15.025, 35.004, 39.001, 39.101, 39.151, 39.157, 39.356, and 39.357.

§25.503. Oversight of Wholesale Market Participants.

(a) Purpose. The purpose of this section is to establish the standards that the commission will apply in monitoring the activities of entities participating in the wholesale electricity markets, including markets administered by the Electric Reliability Council of Texas (ERCOT), and enforcing the Public Utility Regulatory Act (PURA) and ERCOT procedures relating to wholesale markets. The standards contained in this rule are necessary to:

(1) protect customers from unfair, misleading, and deceptive practices in the wholesale markets, including ERCOT-administered markets;

(2) ensure that ancillary services necessary to facilitate the reliable transmission of electric energy are available at reasonable prices;

(3) afford customers safe, reliable, and reasonably priced electricity;

(4) ensure that all wholesale market participants observe all scheduling, operating, reliability, and settlement policies, rules, guidelines, and procedures established in the ERCOT procedures;

(5) clarify prohibited activities in the wholesale markets, including ERCOT-administered markets;

(6) monitor and mitigate market power as authorized by the Public Utility Regulatory Act (PURA) §39.157(a) and prevent market power abuses;

(7) clarify the standards and criteria the commission will use when reviewing wholesale market activities;

(8) clarify the remedies for non-compliance with the Protocols relating to wholesale markets; and

(9) prescribe ERCOT's role in enforcing ERCOT procedures relating to the reliability of the regional electric network and accounting for the production and delivery among generators and all other market participants, and monitoring and obtaining compliance with operating standards within the ERCOT regional network.

(b) Application. This section applies to all market entities, as defined in subsection (c) of this section.

(c) Definitions. The following words and terms when used in this section shall have the following meaning, unless the context indicates otherwise:

(1) Artificial congestion--Congestion created when multiple foreseeable options exist for scheduling, dispatching, or operating a resource, and a market participant chooses an option that is not the most economical, that foreseeably creates or exacerbates transmission congestion, and that results in the market participant being paid to relieve the congestion it caused.

(2) Efficient operation of the market--Operation of the markets administered by ERCOT, consistent with reliability standards, that is characterized by the fullest use of competitive auctions to procure ancillary services, minimal cost socialization, and the most economical utilization of resources, subject to necessary operational and other constraints.

(3) ERCOT procedures--Documents that contain the scheduling, operating, planning, reliability, and settlement procedures, standards, and criteria that are public and in effect in the ERCOT power region, including the ERCOT Protocols and ERCOT Operating Guides as amended from time to time but excluding ERCOT's internal administrative procedures. The Protocols generally govern when there are inconsistencies between the Protocols and the Operating Guides, except when ERCOT staff, consistent with subsection (i) of this section, determines that a provision contained in the Operating Guides is technically superior for the efficient and reliable operation of the electric network.

(4) Excess Revenue--Revenue in excess of the revenue that would have occurred absent a violation of PURA §39.157 or this section.

(5) Market entity--Any person or entity participating in the ERCOT-administered wholesale market, including, but not limited to, a load serving entity (including a municipally owned utility and an electric cooperative), a power marketer, a transmission and distribution utility, a power generation company, a qualifying facility, an exempt wholesale generator, ERCOT, and any entity conducting planning, scheduling, or operating activities on behalf of, or controlling the activities of, such market entities.

(6) Market participant--A market entity other than ERCOT.

(7) Resource--Facilities capable of providing electrical energy or load capable of reducing or increasing the need for electrical energy or providing short-term reserves into the ERCOT system. This includes generation resources and loads acting as resources (LaaRs).

(d) Standards and criteria for enforcement of ERCOT procedures and PURA. The commission will monitor the activities of market entities to determine if such activities are consistent with ERCOT procedures; whether they constitute market power abuses or are unfair, misleading, or deceptive practices affecting customers; and whether they are consistent with the proper accounting for the production and delivery of electricity among generators and other market participants. When reviewing the activities of a market entity, the commission will consider whether the activity was conducted in a manner that:

(1) adversely affected customers in a material way through the use of unfair, misleading, or deceptive practices;

(2) materially reduced the competitiveness of the market, including whether the activity unfairly impacted other market participants in a way that restricts competition;

(3) disregarded its effect on the reliability of the ERCOT electric system; or

(4) interfered with the efficient operation of the market.

(e) Guiding ethical standards. Each market participant is expected to:

(1) observe all applicable laws and rules;

(2) schedule, bid, and operate its resources in a manner consistent with ERCOT procedures to support the efficient and reliable operation of the ERCOT electric system; and

(3) not engage in activities and transactions that create artificial congestion or artificial supply shortages, artificially inflate revenues or volumes, or manipulate the market or market prices in any way.

(f) Duties of market entities.

(1) Each market participant shall be knowledgeable about ERCOT procedures.

(2) A market participant shall comply with ERCOT procedures and any official interpretation of the Protocols issued by ERCOT or the commission.

(A) If a market participant disagrees with any provision of the Protocols or any official interpretation of the Protocols, it may seek an amendment of the Protocols as provided for in the Protocols, appeal an ERCOT official interpretation to the commission, or both.

(B) A market participant appealing an official interpretation of the Protocols or seeking an amendment to the Protocols shall comply with the Protocols unless and until the interpretation is officially changed or the amendment is officially adopted.

(C) A market participant may be excused from compliance with ERCOT instructions or Protocol requirements only if such non-compliance is due to communication or equipment failure beyond the reasonable control of the market participant; if compliance would jeopardize public health and safety or the reliability of the ERCOT transmission grid, or create risk of bodily harm or damage to the equipment; if compliance would be inconsistent with facility licensing, environmental, or legal requirements; if required by applicable law; or for other good cause. A market participant is excused under this subparagraph only for so long as the condition continues.

(3) Whenever the Protocols require that a market participant make its "best effort" or a "good faith effort" to meet a requirement, or similar language, the market participant shall act in accordance with the requirement unless:

(A) it is not technically possible to do so;

(B) doing so would jeopardize public health and safety or the reliability of the ERCOT transmission grid, or would create a risk of bodily harm or damage to the equipment;

(C) doing so would be inconsistent with facility licensing, environmental, or legal requirements; or

(D) other good cause exists for excusing the requirement.

(4) When a market participant is not able to comply with a Protocol requirement or official interpretation of a requirement, or honor a formal commitment to ERCOT, the market participant has an obligation to notify ERCOT immediately upon learning of such constraints and to notify ERCOT when the problem ceases. A market participant who does not comply with a Protocol requirement or official interpretation of a requirement, or honor a formal commitment to ERCOT, has the burden to demonstrate, in any commission proceeding in which the failure to comply is raised, why it cannot comply with the Protocol requirement or official interpretation of the requirement, or honor the commitment.

(5) The commission staff may request information from a market participant concerning a notification of failure to comply with a Protocol requirement or official interpretation of a requirement, or honor a formal commitment to ERCOT. The market participant shall provide a response that is detailed and reasonably complete, explaining the circumstances surrounding the alleged failure, and shall provide documents and other materials relating to such alleged failure to comply. The response shall be submitted to the commission staff within five business days of a written request for information, unless commission staff agrees to an extension.

(6) A market participant's bids of energy and ancillary services shall be from resources that are available and capable of performing, and shall be feasible within the limits of the operating characteristics indicated in the resource plan, as defined in the Protocols, and consistent with the applicable ramp rate, as specified in the Protocols.

(7) All statements, data and information provided by a market participant to market publications and publishers of surveys and market indices for the computation of an industry price index shall be true, accurate, reasonably complete, and shall be consistent with the market participant's activities, subject to generally accepted standards of confidentiality and industry standards. Market participants shall exercise due diligence to prevent the release of materially inaccurate or misleading information.

(8) A market entity has an obligation to provide accurate and factual information and shall not submit false or misleading information, or omit material information, in any communication with ERCOT or with the commission. Market entities shall exercise due diligence to ensure adherence to this provision throughout the entity.

(9) A market participant shall comply with all reporting requirements governing the availability and maintenance of a generating unit or transmission facility, including outage scheduling reporting requirements. A market participant shall immediately notify ERCOT when capacity changes or resource limitations occur that materially affect the availability of a unit or facility, the anticipated operation of its resources, or the ability to comply with ERCOT dispatch instructions.

(10) A market participant shall comply with requests for information or data by ERCOT as specified by the Protocols or ERCOT instructions within the time specified by ERCOT instructions, or such other time agreed to by ERCOT and the market participant.

(11) When a Protocol provision or its applicability is unclear, or when a situation arises that is not contemplated under the Protocols, a market entity seeking clarification of the Protocols shall use the Protocol Revision Request (PRR) process provided in the Protocols. If the PRR process is impractical or inappropriate under the circumstances, the market entity may use the process for requesting formal Protocol clarifications or interpretations described in subsection (i) of this section. This provision is not intended to discourage day to day informal communication between market participants and ERCOT staff.

(12) A market participant operating in the ERCOT markets or a member of the ERCOT staff who identifies a provision in the ERCOT procedures that produces an outcome inconsistent with the efficient and reliable operation of the ERCOT-administered markets shall call the provision to the attention of ERCOT staff and the appropriate ERCOT subcommittee. All market participants shall cooperate with the ERCOT subcommittees, ERCOT staff, and the commission staff to develop Protocols that are clear and consistent.

(13) A market participant shall establish and document internal procedures that instruct its affected personnel on how to implement ERCOT procedures according to the standards delineated in this section. Each market participant shall establish clear lines of accountability for its market practices.

(g) Prohibited activities. Any act or practice of a market participant that materially and adversely affects the reliability of the regional electric network or the proper accounting for the production and delivery of electricity among market participants is considered a "prohibited activity." The term "prohibited activity" in this subsection excludes acts or practices expressly allowed by the Protocols or by official interpretations of the Protocols and acts or practices conducted in compliance with express directions from ERCOT or commission rule or order or other legal authority. The term "prohibited activity" includes, but is not limited to, the following acts and practices that have been found to cause prices that are not reflective of competitive market forces or to adversely affect the reliability of the electric network:

(1) A market participant shall not schedule, operate, or dispatch its generating units in a way that creates artificial congestion.

(2) A market participant shall not execute pre-arranged offsetting trades of the same product among the same parties, or through third party arrangements, which involve no economic risk and no material net change in beneficial ownership.

(3) A market participant shall not offer reliability products to the market that cannot or will not be provided if selected.

(4) A market participant shall not conduct trades that result in a misrepresentation of the financial condition of the organization.

(5) A market participant shall not engage in fraudulent behavior related to its participation in the wholesale market.

(6) A market participant shall not collude with other market participants to manipulate the price or supply of power, allocate territories, customers or products, or otherwise unlawfully restrain competition. This provision should be interpreted in accordance with federal and state antitrust statutes and judicially-developed standards under such statutes regarding collusion.

(7) A market participant shall not engage in market power abuse. Withholding of production, whether economic withholding or physical withholding, by a market participant who has market power, constitutes an abuse of market power.

(h) Defenses. The term "prohibited activity" in subsection (g) of this section excludes acts or practices that would otherwise be included, if the market entity establishes that its conduct served a legitimate business purpose consistent with prices set by competitive market forces; and that it did not know, and could not reasonably anticipate, that its actions would inflate prices, adversely affect the reliability of the regional electric network, or adversely affect the proper accounting for the production and delivery of electricity; or, if applicable, that it exercised due diligence to prevent the excluded act or practice. The defenses established in this subsection may also be asserted in instances in which a market participant is alleged to have violated subsection (f) of this section. A market entity claiming an exclusion or defense under this subsection, or any other type of affirmative defense, has the burden of proof to establish all of the elements of such exclusion or defense.

(i) Official interpretations and clarifications regarding the Protocols. A market entity seeking an interpretation or clarification of the Protocols shall use the PRR process contained in the Protocols whenever possible. If an interpretation or clarification is needed to address an unforeseen situation and there is not sufficient time to submit the issue to the PRR process, a market entity may seek an official Protocol interpretation or clarification from ERCOT in accordance with this subsection.

(1) ERCOT shall develop a process for formally addressing requests for clarification of the Protocols submitted by market participants or issuing official interpretations regarding the application of Protocol provisions and requirements. ERCOT shall respond to the requestor within ten business days of ERCOT's receipt of the request for interpretation or clarification with either an official Protocol interpretation or a recommendation that the requestor take the request through the PRR process.

(2) ERCOT shall designate one or more ERCOT officials who will be authorized to receive requests for clarification from, and issue responses to market participants, and to issue official interpretations on behalf of ERCOT regarding the application of Protocol provisions and requirements.

(3) The designated ERCOT official shall provide a copy of the clarification request to commission staff upon receipt. The ERCOT official shall consult with ERCOT operational or legal staff as appropriate and with commission staff before issuing an official Protocol clarification or interpretation.

(4) The designated ERCOT official may decide, in consultation with the commission staff, that the language for which a clarification is requested is ambiguous or for other reason beyond ERCOT's ability to clarify, in which case the ERCOT official shall inform the requestor, who may take the request through the PRR process provided for in the Protocols.

(5) All official Protocol clarifications or interpretations that ERCOT issues in response to a market participant's formal request or upon ERCOT's own initiative shall be sent out in a market bulletin with the appropriate effective date specified to inform all market participants, and a copy of the clarification or interpretation shall be maintained in a manner that is accessible to market participants. Such response shall not contain information that would identify the requesting market participant.

(6) A market participant may freely communicate informally with ERCOT employees, however, the opinion of an individual ERCOT staff member not issued as an official interpretation of ERCOT pursuant to this subsection may not be relied upon as an affirmative defense by a market participant.

(j) Role of ERCOT in enforcing operating standards. ERCOT shall develop and submit for commission approval a process to monitor material occurrences of non-compliance with ERCOT procedures, which shall mean occurrences that have the potential to impede ERCOT operations, or represent a risk to system reliability. Non-compliance indicators monitored by ERCOT shall include, but shall not be limited to, material occurrences of schedule control error, failing resource plan performance measures as established by ERCOT, failure to follow dispatch instructions within the required time, failure to meet ancillary services obligations, failure to submit mandatory bids or offers that may apply, and other instances of non-compliance of a similar magnitude.

(1) ERCOT shall keep a record of all such material occurrences of non-compliance with ERCOT procedures and shall develop a system for tracking recurrence of such material occurrences of non-compliance.

(2) ERCOT shall promptly provide information to and respond to questions from market participants to allow the market participant to understand and respond to alleged material occurrences of non-compliance with ERCOT procedures. However, this requirement does not relieve the market participant's operator from responding to the ERCOT operator's instruction in a timely manner and should not be interpreted as allowing the market participant's operator to argue with the ERCOT operator as to the need for compliance.

(3) ERCOT shall keep a record of the resolution of such material occurrences of non-compliance and of remedial actions taken by the market participant in each instance.

(4) ERCOT shall inform the commission staff immediately if the material occurrence of non-compliance is not resolved after the system operator has orally informed the market participant of the problem. The occurrence is not resolved if:

(A) the same instance of non-compliance is repeated more than once in a six-month period; or

(B) the occurrence continues after ERCOT has first orally notified the operator of the market participant, and subsequently notified, orally or in writing, the supervisor of the operator of the market participant.

(k) Standards for record keeping.

(1) A market participant who schedules through a qualified scheduling entity (QSE) that submits schedules to ERCOT on behalf of more than one market participants shall maintain records to show scheduling and bidding information for all schedules and bids that its QSE has submitted to ERCOT on its behalf, by interval.

(2) All market participants and ERCOT shall maintain records relative to market participants' activities in the ERCOT-administered markets to show:

(A) information on transactions, as defined in §25.93(c)(3) of this title (relating to Quarterly Wholesale Electricity Transaction Reports), including the date, type of transaction, amount of transaction, and entities involved;

(B) information and documentation of all planned and forced generation and transmission outages including all documentation necessary to document the reason for the outage;

(C) information described under this subsection including transaction information, information on pricing, settlement information, and other information that would be relevant to an investigation under this section, and that has been disclosed to market publications and publishers of surveys and price indices, including the date, information disclosed, and the name of the employees involved in providing the information as well as the publisher to whom it was provided; and

(D) reports of the market participant's financial information given to external parties, including the date, financial results reported, and the party to whom financial information was reported, if applicable.

(3) After the effective date of this section, all records referred to in this subsection except verbally dispatch instructions (VDIs) shall be kept for a minimum of three years from the date of the event. ERCOT shall keep VDI records for a minimum of two years. All records shall be made available to the commission for inspection upon request.

(4) A market participant shall, upon request from the commission, provide the information referred to in this subsection to the commission, and may, if applicable, provide it under a confidentiality agreement or protective order pursuant to §22.71(d) of this title (relating to Filing of Pleadings, Documents, and Other Material).

(l) Investigation. The commission staff may initiate an informal fact-finding review based on a complaint or upon its own initiative to obtain information regarding facts, conditions, practices, or matters that it may find necessary or proper to ascertain in order to evaluate whether any market entity has violated any provision of this section.

(1) The commission staff will contact the market entity whose activities are in question to provide the market entity an opportunity to explain its activities. The commission staff may require the market entity to provide information reasonably necessary for the purposes described in this subsection.

(2) If the market entity asserts that the information requested by commission staff is confidential, the information shall be provided to commission staff as confidential information related to settlement negotiations or other asserted bases for confidentiality pursuant to §22.71(d)(4) of this title.

(3) If after conducting its fact-finding review, the commission staff determines that a market entity may have violated this section, the commission staff may request that the commission initiate a formal investigation against the market entity pursuant to §22.241 of this title (relating to Investigations).

(4) If, as a result of its investigation, commission staff determines that there is evidence of a violation of this section by a market entity, the commission staff may request that the commission initiate appropriate enforcement action against the market entity. A notice of violation requesting administrative penalties or disgorgement of excess revenues shall comply with the requirements of §22.246 of this title (relating to Administrative Penalties). Adjudication of a notice of violation requesting both an administrative penalty and disgorgement of excess revenues may be conducted within a single contested case proceeding. Additionally, for alleged violations that have been reviewed

in the informal procedure established by this subsection, the commission staff shall include as part of its prima facie case:

(A) a statement either that--

(i) the commission staff has conducted the investigation allowed by this section; or

(ii) the market participant has failed to comply with the requirements of paragraph (5) of this subsection;

(B) a summary of the evidence indicating to the commission staff that the market participant has violated one of the provisions of this section;

(C) a summary of any evidence indicating to the commission staff that the market participant benefited from the alleged violation or materially harmed the market; and

(D) a statement that the staff has concluded that the market participant failed to demonstrate, in the course of the investigation, the applicability of an exclusion or affirmative defense under subsection (h) of this section.

(5) A market entity subject to an informal fact-finding review or a formal investigation by the commission has an obligation to fully cooperate with the investigation, to make its company representatives available within a reasonable period of time to discuss the subject of the investigation with the commission staff, and to respond to the commission staff's requests for information within a reasonable time frame as requested by the commission staff.

(6) The procedure for informal fact-finding review established in this subsection does not prevent any person or commission staff from filing a formal complaint with the commission pursuant to §22.242 of this title (relating to Complaints) or pursuing other relief available by law.

(m) Remedies. If the commission finds that a market entity is in violation of this section, the commission may seek or impose any legal remedy it determines appropriate for the violation involved, provided that the remedy of disgorgement of excess revenues shall be imposed for violations and continuing violations of PURA §39.157 and may be imposed for other violations of 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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Adriana A. Gonzales
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CHAPTER 26. SUBSTANTIVE RULES APPLICABLE TO TELECOMMUNICATIONS SERVICE PROVIDERS
SUBCHAPTER P. TEXAS UNIVERSAL SERVICE FUND

16 TAC §26.402

The Public Utility Commission of Texas (commission) adopts new §26.402, relating to Transparency and Accountability in the Administration of the Texas Universal Service Fund, with changes to the proposed text as published in the June 29, 2012, issue of the *Texas Register* (37 TexReg 4777). The purpose of the new rule is to further ensure reasonable transparency and accountability in the administration of the Texas Universal Service Fund (TUSF) by means of reports by recipients of high cost support regarding planned network upgrades and publication of quarterly reports by the commission regarding TUSF cashflows, total deposits, and total disbursements. This new section is adopted under Project Number 39939.

The commission received written comments from the following parties: AMA TechTel Communications (AMA); CenturyLink (CenturyLink); GTE Southwest Incorporated d/b/a Verizon Southwest, Verizon Enterprise Solutions LLC, Verizon Long Distance LLC, MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, MCI Communications Services, Inc. d/b/a Verizon Business Services, and Cellco Partnership and its commercial mobile radio service provider subsidiaries operating in the state of Texas d/b/a Verizon Wireless (Verizon); Southwestern Bell Telephone Company d/b/a AT&T Texas (AT&T); Sprint Communications Company LP, Texas Cable Association and TW Telecomm of Texas LLC (Coalition); TEXALTEL (TEXALTEL); Texas Statewide Telephone Cooperative, Inc. (TSTCI); and Texas Telephone Association (TTA).

All comments, including any not specifically referenced herein, were fully considered by the commission.

No party requested that a public hearing be held regarding the proposed new rule.

Comments

Section 26.402(a), Purpose.

CenturyLink commented that they believe that the "purpose" statement was appropriate and comports with PURA §56.023(d), and that it also reflects that the commission already has rules in place to ensure reasonable transparency and accountability in the administration of the TUSF. CenturyLink contended that the new language in §56.023(d) would serve as a safeguard against future changes to existing rules that might diminish transparency and accountability. But, CenturyLink stated, §56.023(d) does not require the commission to adopt new rules or reporting requirements, and PURA Chapter 56 confers upon the commission broad discretion in administration of the TUSF, including the discretion not to act at all if it believes that it has sufficient rules in place.

The Coalition replied that CenturyLink's statement strains credibility, that the TUSF is so opaque that, until 2008, even the amount of the subsidy to Texas High Cost Universal Service Plan (THCUSP) recipients was not publicly available, and that even today there is no requirement or proposal that small ILEC TUSF recipients publicly file the amount of their TUSF receipts as is required by recipients of monies from the THCUSP. The Coalition argued that under the *status quo* those who fund the TUSF (Texas telephone consumers) have no visibility into what TUSF subsidies are paid, to whom they are paid, and how the funds are used.

The Coalition also took issue with CenturyLink's assertion that PURA §56.023(d) does not mandate the commission's adop-

tion of new transparency and accountability rules if the commission believes current rules are sufficient; the Coalition argued that the Legislature would not have told the commission that it "shall" adopt rules that "ensure" transparency and accountability if it were satisfied with the *status quo.* The Coalition stated that the Legislature not only authorized, but required the commission to adopt rules to ensure transparency and accountability in the TUSF, and the Coalition noted that PURA §56.023(d) is more recent than any statutory language upon which CenturyLink relied.

Commission Response

The commission adopts the proposed language without modification, given that no party suggested changes to this subsection, and adoption of new §26.402 reflects the commission's intent to better meet the legislative mandate set forth in PURA §56.023(d).

Section 26.402(b), Application.

No comments were received regarding this subsection. However, AMA, CenturyLink, Verizon, AT&T, the Coalition, TEXALTEL, TSTCI, and TTA each expressed concern, in comments regarding other proposed subsections, with the public disclosure of confidential company information.

Commission Response

Noting that no party suggested changes to this subsection, the commission adopts the proposed language of this subsection, correcting the internal references to other subsections to reflect deletions of specific proposed subsections, as further discussed below. Additionally, in response to comments regarding the submission of confidential information to the commission, the commission adopts language to make clear that all filings made with the commission pursuant to this section, including a filing subject to a claim of confidentiality, shall be filed pursuant to the commission's procedural rules relating to pleadings and other documents. These procedural rules include processes addressing the filing and handling of materials designated by the filing party as confidential information. The commission notes that if a person submits a request for information filed pursuant to this rule and that the filing party designated as confidential, the request will be processed in compliance with the Public Information Act, Texas Government Code Chapter 552.

Section 26.402(c)(1), Reports required for a price cap carrier designated as an ETP that receives Texas USF high cost support.

The Coalition opined that the proposed rule should include the number of supported lines as well as the support received per line (for carriers other than those who have elected to eliminate their high cost support through the Total Support Reduction Plan), contending that this information is required to be filed publicly by recipients of federal High Cost model support and is critical to understanding how much support is being provided to an ETP in each exchange and whether the support is warranted or should be examined in a separate need inquiry.

CenturyLink replied that they believed the Coalition was overstating the federal requirements. CenturyLink stated that it does not object to filing information regarding the amount of support per line in each exchange, but it does object to filing line counts by wire center, which it considers to be highly sensitive confidential information. CenturyLink stated that this requirement should be rejected.

AMA replied that the Coalition's proposals here exceed the scope of what the Legislature required and what should be approved by the commission. AMA took issue with the Coalition's allegation that the Legislature directed the commission to "take action to ensure transparency and accountability of the TUSF" while the statute language requires rules to "include procedures to ensure reasonable transparency and accountability in the administration of the universal service fund." AMA argued that the Coalition's positions go beyond the Legislature's concern for transparency and accountability in the *administration* (AMA's emphasis) of the TUSF. AMA opined that the Coalition's proposals would effectively give oversight of the TUSF to competitors of the fund's recipients.

AMA stated that the commission should not make a provider's costs available to third parties, once again arguing that the statute calls for transparency and accountability in the *administration* of the fund rather than the fund itself. AMA said that there is a great difference between ensuring that the commission is administering the fund in a transparent and accountable manner and what AMA characterizes the Coalition's position as requiring that all monies received and spent by a carrier be accounted for publicly. AMA stated that the five-year plans required by subsections (c) and (d) include specific descriptions of proposed improvements or upgrades to the reporting carrier's network, and that these should not be made public, or be accessible under a standard protective order. AMA indicated that it is not aware of any provisions in Texas law similar to those proposed by the Coalition. The Coalition gave the example of the Comptroller office which does not allow members of the public to have access to sales tax or revenue reports. AMA said that there has been no suggestion that the Comptroller should provide more transparency of its operations by allowing the public to second-guess the process of revenue collections.

AMA indicated that they support continued transparency to the commission for administration of the fund, but found no need to change current rules to allow third parties to evaluate the fund. AMA observed that PURA charges the commission with responsibility to adopt and enforce rules relating to the TUSF, and that the commission has adopted rules for eligibility and collection and disbursal of TUSF revenues, and that there is no evidence that the commission has failed to meet its obligations in administration of the fund. AMA stated that SB 980 did not abridge these obligations, nor did it direct the commission to allow third party evaluation of the fund, and that the commission is capable of discharging its responsibilities without providing unfettered access to confidential company information to competitors of TUSF recipients or the public.

Verizon did not oppose inclusion of this subsection in the rule.

CenturyLink noted that it considers the booked value of expenses, categorized according to the proposed rule, to be confidential and trade secret information, and that the rule is unclear as to whether all the expense value inputs must be filed or whether only the output from the formula needed to be filed. CenturyLink stated that this should be clarified. CenturyLink contended that if the expense line items were to be filed, it should be done confidentially.

The Coalition expressed skepticism regarding the square mile allocation factor, stating that while some costs are related to density it is not clear that square miles are an appropriate indicator of density when compared to factors such as line/road miles. The Coalition expressed concern that Project No. 40342 had been undertaken to a needs-based reform system for provision

of TUSF support and that the allocation method now being proposed might be characterized as conferring commission support for a methodology that has no evidentiary basis. The Coalition was unclear as to what the allocation would accomplish, how it would inform the commission and public of a carrier's need for support. It was the Coalition's position that the proposed allocation cost factor fails to prove a need for TUSF support in any area, nor does it prove that the support being provided is used to provide service in an area.

CenturyLink said that the Coalition's concerns were overstated, and that any issues the Coalition might have with the square mile allocation methodology for purposes of any "needs based" inquiry could be addressed in comments to Project No. 40342.

CenturyLink replied that use of a line/road mile allocation factor would require extensive annual geocoding which would be burdensome to most carriers and impossible for others. CenturyLink said that the square mile allocation methodology strikes a fair balance between the goals of allocating cost and the burdens of performing an allocation exercise.

CenturyLink said that, while it does not directly measure line density, the proposed rule appears to be a reasonable allocation of costs to supported exchanges, and that any allocation is susceptible to criticism compared to a direct measure of costs, but that allocations are almost always used when determining costs, and while square miles may not be a perfect allocation factor the legal standard for adoption is not perfection.

CenturyLink, in response to TEXALTEL's supplemental comment in which it proposed an alternative allocation factor based on telephone customer counts rather than square miles in subsection (d)(1), contended that if this alternative was made available to some carriers, it should be available to all, both in subsections (d)(1) and (c)(1).

Commission Response

The commission declines to adopt this paragraph, concluding that the issues surrounding implementation of this proposed reporting, coupled with considerable concerns about such a report's benefits, outweigh its value as a contributor to transparency and accountability in the administration of the TUSF.

Section 26.402(c)(2)(A), Reports required for a price cap carrier designated as an ETP and as an ETC that receives federal universal service fund (FUSF) USF high cost support.

Verizon stated that this subsection should not be adopted at this time because it is intended to reflect FCC reporting requirements which have not been finalized, pending a petition filed at the FCC by the Wireless Association® (CTIA) and the United States Telecom Association (USTA). CenturyLink asserted that the granular wire center results of the FCC regression model have never been put to use by that agency or any state. It was CenturyLink's contention that carriers to which subparagraph (A) would apply either lack the data points necessary to populate the model or would have to derive the data from internal and external sources which would vary in quality, thus the outputs from the model would not be considered valid for TUSF purposes. CenturyLink asserted that subparagraph (A) should be deleted from the rule.

Commission Response

The commission declines to adopt this subparagraph, having concluded that the issues surrounding the report required by this language outweigh its benefits.

Section 26.402(c)(2)(B) - (C), (d)(2)(A) - (B), Reports required for a price cap carrier designated as an ETP and as an ETC that receives federal universal service fund (FUSF) USF high cost support.

CenturyLink interpreted subsection (c)(2)(B) as simply requiring an ETC to file its FCC-required plan with the commission. CenturyLink believed that only Windstream and CenturyLink fall into this category. It was CenturyLink's contention that if the proposed rule intended that affected ILECs in Texas file a five-year improvement plan specific to TUSF this would be inconsistent with PURA and is not supported by any federal requirement. CenturyLink stated that an ILEC ETP has no obligation to proactively upgrade its network or improve service quality as conditions of TUSF support so long as the ILEC is satisfying its obligations with respect to basic local telephone service (BLTS) as required under TUSF. CenturyLink concluded that any requirement for a five-year improvement plan requirement under TUSF would overstep the statutory mandate of PURA §56.021(l) and the TUSF orders in P.U.C. Docket Nos. 18515 and 34723 that set conditions under which ILEC ETPs would receive TUSF support. CenturyLink maintained it was entirely possible that an ILEC would have no need to expand its network or make service improvements but that TUSF support would still be justified if that support was used only to offset the high cost of maintaining the network and providing customer service in rural areas.

TEXALTEL stated in reply comment that to the extent the proposed rule simply required that copies of reports to the FCC be filed with the commission, filing parties should be allowed to attach the same level of non-disclosure to the copies files with the commission as those filed with the FCC.

The Coalition replied that CenturyLink's comment that a carrier had no obligation to upgrade or improve the service quality of its network in order to receive TUSF support as long as it is satisfying its ILEC and BLTS obligations merely serves to underscore what the Coalition perceived as inadequacy in the current requirements for TUSF transparency and accountability. The Coalition claimed that CenturyLink must file detailed reports and plans with the FCC in order to receive $5.5 million per year in federal USF support, but that CenturyLink objects to providing comparable reports for the Texas fund from which it receives $34 million per year. The Coalition contended that CenturyLink's real objection is with disclosure of the information.

The Coalition argued that the commission should reject CenturyLink's interpretation that the proposed rule merely requires that an ETC file its FCC-required plan with the commission, stating that since the federal rule already establishes that requirement, it is unreasonable to interpret the proposed rule as a simple restatement of the federal requirement. Rather, the Coalition concluded that the intent of the language in subsection (c)(2)(B) is for an ETC that is also a Texas ETP to file Texas-specific reports of the information gathered in the course of preparing its FCC report filed pursuant to 47 C.F.R. §54.313(i), as the Coalition recommended in its comment on the Strawman rule in this project. The Coalitions requests that, to the extent this is not clear, it should be clarified but not deleted.

The Coalition further argued that the proposed rule should be amended to clarify that ETCs who receive federal or state USF support must file their federal USF reports pursuant to 47 C.F.R. §54.313 (which the Coalition said makes no provision for confidential filings) with the commission and that these be available to the public in a standing project number. It was the Coalition's position that if some or all of these reports are confidential their

review should be permitted pursuant to a standing protective order.

CenturyLink replied that, while 47 C.F.R. §54.313 does not explicitly address confidential filings, it does not prohibit them, and that CenturyLink had made confidential filings pursuant to §54.313 with no parties objecting. CenturyLink stated that, to the best of its knowledge and belief, no party has ever challenged an ETC for filing their 5-year plans and progress reports with the FCC as confidential and those plans and reports are not subject to a standing protective order providing access by third parties. CenturyLink urged the commission to reject the Coalition's request for a protective order that would grant third parties access to confidential data filed pursuant to the proposed rule.

Commission Response

Consistent with CenturyLink's comments, the commission confirms that these subparagraphs are applicable only to those carriers which are required by the FCC to file identical information with the FCC and rejects the Coalition's recommendation that language be added to require a Texas ETP to also file a TUSF-specific five-year plan or update. The commission declines to burden carriers who would not otherwise be doing so with preparation of five-year plans and annual updates.

The filing of, and access to, information designated as confidential by a filing party is addressed above with respect to subsection (b).

Section 26.402(d)(1), Requirements for ETPs and ETCs that receive state or federal high cost support and are designated as rate of return carriers, competitive local exchange carriers, or wireless carriers by the FCC.

The Coalition and TEXALTEL expressed skepticism of the square mile allocation factor, stating that while some costs are related to density it is not clear that square miles are an appropriate indicator of density when compared to factors such as line miles or road miles. The Coalition expressed concern that Project No. 40342 had been undertaken to develop a needs-based reform system for provision of TUSF support and that the allocation method now being proposed might be characterized as conferring commission support for a methodology that has no evidentiary basis. The Coalition was unclear as to what the allocation would accomplish, how it would inform the commission and public of a carrier's need for support. It was the Coalition's position that the proposed allocation cost factor fails to prove a need for TUSF support in any area, nor does it prove that the support being provided is used to provide service in an area.

In initial comments, TEXALTEL noted that the proposed subsection (d) would impose the same reporting requirements on CLEC recipients and rate of return ILECS. TEXALTEL stated that CLECs have not been required to keep the same charts of accounts that ILECS have historically kept. Regarding the proposed use of an allocation factor based on THCUSF subsidized square miles divided by total study area square miles, TEXALTEL said that CLECs do not have study areas, rather they operate in portions of study areas, and that many CLEC service areas have no correlation with ILEC exchange/wire center boundaries. TEXALTEL contended that since CLECS provide ubiquitous service in any wire center receiving THCUSF support, the service area square miles could not be calculated, and that CLECs lack the data necessary to make such a calculation. And for facilities based CLECs in areas which do not receive THCUSF, TEXALTEL contended that such providers do not have a service area per se, rather they serve customers within the range of their facilities, resulting in a "service area" that would look like Swiss cheese. In a supplemental comment, TEXALTEL offered an optional, additional allocation factor derived by dividing a carrier's total customers in supported areas by that carriers total telephone customers in Texas. TEXALTEL conceded in reply comments that this method might be reasonably questioned as an allocation of costs between densely- and sparsely-populated areas, but maintained that a factor based on square miles would have an even smaller likelihood of accuracy. TEXALTEL offered an alternative, suggesting that all Rate of Return ILECs simply report under subsection (d)(1)(B) and not attempt to allocate between subsidized and non-subsidized exchanges, but rather list subsidized and non-subsidized line counts and let any reviewing party draft its own allocation factor for whatever purposes it is analyzing the data.

CenturyLink replied that no allocation method would be as perfect as an intensive determination of direct costs. In their supplemental reply, CenturyLink noted that there is nothing in the record to indicate that TEXALTEL's proposed allocation factor based on customer counts is superior to a square mile allocation factor. While they did not oppose its inclusion, CenturyLink pointed out that the square mile allocation method uses well established exchange boundaries which have been approved by the commission, while the method proposed by TEXALTEL would rely on customer counts which vary and are subject to a carrier's marketing practices, making such a methodology subject to concerns about reliability and accuracy. CenturyLink contended that if the commission allowed one set of carriers to use TEXALTEL's proposed methodology, then all carriers should be given that option, both in subsection (d)(1) and in subsection (c)(1), as well.

In its response to TEXALTEL's supplemental comment, the Coalition said it believed that neither the square mile nor the customer count methodology will produce a reasonable estimate of cost as claimed by the rule, and that absent considerable investigation, no one knows how best to determine an ETP's costs in supported exchanges because ETPs have not been required to track their costs by exchange. The Coalition contended that imposition of an arbitrary allocation factor does nothing to produce an "estimate of costs for the total of all supported wire centers," as the rule intends; rather such methodology only serves to create the illusion of having done so.

The Coalition opined that the proposed rule should include the number of supported lines as well as the support received per line (for carriers other than those who have elected to eliminate their high cost support through the Total Support Reduction Plan). The Coalition stated that this information is critical to understanding how much support is being provided to an ETP in each exchange and whether the support is warranted or should be examined in a separate need inquiry.

The Coalition stated that its greater concern is that P.U.C. Project No. 40342 was opened to investigate how best to establish needs-based reforms to the system, and that use of a cost allocation factor in the proposed rule might confer commission support to the use of such a methodology despite a lack of proof of its efficacy to provide a reasonable estimate of costs in a given area.

The Coalition went on to say that cost allocation factors neither prove need for support in a given area, nor do they prove that

support monies were *actually used* (their emphasis) to provide service in a given area.

TEXALTEL also found the instructions for the allocation factor in subsection (d)(1)(A)(ii) to be confusing, saying that if the intent of the clause is to produce a calculation from the ILEC study area and wire center areas, this would be information to which CLECs likely do not have access. Alternatively, if the intent is to calculate the portion of a CLEC's total expenses allocable to lines supported by TUSF based on square miles served, TEXALTEL has commented on its concerns for this methodology above.

AMA expressed concern for the absence of specific provisions for confidentiality regarding the five-year plan described in subsection (d)(2), saying that the rule should make clear that the reports will be treated confidentially.

TEXALTEL urged that this subsection be applicable only to rate of return ILECs, saying that requiring this information of CLECs would put an undue burden in expense and disruption while failing to generate data that is meaningful to the commission or others. TEXALTEL also requested that the reports described in subsection (d)(2) be required of CLECs only to the extent they are required by the FCC, and that they be accorded the same level of confidentiality as the FCC's reports.

Commission Response

The commission declines to adopt this subparagraph, having concluded that the issues surrounding the report proposed in this subsection outweigh its benefits.

Section 26.402(e)(1), Reports made public by the commission.

AMA said it was reasonable to make public a cash flow statement for the overall TUSF.

Commission Response

The commission adopts the proposed language without modification.

Section 26.402(e)(2), Reports made public by the commission.

TEXALTEL, AMA, TSTCI, CenturyLink, the Coalition, Verizon, AT&T, and TTA opposed publication of carrier contributions to TUSF on the basis that doing so would reveal confidential information to competitors, owing to the fact that contributions to the fund are based on a company's intrastate revenues, which could easily be deduced if the payment amount were known.

AMA noted that it was unaware of any other state requiring public disclosure of company contributions to the fund and joined TTA in urging the commission to use this data for internal analysis only. AT&T contended that it would be unlawful to adopt a rule requiring publication of information that is exempted from disclosure under Texas Government Code §552.001 of the Open Records Act.

TSTCI, TTA, AT&T, Verizon and CenturyLink recommended that only aggregated payment data be made public. CenturyLink suggested that the published data be aggregated by industry segment *(e.g.,* ILEC, CLEC, wireless, VoIP).

The Coalition argued that, while there is a compelling argument for publication of company receipts from TUSF given that these are disbursements of public funds, there is no correlating need to make publicly available each company's contributions to the fund. The Coalition stated that the subsection should be deleted altogether, contending that it serves no legitimate purpose. The Coalition noted that many CLECs are privately held, and do not make their financial information public. As an alternative, the Coalition offered that only the identities of companies who contribute to the TUSF be made public.

AMA observed that no segment of the regulated industry expressed support for this subsection, and no watchdog group had even filed comments.

Commission Response

The commission finds commenters' concerns regarding publication of data from which confidential information could be deduced to be reasonable and modifies the rule language to reflect that only aggregated contributions to the TUSF will be made publicly available.

Section 26.402(e)(3), Reports made public by the commission.

AMA stated that identification of total disbursements from the TUSF to each recipient company or organization is consistent with current policy, saying that this information is already available on a quarterly basis and contributes to current transparency for the TUSF.

Commission Response

The commission adopts the proposed language without modification.

Section 26.402(f)

The Coalition proposed language for a new subsection to the effect that any information filed confidentially pursuant to the proposed rule should be made available to third parties, or at a minimum, their experts or counsel, who are willing to sign a protective order. The Coalition went on to argue that non-cost information, such as the five-year plan and subsequent progress reports should not be permitted to be filed confidentially. It was the Coalition's position that these plans and reports are the sole means by which the public can know whether subsidies paid from the TUSF are being applied appropriately, and that filing "accountability" reports on a confidential basis would run counter to the Legislature's intent to *increase* (Coalition's emphasis) transparency.

Commission Response

As discussed above with respect to subsection (b), the commission adopts language in subsection (b) to make clear that all filings made with the commission pursuant to this section, including a filing subject to a claim of confidentiality, shall be filed pursuant to the commission's procedural rules relating to pleadings and other documents. These procedural rules include processes addressing the filing and handling of materials designated by the filing party as confidential information. The commission notes that if a person submits a request for information filed pursuant to this rule and for which the filing party designated as confidential, such request shall be processed in compliance with the Public Information Act, Texas Government Code Chapter 552. For information filed with the commission and designated by the filing party as confidential, the Public Information Act does not allow the commission to provide access to the information to other entities, via a protective order or otherwise. The commission rejects the Coalition's proposed language and adopts language in support of this finding.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this rule, the commission makes other changes for the purpose of clarifying its intent.

The new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (West 2007 and Supp. 2012), which provides authority to the commission to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §56.023(d), which requires the commission to adopt rules that include procedures to ensure reasonable transparency and accountability in the administration of the TUSF.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §56.023(d).

§26.402. Transparency and Accountability in the Administration of the Texas Universal Service Fund.

(a) Purpose. This section, in conjunction with the audit, eligibility, public reporting, and affidavits of compliance requirements set forth throughout this subchapter, establishes procedures to ensure reasonable transparency and accountability in the administration of the Texas Universal Service Fund (TUSF).

(b) Application.

(1) This section applies to a telecommunications provider that has been designated as an eligible telecommunications provider (ETP) by the commission pursuant to §26.417 of this title (relating to Designation as Eligible Telecommunications Providers to Receive Texas Universal Service Funds (TUSF)). Subsections (c) and (d) of this section apply to a telecommunications provider that has been designated, or has applied after June 30, 2013 to be designated by the commission as an eligible telecommunications carrier (ETC) pursuant to §26.418 of this title (relating to Designation of Common Carrier as Eligible Telecommunications Carriers to Receive Federal Universal Service Funds).

(2) All filings made with the commission pursuant to this section, including a filing subject to a claim of confidentiality, shall be filed with the commission's Filing Clerk in accordance with the commission's Procedural Rules, Chapter 22, Subchapter E of this title (relating to Pleadings and other Documents).

(c) Reports required for a price cap carrier designated as an ETP and as an ETC that receives federal USF high cost support. This subsection applies to an ETP that has been designated as an ETC that receives federal high cost support and has been designated as a price cap carrier by the Federal Communications Commission (FCC).

(1) By July 1, 2013, a telecommunications provider that has been designated as an ETC shall file a five-year plan that describes with specificity proposed improvements or upgrades to the ETC's network throughout its service area or proposed service area. The information shall be submitted at the wire center level for a carrier receiving high cost support and on a census block level for a carrier receiving Mobility Fund support. The ETC shall estimate the area (expressed in square miles) and population that will be served as a result of the improvements for each wire center or census block as appropriate. An ETC that has been granted a limited ETC for purposes of providing Lifeline only, pursuant to 47 C.F.R. Part 54 Subpart E, is not required to submit a five-year plan. Any telecommunications provider that applies for ETC designation after June 30, 2013 shall submit a five-year plan with its ETC application.

(2) By July 1 of each subsequent year after filing its five-year plan pursuant to paragraph (1) of this subsection, each ETC shall submit a progress report on its five-year plan, including maps detailing its progress towards meeting its plan targets, an explanation of how much universal service support was received and how it was used to improve service quality, coverage, or capacity, and an explanation regarding any network improvement targets that have not been fulfilled in the prior calendar year. The information shall be submitted at the wire center level or census block as appropriate.

(d) Reports required for a rate of return carrier, competitive local exchange carrier (CLEC), or wireless carrier designated as an ETP and as an ETC that receives federal USF high cost support. This subsection applies to an ETP that has been designated as an ETC that receives federal high cost support and that has been designated as a rate of return carrier, competitive local exchange carrier, or wireless carrier by the FCC.

(1) By July 1, 2013, a telecommunications provider that has been designated as an ETC shall file a five-year plan that describes with specificity proposed improvements or upgrades to the ETC's network throughout its service area or proposed service area. The information shall be submitted at the wire center level for a carrier receiving high cost support and on a census block level for carriers receiving Mobility Fund support. The ETC shall estimate the area (expressed in square miles) and population that will be served as a result of the improvements for each wire center or census block as appropriate. An ETC that has been granted a limited ETC for purposes of providing Lifeline only, pursuant to 47 C.F.R. Part 54 Subpart E, is not required to submit a five-year plan. Any telecommunications provider that applies for ETC designation after June 30, 2013 shall submit a five-year plan with its ETC application.

(2) By July 1 of each subsequent year after filing its five-year plan pursuant to paragraph (1) of this subsection, each ETC shall submit a progress report on its five-year plan, including maps detailing its progress towards meeting its plan targets, an explanation of how much universal service support was received and how it was used to improve service quality, coverage, or capacity, and an explanation regarding any network improvement targets that have not been fulfilled in the prior calendar year. The information shall be submitted at the wire center level or census block as appropriate.

(e) Reports made public by the commission. For each State fiscal quarter, no later than the 45th day after the end of the preceding quarter, the commission shall make the following information publicly available on the commission's website:

(1) A cash flow statement for the overall TUSF indicating starting balance, total revenues, disbursements for each program described in §26.401(b) of this title (relating to Texas Universal Service Plan (TUSF)), and ending balance; and

(2) Total disbursements from the TUSF to each recipient company or organization for each program described in §26.401(b) of this title.

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

Filed with the Office of the Secretary of State on October 17, 2012.

TRD-201205410
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Effective date: November 6, 2012
Proposal publication date: June 29, 2012
For further information, please call: (512) 936-7223

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 133. HOSPITAL LICENSING

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts amendments to §133.2 and §133.41, concerning the regulation of hospitals. Section 133.41 is adopted with changes to the proposed text as published in the May 4, 2012, issue of the *Texas Register* (37 TexReg 3335). Section 133.2 is adopted without changes and, therefore, the section will not be republished.

BACKGROUND AND PURPOSE

The amendments to the hospital licensing rules require hospitals to comply with four pieces of legislation passed during the 82nd Legislature, Regular Session, 2011: House Bill 1481, House Bill 411, House Bill 1983, and House Bill 118.

House Bill 1481 added Chapter 392 as well as Government Code, §531.0227, to require the use of "Person First Respectful Language" when referring to individuals with disabilities in agency rules, reference materials, publications, and electronic media.

House Bill 411, which amended and added several provisions to Health and Safety Code, Chapter 47 (Hearing Loss in Newborns), requires all hospitals that provide obstetrical services to perform, either directly or through a transfer agreement, audiological screenings on all newborns or infants born at the facility for the identification of hearing loss prior to discharge. The screenings are required unless a parent or legal guardian of the infant declines the screening or the newborn is transferred to another facility before the screening is performed.

House Bill 1983, Section 2, added Health and Safety Code, §241.007, to require hospitals that provide obstetrical services to collaborate with their physicians to develop quality initiatives to reduce the number of elective or nonmedically indicated induced deliveries or cesarean sections performed at the hospital on a woman before the 39th week of gestation.

House Bill 118 added subsection (d) to Health and Safety Code, §241.103 (Preservation of Records), to require hospitals to provide written notice to a patient, on the date the patient is treated or as soon as reasonably practicable following emergency treatment, that the hospital may authorize disposal of medical records relating to the patient on or after the time periods specified in §241.103(a) and (b).

SECTION-BY-SECTION SUMMARY

Amendments to §133.2 and §133.41 replace the terms "mental retardation" with "intellectual disability" to comply with House Bill 1481.

Two new provisions are being added to §133.41(f), the Governing Body rule for hospitals, to comply with the new mandates of House Bill 1983, Section 2, and House Bill 411 which are applicable to hospitals that provide obstetrical services.

In particular, under §133.41(f)(4) regarding "Responsibilities relating to the medical staff," new language is being added at subparagraph (C) which requires the governing bodies at hospitals that provide obstetrical services to collaborate with their physicians to develop quality initiatives to reduce the number of elective or nonmedically indicated induced deliveries or cesarean sections performed at the hospital on a woman before the 39th week of gestation. This provision is being added to comply with House Bill 1983.

New language also is being added to subparagraph (D) of §133.41(f)(4) to require the governing bodies at hospitals that provide obstetrical services to ensure that a newborn audiological screening program, consistent with the requirements of Health and Safety Code, Chapter 47 (Hearing Loss in Newborns), performs, either directly or through a transfer agreement, audiological screenings for the identification of hearing loss on each newborn or infant born at the facility before the newborn or infant is discharged. This provision is being added to comply with House Bill 411.

An amendment to §133.41(j) which adds a new paragraph (11), requires hospitals to provide written notice to a patient that the hospital may authorize disposal of medical records relating to the patient on or after the required retention period set forth in Health and Safety Code, §241.103(a) and (b), or other provisions of §133.41(j), to comply with House Bill 118.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared a response to the only comment received regarding the proposed rules during the comment period, which the commission has reviewed and accepts. The commenter was the Texas Hospital Association and it suggested one change which is described in the following comment.

Comment: Concerning the placement of the requirements in §133.41 regarding initiatives to reduce the number of induced births and to implement audiology screenings of all newborns, the Texas Hospital Association recommended that these two rule amendments be placed in §133.45 addressing miscellaneous policies and protocols, rather than under §133.41(f), governing body, stating that the legislation did not impose these new requirements directly on governing boards. Otherwise, the commenter was in favor of the rule.

Response: The department does not agree with the suggestion that the rule amendments should be placed in §133.45. However, in response to the comment, the department has revised the proposed language in §133.41(f) to state that in hospitals that provide obstetrical services, "the governing body shall ensure that the hospital" complies with these new requirements, rather than stating that the governing body directly will collaborate with medical staff or implement the new rules.

LEGAL CERTIFICATION

The Department of State Health Services, General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

SUBCHAPTER A. GENERAL PROVISIONS

25 TAC §133.2

STATUTORY AUTHORITY

The amendment is authorized by Health and Safety Code, §241.026, concerning rules and minimum standards for the licensing and regulation of hospitals required to obtain a license under this chapter; and Government Code, §531.0055(e), and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the

operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

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

Filed with the Office of the Secretary of State on October 22, 2012.

TRD-201205483
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: November 11, 2012
Proposal publication date: May 4, 2012
For further information, please call: (512) 776-6972

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SUBCHAPTER C. OPERATIONAL REQUIREMENTS

25 TAC §133.41

The amendment is authorized by Health and Safety Code, §241.026, concerning rules and minimum standards for the licensing and regulation of hospitals required to obtain a license under this chapter; and Government Code, §531.0055(e), and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

§133.41. Hospital Functions and Services.

(a) Anesthesia services. If the hospital furnishes anesthesia services, these services shall be provided in a well-organized manner under the direction of a qualified physician in accordance with the Medical Practice Act and the Nursing Practice Act. The hospital is responsible for and shall document all anesthesia services administered in the hospital.

(1) Organization and staffing. The organization of anesthesia services shall be appropriate to the scope of the services offered. Only personnel who have been approved by the facility to provide anesthesia services shall administer anesthesia. All approvals or delegations of anesthesia services as authorized by law shall be documented and include the training, experience, and qualifications of the person who provided the service.

(2) Delivery of services. Anesthesia services shall be consistent with needs and resources. Policies on anesthesia procedure shall include the delineation of pre-anesthesia and post-anesthesia responsibilities. The policies shall ensure that the following are provided for each patient.

(A) A pre-anesthesia evaluation by an individual qualified to administer anesthesia under paragraph (1) of this subsection shall be performed within 48 hours prior to surgery.

(B) An intraoperative anesthesia record shall be provided. The record shall include any complications or problems occurring during the anesthesia including time, description of symptoms, review of affected systems, and treatments rendered. The record shall correlate with the controlled substance administration record.

(C) A post-anesthesia follow-up report shall be written by the person administering the anesthesia before transferring the patient from the post-anesthesia care unit and shall include evaluation for recovery from anesthesia, level of activity, respiration, blood pressure, level of consciousness, and patient's oxygen saturation level.

(i) With respect to inpatients, a post-anesthesia evaluation for proper anesthesia recovery shall be performed after transfer from the post-anesthesia care unit and within 48 hours after surgery by the person administering the anesthesia, registered nurse (RN), or physician in accordance with policies and procedures approved by the medical staff and using criteria written in the medical staff bylaws for postoperative monitoring of anesthesia.

(ii) With respect to outpatients, immediately prior to discharge, a post-anesthesia evaluation for proper anesthesia recovery shall be performed by the person administering the anesthesia, RN, or physician in accordance with policies and procedures approved by the medical staff and using criteria written in the medical staff bylaws for postoperative monitoring of anesthesia.

(b) Chemical dependency services.

(1) Chemical dependency unit. A hospital may not admit patients to a chemical dependency services unit unless the unit is approved by the Department of State Health Services (department) as meeting the requirements of §133.163(q) of this title (relating to Spatial Requirements for New Construction).

(2) Admission criteria. A hospital providing chemical dependency services shall have written admission criteria that are applied uniformly to all patients who are admitted to the chemical dependency unit.

(A) The hospital's admission criteria shall include procedures to prevent the admission of minors for a condition which is not generally recognized as responsive to treatment in an inpatient setting for chemical dependency services.

(i) The following conditions are not generally recognized as responsive to treatment in a treatment facility for chemical dependency unless the minor to be admitted is qualified because of other disabilities, such as:

(I) cognitive disabilities due to intellectual disability;

(II) learning disabilities; or

(III) psychiatric disorders.

(ii) A minor may be qualified for admission based on other disabilities which would be responsive to chemical dependency services.

(iii) A minor patient shall be separated from adult patients.

(B) The hospital shall have a preadmission examination procedure under which each patient's condition and medical history are reviewed by a member of the medical staff to determine whether the patient is likely to benefit significantly from an intensive inpatient program or assessment.

(C) A voluntarily admitted patient shall sign an admission consent form prior to admission to a chemical dependency unit which includes verification that the patient has been informed of the services to be provided and the estimated charges.

(3) Compliance. A hospital providing chemical dependency services in an identifiable unit within the hospital shall comply

with Chapter 448, Subchapter B of this title (relating to Standard of Care Applicable to All Providers).

(c) Comprehensive medical rehabilitation services.

(1) Rehabilitation units. A hospital may not admit patients to a comprehensive medical rehabilitation services unit unless the unit is approved by the department as meeting the requirements of §133.163(z) of this title.

(2) Equipment and space. The hospital shall have the necessary equipment and sufficient space to implement the treatment plan described in paragraph (7)(C) of this subsection and allow for adequate care. Necessary equipment is all equipment necessary to comply with all parts of the written treatment plan. The equipment shall be on-site or available through an arrangement with another provider. Sufficient space is the physical area of a hospital which in the aggregate, constitutes the total amount of the space necessary to comply with the written treatment plan.

(3) Emergency requirements. Emergency personnel, equipment, supplies and medications for hospitals providing comprehensive medical rehabilitation services shall be as follows.

(A) A hospital that provides comprehensive medical rehabilitation services shall have emergency equipment, supplies, medications, and designated personnel assigned for providing emergency care to patients and visitors.

(B) The emergency equipment, supplies, and medications shall be properly maintained and immediately accessible to all areas of the hospital. The emergency equipment shall be periodically tested according to the policy adopted, implemented and enforced by the hospital.

(C) At a minimum, the emergency equipment and supplies shall include those specified in subsection (e)(4) of this section.

(D) The personnel providing emergency care in accordance with this subsection shall be staffed for 24-hour coverage and accessible to all patients receiving comprehensive medical rehabilitation services. At least one person who is qualified by training to perform advanced cardiac life support and administer emergency drugs shall be on duty each shift.

(E) All direct patient care licensed personnel shall maintain current certification in cardiopulmonary resuscitation (CPR).

(4) Medications. A rehabilitation hospital's governing body shall adopt, implement and enforce policies and procedures that require all medications to be administered by licensed nurses, physicians, or other licensed professionals authorized by law to administer medications.

(5) Organization and Staffing.

(A) A hospital providing comprehensive medical rehabilitation services shall be organized and staffed to ensure the health and safety of the patients.

(i) All provided services shall be consistent with accepted professional standards and practice.

(ii) The organization of the services shall be appropriate to the scope of the services offered.

(iii) The hospital shall adopt, implement and enforce written patient care policies that govern the services it furnishes.

(B) The provision of comprehensive medical rehabilitation services in a hospital shall be under the medical supervision of a physician who is on duty and available, or who is on-call 24 hours each day.

(C) A hospital providing comprehensive medical rehabilitation services shall have a medical director or clinical director who supervises and administers the provision of comprehensive medical rehabilitation services.

(i) The medical director or clinical director shall be a physician who is board certified or eligible for board certification in physical medicine and rehabilitation, orthopedics, neurology, neurosurgery, internal medicine, or rheumatology as appropriate for the rehabilitation program.

(ii) The medical director or clinical director shall be qualified by training or at least two years training and experience to serve as medical director or clinical director. A person is qualified under this subsection if the person has training and experience in the treatment of rehabilitation patients in a rehabilitation setting.

(6) Admission criteria. A hospital providing comprehensive medical rehabilitation services shall have written admission criteria that are applied uniformly to all patients who are admitted to the comprehensive medical rehabilitation unit.

(A) The hospital's admission criteria shall include procedures to prevent the admission of a minor for a condition which is not generally recognized as responsive to treatment in an inpatient setting for comprehensive medical rehabilitation services.

(i) The following conditions are not generally recognized as responsive to treatment in an inpatient setting for comprehensive medical rehabilitation services unless the minor to be admitted is qualified because of other disabilities, such as:

(I) cognitive disabilities due to intellectual disability;

(II) learning disabilities; or

(III) psychiatric disorders.

(ii) A minor may be qualified for admission based on other disabilities which would be responsive to comprehensive medical rehabilitation services.

(B) The hospital shall have a preadmission examination procedure under which each patient's condition and medical history are reviewed by a member of the medical staff to determine whether the patient is likely to benefit significantly from an intensive inpatient program or assessment.

(7) Care and services.

(A) A hospital providing comprehensive medical rehabilitation services shall use a coordinated interdisciplinary team which is directed by a physician and which works in collaboration to develop and implement the patient's treatment plan.

(i) The interdisciplinary team for comprehensive medical rehabilitation services shall have available to it, at the hospital at which the services are provided or by contract, members of the following professions as necessary to meet the treatment needs of the patient:

(I) physical therapy;

(II) occupational therapy;

(III) speech-language pathology;

(IV) therapeutic recreation;

(V) social services and case management;

(VI) dietetics;

(VII) psychology;

(VIII) respiratory therapy;

(IX) rehabilitative nursing;

(X) certified orthotics;

(XI) certified prosthetics;

(XII) pharmaceutical care; and

(XIII) in the case of a minor patient, persons who have specialized education and training in emotional, mental health, or chemical dependency problems, as well as the treatment of minors.

(ii) The coordinated interdisciplinary team approach used in the rehabilitation of each patient shall be documented by periodic entries made in the patient's medical record to denote:

(I) the patient's status in relationship to goal attainment; and

(II) that team conferences are held at least every two weeks to determine the appropriateness of treatment.

(B) An initial assessment and preliminary treatment plan shall be performed or established by the physician within 24 hours of admission.

(C) The physician in coordination with the interdisciplinary team shall establish a written treatment plan for the patient within seven working days of the date of admission.

(i) Comprehensive medical rehabilitation services shall be provided in accordance with the written treatment plan.

(ii) The treatment provided under the written treatment plan shall be provided by staff who are qualified to provide services under state law. The hospital shall establish written qualifications for services provided by each discipline for which there is no applicable state statute for professional licensure or certification.

(iii) Services provided under the written treatment plan shall be given in accordance with the orders of physicians, dentists, podiatrists or practitioners who are authorized by the governing body, hospital administration, and medical staff to order the services, and the orders shall be incorporated in the patient's record.

(iv) The written treatment plan shall delineate anticipated goals and specify the type, amount, frequency, and anticipated duration of service to be provided.

(v) Within 10 working days after the date of admission, the written treatment plan shall be provided. It shall be in the person's primary language, if practicable. What is or would have been practicable shall be determined by the facts and circumstances of each case. The written treatment plan shall be provided to:

(I) the patient;

(II) a person designated by the patient; and

(III) upon request, a family member, guardian, or individual who has demonstrated on a routine basis responsibility and participation in the patient's care or treatment, but only with the patient's consent unless such consent is not required by law.

(vi) The written treatment plan shall be reviewed by the interdisciplinary team at least every two weeks.

(vii) The written treatment plan shall be revised by the interdisciplinary team if a comprehensive reassessment of the patient's status or the results of a patient case review conference indicates the need for revision.

(viii) The revision shall be incorporated into the patient's record within seven working days after the revision.

(ix) The revised treatment plan shall be reduced to writing in the person's primary language, if practicable, and provided to:

(I) the patient;

(II) a person designated by the patient; and

(III) upon request, a family member, guardian, or individual who has demonstrated on a routine basis responsibility and participation in the patient's care or treatment, but only with the patient's consent unless such consent is not required by law.

(8) Discharge and continuing care plan. The patient's interdisciplinary team shall prepare a written continuing care plan that addresses the patient's needs for care after discharge.

(A) The continuing care plan for the patient shall include recommendations for treatment and care and information about the availability of resources for treatment or care.

(B) If the patient's interdisciplinary team deems it impracticable to provide a written continuing care plan prior to discharge, the patient's interdisciplinary team shall provide the written continuing care plan to the patient within two working days after the date of discharge.

(C) Prior to discharge or within two working days after the date of discharge, the written continuing care plan shall be provided in the person's primary language, if practicable, to:

(i) the patient;

(ii) a person designated by the patient; and

(iii) upon request, to a family member, guardian, or individual who has demonstrated on a routine basis responsibility and participation in the patient's care or treatment, but only with the patient's consent unless such consent is not required by law.

(d) Dietary services. The hospital shall have organized dietary services that are directed and staffed by adequate qualified personnel. However, a hospital that has a contract with an outside food management company or an arrangement with another hospital may meet this requirement if the company or other hospital has a dietitian who serves the hospital on a full-time, part-time, or consultant basis, and if the company or other hospital maintains at least the minimum requirements specified in this section, and provides for the frequent and systematic liaison with the hospital medical staff for recommendations of dietetic policies affecting patient treatment. The hospital shall ensure that there are sufficient personnel to respond to the dietary needs of the patient population being served.

(1) Organization.

(A) The hospital shall have a full-time employee who is qualified by experience or training to serve as director of the food and dietetic service, and be responsible for the daily management of the dietary services.

(B) There shall be a qualified dietitian who works full-time, part-time, or on a consultant basis. If by consultation, such services shall occur at least once per month for not less than eight hours. The dietitian shall:

(i) be currently licensed under the laws of this state to use the titles of licensed dietitian or provisional licensed dietitian, or be a registered dietitian;

(ii) maintain standards for professional practice;

(iii) supervise the nutritional aspects of patient care;

(iv) make an assessment of the nutritional status and adequacy of nutritional regimen, as appropriate;

(v) provide diet counseling and teaching, as appropriate;

(vi) document nutritional status and pertinent information in patient medical records, as appropriate;

(vii) approve menus; and

(viii) approve menu substitutions.

(C) There shall be administrative and technical personnel competent in their respective duties. The administrative and technical personnel shall:

(i) participate in established departmental or hospital training pertinent to assigned duties;

(ii) conform to food handling techniques in accordance with paragraph (2)(E)(viii) of this subsection;

(iii) adhere to clearly defined work schedules and assignment sheets; and

(iv) comply with position descriptions which are job specific.

(2) Director. The director shall:

(A) comply with a position description which is job specific;

(B) clearly delineate responsibility and authority;

(C) participate in conferences with administration and department heads;

(D) establish, implement, and enforce policies and procedures for the overall operational components of the department to include, but not be limited to:

(i) quality assessment and performance improvement program;

(ii) frequency of meals served;

(iii) nonroutine occurrences; and

(iv) identification of patient trays; and

(E) maintain authority and responsibility for the following, but not be limited to:

(i) orientation and training;

(ii) performance evaluations;

(iii) work assignments;

(iv) supervision of work and food handling techniques;

(v) procurement of food, paper, chemical, and other supplies, to include implementation of first-in first-out rotation system for all food items;

(vi) ensuring there is a four-day food supply on hand at all times;

(vii) menu planning; and

(viii) ensuring compliance with §§229.161 - 229.171 of this title (relating to Texas Food Establishments).

(3) Diets. Menus shall meet the needs of the patients.

(A) Therapeutic diets shall be prescribed by the physician(s) responsible for the care of the patients. The dietary department of the hospital shall:

(i) establish procedures for the processing of therapeutic diets to include, but not be limited to:

(I) accurate patient identification;

(II) transcription from nursing to dietary services;

(III) diet planning by a dietitian;

(IV) regular review and updating of diet when necessary; and

(V) written and verbal instruction to patient and family. It shall be in the patient's primary language, if practicable, prior to discharge. What is or would have been practicable shall be determined by the facts and circumstances of each case;

(ii) ensure that therapeutic diets are planned in writing by a qualified dietitian;

(iii) ensure that menu substitutions are approved by a qualified dietitian;

(iv) document pertinent information about the patient's response to a therapeutic diet in the medical record; and

(v) evaluate therapeutic diets for nutritional adequacy.

(B) Nutritional needs shall be met in accordance with recognized dietary practices and in accordance with orders of the physician(s) or appropriately credentialed practitioner(s) responsible for the care of the patients. The following requirements shall be met.

(i) Menus shall provide a sufficient variety of foods served in adequate amounts at each meal according to the guidance provided in the Recommended Dietary Allowances (RDA), as published by the Food and Nutrition Board, Commission on Life Sciences, National Research Council, Tenth edition, 1989, which may be obtained by writing the National Academies Press, 500 Fifth Street, NW Lockbox 285, Washington, D.C. 20055, telephone (888) 624-8373.

(ii) A maximum of 15 hours shall not be exceeded between the last meal of the day (i.e. supper) and the breakfast meal, unless a substantial snack is provided. The hospital shall adopt, implement, and enforce a policy on the definition of "substantial" to meet each patient's varied nutritional needs.

(C) A current therapeutic diet manual approved by the dietitian and medical staff shall be readily available to all medical, nursing, and food service personnel. The therapeutic manual shall:

(i) be revised as needed, not to exceed 5 years;

(ii) be appropriate for the diets routinely ordered in the hospital;

(iii) have standards in compliance with the RDA;

(iv) contain specific diets which are not in compliance with RDA; and

(v) be used as a guide for ordering and serving diets.

(e) Emergency services. All licensed hospital locations, including multiple-location sites, shall have an emergency suite that complies with §133.161(a)(1)(A) of this title (relating to Requirements for Buildings in Which Existing Licensed Hospitals are Located) or §133.163(f) of this title, and the following.

(1) Organization. The organization of the emergency services shall be appropriate to the scope of the services offered.

(A) The services shall be organized under the direction of a qualified member of the medical staff who is the medical director or clinical director.

(B) The services shall be integrated with other departments of the hospital.

(C) The policies and procedures governing medical care provided in the emergency suite shall be established by and shall be a continuing responsibility of the medical staff.

(D) Medical records indicating patient identification, complaint, physician, nurse, time admitted to the emergency suite, treatment, time discharged, and disposition shall be maintained for all emergency patients.

(2) Personnel.

(A) There shall be adequate medical and nursing personnel qualified in emergency care to meet the written emergency procedures and needs anticipated by the hospital.

(B) Except for comprehensive medical rehabilitation hospitals and pediatric and adolescent hospitals that generally provide care that is not administered for or in expectation of compensation:

(i) there shall be on duty and available at all times at least one person qualified as determined by the medical staff to initiate immediate appropriate lifesaving measures; and

(ii) in general hospitals where the emergency treatment area is not contiguous with other areas of the hospital that maintain 24 hour staffing by qualified staff (including but not limited to separation by one or more floors in multiple-occupancy buildings), qualified personnel must be physically present in the emergency treatment area at all times.

(C) Except for comprehensive medical rehabilitation hospitals and pediatric and adolescent hospitals that generally provide care that is not administered for or in expectation of compensation, the hospital shall provide that one or more physicians shall be available at all times for emergencies, as follows.

(i) General hospitals, except for hospitals designated as critical access hospitals (CAHs) by the Centers for Medicare & Medicaid Services (CMS), located in counties with a population of 100,000 or more shall have a physician qualified to provide emergency medical care on duty in the emergency treatment area at all times.

(ii) Special hospitals, hospitals designated as CAHs by the CMS, and general hospitals located in counties with a population of less than 100,000 shall have a physician on-call and able to respond in person, or by radio or telephone within 30 minutes.

(D) Schedules, names, and telephone numbers of all physicians and others on emergency call duty, including alternates, shall be maintained. Schedules shall be retained for no less than one year.

(3) Supplies and equipment. Adequate age appropriate supplies and equipment shall be available and in readiness for use. Equipment and supplies shall be available for the administration of intravenous medications as well as facilities for the control of bleeding and emergency splinting of fractures. Provision shall be made for the storage of blood and blood products as needed. The emergency equipment shall be periodically tested according to the policy adopted, implemented and enforced by the hospital.

(4) Required emergency equipment. At a minimum, the age appropriate emergency equipment and supplies shall include the following:

(A) emergency call system;

(B) oxygen;

(C) mechanical ventilatory assistance equipment, including airways, manual breathing bag, and mask;

(D) cardiac defibrillator;

(E) cardiac monitoring equipment;

(F) laryngoscopes and endotracheal tubes;

(G) suction equipment;

(H) emergency drugs and supplies specified by the medical staff;

(I) stabilization devices for cervical injuries;

(J) blood pressure monitoring equipment; and

(K) pulse oximeter or similar medical device to measure blood oxygenation.

(5) Participation in local emergency medical service (EMS) system.

(A) General hospitals shall participate in the local EMS system, based on the hospital's capabilities and capacity, and the locale's existing EMS plan and protocols.

(B) The provisions of subparagraph (A) of this paragraph do not apply to a comprehensive medical rehabilitation hospital or a pediatric and adolescent hospital that generally provides care that is not administered for or in expectation of compensation.

(6) Emergency services for survivors of sexual assault.

(A) The hospital shall develop, implement and enforce policies and procedures to ensure that a sexual assault survivor who presents to the hospital following a sexual assault receives one of the following:

(i) the care specified under subparagraph (B) of this paragraph; or

(ii) stabilization and transfer to a health care facility designated in a community-wide plan as the health care facility for treating sexual assault survivors, where the survivor will receive the care specified under subparagraph (B) of this paragraph.

(B) A hospital providing care to a sexual assault survivor shall provide the survivor with the following:

(i) a forensic medical examination in accordance with Government Code, Chapter 420, Subchapter B, when the examination has been requested by a law enforcement agency under Code of Criminal Procedure, Article 56.06, or is conducted under Code of Criminal Procedure, Article 56.065. If a sexual assault survivor is age 18 or older and has not reported the assault to a law enforcement agency, a hospital shall provide this forensic medical examination, when the sexual assault survivor has arrived at the facility not later than 96 hours after the time the assault occurred and has consented to the examination;

(ii) a private area, if available, to wait or speak with the appropriate medical, legal, or sexual assault crisis center staff or volunteer until a physician, nurse, or physician assistant is able to treat the survivor;

(iii) access to a sexual assault program advocate, if available, as provided by Code of Criminal Procedure, Article 56.045;

(iv) the information form required by Health and Safety Code, §323.005;

(v) a private treatment room, if available;

(vi) if indicated by the history of contact, access to appropriate prophylaxis for exposure to sexually transmitted infections; and

(vii) the name and telephone number of the nearest sexual assault crisis center.

(C) The hospital must obtain documented consent before providing the forensic medical examination and treatment.

(D) Upon request, the hospital shall submit to the department their plan for the provision of service to sexual assault survivors. The plan must describe how the hospital will ensure that the services required under subparagraph (B) of this paragraph will be provided.

(i) The hospital shall submit the plan by the 60th day after the department makes the request.

(ii) The department will approve or reject the plan not later than 120th day following the submission of the plan.

(iii) If the department is not able to approve the plan, the department will return the plan to the hospital and will identify the specific provisions with which the hospital's plan failed to comply.

(iv) The hospital shall correct and resubmit the plan to the department for approval not later than the 90th day after the plan is returned to the hospital.

(f) Governing body.

(1) Legal responsibility. There shall be a governing body responsible for the organization, management, control, and operation of the hospital, including appointment of the medical staff. For hospitals owned and operated by an individual or by partners, the individual or partners shall be considered the governing body.

(2) Organization. The governing body shall be formally organized in accordance with a written constitution and bylaws which clearly set forth the organizational structure and responsibilities.

(3) Meeting records. Records of governing body meetings shall be maintained.

(4) Responsibilities relating to the medical staff.

(A) The governing body shall ensure that the medical staff has current bylaws, rules, and regulations which are implemented and enforced.

(B) The governing body shall approve medical staff bylaws and other medical staff rules and regulations.

(C) In hospitals that provide obstetrical services, the governing body shall ensure that the hospital collaborates with physicians providing services at the hospital to develop quality initiatives, through the adoption, implementation, and enforcement of appropriate hospital policies and procedures, to reduce the number of elective or nonmedically indicated induced deliveries or cesarean sections performed at the hospital on a woman before the 39th week of gestation.

(D) In hospitals that provide obstetrical services, the governing body shall ensure that the hospital implements a newborn audiological screening program, consistent with the requirements of Health and Safety Code, Chapter 47 (Hearing Loss in Newborns), and performs, either directly or through a transfer agreement, audiological screenings for the identification of hearing loss on each newborn or infant born at the facility before the newborn or infant is discharged. These audiological screenings are required to be performed on all newborns or infants before discharge from the facility unless:

(i) a parent or legal guardian of the newborn or infant declines the screening;

(ii) the newborn or infant requires emergency transfer to a tertiary care facility prior to the completion of the screening; or

(iii) the screening previously has been completed.

(E) The governing body shall determine, in accordance with state law and with the advice of the medical staff, which categories of practitioners are eligible candidates for appointment to the medical staff.

(i) In considering applications for medical staff membership and privileges or the renewal, modification, or revocation of medical staff membership and privileges, the governing body must ensure that each physician, podiatrist, and dentist is afforded procedural due process.

(I) If a hospital's credentials committee has failed to take action on a completed application as required by subclause (VIII) of this clause, or a physician, podiatrist, or dentist is subject to a professional review action that may adversely affect his medical staff membership or privileges, and the physician, podiatrist, or dentist believes that mediation of the dispute is desirable, the physician, podiatrist, or dentist may require the hospital to participate in mediation as provided in Civil Practice and Remedies Code (CPRC), Chapter 154. The mediation shall be conducted by a person meeting the qualifications required by CPRC §154.052 and within a reasonable period of time.

(II) Subclause (I) of this clause does not authorize a cause of action by a physician, podiatrist, or dentist against the hospital other than an action to require a hospital to participate in mediation.

(III) An applicant for medical staff membership or privileges may not be denied membership or privileges on any ground that is otherwise prohibited by law.

(IV) A hospital's bylaw requirements for staff privileges may require a physician, podiatrist, or dentist to document the person's current clinical competency and professional training and experience in the medical procedures for which privileges are requested.

(V) In granting or refusing medical staff membership or privileges, a hospital may not differentiate on the basis of the academic medical degree held by a physician.

(VI) Graduate medical education may be used as a standard or qualification for medical staff membership or privileges for a physician, provided that equal recognition is given to training programs accredited by the Accreditation Council for Graduate Medical Education and by the American Osteopathic Association.

(VII) Board certification may be used as a standard or qualification for medical staff membership or privileges for a physician, provided that equal recognition is given to certification pro-

grams approved by the American Board of Medical Specialties and the Bureau of Osteopathic Specialists.

(VIII) A hospital's credentials committee shall act expeditiously and without unnecessary delay when a licensed physician, podiatrist, or dentist submits a completed application for medical staff membership or privileges. The hospital's credentials committee shall take action on the completed application not later than the 90th day after the date on which the application is received. The governing body of the hospital shall take final action on the application for medical staff membership or privileges not later than the 60th day after the date on which the recommendation of the credentials committee is received. The hospital must notify the applicant in writing of the hospital's final action, including a reason for denial or restriction of privileges, not later than the 20th day after the date on which final action is taken.

(ii) The governing body is authorized to adopt, implement and enforce policies concerning the granting of clinical privileges to advanced practice nurses and physician assistants, including policies relating to the application process, reasonable qualifications for privileges, and the process for renewal, modification, or revocation of privileges.

(I) If the governing body of a hospital has adopted, implemented and enforced a policy of granting clinical privileges to advanced practice nurses or physician assistants, an individual advanced practice nurse or physician assistant who qualifies for privileges under that policy shall be entitled to certain procedural rights to provide fairness of process, as determined by the governing body of the hospital, when an application for privileges is submitted to the hospital. At a minimum, any policy adopted shall specify a reasonable period for the processing and consideration of the application and shall provide for written notification to the applicant of any final action on the application by the hospital, including any reason for denial or restriction of the privileges requested.

(II) If an advanced practice nurse or physician assistant has been granted clinical privileges by a hospital, the hospital may not modify or revoke those privileges without providing certain procedural rights to provide fairness of process, as determined by the governing body of the hospital, to the advanced practice nurse or physician assistant. At a minimum, the hospital shall provide the advanced practice nurse or physician assistant written reasons for the modification or revocation of privileges and a mechanism for appeal to the appropriate committee or body within the hospital, as determined by the governing body of the hospital.

(III) If a hospital extends clinical privileges to an advanced practice nurse or physician assistant conditioned on the advanced practice nurse or physician assistant having a sponsoring or collaborating relationship with a physician and that relationship ceases to exist, the advanced practice nurse or physician assistant and the physician shall provide written notification to the hospital that the relationship no longer exists. Once the hospital receives such notice from an advanced practice nurse or physician assistant and the physician, the hospital shall be deemed to have met its obligations under this section by notifying the advanced practice nurse or physician assistant in writing that the advanced practice nurse's or physician assistant's clinical privileges no longer exist at that hospital.

(IV) Nothing in this clause shall be construed as modifying Subtitle B, Title 3, Occupations Code, Chapter 204 or 301, or any other law relating to the scope of practice of physicians, advanced practice nurses, or physician assistants.

(V) This clause does not apply to an employer-employee relationship between an advanced practice nurse or physician assistant and a hospital.

(F) The governing body shall ensure that the hospital complies with the requirements concerning physician communication and contracts as set out in Health and Safety Code, §241.1015 (Physician Communication and Contracts).

(G) The governing body shall ensure the hospital complies with the requirements for reporting to the Texas Medical Board the results and circumstances of any professional review action in accordance with the Medical Practice Act, Occupations Code, §160.002 and §160.003.

(H) The governing body shall be responsible for and ensure that any policies and procedures adopted by the governing body to implement the requirements of this chapter shall be implemented and enforced.

(5) Hospital administration. The governing body shall appoint a chief executive officer or administrator who is responsible for managing the hospital.

(6) Patient care. In accordance with hospital policy adopted, implemented and enforced, the governing body shall ensure that:

(A) every patient is under the care of:

(i) a physician. This provision is not to be construed to limit the authority of a physician to delegate tasks to other qualified health care personnel to the extent recognized under state law or the state's regulatory mechanism;

(ii) a dentist who is legally authorized to practice dentistry by the state and who is acting within the scope of his or her license; or

(iii) a podiatrist, but only with respect to functions which he or she is legally authorized by the state to perform.

(B) patients are admitted to the hospital only by members of the medical staff who have been granted admitting privileges; and

(C) a physician is on duty or on-call at all times.

(7) Services. The governing body shall be responsible for all services furnished in the hospital, whether furnished directly or under contract. The governing body shall ensure that services are provided in a safe and effective manner that permits the hospital to comply with all applicable rules and standards.

(8) Nurse Staffing. The governing body shall adopt, implement and enforce a written nurse staffing policy to ensure that an adequate number and skill mix of nurses are available to meet the level of patient care needed. The governing body policy shall require that hospital administration adopt, implement and enforce a nurse staffing plan and policies that:

(A) require significant consideration be given to the nurse staffing plan recommended by the hospital's nurse staffing committee and the committee's evaluation of any existing plan;

(B) are based on the needs of each patient care unit and shift and on evidence relating to patient care needs;

(C) ensure that all nursing assignments consider client safety, and are commensurate with the nurse's educational preparation, experience, knowledge, and physical and emotional ability;

(D) require use of the official nurse services staffing plan as a component in setting the nurse staffing budget;

(E) encourage nurses to provide input to the nurse staffing committee relating to nurse staffing concerns;

(F) protect from retaliation nurses who provide input to the nurse staffing committee; and

(G) comply with subsection (o) of this section.

(g) Infection control. The hospital shall provide a sanitary environment to avoid sources and transmission of infections and communicable diseases. There shall be an active program for the prevention, control, and surveillance of infections and communicable diseases.

(1) Organization and policies. A person shall be designated as infection control professional. The hospital shall ensure that policies governing prevention, control and surveillance of infections and communicable diseases are developed, implemented and enforced.

(A) There shall be a system for identifying, reporting, investigating, and controlling health care associated infections and communicable diseases between patients and personnel.

(B) The infection control professional shall maintain a log of all reportable diseases and health care associated infections designated as epidemiologically significant according to the hospital's infection control policies.

(C) A written policy shall be adopted, implemented and enforced for reporting all reportable diseases to the local health authority and the Infectious Disease Surveillance and Epidemiology Branch, Department of State Health Services, Mail Code 2822, P. O. Box 149347, Austin, Texas 78714-9347, in accordance with Chapter 97 of this title (relating to Communicable Diseases), and Health and Safety Code, §§98.103, 98.104, and 98.1045 (relating to Reportable Infections, Alternative for Reportable Surgical Site Infections, and Reporting of Preventable Adverse Events).

(D) The infection control program shall include active participation by the pharmacist.

(2) Responsibilities of the chief executive officer (CEO), medical staff, and chief nursing officer (CNO). The CEO, the medical staff, and the CNO shall be responsible for the following.

(A) The hospital-wide quality assessment and performance improvement program and training programs shall address problems identified by the infection control professional.

(B) Successful corrective action plans in affected problem areas shall be implemented.

(3) Universal precautions. The hospital shall adopt, implement, and enforce a written policy to monitor compliance of the hospital and its personnel and medical staff with universal precautions in accordance with HSC Chapter 85, Acquired Immune Deficiency Syndrome and Human Immunodeficiency Virus Infection.

(h) Laboratory services. The hospital shall maintain directly, or have available adequate laboratory services to meet the needs of its patients.

(1) Hospital laboratory services. A hospital that provides laboratory services shall comply with the Clinical Laboratory Improvement Amendments of 1988 (CLIA 1988), in accordance with the requirements specified in 42 Code of Federal Regulations (CFR), §§493.1 - 493.1780. CLIA 1988 applies to all hospitals with laboratories that examine human specimens for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings.

(2) Contracted laboratory services. The hospital shall ensure that all laboratory services provided to its patients through a contractual agreement are performed in a facility certified in the appropriate specialties and subspecialties of service in accordance with the requirements specified in 42 CFR Part 493 to comply with CLIA 1988.

(3) Adequacy of laboratory services. The hospital shall ensure the following.

(A) Emergency laboratory services shall be available 24 hours a day.

(B) A written description of services provided shall be available to the medical staff.

(C) The laboratory shall make provision for proper receipt and reporting of tissue specimens.

(D) The medical staff and a pathologist shall determine which tissue specimens require a macroscopic (gross) examination and which require both macroscopic and microscopic examination.

(E) When blood and blood components are stored, there shall be written procedures readily available containing directions on how to maintain them within permissible temperatures and including instructions to be followed in the event of a power failure or other disruption of refrigeration. A label or tray with the recipient's first and last names and identification number, donor unit number and interpretation of compatibility, if performed, shall be attached securely to the blood container.

(F) The hospital shall establish a mechanism for ensuring that the patient's physician or other licensed health care professional is made aware of critical value lab results, as established by the medical staff, before or after the patient is discharged.

(4) Chemical hygiene. A hospital that provides laboratory services shall adopt, implement, and enforce written policies and procedures to manage, minimize, or eliminate the risks to laboratory personnel of exposure to potentially hazardous chemicals in the laboratory which may occur during the normal course of job performance.

(i) Linen and laundry services. The hospital shall provide sufficient clean linen to ensure the comfort of the patient.

(1) For purposes of this subsection, contaminated linen is linen which has been soiled with blood or other potentially infectious materials or may contain sharps. Other potentially infectious materials means:

(A) the following human body fluids: semen, vaginal secretions, cerebrospinal fluid, synovial fluid, pleural fluid, pericardial fluid, peritoneal fluid, amniotic fluid, saliva in dental procedures, any body fluid that is visibly contaminated with blood, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids;

(B) any unfixed tissue or organ (other than intact skin) from a human (living or dead); and

(C) Human Immunodeficiency Virus (HIV)-containing cell or tissue cultures, organ cultures, and HIV or Hepatitis B Virus (HBV)-containing culture medium or other solutions; and blood, organs, or other tissues from experimental animals infected with HIV or HBV.

(2) The hospital, whether it operates its own laundry or uses commercial service, shall ensure the following.

(A) Employees of a hospital involved in transporting, processing, or otherwise handling clean or soiled linen shall be given

initial and follow-up in-service training to ensure a safe product for patients and to safeguard employees in their work.

(B) Clean linen shall be handled, transported, and stored by methods that will ensure its cleanliness.

(C) All contaminated linen shall be placed and transported in bags or containers labeled or color-coded.

(D) Employees who have contact with contaminated linen shall wear gloves and other appropriate personal protective equipment.

(E) Contaminated linen shall be handled as little as possible and with a minimum of agitation. Contaminated linen shall not be sorted or rinsed in patient care areas.

(F) All contaminated linen shall be bagged or put into carts at the location where it was used.

(i) Bags containing contaminated linen shall be closed prior to transport to the laundry.

(ii) Whenever contaminated linen is wet and presents a reasonable likelihood of soak-through of or leakage from the bag or container, the linen shall be deposited and transported in bags that prevent leakage of fluids to the exterior.

(iii) All linen placed in chutes shall be bagged.

(iv) If chutes are not used to convey linen to a central receiving or sorting room, then adequate space shall be allocated on the various nursing units for holding the bagged contaminated linen.

(G) Linen shall be processed as follows:

(i) If hot water is used, linen shall be washed with detergent in water with a temperature of at least 71 degrees Centigrade (160 degrees Fahrenheit) for 25 minutes. Hot water requirements specified in Table 5 of §133.169(e) of this title (relating to Tables) shall be met.

(ii) If low-temperature (less than or equal to 70 degrees Centigrade) (158 degrees Fahrenheit) laundry cycles are used, chemicals suitable for low-temperature washing at proper use concentration shall be used.

(iii) Commercial dry cleaning of fabrics soiled with blood also renders these items free of the risk of pathogen transmission.

(H) Flammable liquids shall not be used to process laundry, but may be used for equipment maintenance.

(j) Medical record services. The hospital shall have a medical record service that has administrative responsibility for medical records. A medical record shall be maintained for every individual who presents to the hospital for evaluation or treatment.

(1) The organization of the medical record service shall be appropriate to the scope and complexity of the services performed. The hospital shall employ or contract with adequate personnel to ensure prompt completion, filing, and retrieval of records.

(2) The hospital shall have a system of coding and indexing medical records. The system shall allow for timely retrieval by diagnosis and procedure, in order to support medical care evaluation studies.

(3) The hospital shall adopt, implement, and enforce a policy to ensure that the hospital complies with HSC, Chapter 241, Subchapter G (Disclosure of Health Care Information).

(4) The medical record shall contain information to justify admission and continued hospitalization, support the diagnosis, reflect significant changes in the patient's condition, and describe the patient's progress and response to medications and services. Medical records shall be accurately written, promptly completed, properly filed and retained, and accessible.

(5) Medical record entries must be legible, complete, dated, timed, and authenticated in written or electronic form by the person responsible for providing or evaluating the service provided, consistent with hospital policies and procedures.

(6) All orders (except verbal orders) must be dated, timed, and authenticated the next time the prescriber or another practitioner who is responsible for the care of the patient and has been credentialed by the medical staff and granted privileges which are consistent with the written orders provides care to the patient, assesses the patient, or documents information in the patient's medical record.

(7) All verbal orders must be dated, timed, and authenticated within 48 hours by the prescriber or another practitioner who is responsible for the care of the patient and has been credentialed by the medical staff and granted privileges which are consistent with the written orders.

(A) Use of signature stamps by physicians and other licensed practitioners credentialed by the medical staff may be allowed in hospitals when the signature stamp is authorized by the individual whose signature the stamp represents. The administrative offices of the hospital shall have on file a signed statement to the effect that he or she is the only one who has the stamp and uses it. The use of a signature stamp by any other person is prohibited.

(B) A list of computer codes and written signatures shall be readily available and shall be maintained under adequate safeguards.

(C) Signatures by facsimile shall be acceptable. If received on a thermal machine, the facsimile document shall be copied onto regular paper.

(8) Medical records (reports and printouts) shall be retained by the hospital in their original or legally reproduced form for a period of at least ten years. A legally reproduced form is a medical record retained in hard copy, microform (microfilm or microfiche), or other electronic medium. Films, scans, and other image records shall be retained for a period of at least five years. For retention purposes, medical records that shall be preserved for ten years include:

(A) identification data;

(B) the medical history of the patient;

(C) evidence of a physical examination, including a health history, performed no more than 30 days prior to admission or within 24 hours after admission. The medical history and physical examination shall be placed in the patient's medical record within 24 hours after admission;

(D) an updated medical record entry documenting an examination for any changes in the patient's condition when the medical history and physical examination are completed within 30 days before admission. This updated examination shall be completed and documented in the patient's medical record within 24 hours after admission;

(E) admitting diagnosis;

(F) diagnostic and therapeutic orders;

(G) properly executed informed consent forms for procedures and treatments specified by the medical staff, or by federal or state laws if applicable, to require written patient consent;

(H) clinical observations, including the results of therapy and treatment, all orders, nursing notes, medication records, vital signs, and other information necessary to monitor the patient's condition;

(I) reports of procedures, tests, and their results, including laboratory, pathology, and radiology reports;

(J) results of all consultative evaluations of the patient and appropriate findings by clinical and other staff involved in the care of the patient;

(K) discharge summary with outcome of hospitalization, disposition of care, and provisions for follow-up care; and

(L) final diagnosis with completion of medical records within 30 calendar days following discharge.

(9) If a patient was less than 18 years of age at the time he was last treated, the hospital may authorize the disposal of those medical records relating to the patient on or after the date of his 20th birthday or on or after the 10th anniversary of the date on which he was last treated, whichever date is later.

(10) The hospital shall not destroy medical records that relate to any matter that is involved in litigation if the hospital knows the litigation has not been finally resolved.

(11) The hospital shall provide written notice to a patient, or a patient's legally authorized representative, that the hospital may authorize the disposal of medical records relating to the patient on or after the periods specified in this section. The notice shall be provided to the patient or the patient's legally authorized representative not later than the date on which the patient who is or will be the subject of a medical record is treated, except in an emergency treatment situation. In an emergency treatment situation, the notice shall be provided to the patient or the patient's legally authorized representative as soon as is reasonably practicable following the emergency treatment situation.

(12) If a licensed hospital should close, the hospital shall notify the department at the time of closure the disposition of the medical records, including the location of where the medical records will be stored and the identity and telephone number of the custodian of the records.

(k) Medical staff.

(1) The medical staff shall be composed of physicians and may also be composed of podiatrists, dentists and other practitioners appointed by the governing body.

(A) The medical staff shall periodically conduct appraisals of its members according to medical staff bylaws.

(B) The medical staff shall examine credentials of candidates for medical staff membership and make recommendations to the governing body on the appointment of the candidate.

(2) The medical staff shall be well-organized and accountable to the governing body for the quality of the medical care provided to patients.

(A) The medical staff shall be organized in a manner approved by the governing body.

(B) If the medical staff has an executive committee, a majority of the members of the committee shall be doctors of medicine or osteopathy.

(C) Records of medical staff meetings shall be maintained.

(D) The responsibility for organization and conduct of the medical staff shall be assigned only to an individual physician.

(E) Each medical staff member shall sign a statement signifying they will abide by medical staff and hospital policies.

(3) The medical staff shall adopt, implement, and enforce bylaws, rules, and regulations to carry out its responsibilities. The bylaws shall:

(A) be approved by the governing body;

(B) include a statement of the duties and privileges of each category of medical staff (e.g., active, courtesy, consultant);

(C) describe the organization of the medical staff;

(D) describe the qualifications to be met by a candidate in order for the medical staff to recommend that the candidate be appointed by the governing body;

(E) include criteria for determining the privileges to be granted and a procedure for applying the criteria to individuals requesting privileges; and

(F) include a requirement that a physical examination and medical history be done no more than 30 days before or 24 hours after an admission for each patient by a physician or other qualified practitioner who has been granted these privileges by the medical staff. The medical history and physical examination shall be placed in the patient's medical record within 24 hours after admission. When the medical history and physical examination are completed within the 30 days before admission, an updated examination for any changes in the patient's condition must be completed and documented in the patient's medical record within 24 hours after admission.

(l) Mental health services.

(1) Mental health services unit. A hospital may not admit patients to a mental health services unit unless the unit is approved by the department as meeting the requirements of §133.163(q) of this title.

(2) Admission criteria. A hospital providing mental health services shall have written admission criteria that are applied uniformly to all patients who are admitted to the service.

(A) The hospital's admission criteria shall include procedures to prevent the admission of minors for a condition which is not generally recognized as responsive to treatment in an inpatient setting for mental health services.

(i) The following conditions are not generally recognized as responsive to treatment in a hospital unless the minor to be admitted is qualified because of other disabilities, such as:

(I) cognitive disabilities due to intellectual disability; or

(II) learning disabilities.

(ii) A minor may be qualified for admission based on other disabilities which would be responsive to mental health services.

(B) The medical record shall contain evidence that admission consent was given by the patient, the patient's legal guardian, or the managing conservator, if applicable.

(C) The hospital shall have a preadmission examination procedure under which each patient's condition and medical history are reviewed by a member of the medical staff to determine whether the patient is likely to benefit significantly from an intensive inpatient program or assessment.

(D) A voluntarily admitted patient shall sign an admission consent form prior to admission to a mental health unit which includes verification that the patient has been informed of the services to be provided and the estimated charges.

(3) Compliance. A hospital providing mental health services shall comply with the following rules administered by the department. The rules are:

(A) Chapter 411, Subchapter J of this title (relating to Standards of Care and Treatment in Psychiatric Hospitals);

(B) Chapter 404, Subchapter E of this title (relating to Rights of Persons Receiving Mental Health Services);

(C) Chapter 405, Subchapter E of this title (relating to Electroconvulsive Therapy (ECT));

(D) Chapter 414, Subchapter I of this title (relating to Consent to Treatment with Psychoactive Medication--Mental Health Services); and

(E) Chapter 415, Subchapter F of this title (relating to Interventions in Mental Health Programs).

(m) Mobile, transportable, and relocatable units. The hospital shall adopt, implement and enforce procedures which address the potential emergency needs for those inpatients who are taken to mobile units on the hospital's premises for diagnostic procedures or treatment.

(n) Nuclear medicine services. If the hospital provides nuclear medicine services, these services shall meet the needs of the patients in accordance with acceptable standards of practice and be licensed in accordance with §289.256 of this title (relating to Medical and Veterinary Use of Radioactive Material).

(1) Policies and procedures. Policies and procedures shall be adopted, implemented, and enforced which will describe the services nuclear medicine provides in the hospital and how employee and patient safety will be maintained.

(2) Organization and staffing. The organization of the nuclear medicine services shall be appropriate to the scope and complexity of the services offered.

(A) There shall be a medical director or clinical director who is a physician qualified in nuclear medicine.

(B) The qualifications, training, functions, and responsibilities of nuclear medicine personnel shall be specified by the medical director or clinical director and approved by the medical staff.

(3) Delivery of services. Radioactive materials shall be prepared, labeled, used, transported, stored, and disposed of in accordance with acceptable standards of practice and in accordance with §289.256 of this title.

(A) In-house preparation of radiopharmaceuticals shall be by, or under, the direct supervision of an appropriately trained licensed pharmacist or physician.

(B) There shall be proper storage and disposal of radioactive materials.

(C) If clinical laboratory tests are performed by the nuclear medicine services staff, the nuclear medicine staff shall comply with CLIA 1988 in accordance with the requirements specified in 42 CFR Part 493.

(D) Nuclear medicine workers shall be provided personnel monitoring dosimeters to measure their radiation exposure. Exposure reports and documentation shall be available for review.

(4) Equipment and supplies. Equipment and supplies shall be appropriate for the types of nuclear medicine services offered and shall be maintained for safe and efficient performance. The equipment shall be inspected, tested, and calibrated at least annually by qualified personnel.

(5) Records. The hospital shall maintain signed and dated reports of nuclear medicine interpretations, consultations, and procedures.

(A) The physician approved by the medical staff to interpret diagnostic procedures shall sign and date the interpretations of these tests.

(B) The hospital shall maintain records of the receipt and disposition of radiopharmaceuticals until disposal is authorized by the department's Radiation Safety Licensing Branch in accordance with §289.256 of this title.

(C) Nuclear medicine services shall be ordered only by an individual whose scope of state licensure and whose defined staff privileges allow such referrals.

(o) Nursing services. The hospital shall have an organized nursing service that provides 24-hour nursing services as needed.

(1) Organization. The hospital shall have a well-organized service with a plan of administrative authority and delineation of responsibilities for patient care.

(A) Nursing services shall be under the administrative authority of a chief nursing officer (CNO) who shall be an RN and comply with one of the following:

(i) possess a master's degree in nursing;

(ii) possess a master's degree in health care administration or business administration;

(iii) possess a master's degree in a health-related field obtained through a curriculum that included courses in administration and management; or

(iv) be progressing under a written plan to obtain the nursing administration qualifications associated with a master's degree in nursing. The plan shall:

(I) describe efforts to obtain the knowledge associated with graduate education and to increase administrative and management skills and experience;

(II) include courses related to leadership, administration, management, performance improvement and theoretical approaches to delivering nursing care; and

(III) provide a time-line for accomplishing skills.

(B) The CNO in hospitals with 100 or fewer licensed beds and located in counties with a population of less than 50,000, or in hospitals that have been certified by the Centers for Medicare and Medicaid Services as critical access hospitals in accordance with the Code of Federal Regulations, Title 42, Volume 3, Part 485, Subpart F, §485.606(b), shall be exempted from the requirements in subparagraph (A)(i) - (iv) of this paragraph.

(C) The CNO shall be responsible for the operation of the services, including determining the types and numbers of nursing personnel and staff necessary to provide nursing care for all areas of the hospital.

(D) The CNO shall report directly to the individual who has authority to represent the hospital and who is responsible for the

operation of the hospital according to the policies and procedures of the hospital's governing board.

(E) The CNO shall participate with leadership from the governing body, medical staff, and clinical areas, in planning, promoting and conducting performance improvement activities.

(2) Staffing and delivery of care.

(A) The nursing services shall adopt, implement and enforce a procedure to verify that hospital nursing personnel for whom licensure is required have valid and current licensure.

(B) There shall be adequate numbers of RNs, licensed vocational nurses (LVNs), and other personnel to provide nursing care to all patients as needed.

(C) There shall be supervisory and staff personnel for each department or nursing unit to provide, when needed, the immediate availability of an RN to provide care for any patient.

(D) An RN shall be on duty in each building of a licensed hospital that contains at least one nursing unit where patients are present. The RN shall supervise and evaluate the nursing care for each patient and assign the nursing care to other nursing personnel in accordance with the patient's needs and the specialized qualifications and competence of the nursing staff available.

(E) The nursing staff shall develop and keep current a nursing plan of care for each patient which addresses the patient's needs.

(F) The hospital shall establish a nurse staffing committee as a standing committee of the hospital. The committee shall be established in accordance with Health and Safety Code (HSC), §§161.031 - 161.033, to be responsible for soliciting and receiving input from nurses on the development, ongoing monitoring, and evaluation of the staffing plan. As provided by HSC, §161.032, the hospital's records and review relating to evaluation of these outcomes and indicators are confidential and not subject to disclosure under Government Code, Chapter 552 and not subject to disclosure, discovery, subpoena or other means of legal compulsion for their release. As used in this subsection, "committee" or "staffing committee" means a nurse staffing committee established under this subparagraph.

(i) The committee shall be composed of:

(I) at least 60% registered nurses who are involved in direct patient care at least 50% of their work time and selected by their peers who provide direct care during at least 50% of their work time;

(II) at least one representative from either infection control, quality assessment and performance improvement or risk management;

(III) members who are representative of the types of nursing services provided at the hospital; and

(IV) the chief nursing officer of the hospital who is a voting member.

(ii) Participation on the committee by a hospital employee as a committee member shall be part of the employee's work time and the hospital shall compensate that member for that time accordingly. The hospital shall relieve the committee member of other work duties during committee meetings.

(iii) The committee shall meet at least quarterly.

(iv) The responsibilities of the committee shall be to:

(I) develop and recommend to the hospital's governing body a nurse staffing plan that meets the requirements of subparagraph (G) of this paragraph;

(II) review, assess and respond to staffing concerns expressed to the committee;

(III) identify the nurse-sensitive outcome measures the committee will use to evaluate the effectiveness of the official nurse services staffing plan;

(IV) evaluate, at least semiannually, the effectiveness of the official nurse services staffing plan and variations between the plan and the actual staffing; and

(V) submit to the hospital's governing body, at least semiannually, a report on nurse staffing and patient care outcomes, including the committee's evaluation of the effectiveness of the official nurse services staffing plan and aggregate variations between the staffing plan and actual staffing.

(G) The hospital shall adopt, implement and enforce a written official nurse services staffing plan. As used in this subsection, "patient care unit" means a unit or area of a hospital in which registered nurses provide patient care.

(i) The official nurse services staffing plan and policies shall:

(I) require significant consideration to be given to the nurse staffing plan recommended by the hospital's nurse staffing committee and the committee's evaluation of any existing plan;

(II) be based on the needs of each patient care unit and shift and on evidence relating to patient care needs;

(III) require use of the official nurse services staffing plan as a component in setting the nurse staffing budget;

(IV) encourage nurses to provide input to the nurse staffing committee relating to nurse staffing concerns;

(V) protect from retaliation nurses who provide input to the nurse staffing committee; and

(VI) comply with subsection (o) of this section.

(ii) The plan shall:

(I) set minimum staffing levels for patient care units that are:

(-a-) based on multiple nurse and patient considerations including:

(-1-) patient characteristics and number of patients for whom care is being provided, including number of admissions, discharges and transfers on a unit;

(-2-) intensity of patient care being provided and variability of patient care across a nursing unit;

(-3-) scope of services provided;

(-4-) context within which care is provided, including architecture and geography of the environment, and the availability of technology; and

(-5-) nursing staff characteristics, including staff consistency and tenure, preparation and experience, and the number and competencies of clinical and non-clinical support staff the nurse must collaborate with or supervise.

(-b-) determined by the nursing assessment and in accordance with evidence-based safe nursing standards; and

(-c-) recalculated at least annually, or as necessary;

(II) include a method for adjusting the staffing plan shift to shift for each patient care unit based on factors, such as, the intensity of patient care to provide staffing flexibility to meet patient needs;

(III) include a contingency plan when patient care needs unexpectedly exceed direct patient care staff resources;

(IV) include how on-call time will be used;

(V) reflect current standards established by private accreditation organizations, governmental entities, national nursing professional associations, and other health professional organizations and should be developed based upon a review of the codes of ethics developed by the nursing profession through national nursing organizations;

(VI) include a mechanism for evaluating the effectiveness of the official nurse services staffing plan based on patient needs, nursing sensitive quality indicators, nurse satisfaction measures collected by the hospital and evidence based nurse staffing standards. At least one from each of the following three types of outcomes shall be correlated to the adequacy of staffing:

(-a-) nurse-sensitive patient outcomes selected by the nurse staffing committee, such as, patient falls, adverse drug events, injuries to patients, skin breakdown, pneumonia, infection rates, upper gastrointestinal bleeding, shock, cardiac arrest, length of stay, or patient readmissions;

(-b-) operational outcomes, such as, work-related injury or illness, vacancy and turnover rates, nursing care hours per patient day, on-call use, or overtime rates; and

(-c-) substantiated patient complaints related to staffing levels;

(VII) incorporate a process that facilitates the timely and effective identification of concerns about the adequacy of the staffing plan by the nurse staffing committee established pursuant to subparagraph (F) of this paragraph. This process shall include:

(-a-) a prohibition on retaliation for reporting concerns;

(-b-) a requirement that nurses report concerns timely through appropriate channels within the hospital;

(-c-) orientation of nurses on how to report concerns and to whom;

(-d-) encouraging nurses to provide input to the committee relating to nurse staffing concerns;

(-e-) review, assessment, and response by the committee to staffing concerns expressed to the committee;

(-f-) a process for providing feedback during the committee meeting on how concerns are addressed by the committee established under subparagraph (F) of this paragraph; and

(-g-) use of the nurse safe harbor peer review process pursuant to Occupations Code, §303.005;

(VIII) include policies and procedures that require:

(-a-) orientation of nurses and other personnel who provide nursing care to all patient care units to which they are assigned on either a temporary or permanent basis;

(-b-) that the orientation of nurses and other personnel and the competency to perform nursing services is documented in accordance with hospital policy;

(-c-) that nursing assignments be congruent with documented competency; and

(IX) be used by the hospital as a component in setting the nurse staffing budget and guiding the hospital in assigning nurses hospital wide.

(iii) The hospital shall make readily available to nurses on each patient care unit at the beginning of each shift the official nurse services staffing plan levels and current staffing levels for that unit and that shift.

(iv) There shall be a semiannual evaluation by the staffing committee of the effectiveness of the official nurse services staffing plan and variations between the staffing plan and actual staffing. The evaluation shall consider the outcomes and nursing-sensitive indicators as set out in clause (ii)(VI) of this subparagraph, patient needs, nurse satisfaction measures collected by the hospital, and evidence based nurse staffing standards. This evaluation shall be documented in the minutes of the committee established under subparagraph (F) of this paragraph and presented to the hospital's governing body. Hospitals may determine whether this evaluation is done on a unit or facility level basis. To assist the committee with the semiannual evaluation, the hospital shall report to the committee the variations between the staffing plan and actual staffing. This report of variations shall be confidential and not subject to disclosure under Government Code, Chapter 552 and not subject to disclosure, discovery, subpoena or other means of legal compulsion for their release.

(v) The staffing plan shall be retained for a period of two years.

(H) Nonemployee licensed nurses who are working in the hospital shall adhere to the policies and procedures of the hospital. The CNO shall provide for the adequate orientation, supervision, and evaluation of the clinical activities of nonemployee nursing personnel which occur within the responsibility of the nursing services.

(I) The hospital shall annually report to the department on:

(i) whether the hospital's governing body has adopted a nurse staffing policy;

(ii) whether the hospital has established a nurse staffing committee that meets the membership requirements of subparagraph (F) of this paragraph;

(iii) whether the nurse staffing committee has evaluated the hospital's official nurse services staffing plan and has reported the results of the evaluation to the hospital's governing body; and

(iv) the nurse-sensitive outcome measures the committee adopted for use in evaluating the hospital's official nurse services staffing plan.

(3) Mandatory overtime. The hospital shall adopt, implement and enforce policies on use of mandatory overtime.

(A) As used in this subsection:

(i) "on-call time" means time spent by a nurse who is not working but who is compensated for availability; and

(ii) "mandatory overtime" means a requirement that a nurse work hours or days that are in addition to the hours or days scheduled, regardless of the length of a scheduled shift or the number of scheduled shifts each week. Mandatory overtime does not include prescheduled on-call time or time immediately before or after a scheduled shift necessary to document or communicate patient status to ensure patient safety.

(B) A hospital may not require a nurse to work mandatory overtime, and a nurse may refuse to work mandatory overtime.

(C) This section does not prohibit a nurse from volunteering to work overtime.

(D) A hospital may not use on-call time as a substitute for mandatory overtime.

(E) The prohibitions on mandatory overtime do not apply if:

(i) a health care disaster, such as a natural or other type of disaster that increases the need for health care personnel, unexpectedly affects the county in which the nurse is employed or affects a contiguous county;

(ii) a federal, state, or county declaration of emergency is in effect in the county in which the nurse is employed or is in effect in a contiguous county;

(iii) there is an emergency or unforeseen event of a kind that:

(I) does not regularly occur;

(II) increases the need for health care personnel at the hospital to provide safe patient care; and

(III) could not prudently be anticipated by the hospital; or

(iv) the nurse is actively engaged in an ongoing medical or surgical procedure and the continued presence of the nurse through the completion of the procedure is necessary to ensure the health and safety of the patient. The nurse staffing committee shall ensure that scheduling a nurse for a procedure that could be anticipated to require the nurse to stay beyond the end of his or her scheduled shift does not constitute mandatory overtime.

(F) If a hospital determines that an exception exists under subparagraph (E) of this paragraph, the hospital shall, to the extent possible, make and document a good faith effort to meet the staffing need through voluntary overtime, including calling per diems and agency nurses, assigning floats, or requesting an additional day of work from off-duty employees.

(G) A hospital may not suspend, terminate, or otherwise discipline or discriminate against a nurse who refuses to work mandatory overtime.

(4) Drugs and biologicals. Drugs and biologicals shall be prepared and administered in accordance with federal and state laws, the orders of the individuals granted privileges by the medical staff, and accepted standards of practice.

(A) All drugs and biologicals shall be administered by, or under supervision of, nursing or other personnel in accordance with federal and state laws and regulations, including applicable licensing rules, and in accordance with the approved medical staff policies and procedures.

(B) All orders for drugs and biologicals shall be in writing, dated, timed, and signed by the individual responsible for the care of the patient as specified under subsection (f)(6)(A) of this section. When telephone or verbal orders must be used, they shall be:

(i) accepted only by personnel who are authorized to do so by the medical staff policies and procedures, consistent with federal and state laws;

(ii) dated, timed, and authenticated within 48 hours by the prescriber or another practitioner who is responsible for the care of the patient and has been credentialed by the medical staff and granted privileges which are consistent with the written orders; and

(iii) used infrequently.

(C) There shall be a hospital procedure for immediately reporting transfusion reactions, adverse drug reactions, and errors in administration of drugs to the attending physician and, if appropriate, to the hospital-wide quality assessment and performance improvement program.

(5) Blood transfusions.

(A) Transfusions shall be prescribed in accordance with hospital policy and administered in accordance with a written protocol for the administration of blood and blood components and the use of infusion devices and ancillary equipment.

(B) Personnel administering blood transfusions and intravenous medications shall have special training for this duty according to written, adopted, implemented and enforced hospital policy.

(C) Blood and blood components shall be transfused through a sterile, pyrogen-free transfusion set that has a filter designed to retain particles potentially harmful to the recipient.

(D) The patient must be observed during the transfusion and for an appropriate time thereafter for suspected adverse reactions.

(E) Pretransfusion and posttransfusion vital signs shall be recorded.

(F) When warming of blood is indicated, this shall be accomplished during its passage through the transfusion set. The warming system shall be equipped with a visible thermometer and may have an audible warning system. Blood shall not be warmed above 42 degrees Celsius.

(G) Drugs or medications, including those intended for intravenous use, shall not be added to blood or blood components. A 0.9% sodium chloride injection, United States Pharmacopeia, may be added to blood or blood components. Other solutions intended for intravenous use may be used in an administration set or added to blood or blood components under either of the following conditions:

(i) they have been approved for this use by the Federal Drug Administration; or

(ii) there is documentation available to show that addition to the component involved is safe and efficacious.

(H) There shall be a system for detection, reporting and evaluation of suspected complications of transfusion. Any adverse event experienced by a patient in association with a transfusion is to be regarded as a suspected transfusion complication. In the event of a suspected transfusion complication, the personnel attending the patient shall notify immediately a responsible physician and the transfusion service and document the complication in the patient's medical record. All suspected transfusion complications shall be evaluated promptly according to an established procedure.

(I) Following the transfusion, the blood transfusion record or a copy shall be made a part of the patient's medical record.

(6) Reporting and peer review of a vocational or registered nurse. A hospital shall adopt, implement, and enforce a policy to ensure that the hospital complies with the Occupations Code §§301.401 - 301.403, 301.405 and Chapter 303 (relating to Grounds for Reporting Nurse, Duty of Nurse to Report, Duty of Peer Review Committee to Report, Duty of Person Employing Nurse to Report, and Nursing Peer Review respectively), and with the rules adopted by the Board of Nurse Examiners in 22 TAC §217.16 (relating to Minor Incidents),

§217.19 (relating to Incident-Based Nursing Peer Review and Whistleblower Protections), and §217.20 (relating to Safe Harbor Peer Review for Nurses and Whistleblower Protections).

(7) Policies and procedures related to workplace safety.

(A) The hospital shall adopt, implement and enforce policies and procedures related to the work environment for nurses which:

(i) improve workplace safety and reduce the risk of injury, occupational illness, and violence; and

(ii) increase the use of ergonomic principles and ergonomically designed devices to reduce injury and fatigue.

(B) The policies and procedures adopted under subparagraph (A) of this paragraph, at a minimum, must include:

(i) evaluating new products and technology that incorporate ergonomic principles;

(ii) educating nurses in the application of ergonomic practices;

(iii) conducting workplace audits to identify areas of risk of injury, occupational illness, or violence and recommending ways to reduce those risks;

(iv) controlling access to those areas identified as having a high risk of violence; and

(v) promptly reporting crimes committed against nurses to appropriate law enforcement agencies.

(8) Safe patient handling and movement practices.

(A) The hospital shall adopt, implement and enforce policies and procedures to identify, assess, and develop strategies to control risk of injury to patients and nurses associated with the lifting, transferring, repositioning, or movement of a patient.

(B) The policies and procedures shall establish a process that, at a minimum, includes the following:

(i) analysis of the risk of injury to both patients and nurses posed by the patient handling needs of the patient populations served by the hospital and the physical environment in which patient handling and movement occurs;

(ii) education of nurses in the identification, assessment, and control of risks of injury to patients and nurses during patient handling;

(iii) evaluation of alternative ways to reduce risks associated with patient handling, including evaluation of equipment and the environment;

(iv) restriction, to the extent feasible with existing equipment and aids, of manual patient handling or movement of all or most of a patient's weight to emergency, life-threatening, or otherwise exceptional circumstances;

(v) collaboration with and annual report to the nurse staffing committee;

(vi) procedures for nurses to refuse to perform or be involved in patient handling or movement that the nurse believes in good faith will expose a patient or a nurse to an unacceptable risk of injury;

(vii) submission of an annual report to the governing body on activities related to the identification, assessment, and development of strategies to control risk of injury to patients and nurses associated with the lifting, transferring, repositioning, or movement of a patient; and

(viii) development of architectural plans for constructing or remodeling a hospital or a unit of a hospital in which patient handling and movement occurs, with consideration of the feasibility of incorporating patient handling equipment or the physical space and construction design needed to incorporate that equipment at a later date.

(p) Outpatient services. If the hospital provides outpatient services, the services shall meet the needs of the patients in accordance with acceptable standards of practice.

(1) Organization. Outpatient services shall be appropriately organized and integrated with inpatient services.

(2) Personnel.

(A) The hospital shall assign an individual to be responsible for outpatient services.

(B) The hospital shall have appropriate physicians on staff and other professional and nonprofessional personnel available.

(q) Pharmacy services. The hospital shall provide pharmaceutical services that meet the needs of the patients.

(1) Compliance. The hospital shall provide a pharmacy which is licensed, as required, by the Texas State Board of Pharmacy. Pharmacy services shall comply with all applicable statutes and rules.

(2) Organization. The hospital shall have a pharmacy directed by a licensed pharmacist.

(3) Medical staff. The medical staff shall be responsible for developing policies and procedures that minimize drug errors. This function may be delegated to the hospital's organized pharmaceutical services.

(4) Pharmacy management and administration. The pharmacy or drug storage area shall be administered in accordance with accepted professional principles.

(A) Standards of practice as defined by state law shall be followed regarding the provision of pharmacy services.

(B) The pharmaceutical services shall have an adequate number of personnel to ensure quality pharmaceutical services including emergency services.

(i) The staff shall be sufficient in number and training to respond to the pharmaceutical needs of the patient population being served. There shall be an arrangement for emergency services.

(ii) Employees shall provide pharmaceutical services within the scope of their license and education.

(C) Drugs and biologicals shall be properly stored to ensure ventilation, light, security, and temperature controls.

(D) Records shall have sufficient detail to follow the flow of drugs from entry through dispensation.

(E) There shall be adequate controls over all drugs and medications including the floor stock. Drug storage areas shall be approved by the pharmacist, and floor stock lists shall be established.

(F) Inspections of drug storage areas shall be conducted throughout the hospital under pharmacist supervision.

(G) There shall be a drug recall procedure.

(H) A full-time, part-time, or consulting pharmacist shall be responsible for developing, supervising, and coordinating all the activities of the pharmacy services.

(i) Direction of pharmaceutical services may not require on-premises supervision but may be accomplished through regularly scheduled visits in accordance with state law.

(ii) A job description or other written agreement shall clearly define the responsibilities of the pharmacist.

(I) Current and accurate records shall be kept of the receipt and disposition of all scheduled drugs.

(i) There shall be a record system in place that provides the information on controlled substances in a readily retrievable manner which is separate from the patient record.

(ii) Records shall trace the movement of scheduled drugs throughout the services, documenting utilization or wastage.

(iii) The pharmacist shall be responsible for determining that all drug records are in order and that an account of all scheduled drugs is maintained and reconciled with written orders.

(5) Delivery of services. In order to provide patient safety, drugs and biologicals shall be controlled and distributed in accordance with applicable standards of practice, consistent with federal and state laws.

(A) All compounding, packaging, and dispensing of drugs and biologicals shall be under the supervision of a pharmacist and performed consistent with federal and state laws.

(B) All drugs and biologicals shall be kept in a secure area, and locked when appropriate.

(i) A policy shall be adopted, implemented, and enforced to ensure the safeguarding, transferring, and availability of keys to the locked storage area.

(ii) Drugs listed in Schedules II, III, IV, and V of the Comprehensive Drug Abuse Prevention and Control Act of 1970 shall be kept locked within a secure area.

(C) Outdated, mislabeled, or otherwise unusable drugs and biologicals shall not be available for patient use.

(D) When a pharmacist is not available, drugs and biologicals shall be removed from the pharmacy or storage area only by personnel designated in the policies of the medical staff and pharmaceutical service, in accordance with federal and state laws.

(i) There shall be a current list of individuals identified by name and qualifications who are designated to remove drugs from the pharmacy.

(ii) Only amounts sufficient for immediate therapeutic needs shall be removed.

(E) Drugs and biologicals not specifically prescribed as to time or number of doses shall automatically be stopped after a reasonable time that is predetermined by the medical staff.

(i) Stop order policies and procedures shall be consistent with those of the nursing staff and the medical staff rules and regulations.

(ii) A protocol shall be established by the medical staff for the implementation of the stop order policy, in order that drugs shall be reviewed and renewed, or automatically stopped.

(iii) A system shall be in place to determine compliance with the stop order policy.

(F) Drug administration errors, adverse drug reactions, and incompatibilities shall be immediately reported to the attending physician and, if appropriate, to the hospital-wide quality assessment and performance improvement program. There shall be a mechanism in place for capturing, reviewing, and tracking medication errors and adverse drug reactions.

(G) Abuses and losses of controlled substances shall be reported, in accordance with applicable federal and state laws, to the individual responsible for the pharmaceutical services, and to the chief executive officer, as appropriate.

(H) Information relating to drug interactions and information on drug therapy, side effects, toxicology, dosage, indications for use, and routes of administration shall be immediately available to the professional staff.

(i) A pharmacist shall be readily accessible by telephone or other means to discuss drug therapy, interactions, side effects, dosage, assist in drug selection, and assist in the identification of drug induced problems.

(ii) There shall be staff development programs on drug therapy available to facility staff to cover such topics as new drugs added to the formulary, how to resolve drug therapy problems, and other general information as the need arises.

(I) A formulary system shall be established by the medical staff to ensure quality pharmaceuticals at reasonable costs.

(r) Quality assessment and performance improvement. The governing body shall ensure that there is an effective, ongoing, hospital-wide, data-driven quality assessment and performance improvement (QAPI) program to evaluate the provision of patient care.

(1) Program scope. The hospital-wide QAPI program shall reflect the complexity of the hospital's organization and services and have a written plan of implementation. The program must include an ongoing program that shows measurable improvements in the indicators for which there is evidence that they will improve health outcomes, and identify and reduce medical errors.

(A) All hospital departments and services, including services furnished under contract or arrangement shall be evaluated.

(B) Health care associated infections shall be evaluated.

(C) Medication therapy shall be evaluated.

(D) All medical and surgical services performed in the hospital shall be evaluated as they relate to appropriateness of diagnosis and treatment.

(E) The program must measure, analyze and track quality indicators, including adverse patients' events, and other aspects of performance that assess processes of care, hospital services and operations.

(F) Data collected must be used to monitor the effectiveness and safety of service and quality of care, and to identify opportunities for changes that will lead to improvement.

(G) Priorities must be established for performance improvement activities that focus on high-risk, high-volume, or problem-prone areas, taking into consideration the incidence, prevalence and severity of problems in those areas, and how health outcomes and quality of care may be affected.

(H) Performance improvement activities which affect patient safety, including analysis of medical errors and adverse patient events, must be established, and preventive actions implemented.

(I) Success of actions implemented as a result of performance improvement activities must be measured, and ongoing performance must be tracked to ensure improvements are sustained.

(2) Responsibility and accountability. The hospital's governing body, medical staff and administrative staff are responsible and accountable for ensuring that:

(A) an ongoing program for quality improvement is defined, implemented and maintained, and that program requirements are met;

(B) an ongoing program for patient safety, including reduction of medical errors, is defined, implemented and maintained;

(C) the hospital-wide QAPI efforts address priorities for improved quality of care and patient safety, and that all improvement actions are evaluated; and

(D) adequate resources are allocated for measuring, assessing, improving and sustaining the hospital's resources, and for reducing risk to patients.

(3) Medically-related patient care services. The hospital shall have an ongoing plan, consistent with available community and hospital resources, to provide or make available social work, psychological, and educational services to meet the medically-related needs of its patients. The hospital also shall have an effective, ongoing discharge planning program that facilitates the provision of follow-up care.

(A) Discharge planning shall be completed prior to discharge.

(B) Patients, along with necessary medical information, shall be transferred or referred to appropriate facilities, agencies, or outpatient services, as needed for follow-up or ancillary care.

(4) Implementation. The hospital must take actions aimed at performance improvement and, after implementing those actions, the hospital must measure its success, and track performance to ensure that improvements are sustained.

(s) Radiology services. The hospital shall maintain, or have available, diagnostic radiologic services according to needs of the patients. All radiology equipment, including X-ray equipment, mammography equipment and laser equipment, shall be licensed and registered as required under Chapter 289 of this title (relating to Radiation Control). If therapeutic services are also provided, the services, as well as the diagnostic services, shall meet professionally approved standards for safety and personnel qualifications as required in §§289.227, 289.229, 289.230 and 289.231 of this title (relating to Registration Regulations). In a special hospital, portable X-ray equipment may be acceptable as a minimum requirement.

(1) Policies and procedures. Policies and procedures shall be adopted, implemented and enforced which will describe the radiology services provided in the hospital and how employee and patient safety will be maintained.

(2) Safety for patients and personnel. The radiology services, particularly ionizing radiology procedures, shall minimize hazards to patients and personnel.

(A) Proper safety precautions shall be maintained against radiation hazards. This includes adequate radiation shielding, safety procedures and equipment maintenance and testing.

(B) Inspection of equipment shall be made by or under the supervision of a licensed medical physicist in accordance with §289.227(o) of this title (relating to Use of Radiation Machines in the Healing Arts). Defective equipment shall be promptly repaired or replaced.

(C) Radiation workers shall be provided personnel monitoring dosimeters to measure the amount of radiation exposure they receive. Exposure reports and documentation shall be available for review.

(D) Radiology services shall be provided only on the order of individuals granted privileges by the medical staff.

(3) Personnel.

(A) A qualified full-time, part-time, or consulting radiologist shall supervise the ionizing radiology services and shall interpret only those radiology tests that are determined by the medical staff to require a radiologist's specialized knowledge. For purposes of this section a radiologist is a physician who is qualified by education and experience in radiology in accordance with medical staff bylaws.

(B) Only personnel designated as qualified by the medical staff shall use the radiology equipment and administer procedures.

(4) Records. Records of radiology services shall be maintained. The radiologist or other individuals who have been granted privileges to perform radiology services shall sign reports of his or her interpretations.

(t) Renal dialysis services.

(1) Hospitals may provide inpatient dialysis services without an additional license under HSC Chapter 251. Hospitals providing outpatient dialysis services shall be licensed under HSC Chapter 251.

(2) Hospitals may provide outpatient dialysis services when the governor or the president of the United States declares a disaster in this state or another state. The hospital may provide outpatient dialysis only during the term of the disaster declaration.

(3) Equipment.

(A) Maintenance and repair. All equipment used by a facility, including backup equipment, shall be operated within manufacturer's specifications, and maintained free of defects which could be a potential hazard to patients, staff, or visitors. Maintenance and repair of all equipment shall be performed by qualified staff or contract personnel.

(i) Staff shall be able to identify malfunctioning equipment and report such equipment to the appropriate staff for immediate repair.

(ii) Medical equipment that malfunctions must be clearly labeled and immediately removed from service until the malfunction is identified and corrected.

(iii) Written evidence of all maintenance and repairs shall be maintained.

(iv) After repairs or alterations are made to any equipment or system, the equipment or system shall be thoroughly tested for proper operation before returning to service. This testing must be documented.

(v) A facility shall comply with the federal Food, Drug, and Cosmetic Act, 21 United States Code (USC), §360i(b), concerning reporting when a medical device as defined in 21 USC §321(h) has or may have caused or contributed to the injury or death of a patient of the facility.

(B) Preventive maintenance. A facility shall develop, implement and enforce a written preventive maintenance program to ensure patient care related equipment used in a facility receives electri-

cal safety inspections, if appropriate, and maintenance at least annually or more frequently as recommended by the manufacturer. The preventive maintenance may be provided by facility staff or by contract.

(C) Backup machine. At least one complete dialysis machine shall be available on site as backup for every ten dialysis machines in use. At least one of these backup machines must be completely operational during hours of treatment. Machines not in use during a patient shift may be counted as backup except at the time of an initial or an expansion survey.

(D) Pediatric patients. If pediatric patients are treated, a facility shall use equipment and supplies, to include blood pressure cuffs, dialyzers, and blood tubing, appropriate for this special population.

(E) Emergency equipment and supplies. A facility shall have emergency equipment and supplies immediately accessible in the treatment area.

(i) At a minimum, the emergency equipment and supplies shall include the following:

(I) oxygen;

(II) mechanical ventilatory assistance equipment, to include airways, manual breathing bag, and mask;

(III) suction equipment;

(IV) supplies specified by the medical director;

(V) electrocardiograph; and

(VI) automated external defibrillator or defibrillator.

(ii) If pediatric patients are treated, the facility shall have the appropriate type and size emergency equipment and supplies listed in clause (i) of this subparagraph for this special population.

(iii) A facility shall establish, implement, and enforce a policy for the periodic testing and maintenance of the emergency equipment. Staff shall properly maintain and test the emergency equipment and supplies and document the testing and maintenance.

(F) Transducer protector. A transducer protector shall be replaced when wetted during a dialysis treatment and shall be used for one treatment only.

(4) Water treatment and dialysate concentrates.

(A) Compliance required. A facility shall meet the requirements of this section. A facility may follow more stringent requirements than the minimum standards required by this section.

(i) The facility administrator and medical director shall each demonstrate responsibility for the water treatment and dialysate supply systems to protect hemodialysis patients from adverse effects arising from known chemical and microbial contaminates that may be found in improperly prepared dialysate, to ensure that the dialysate is correctly formulated and meets the requirements of all applicable quality standards.

(ii) The facility administrator and medical director must assure that policies and procedures related to water treatment and dialysate are understandable and accessible to the operator(s) and that the training program includes quality testing, risks and hazards of improperly prepared concentrate and bacterial issues.

(iii) The facility administrator and medical director must be informed prior to any alteration of, or any device being added to, the water system.

(B) Water treatment. These requirements apply to water intended for use in the delivery of hemodialysis, including the preparation of concentrates from powder at a dialysis facility and dialysate.

(i) The design for the water treatment system in a facility shall be based on considerations of the source water for the facility and designed by a water quality professional with education, training, or experience in dialysis system design.

(ii) When a public water system supply is not used by a facility, the source water shall be tested by the facility at monthly intervals in the same manner as a public water system as described in 30 TAC §290.104 (relating to Summary of Maximum Contaminant Levels, Maximum Residual Disinfectant Levels, Treatment Techniques, and Action Levels), and §290.109 (relating to Microbial Contaminants) as adopted by the Texas Commission on Environmental Quality (TCEQ).

(iii) The physical space in which the water treatment system is located must be adequate to allow for maintenance, testing, and repair of equipment. If mixing of dialysate is performed in the same area, the physical space must also be adequate to house and allow for the maintenance, testing, and repair of the mixing equipment and for performing the mixing procedure.

(iv) The water treatment system components shall be arranged and maintained so that bacterial and chemical contaminant levels in the product water do not exceed the standards for hemodialysis water quality described in §4.2.1 (concerning Water Bacteriology) and §4.2.2 (concerning Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the Association for the Advancement of Medical Instrumentation (AAMI). All documents published by the AAMI as referenced in this section may be obtained by writing the following address: 1110 North Glebe Road, Suite 220, Arlington, Virginia 22201.

(v) Written policies and procedures for the operation of the water treatment system must be developed and implemented. Parameters for the operation of each component of the water treatment system must be developed in writing and known to the operator. Each major water system component shall be labeled in a manner that identifies the device; describes its function, how performance is verified and actions to take in the event performance is not within an acceptable range.

(vi) The materials of any components of water treatment systems (including piping, storage, filters and distribution systems) that contact the purified water shall not interact chemically or physically so as to affect the purity or quality of the product water adversely. Such components shall be fabricated from unreactive materials (e.g. plastics) or appropriate stainless steel. The use of materials that are known to cause toxicity in hemodialysis, such as copper, brass, galvanized material, or aluminum, is prohibited.

(vii) Chemicals infused into the water such as iodine, acid, flocculants, and complexing agents shall be shown to be nondialyzable or shall be adequately removed from product water. Monitors or specific test procedures to verify removal of additives shall be provided and documented.

(viii) Each water treatment system shall include reverse osmosis membranes or deionization tanks and a minimum of two carbon tanks in series. If the source water is from a private supply which does not use chlorine/chloramine, the water treatment system shall include reverse osmosis membranes or deionization tanks and a minimum of one carbon tank.

(I) Reverse osmosis membranes. Reverse osmosis membranes, if used, shall meet the standards in §4.3.7 (concerning Reverse Osmosis) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the AAMI.

(II) Deionization systems.

(-a-) Deionization systems, if used, shall be monitored continuously to produce water of one megohm-centimeter (cm) or greater specific resistivity (or conductivity of one microsiemen/cm or less) at 25 degrees Celsius. An audible and visual alarm shall be activated when the product water resistivity falls below this level and the product water stream shall be prevented from reaching any point of use.

(-b-) Patients shall not be dialyzed on deionized water with a resistivity less than 1.0 megohm-cm measured at the output of the deionizer.

(-c-) A minimum of two deionization (DI) tanks in series shall be used with resistivity monitors including audible and visual alarms placed pre and post the final DI tank in the system. The alarms must be audible in the patient care area.

(-d-) Feed water for deionization systems shall be pretreated with activated carbon adsorption, or a comparable alternative, to prevent nitrosamine formation.

(-e-) If a deionization system is the last process in a water treatment system, it shall be followed by an ultrafilter or other bacteria and endotoxin reducing device.

(III) Carbon tanks.

(-a-) The carbon tanks must contain acid washed carbon, 30-mesh or smaller with a minimum iodine number of 900.

(-b-) A minimum of two carbon adsorption beds shall be installed in a series configuration.

(-c-) The total empty bed contact time (EBCT) shall be at least ten minutes, with the final tank providing at least five minutes EBCT. Carbon adsorption systems used to prepare water for portable dialysis systems are exempt from the requirement for the second carbon and a ten minute EBCT if removal of chloramines to below 0.1 milligram (mg)/1 is verified before each treatment.

(-d-) A means shall be provided to sample the product water immediately prior to the final bed(s). Water from this port(s) must be tested for chlorine/chloramine levels immediately prior to each patient shift.

(-e-) All samples for chlorine/chloramine testing must be drawn when the water treatment system has been operating for at least 15 minutes.

(-f-) Tests for total chlorine, which include both free and combined forms of chlorine, may be used as a single analysis with the maximum allowable concentration of 0.1 mg/liter (L). Test results of greater than 0.5 parts per million (ppm) for chlorine or 0.1 ppm for chloramine from the port between the initial tank(s) and final tank(s) shall require testing to be performed at the final exit and replacement of the initial tank(s).

(-g-) In a system without a holding tank, if test results at the exit of the final tank(s) are greater than the parameters for chlorine or chloramine described in this subclause, dialysis treatment shall be immediately terminated to protect patients from exposure to chlorine/chloramine and the medical director shall be notified. In systems with holding tanks, if the holding tank tests <1mg/L for total chlorine, the reverse osmosis (RO) may be turned off and the product water in the holding tank may be used to finish treatments in process. The medical director shall be notified.

(-h-) If means other than granulated carbon are used to remove chlorine/chloramine, the facility's governing body must approve such use in writing after review of the safety of the intended method for use in hemodialysis applications. If such methods include the use of additives, there must be evidence the product water does not contain unsafe levels of these additives.

(ix) Water softeners, if used, shall be tested at the end of the treatment day to verify their capacity to treat a sufficient volume of water to supply the facility for the entire treatment day and shall be fitted with a mechanism to prevent water containing the high concentrations of sodium chloride used during regeneration from entering the product water line during regeneration.

(x) If used, the face(s) of timer(s) used to control any component of the water treatment or dialysate delivery system shall be visible to the operator at all times. Written evidence that timers are checked for operation and accuracy each day of operation must be maintained.

(xi) Filter housings, if used during disinfectant procedures, shall include a means to clear the lower portion of the housing of the disinfecting agents. Filter housings shall be opaque.

(xii) Ultrafilters, or other bacterial reducing filters, if used, shall be fitted with pressure gauges on the inlet and outlet water lines to monitor the pressure drop across the membrane. Ultrafilters shall be included in routine disinfection procedures.

(xiii) If used, storage tanks shall have a conical or bowl shaped base and shall drain from the lowest point of the base. Storage tanks shall have a tight-fitting lid and be vented through a hydrophobic 0.2 micron air filter. Means shall be provided to effectively disinfect any storage tank installed in a water distribution system.

(xiv) Ultraviolet (UV) lights, if used, shall be monitored at the frequency recommended by the manufacturer. A log sheet shall be used to record monitoring.

(xv) Water treatment system piping shall be labeled to indicate the contents of the pipe and direction of flow.

(xvi) The water treatment system must be continuously monitored during patient treatment and be guarded by audible and visual alarms which can be seen and heard in the dialysis treatment area should water quality drop below specific parameters. Quality monitor sensing cells shall be located as the last component of the water treatment system and at the beginning of the distribution system. No water treatment components that could affect the quality of the product water as measured by this device shall be located after the sensing cell.

(xvii) When deionization tanks do not follow a reverse osmosis system, parameters for the rejection rate of the membranes must assure that the lowest rate accepted would provide product water in compliance with §4.2.2 (concerning Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition published by the AAMI.

(xviii) A facility shall maintain written logs of the operation of the water treatment system for each treatment day. The log book shall include each component's operating parameter and the action taken when a component is not within the facility's set parameters.

(xix) Microbiological testing of product water shall be conducted.

(I) Frequency. Microbiological testing shall be conducted monthly and following any repair or change to the water treatment system. For a newly installed water distribution system, or when a change has been made to an existing system, weekly testing shall be conducted for one month to verify that bacteria and endotoxin levels are consistently within the allowed limits.

(II) Sample sites. At a minimum, sample sites chosen for the testing shall include the beginning of the distribution piping, at any site of dialysate mixing, and the end of the distribution piping.

(III) Technique. Samples shall be collected immediately before sanitization/disinfection of the water treatment system and dialysis machines. Water testing results shall be routinely trended and reviewed by the medical director in order to determine if results seem questionable or if there is an opportunity for improvement. The medical director shall determine if there is a need for retesting. Repeated results of "no growth" shall be validated via an outside laboratory. A calibrated loop may not be used in microbiological testing of water samples. Colonies shall be counted using a magnifying device.

(IV) Expected results. Product water used to prepare dialysate, concentrates from powder, or to reprocess dialyzers for multiple use, shall contain a total viable microbial count less than 200 colony forming units (CFU)/millimeter (ml) and an endotoxin concentration less than 2 endotoxin units (EU)/ml. The action level for the total viable microbial count in the product water shall be 50 CFU/ml and the action level for the endotoxin concentration shall be 1 EU/ml.

(V) Required action for unacceptable results. If the action levels described at subclause (IV) of this clause are observed in the product water, corrective measures shall be taken promptly to reduce the levels into an acceptable range.

(VI) Records. All bacteria and endotoxin results shall be recorded on a log sheet in order to identify trends that may indicate the need for corrective action.

(xx) If ozone generators are used to disinfect any portion of the water or dialysate delivery system, testing based on the manufacturer's direction shall be used to measure the ozone concentration each time disinfection is performed, to include testing for safe levels of residual ozone at the end of the disinfection cycle. Testing for ozone in the ambient air shall be conducted on a periodic basis as recommended by the manufacturer. Records of all testing must be maintained in a log.

(xxi) If used, hot water disinfection systems shall be monitored for temperature and time of exposure to hot water as specified by the manufacturer. Temperature of the water shall be recorded at a point furthest from the water heater, where the lowest water temperature is likely to occur. The water temperature shall be measured each time a disinfection cycle is performed. A record that verifies successful completion of the heat disinfection shall be maintained.

(xxii) After chemical disinfection, means shall be provided to restore the equipment and the system in which it is installed to a safe condition relative to residual disinfectant prior to the product water being used for dialysis applications.

(xxiii) Samples of product water must be submitted for chemical analysis every six months and must demonstrate that the quality of the product water used to prepare dialysate or concentrates from powder, meets §4.2.2 (concerning Maximum Level of Chemical Contaminants) of the American National Standard, Water Treatment Equipment for Hemodialysis Applications, August 2001 Edition, published by the AAMI.

(I) Samples for chemical analysis shall be collected at the end of the water treatment components and at the most distal point in each water distribution loop, if applicable. All other outlets from the distribution loops shall be inspected to ensure that the outlets are fabricated from compatible materials. Appropriate containers and pH adjustments shall be used to ensure accurate determinations. New facilities or facilities that add or change the configuration of the water distribution system must draw samples at the most distal point for each water distribution loop, if applicable, on a one time basis.

(II) Additional chemical analysis shall be submitted if substantial changes are made to the water treatment system or if the percent rejection of a reverse osmosis system decreased 5.0% or more from the percent rejection measured at the time the water sample for the preceding chemical analysis was taken.

(xxiv) Facility records must include all test results and evidence that the medical director has reviewed the results of the water quality testing and directed corrective action when indicated.

(xxv) Only persons qualified by the education or experience may operate, repair, or replace components of the water treatment system.

(C) Dialysate.

(i) Quality control procedures shall be established to ensure ongoing conformance to policies and procedures regarding dialysate quality.

(ii) Each facility shall set all hemodialysis machines to use only one family of concentrates. When new machines are put into service or the concentrate family or concentrate manufacturer is changed, samples shall be sent to a laboratory for verification.

(iii) Prior to each patient treatment, staff shall verify the dialysate conductivity and pH of each machine with an independent device.

(iv) Bacteriological testing shall be conducted.

(I) Frequency. Responsible facility staff shall develop a schedule to ensure each hemodialysis machine is tested quarterly for bacterial growth and the presence of endotoxins. Hemodialysis machines of home patients shall be cultured monthly until results not exceeding 200 CFU/ml are obtained for three consecutive months, then quarterly samples shall be cultured.

(II) Acceptable limits. Dialysate shall contain less than 200 CFU/ml and an endotoxin concentration of less than 2 EU/ml. The action level for total viable microbial count shall be 50 CFU/ml and the action level for endotoxin concentration shall be 1 EU/ml.

(III) Action to be taken. Disinfection and retesting shall be done when bacterial or endotoxin counts exceed the action levels. Additional samples shall be collected when there is a clinical indication of a pyrogenic reaction and/or septicemia.

(v) Only a licensed nurse may use an additive to increase concentrations of specific electrolytes in the acid concentrate. Mixing procedures shall be followed as specified by the additive manufacturer. When additives are prescribed for a specific patient, the container holding the prescribed acid concentrate shall be labeled with the name of the patient, the final concentration of the added electrolyte, the date the prescribed concentrate was made, and the name of the person who mixed the additive.

(vi) All components used in concentrate preparation systems (including mixing and storage tanks, pumps, valves and piping) shall be fabricated from materials (e.g., plastics or appropriate

stainless steel) that do not interact chemically or physically with the concentrate so as to affect its purity, or with the germicides used to disinfect the equipment. The use of materials that are known to cause toxicity in hemodialysis such as copper, brass, galvanized material and aluminum is prohibited.

(vii) Facility policies shall address means to protect stored acid concentrates from tampering or from degeneration due to exposure to extreme heat or cold.

(viii) Procedures to control the transfer of acid concentrates from the delivery container to the storage tank and prevent the inadvertent mixing of different concentrate formulations shall be developed, implemented and enforced. The storage tanks shall be clearly labeled.

(ix) Concentrate mixing systems shall include a purified water source, a suitable drain, and a ground fault protected electrical outlet.

(I) Operators of mixing systems shall use personal protective equipment as specified by the manufacturer during all mixing processes.

(II) The manufacturer's instructions for use of a concentrate mixing system shall be followed, including instructions for mixing the powder with the correct amount of water. The number of bags or weight of powder added shall be determined and recorded.

(III) The mixing tank shall be clearly labeled to indicate the fill and final volumes required to correctly dilute the powder.

(IV) Systems for preparing either bicarbonate or acid concentrate from powder shall be monitored according to the manufacturer's instructions.

(V) Concentrates shall not be used, or transferred to holding tanks or distribution systems, until all tests are completed.

(VI) If a facility designs its own system for mixing concentrates, procedures shall be developed and validated using an independent laboratory to ensure proper mixing.

(x) Acid concentrate mixing tanks shall be designed to allow the inside of the tank to be rinsed when changing concentrate formulas.

(I) Acid mixing systems shall be designed and maintained to prevent rust and corrosion.

(II) Acid concentrate mixing tanks shall be emptied completely and rinsed with product water before mixing another batch of concentrate to prevent cross contamination between different batches.

(III) Acid concentrate mixing equipment shall be disinfected as specified by the equipment manufacturer or in the case where no specifications are given, as defined by facility policy.

(IV) Records of disinfection and rinsing of disinfectants to safe residual levels shall be maintained.

(xi) Bicarbonate concentrate mixing tanks shall have conical or bowl shaped bottoms and shall drain from the lowest point of the base. The tank design shall allow all internal surfaces to be disinfected and rinsed.

(I) Bicarbonate concentrate mixing tanks shall not be prefilled the night before use.

(II) If disinfectant remains in the mixing tank overnight, this solution must be completely drained, the tank rinsed and tested for residual disinfectant prior to preparing the first batch of that day of bicarbonate concentrate.

(III) Unused portions of bicarbonate concentrate shall not be mixed with fresh concentrate.

(IV) At a minimum, bicarbonate distribution systems shall be disinfected weekly. More frequent disinfection shall be done if required by the manufacturer, or if dialysate culture results are above the action level.

(V) If jugs are reused to deliver bicarbonate concentrate to individual hemodialysis machines:

(-a-) jugs shall be emptied of concentrate, rinsed and inverted to drain at the end of each treatment day;

(-b-) at a minimum, jugs shall be disinfected weekly, more frequent disinfection shall be considered by the medical director if dialysate culture results are above the action level; and

(-c-) following disinfection, jugs shall be drained, rinsed free of residual disinfectant, and inverted to dry. Testing for residual disinfectant shall be done and documented.

(xii) All mixing tanks, bulk storage tanks, dispensing tanks and containers for single hemodialysis treatments shall be labeled as to the contents.

(I) Mixing tanks. Prior to batch preparation, a label shall be affixed to the mixing tank that includes the date of preparation and the chemical composition or formulation of the concentrate being prepared. This labeling shall remain on the mixing tank until the tank has been emptied.

(II) Bulk storage/dispensing tanks. These tanks shall be permanently labeled to identify the chemical composition or formulation of their contents.

(III) Single machine containers. At a minimum, single machine containers shall be labeled with sufficient information to differentiate the contents from other concentrate formulations used in the facility and permit positive identification by users of container contents.

(xiii) Permanent records of batches produced shall be maintained to include the concentrate formula produced, the volume of the batch, lot number(s) of powdered concentrate packages, the manufacturer of the powdered concentrate, date and time of mixing, test results, person performing mixing, and expiration date (if applicable).

(xiv) If dialysate concentrates are prepared in the facility, the manufacturers' recommendations shall be followed regarding any preventive maintenance. Records shall be maintained indicating the date, time, person performing the procedure, and the results (if applicable).

(5) Prevention requirements concerning patients.

(A) Hepatitis B vaccination.

(i) With the advice and consent of a patient's attending nephrologist, facility staff shall make the hepatitis B vaccine available to a patient who is susceptible to hepatitis B, provided that the patient has coverage or is willing to pay for vaccination.

(ii) The facility shall make available to patients literature describing the risks and benefits of the hepatitis B vaccination.

(B) Serologic screening of patients.

(i) A patient new to dialysis shall have been screened for hepatitis B surface antigen (HBsAg) within one month before or at the time of admission to the facility or have a known

hepatitis B surface antibody (anti-HBs) status of at least 10 milli-international units per milliliter no more than 12 months prior to admission. The facility shall document how this screening requirement is met.

(ii) Repeated serologic screening shall be based on the antigen or antibody status of the patient.

(I) Monthly screening for HBsAg is required for patients whose previous test results are negative for HBsAg.

(II) Screening of HBsAg-positive or anti-HBs-positive patients may be performed on a less frequent basis, provided that the facility's policy on this subject remains congruent with Appendices i and ii of the National Surveillance of Dialysis Associated Disease in the United States, 2000, published by the United States Department of Health and Human Services.

(C) Isolation procedures for the HBsAg-positive patient.

(i) The facility shall treat patients positive for HBsAg in a segregated treatment area which includes a hand washing sink, a work area, patient care supplies and equipment, and sufficient space to prevent cross-contamination to other patients.

(ii) A patient who tests positive for HBsAg shall be dialyzed on equipment reserved and maintained for the HBsAg-positive patient's use only.

(iii) When a caregiver is assigned to both HBsAg-negative and HBsAg-positive patients, the HBsAg-negative patients assigned to this grouping must be Hepatitis B antibody positive. Hepatitis B antibody positive patients are to be seated at the treatment stations nearest the isolation station and be assigned to the same staff member who is caring for the HBsAg-positive patient.

(iv) If an HBsAg-positive patient is discharged, the equipment which had been reserved for that patient shall be given intermediate level disinfection prior to use for a patient testing negative for HBsAg.

(v) In the case of patients new to dialysis, if these patients are admitted for treatment before results of HBsAg or anti-HBs testing are known, these patients shall undergo treatment as if the HBsAg test results were potentially positive, except that they shall not be treated in the HBsAg isolation room, area, or machine.

(I) The facility shall treat potentially HBsAg-positive patients in a location in the treatment area which is outside of traffic patterns until the HBsAg test results are known.

(II) The dialysis machine used by this patient shall be given intermediate level disinfection prior to its use by another patient.

(III) The facility shall obtain HBsAg status results of the patient no later than three days from admission.

(u) Respiratory care services. The hospital shall meet the needs of the patients in accordance with acceptable standards of practice.

(1) Policies and procedures shall be adopted, implemented, and enforced which describe the provision of respiratory care services in the hospital.

(2) The organization of the respiratory care services shall be appropriate to the scope and complexity of the services offered.

(3) There shall be a medical director or clinical director of respiratory care services who is a physician with the knowledge, experience, and capabilities to supervise and administer the services properly. The medical director or clinical director may serve on either a full-time or part-time basis.

(4) There shall be adequate numbers of respiratory therapists, respiratory therapy technicians, and other personnel who meet the qualifications specified by the medical staff, consistent with the state law.

(5) Personnel qualified to perform specific procedures and the amount of supervision required for personnel to carry out specific procedures shall be designated in writing.

(6) If blood gases or other clinical laboratory tests are performed by the respiratory care services staff, the respiratory care staff shall comply with CLIA 1988 in accordance with the requirements specified in 42 CFR, Part 493.

(7) Services shall be provided only on, and in accordance with, the orders of a physician.

(v) Sterilization and sterile supplies.

(1) Supervision. The sterilization of all supplies and equipment shall be under the supervision of a person qualified by education, training and experience. Staff responsible for the sterilization of supplies and equipment shall participate in a documented continuing education program; new employees shall receive initial orientation and on-the-job training.

(2) Equipment and procedures.

(A) Sterilization. Every hospital shall provide equipment adequate for sterilization of supplies and equipment as needed. Equipment shall be maintained and operated to perform, with accuracy, the sterilization of the various materials required.

(B) Written policy. Written policies and procedures for the decontamination and sterilization activities performed shall be adopted, implemented and enforced. Policies shall include the receiving, cleaning, decontaminating, disinfecting, preparing and sterilization of reusable items, as well as those for the assembly, wrapping, storage, distribution and quality control of sterile items and equipment. These written policies shall be reviewed at least every other year and approved by the infection control practitioner or committee.

(C) Separation. Where cleaning, preparation, and sterilization functions are performed in the same room or unit, the physical facilities, equipment, and the policies and procedures for their use, shall be such as to effectively separate soiled or contaminated supplies and equipment from the clean or sterilized supplies and equipment. Hand washing facilities shall be provided and a separate sink shall be provided for safe disposal of liquid waste.

(D) Labeling. All containers for solutions, drugs, flammable solvents, ether, alcohol, and medicated supplies shall be clearly labeled to indicate contents. Those which are sterilized by the hospital shall be labeled so as to be identifiable both before and after sterilization. Sterilized items shall have a load control identification that indicates the sterilizer used, the cycle or load number, and the date of sterilization.

(E) Preparation for sterilization.

(i) All items to be sterilized shall be prepared to reduce the bioburden. All items shall be thoroughly cleaned, decontaminated and prepared in a clean, controlled environment.

(ii) All articles to be sterilized shall be arranged so all surfaces will be directly exposed to the sterilizing agent for the prescribed time and temperature.

(F) Packaging. All wrapped articles to be sterilized shall be packaged in materials recommended for the specific type of sterilizer and material to be sterilized.

(G) External chemical indicators.

(i) External chemical indicators, also known as sterilization process indicators, shall be used on each package to be sterilized, including items being flash sterilized to indicate that items have been exposed to the sterilization process.

(ii) The indicator results shall be interpreted according to manufacturer's written instructions and indicator reaction specifications.

(iii) A log shall be maintained with the load identification, indicator results, and identification of the contents of the load.

(H) Biological indicators. Biological indicators are commercially-available microorganisms (e.g., United States Food and Drug Administration (FDA) approved strips or vials of Bacillus species endospores) which can be used to verify the performance of waste treatment equipment and processes (or sterilization equipment and processes).

(i) The efficacy of the sterilizing process shall be monitored with reliable biological indicators appropriate for the type of sterilizer used.

(ii) Biological indicators shall be included in at least one run each week of use for steam sterilizers, at least one run each day of use for low-temperature hydrogen peroxide gas sterilizers, and every load for ethylene oxide (EO) sterilizers.

(iii) Biological indicators shall be included in every load that contains implantable objects.

(iv) A log shall be maintained with the load identification, biological indicator results, and identification of the contents of the load.

(v) If a test is positive, the sterilizer shall immediately be taken out of service.

(I) Implantable items shall be recalled and reprocessed if a biological indicator test (spore test) is positive.

(II) All available items shall be recalled and reprocessed if a sterilizer malfunction is found and a list of those items not retrieved in the recall shall be submitted to infection control.

(III) A malfunctioning sterilizer shall not be put back into use until it has been serviced and successfully tested according to the manufacturer's recommendations.

(I) Sterilizers.

(i) Steam sterilizers (saturated steam under pressure) shall be utilized for sterilization of heat and moisture stable items. Steam sterilizers shall be used according to manufacturer's written instructions.

(ii) EO sterilizers shall be used for processing heat and moisture sensitive items. EO sterilizers and aerators shall be used and vented according to the manufacturer's written instructions.

(iii) Flash sterilizers shall be used for emergency sterilization of clean, unwrapped instruments and porous items only.

(J) Disinfection.

(i) Written policies, approved by the infection control committee, shall be adopted, implemented and enforced for the use of chemical disinfectants.

(ii) The manufacturer's written instructions for the use of disinfectants shall be followed.

(iii) An expiration date, determined according to manufacturer's written recommendations, shall be marked on the container of disinfection solution currently in use.

(iv) Disinfectant solutions shall be kept covered and used in well-ventilated areas.

(v) Chemical germicides that are registered with the United States Environmental Protection Agency as "sterilants" may be used either for sterilization or high-level disinfection.

(vi) All staff personnel using chemical disinfectants shall have received training on their use.

(K) Performance records.

(i) Performance records for all sterilizers shall be maintained for each cycle. These records shall be retained and available for review for a minimum of five years.

(ii) Each sterilizer shall be monitored continuously during operation for pressure, temperature, and time at desired temperature and pressure. A record shall be maintained and shall include:

(I) the sterilizer identification;

(II) sterilization date;

(III) cycle number;

(IV) contents of each load;

(V) duration and temperature of exposure phase (if not provided on sterilizer recording charts);

(VI) identification of operator(s);

(VII) results of biological tests and dates performed;

(VIII) time-temperature recording charts from each sterilizer;

(IX) gas concentration and relative humidity (if applicable); and

(X) any other test results.

(L) Storage of sterilized items.

(i) Sterilized items shall be transported so as to maintain cleanliness and sterility and to prevent physical damage.

(ii) Sterilized items shall be stored in well-ventilated, limited access areas with controlled temperature and humidity.

(iii) The hospital shall adopt, implement and enforce a policy which describes the mechanism used to determine the shelf life of sterilized packages.

(M) Preventive maintenance. Preventive maintenance of all sterilizers shall be performed according to individual adopted, implemented and enforced policy on a scheduled basis by qualified personnel, using the sterilizer manufacturer's service manual as a reference. A preventive maintenance record shall be maintained for each sterilizer. These records shall be retained at least two years and shall be available for review.

(w) Surgical services. If a hospital provides surgical services, the services shall be well-organized and provided in accordance with acceptable standards of practice. If outpatient surgical services are offered, the services shall be consistent in quality with inpatient care in

accordance with the complexity of services offered. A special hospital may not offer surgical services.

(1) Organization and staffing. The organization of the surgical services shall be appropriate for the scope of the services offered.

(A) The operating rooms shall be supervised by an experienced RN or physician.

(B) Licensed vocational nurses (LVNs) and surgical technologists (operating room technicians) may serve as scrub nurses or technologists under the supervision of an RN.

(C) Circulating duties in the operating room must be performed by qualified RNs. In accordance with approved medical staff polices and procedures, LVNs and surgical technologists may assist in circulatory duties under the direct supervision of a qualified RN circulator.

(D) Surgical privileges shall be delineated for all physicians, podiatrists, and dentists performing surgery in accordance with the competencies of each. The surgical services shall maintain a roster specifying the surgical privileges of each.

(E) If the facility employs surgical technologists, the facility shall adopt, implement, and enforce policies and procedures to comply with Health and Safety Code, Chapter 259 (relating to Surgical Technologists at Health Care Facilities).

(2) Delivery of service. Surgical services shall be consistent with needs and resources. Written policies governing surgical care which are designed to ensure the achievement and maintenance of high standards of medical practice and patient care shall be adopted, implemented and enforced.

(A) There shall be a complete medical history and physical examination, as required under subsection (k)(3)(F) of this section, in the medical record of every patient prior to surgery, except in emergencies. If this has been dictated, but not yet recorded in the patient's medical record, there shall be a statement to that effect and an admission note in the record by the individual who admitted the patient.

(B) A properly executed informed consent form for the operation shall be in the patient's medical record before surgery, except in emergencies.

(C) The following equipment shall be available in the operating room suites:

(i) communication system;

(ii) cardiac monitor;

(iii) resuscitator;

(iv) defibrillator;

(v) aspirator; and

(vi) tracheotomy set.

(D) There shall be adequate provisions for immediate postoperative care.

(E) The operating room register shall be complete and up-to-date. The register shall contain, but not be limited to, the following:

(i) patient's name and hospital identification number;

(ii) date of operation;

(iii) operation performed;

(iv) operating surgeon and assistant(s);

(v) type of anesthesia used and name of person administering it;

(vi) time operation began and ended;

(vii) time anesthesia began and ended;

(viii) disposition of specimens;

(ix) names of scrub and circulating personnel;

(x) unusual occurrences; and

(xi) disposition of the patient.

(F) An operative report describing techniques, findings, and tissue removed or altered shall be written or dictated immediately following surgery and signed by the surgeon.

(x) Therapy services. If the hospital provides physical therapy, occupational therapy, audiology, or speech pathology services, the services shall be organized and staffed to ensure the health and safety of patients.

(1) Organization and staffing. The organization of the services shall be appropriate to the scope of the services offered.

(A) The director of the services shall have the necessary knowledge, experience, and capabilities to properly supervise and administer the services.

(B) Physical therapy, occupational therapy, speech therapy, or audiology services, if provided, shall be provided by staff who meet the qualifications specified by the medical staff, consistent with state law.

(2) Delivery of services. Services shall be furnished in accordance with a written plan of treatment. Services to be provided shall be consistent with applicable state laws and regulations, and in accordance with orders of the physician, podiatrist, dentist or other licensed practitioner who is authorized by the medical staff to order the services. Therapy orders shall be incorporated in the patient's medical record.

(y) Waste and waste disposal.

(1) Special waste and liquid/sewage waste management.

(A) The hospital shall comply with the requirements set forth by the department in §§1.131 - 1.137 of this title (relating to Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities) and the TCEQ requirements in 30 TAC §330.1207 (relating to Generators of Medical Waste).

(B) All sewage and liquid wastes shall be disposed of in a municipal sewerage system or a septic tank system permitted by the TCEQ in accordance with 30 TAC Chapter 285 (relating to On-Site Sewage Facilities).

(2) Waste receptacles.

(A) Waste receptacles shall be conveniently available in all toilet rooms, patient areas, staff work areas, and waiting rooms. Receptacles shall be routinely emptied of their contents at a central location(s) into closed containers.

(B) Waste receptacles shall be properly cleaned with soap and hot water, followed by treatment of inside surfaces of the receptacles with a germicidal agent.

(C) All containers for other municipal solid waste shall be leak-resistant, have tight-fitting covers, and be rodent-proof.

(D) Nonreusable containers shall be of suitable strength to minimize animal scavenging or rupture during collection operations.

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 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 34. STATE FIRE MARSHAL
SUBCHAPTER C. STANDARDS AND FEES FOR STATE FIRE MARSHAL INSPECTIONS

The Texas Department of Insurance adopts amendments to §§34.301, 34.303, and 34.304 and new §34.320 and §34.340, concerning inspection guidelines and fees that may be charged if a property owner or occupant requests a state fire marshal inspection. Amendments to update and reorganize the subchapter are also adopted. The amendments to §§34.301, 34.303, and 34.304 are adopted without changes to the proposed text published in the May 4, 2012, issue of the *Texas Register* (37 TexReg 3347) and will not be republished. Section 34.320, §34.340, and the Inspection Request Form adopted by reference in §34.340 are adopted with nonsubstantive changes.

REASONED JUSTIFICATION. The amendments and new sections are necessary to implement House Bill 1951, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011. House Bill 1951 amends Government Code §417.008 and §417.0081, modifying the fire safety inspection duties of the state fire marshal and authorizing the state fire marshal to charge the property owner or occupant a fee for a requested inspection. Additional amendments include updating the purpose of the subchapter; reorganizing the subchapter; and adopting the updated National Fire Protection Association (NFPA) Life Safety Code. Finally, the amendments update obsolete severability language.

HB 1951--Guidelines for Assigning Potential Fire Safety Risk.

Chapter 417, Government Code, addresses certain powers and duties of the commissioner and the state fire marshal. HB 1951 adds new Government Code §417.0081(b) to require the commissioner of insurance to adopt guidelines for assigning potential fire safety risk to state-owned and state-leased buildings to determine a schedule for the inspection of the buildings. New §34.320 implements this requirement.

The State Fire Marshal's Office (SFMO) already inspects state-owned buildings, including the capitol complex, hospitals, correctional facilities, and universities. The addition of leased properties to the inspection schedule will add more than 1,000 buildings and more than 10 million square feet to these inspection responsibilities.

The SFMO determines the relative risk level of a particular state-owned building from Texas Facilities Commission files and previous SFMO inspection reports. SFMO must rely on Texas Facilities Commission file information regarding state-leased buildings because the SFMO did not previously inspect leased facilities. That information is frequently limited to location and square footage of leased space. In October 2011, the SFMO began inspecting leased properties around the state to start accumulating risk factor data on the properties. Information gathered in prior SFMO inspection reports will modify a building's risk factor.

The assessment model identifies risk factors that can affect both the occurrence (frequency and number) of fire and the loss (casualties and dollar loss) from fire. A fire safety inspection uses these considerations or features. An inspection categorizes the risk factors into more subjective detail, including revealing what structure or feature is adequate; what meets minimal standards; what is non-compliant; and what constitutes severe danger. Because information concerning every characteristic is not currently available for use in prioritizing inspections, the SFMO will use available information to make a good faith estimate for prioritization purposes. The SFMO will then reprioritize inspections using the adopted guidelines after more risk criteria information becomes available.

Section 34.320 establishes the factors for identifying and prioritizing the inspection of state-owned and state-leased buildings that evidence the highest risk. The guidelines establish the following nine factors for consideration in prioritizing inspections: (1) gross square feet; (2) occupancy classification; (3) occupant load; (4) fire protection features; (5) fire protection systems; (6) stories/height; (7) maintenance/management issues; (8) replacement cost/building value; and (9) critical nature of facility. Section 34.320 describes these risk factors.

HB 1951--Fees for Requested Inspections.

HB 1951 also adds new Government Code §417.008(f) requiring the commissioner to prescribe a reasonable fee that may be charged to a private property owner or occupant who requests an SFMO inspection. In prescribing the fee, §417.008(f) requires the commissioner to consider the overall cost to the SFMO to perform the inspections, including the approximate amount of time the SFMO staff needs to perform an inspection, travel costs, and other expenses.

The Sunset Advisory Commission's "Texas Department of Insurance Report to the 82nd Legislature" recommends authorizing the SFMO to charge a fee for inspections of privately owned buildings. The Sunset Advisory Commission's July 2009 "Final Report to the Legislature on the Texas Department of Insurance and Office of Public Insurance Council" states that the inability to charge an inspection fee continues to contribute to the SFMO's inappropriate involvement in private building inspections. Further, the July 2011 report states that the 2008 Sunset review found that although the SFMO has limited resources to effectively perform fire safety inspections of privately owned buildings, it is often the inspector of choice because it cannot charge a fee, unlike local county and city fire marshals. Inspections of private buildings continue to represent almost 40 percent of the SFMO's inspection workload. As a result of these findings, the Sunset Commission recommended that the Legislature authorize the SFMO to charge a fee for inspections of privately owned

buildings. This recommendation remains appropriate as the Office still needs statutory authority to charge inspection fees.

Section 34.340 states the fee schedule that the SFMO will use for requested inspections and prescribes the form of payment required. The fees vary based on the use of the facility and the number of buildings. Requesters must use the Inspection Request Form to request an inspection.

In determining the fee schedule, TDI considered the SFMO's costs to perform the inspections, including the approximate amount of time the staff of the SFMO needs to perform an inspection, travel costs, and other expenses. The SFMO employs a limited number of trained professional inspectors stationed throughout the state. However, requested inspections of privately owned buildings are not the SFMO's inspectors' only responsibility. They also inspect state-owned and state-leased facilities, including all state health institutions, prisons, educational institutions, office space, and warehouses.

TDI also considered that different uses of a building may involve the application of additional fire codes or may indicate certain activities that require more extensive fire protection devices. The fee schedule reflects the additional time required to inspect certain types of buildings. Note that additional buildings in §34.340(b)(8) include support buildings such as boiler houses, maintenance shops, and repair shops. Scheduling of inspections is based on the availability and priorities of SFMO inspectors. SFMO inspectors often schedule inspections based on a circuit of their general area of responsibility, inspecting facilities in close proximity at the same time to minimize travel. SFMO inspectors will not cancel or change previously agreed upon inspection schedules in order to schedule expedited inspections. The scheduled date for inspections is selected by the SFMO.

The Inspection Request Form is adopted by reference in §34.340. The form requires the submission of contact information for the requester and the property owner. The form also requires the submission of the property address and disclosure of the use of the building, the number of buildings, and whether the requester is seeking an expedited request.

General Updates.

The amendments to §34.301 clarify the purpose of the subchapter to reflect the amendments in HB 1951 that expand the duties of the SFMO. The amendments clarify that the subchapter now applies to the inspections of both public and private buildings.

Implementing the changes to SFMO inspections in HB 1951 requires the expansion of rules regarding inspections in Subchapter C of 28 Texas Administrative Code Chapter 34. The amendments revise the title of the subchapter to reflect its revised content as including the fee that will be charged for inspections. New divisions improve the organization of the subchapter. New Division 1, entitled General Provisions, includes existing §§34.301 - 34.304. New Division 2, entitled Inspection Guidelines, contains §34.320 and concerns guidelines for assigning the potential fire safety risk of state-owned and state-leased buildings. New Division 3, entitled Inspection Fees, contains §34.340 and concerns procedures and fees for SFMO inspections.

The amendment to §34.304 modifies the severability language to reflect TDI's current standardized language.

Update Minimum Standards.

Amendments to §34.303 adopt the most recent version of the National Fire Protection Association (NFPA) Life Safety Code 101 for inspections performed under Government Code §417.008. Government Code §417.008(e) provides that the commissioner may adopt by rule any appropriate standard a nationally recognized standards-making association has developed for this purpose. The NFPA Life Safety Code 101 addresses those construction, protection, and occupancy features necessary to minimize danger to life from the effects of fire, including smoke, heat, and toxic gases created during a fire.

The Life Safety Code addresses life safety standards in both new and existing structures and includes standards concerning exits, sprinklers, alarms, emergency lighting, smoke barriers, and special hazard protection. The 2012 revision of the Life Safety Code amends definitions and provides clarification in consensus with associated codes and standards. In addition, the revised code requires fire sprinklers on covered balconies, porches, and attics for certain residential board and care facilities. Modified healthcare occupancy requirements allow the healthcare setting to be more homelike, including permitting fireplaces and food warming equipment. The 2012 revision also provides that building services areas that are not normally occupied have new alternate provisions for means of egress. The revised code also requires carbon monoxide detection for new residential occupancies where fuel fired equipment or attached garages are present.

A copy of the standard is available for public inspection in the State Fire Marshal's Office. The NFPA also makes available codes for read-only inspection online through their website at www.nfpa.org. To view the NFPA codes on the NFPA website, users must create a free account and agree to certain terms and conditions.

Changes to Proposed Text and Form.

A change is made to §34.340(c) to eliminate the formal request to expedite inspection requests. Based on current demand for inspectors, at this time the SFMO cannot routinely promise to make requested inspections in the time allotted. The text of §34.340(c) has changed to delete subsection (c)(1), (2), and (3). Section 34.340(c) now reads: "To obtain an inspection, a person requesting an inspection must submit the Inspection Request Form to the State Fire Marshal's Office. The form must be submitted as specified in the Inspection Request. All payments are nonrefundable. Corresponding changes have been made to the Inspection Request Form. Requesters requiring an expedited inspection may contact the SFMO, but all inspection scheduling is subject to the existing schedules and availability of the SFMO inspectors."

A nonsubstantive change was made to the Guidelines For Assigning Potential Fire Safety Risk for the occupational load in §34.320(b)(3). The subsection is changed so that only the NFPA 101 Life Safety Code is referenced, and not the International Building Code. This change is made because the state fire marshal works primarily with the Life Safety Code and state fire marshal inspectors are not experts on the International Building Code.

A nonsubstantive change was made to the form to update the name of the form and to correct the name of the office to contact to correct the requester's TDI-held information. Section 34.340 is revised to change the name of Form No. SF259 (Inspection Request Form) to Inspection Request Form. The change of form name is made to make the new section and form match new agency style guidelines. Additional instruction was added below the box for multiple buildings to specifically mention the possibility of support buildings such as boiler houses, maintenance

shops, and repair shops. Also, the Inspection Request Form is changed to request the name of the business, the mailing address if different from the business address, and a business phone and cell phone number. An explanatory note is added to the form to explain who may request an inspection and to warn the requestor that a local authority having jurisdiction may be the proper inspector. Another explanatory note is added to state that a single reinspection is included without additional cost, but that subsequent inspections will require submission of the Inspection Request Form and the associated fee.

None of the changes made to the proposed text materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice.

HOW THE SECTIONS WILL FUNCTION.

Section 34.301 clarifies the purpose of the subchapter and reflects the HB 1951 amendments.

Section 34.303 adopts the most recent version of the NFPA Life Safety Code 101 for inspections performed under Government Code §417.008.

Section 34.304 states the severability language of the subchapter.

Section 34.320 implements the Government Code §417.0081(b) requirements that the commissioner adopt guidelines for assigning potential fire safety risk to state-owned and state-leased buildings to determine a schedule for the inspection of the buildings. The section specifies the nine factors the SFMO will use to prioritize fire safety inspections for state-owned and state-leased buildings.

Section 34.340 prescribes a reasonable fee for an SFMO inspection that may be charged to a private property owner or occupant who requests an inspection. The section also requires the use of the Inspection Request Form to request an inspection and prescribes the form of payment required.

The Inspection Request Form is adopted by reference in §34.340. The form requires the submission of contact information for the requester and the property owner. The form also requires the submission of the property address and disclosure of the use of the building, and the number of buildings. The form includes notices regarding the payment, scheduling of inspections, the use of certified inspectors by local jurisdictions, and a notice about privacy laws.

SUMMARY OF COMMENTS AND AGENCY RESPONSE. TDI did not receive any comments on the published proposal.

DIVISION 1. GENERAL PROVISIONS

28 TAC §§34.301, 34.303, 34.304

STATUTORY AUTHORITY. The amendments are adopted pursuant to Government Code §§417.004, 417.005, 417.008, and 417.0081 and Insurance Code §36.001. Government Code §417.004 specifies that the commissioner of insurance shall perform the rulemaking functions the Texas Commission on Fire Protection previously performed. Government Code §417.005 states that the commissioner, after consulting with the state fire marshal, may adopt rules necessary to guide the state fire marshal and fire and arson investigators the state fire marshal commissions and in the performance of other duties for the commissioner. Government Code §417.008 provides that the commissioner by rule shall prescribe a reasonable fee for a state fire marshal inspection that may be charged to a property owner or occupant who requests the inspection, as the commissioner considers appropriate. Government Code §417.008(e) provides that the commissioner may adopt by rule any appropriate standard related to fire danger developed by a nationally recognized standards-making association. Government Code §417.0081 provides that the commissioner by rule shall adopt guidelines for assigning potential fire safety risk to state-owned and state-leased buildings and providing for the inspection of each building to which this section applies. Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

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

Filed with the Office of the Secretary of State on October 19, 2012.

TRD-201205462
Sara Waitt
General Counsel
Texas Department of Insurance
Effective date: November 8, 2012
Proposal publication date: May 4, 2012
For further information, please call: (512) 463-6327

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DIVISION 2. INSPECTION GUIDELINES

28 TAC §34.320

STATUTORY AUTHORITY. The new section is adopted pursuant to Government Code §§417.004, 417.005, 417.008, and 417.0081 and Insurance Code §36.001. Government Code §417.004 specifies that the commissioner of insurance shall perform the rulemaking functions the Texas Commission on Fire Protection previously performed. Government Code §417.005 states that the commissioner, after consulting with the state fire marshal, may adopt rules necessary to guide the state fire marshal and fire and arson investigators the state fire marshal commissions and in the performance of other duties for the commissioner. Government Code §417.008 provides that the commissioner by rule shall prescribe a reasonable fee for a state fire marshal inspection that may be charged to a property owner or occupant who requests the inspection, as the commissioner considers appropriate. Government Code §417.008(e) provides that the commissioner may adopt by rule any appropriate standard related to fire danger developed by a nationally recognized standards-making association. Government Code §417.0081 provides that the commissioner by rule shall adopt guidelines for assigning potential fire safety risk to state-owned and state-leased buildings and providing for the inspection of each building to which this section applies. Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§34.320. Guidelines For Assigning Potential Fire Safety Risk.

(a) The commissioner adopts the following "Guidelines For Assigning Potential Fire Safety Risk", for use by the state fire marshal in the inspection of state-owned and state-leased buildings.

(b) The state fire marshal will review all available information regarding the potential risk factors stated in paragraphs (1) - (9) of this subsection for a building to determine its inspection priority. The scheduling of inspections will prioritize those buildings that evidence the highest potential risk.

(1) Gross square feet--the total area reported for the building in square feet;

(2) Occupancy classification--the purpose and intended use of a building or portion of the building;

(3) Occupant load--the total number of persons that might occupy a building or portion of the building at any point in time, equal to the usable square footage divided by an occupant load factor. Occupant load factors are commonly assigned for each type of building use under the NFPA 101, "Life Safety Code";

(4) Fire protection features--includes the type of building construction, use of compartmentalization, use of fire-resistive and -rated materials and components, smoke control, and adequacy of means of exit;

(5) Fire protection systems--fire alarm, extinguisher, and sprinkler systems, communications systems, and fire fighter emergency operations equipment;

(6) Stories/Height--the reported height of the building in stories above grade;

(7) Maintenance/Management issues--the building environment, including staff availability and responsiveness, sanitation, deferred maintenance, security, and occupancy;

(8) Replacement cost/Building value; and

(9) Critical nature of facility--the specific use and occupancy of a building that warrants additional consideration because of historical value, the building contents, or the function or operations carried on in the building that are vital to the public health, safety, or general welfare.

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

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DIVISION 3. INSPECTION FEES

28 TAC §34.340

STATUTORY AUTHORITY. The new section is adopted pursuant to Government Code §§417.004, 417.005, 417.008, and 417.0081 and Insurance Code §36.001. Government Code §417.004 specifies that the commissioner of insurance shall perform the rulemaking functions the Texas Commission on Fire Protection previously performed. Government Code §417.005 states that the commissioner, after consulting with the state fire marshal, may adopt rules necessary to guide the state fire marshal and fire and arson investigators the state fire marshal commissions and in the performance of other duties for the commissioner. Government Code §417.008 provides that the commissioner by rule shall prescribe a reasonable fee for a state fire marshal inspection that may be charged to a property owner or occupant who requests the inspection, as the commissioner considers appropriate. Government Code §417.008(e) provides that the commissioner may adopt by rule any appropriate standard related to fire danger developed by a nationally recognized standards-making association. Government Code §417.0081 provides that the commissioner by rule shall adopt guidelines for assigning potential fire safety risk to state-owned and state-leased buildings and providing for the inspection of each building to which this section applies. Insurance Code §36.001 provides that the commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§34.340. Inspection Fees For Requested Inspections.

(a) The commissioner adopts by reference the Inspection Request Form for use to request a fire safety inspection by the State Fire Marshal's Office. This form is published by and available from the State Fire Marshal's Office.

(b) The amount of money a person requesting an inspection must pay to the department for a state fire marshal fire safety inspection is listed in paragraphs (1) - (7) of this subsection. If the building includes more than one building type as listed in paragraphs (1) - (7) of this subsection, then the requester must pay for the most expensive building type that the building includes, plus the amount of money specified in paragraph (8) of this subsection.

(1) Licensed adult or child day care facility or foster home--$75;

(2) Licensed nursing home, assisted living or board and care facility, or school--$100;

(3) Apartment building, hotel, motel, lodge, or rooming house--$150;

(4) Assembly occupancy, restaurant, or other commercial facility--$150;

(5) Industrial facility or warehouse--$200;

(6) Private prison or jail--$200;

(7) Other building not listed in paragraphs (1) - (6) of this subsection:

(A) less than 25,000 square feet--$100;

(B) 25,000 square feet to less than 100,000 square feet--$200; and

(C) 100,000 square feet or greater--$300.

(8) Each additional building after the first--$25.

(c) To obtain an inspection, a person requesting an inspection must submit the Inspection Request Form to the State Fire Marshal's Office. The form must be submitted as specified in the Inspection Request Form. All payments are nonrefundable.

(d) A person submitting an inspection request must pay the inspection fee by cashier's check or money order made payable to the Texas Department of Insurance at the time the Inspection Request Form is submitted to the state fire marshal.

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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Sara Waitt
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PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 180. MONITORING AND ENFORCEMENT

SUBCHAPTER C. MEDICAL QUALITY REVIEW PANEL

28 TAC §§180.60, 180.62, 180.64, 180.66, 180.68, 180.70, 180.72, 180.74, 180.76, 180.78

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) adopts new Subchapter C, Medical Quality Review Panel (MQRP), §180.60, concerning Definitions; §180.62, concerning Medical Quality Review Panel; §180.64, concerning MQRP Application Process; §180.66, concerning Medical Case Review; §180.68, concerning Medical Quality Review Process; §180.70, concerning MQRP Training; §180.72, concerning Conflict of Interest; §180.74, concerning MQRP Notification of Case Status; §180.76, concerning Rights and Responsibilities of Persons Involved in the Medical Quality Review Process; and §180.78, concerning Effective Date. Sections 180.62, 180.64, 180.66, 180.70, 180.72 and 180.76 are adopted with changes to the proposed text as published in the July 27, 2012, issue of the *Texas Register* (37 TexReg 5551). Sections 180.60, 180.68, 180.74 and 180.78 are adopted without changes to the proposed text as published in the July 27, 2012, issue of the *Texas Register* (37 TexReg 5551).

The Division published an informal draft of the proposed new sections on the Division's website from May 6, 2012 until June 6, 2012, and received eight informal comments on the proposed rules. Subsequent changes were made to the draft based on the informal comments received on the draft, and the sections were proposed in the *Texas Register* on July 27, 2012 (37 TexReg 5551). A public hearing for this proposal was held on August 13, 2012. The public comment period closed on August 27, 2012. The Division received four public comments.

The Division has changed some of the proposed language in the text of the rules as adopted in response to public comments received, or for non-substantive clarification. The changes, however, do not materially alter issues raised in the proposal, introduce new subject matter, or affect persons other than those previously on notice. The changes are explained below.

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 rules, and the reasons why the Division agrees or disagrees with the comments and recommendations. These new sections are adopted to implement several statutory amendments in House Bill 2605, enacted by the 82nd Legislature, Regular Session, effective September 1, 2011 (HB 2605).

HB 2605 added new Labor Code §§413.05115, 413.05121 and 413.05122 and amended Labor Code §413.0512 to clarify the composition and training requirements of the MQRP and establish the Quality Assurance Panel (QAP), which is a subset of the MQRP.

Labor Code §413.0512 was amended to clarify that the medical advisor must notify the Division if the medical advisor determines that a particular health care specialty field is no longer necessary for inclusion on the MQRP or if there is a need to include a particular health care specialty field that is not currently represented on the panel. This section was also amended to clarify that the Division may enter into agreements with other state agencies, as necessary, to access particular health care expertise.

HB 2605 added new Labor Code §413.05121 to require the establishment of a QAP within the MQRP to provide an additional level of evaluation in medical case reviews, assist the medical advisor and medical quality review panel, evaluate medical care and recommend enforcement actions to the medical advisor.

HB 2605 also added new Labor Code §413.05122 to require the Commissioner of Workers' Compensation (Commissioner) to adopt rules concerning the operation of the medical quality review panel, including rules that establish the qualifications necessary for a health care provider to serve on the MQRP, the composition of the MQRP, the number of members to be included on the panel and the health care specialty fields required to be represented by the members of the panel. The rules must also set the maximum length of time a health care provider may serve on the MQRP, a policy defining situations that constitute a conflict of interest for a member of the MQRP, and procedures and grounds for removing a member of the MQRP from the panel, including as a ground for removal that a member is repeatedly delinquent in conducting case reviews. Finally, the rules must also establish a procedure through which members of the MQRP review panel are notified concerning the status and enforcement outcomes of cases resulting from the MQRP quality review process and the training requirements for members of the MQRP.

The rules must ensure that panel members are fully aware of any requirements imposed by the Labor Code concerning the medical quality review process and the Division's goals concerning the process. The rules may require members to receive training on any topic determined by the Division or the Commissioner to be relevant to the operations of the panel and must require members of the panel to receive training concerning administrative violations that affect the delivery of appropriate medical care, the confidentiality requirements described by Labor Code §413.0513, the immunity from liability provided to members of the panel under Labor Code §413.054, and the medical quality review criteria adopted under Labor Code §413.05115.

Adopted New §180.60.

Adopted new §180.60 defines the terms "doctor" and "medical case review" for purposes of this subchapter. The term "doctor" has the same definition as Labor Code §401.011(17), a doctor of medicine, osteopathic medicine, optometry, dentistry, podiatry, or chiropractic who is licensed and authorized to practice. The term "Medical Case Review" is defined as a review of medical services or professionalism in a particular case by an MQRP member regarding the delivery of health care, or the quality of a health care practitioner's opinion, recommendation or report. Medical case review may include the review of a treating doctor, peer review doctor, designated doctor, another health care practitioner, an independent review organization, an insurance carrier, or a utilization review agent. This definition is necessary in order to provide clarity as to what constitutes a medical case review.

Adopted New §180.62.

Adopted new §180.62(a) provides that the purpose of the MQRP is to assist the medical advisor in the performance of the medical advisor's duties under Labor Code §413.0511 in accordance with the provisions of Labor Code §413.0512 and §413.05121. This provision is consistent with the purposes of the MQRP as set out in the Labor Code.

Adopted new §180.62(b) provides that members of the MQRP who prepare reports for medical case review shall be known as MQRP Experts. This language mirrors Texas Medical Board rules and helps harmonize the procedures of the two regulatory agencies, Texas Medical Board and the Division.

Adopted new §180.62(c) provides that applicants for the MQRP may be selected and appointed to the MQRP at the discretion of the medical advisor and the Commissioner in accordance with §180.62. The appointments are made by both the medical advisor and the Commissioner. This rule is necessary because Labor Code §413.0512(a) requires the medical advisor to establish the MQRP and under the Labor Code the Commissioner is given broad executive authority to enforce and administer the provisions of the Labor Code including provisions governing the operations of the MQRP. The Commissioner is the chief executive and administrative officer of the Division, Labor Code §402.00116, the Commissioner has all executive authority under Labor Code, Labor Code §402.00111, and general operational powers of the Division are vested in the Commissioner, Labor Code §402.00128.

The MQRP must have at least 25 members and must, at a minimum, have members in the health care specialty fields of orthopedic surgery, neurosurgery, chiropractic, occupational medicine and pain medicine. The MQRP may have members that include other types of health care practitioners determined to be necessary by the medical advisor and the Commissioner. This rule is necessary to fulfill the requirements of Labor Code §413.05122(a)(2). The minimum number of members was set at 25 because that was determined to be the minimum number of persons necessary to carry the workload of the MQRP. The health care specialty fields of orthopedic surgery, neurosurgery, chiropractic, occupational medicine and pain medicine were specifically enumerated because they are the most common health care specialty fields utilized by the MQRP. The language authorizing the medical advisor and the Commissioner to add other members determined to be necessary is necessary for purposes of flexibility and efficiency.

Adopted new §180.62(d) provides that, to be eligible to serve on the MQRP, a health care practitioner must possess an unrestricted license to practice in Texas with the appropriate credentials as defined by §180.1 of this title (relating to Definitions), be board certified in a specialty or subspecialty, and have an active practice in Texas. "Active practice" means, within either of the last two calendar years, at the time of appointment to the MQRP, the applicant has actively diagnosed or treated persons at least 20 hours per week for 40 weeks duration during a given calendar year; or performed administrative, leadership, or advisory roles in the practice of medicine. The medical advisor and the Commissioner may waive these requirements if needed to adequately perform medical case review. This subsection is necessary to fulfill the requirements of Labor Code §413.05122(1) and to ensure that MQRP members have the necessary licensing and expertise to fulfill their functions. Board certification ensures a higher level of training and expertise in a given field. The active practice requirement ensures that the MQRP member is utilizing the training that they have been given. This waiver provision is necessary for situations where there is no MQRP member available for a medical case review who meets these heightened requirements, but there do exist other health care professionals who are otherwise qualified to conduct the reviews and who may be recruited to perform the review.

Adopted new §180.62(e) provides that MQRP members shall be appointed for a term of two years. They shall serve until the expiration of their term, until their resignation, or until their removal from the MQRP. An MQRP member may not serve on the panel for more than 10 years. Years served prior to September 1, 2013 do not count toward the 10-year limit. This language was modified from the proposal for clarity by removing the phrase "an appointment on or after" to remove any potential ambiguity. This subsection is necessary to fulfill the requirements of Labor Code §413.05122(a)(3). The two year term is historically the length of a term of an MQRP member. The 10 year service limit was established to fulfill the legislative requirement of a maximum term of service. It encourages stability and consistency and ensures the MQRP has experienced members with expertise in the workers comp system. The 10 year limit begins September 1, 2013 for administrative clarity and because the previous two year appointments will expire on that date. This also allows clear notice to prospective MQRP members of the prospective limits on their appointments.

Adopted new §180.62(e) also provides that an MQRP member may resign from the MQRP at any time. Further, an MQRP member may be removed from the MQRP for cause at any time on the order of the Commissioner for failure to maintain the eligibility requirements of this title, failure to timely inform the Division of conflicts of interest, repeated failure to timely review medical case review assignments or timely submit reports to the Division, repeated failure to prepare the reports in the prescribed format; or other issues deemed sufficient by the medical advisor or the commissioner. A non-substantive clarification from the proposal was made by deleting the word "on" in subsection (e)(4) between "time" and "immediately". The removal provisions are necessary to fulfill the requirement of Labor Code §413.05122(a)(5). The removal provisions ensure that the MQRP members maintain the eligibility requirements, remain unconflicted and perform the work of the MQRP in a timely and diligent manner. The provision authorizing removal of a member who repeatedly fails to timely review medical case review assignments fulfills the requirements of Labor Code §413.05122(a)(5). The provision authorizing the removal of an MQRP member for other reasons deemed sufficient by the medical advisor or Commissioner is necessary be-

cause other reasons that are sufficient to justify removal may arise in the course of the operations of the MQRP.

Adopted new §180.62(f) provides that an MQRP member shall not use his or her position to influence an insurance carrier, agent, or other person or entity in connection with a personal or other insurance related matter beyond referring to their position to demonstrate qualifications except as otherwise provided by this subchapter. This provision is necessary in order to ensure that MQRP members do not use their positions as MQRP members to exert undue influence in other circumstances unrelated to their duties under these rules. This provision does not prohibit MQRP members from referring to their position as an MQRP member to demonstrate their qualifications such as in an application for employment.

Adopted new §180.62(g) provides that the medical advisor shall establish the Quality Assurance Panel (QAP) within the MQRP. All members of the QAP are members of the MQRP. They perform all of the duties of an MQRP member under Labor Code §413.0512 as well as the duties of a QAP member under Labor Code §413.05121. A member of the QAP shall also be known as an Arbiter. An Arbiter serves in an informal settlement conference to help determine a resolution of the case. Arbiters may provide any services to the medical advisor provided by Labor Code §413.0512 and §413.05121, including, but not limited to serving as a representative for the medical advisor in informal settlement conferences, and serving as the chair to the quality assurance committee. Arbiters may serve as expert witnesses in enforcement actions, as appropriate, and provide an additional level of medical expertise and quality assurance to assist the medical advisor in the medical advisor's duties under Labor Code §413.0511. This subsection is necessary to fulfill the requirements of Labor Code §413.0512 and identify the functions of QAP members.

Adopted New §180.64.

Adopted new §180.64(a) establishes the process to apply to be a member of the MQRP. To apply to the MQRP, a person must submit an application in the form and manner required by the Division demonstrating compliance with the required qualifications. The application must contain the information required by §180.64(b). The medical advisor and the commissioner may select and appoint only qualified applicants to the Division's MQRP but are not required to accept all applicants who meet the requirements specified in this subchapter. The phrase "The medical advisor may select" was clarified for consistency by changing the proposal language to read "The medical advisor and the commissioner may select." This change is for consistency with the language in §§180.62(c), 180.62(d)(4), and 180.64(f).

Adopted new §180.64(b) establishes the contents of the application form for the MQRP. The form must include, at a minimum, contact information for the health care practitioner, information about the health care practitioner's education, a description of the health care practitioner's license(s), certifications, and professional specialty, if any, a description of the health care practitioner's work history and hospital or other health care practitioner affiliations. The form must also contain a description of any affiliations the health care practitioner has with a workers' compensation health care network certified under Chapter 1305 of the Insurance Code or a political subdivision as described in Labor Code §504.053(b)(2), identification of and a description of all current and past review affiliations, including but not limited to an independent review organization (IRO), utilization review agent (URA), licensing board, and insurance carrier. In addition, the form must include information regarding the health care practitioner's current practice locations, disclosure regarding the health care practitioner's professional background, education, training, and fitness to perform the duties of an MQRP member. This must include disclosure of any disciplinary actions or other sanctions taken against the health care practitioner by any state licensing board, state or federal agency, and hospital or other health care institution, as well as disclosure of any voluntary relinquishments of license or privileges, drug and alcohol misuse, malpractice claims history and criminal history.

The form must include a description of all ownership interests or other financial arrangements, such as salaried or contract employment, involving a person or their agent subject to the Act or a rule, order, or decision of the Commissioner. Total ownership and a share of ownership is ownership. Ownership also includes owning shares of facilities such as surgery centers.

The applicant must sign an authorization for third parties to release information relevant to the verification of the information provided on the application to the Division, an affirmation that all information provided in the application is accurate and complete to the best of the health care practitioner's knowledge; and an affirmation of understanding of the legal requirements, including confidentiality provisions, for MQRP members.

Adopted new §180.64(c) provides that a credentialing application for hospital credentialing may substitute for some items under subsection (b).

Adopted new §180.64(d) provides that the health care practitioner must inform the medical advisor of any changes to this information within 30 days after the change.

Adopted new §180.64(e) provides that the application shall be reviewed by the medical advisor.

Adopted new §180.64(f) provides that the medical advisor and the Commissioner have the discretion to select, appoint and remove an applicant to the MQRP. The language was clarified from the proposal by adding "and remove" to the text.

Adopted new §180.64(g) provides that membership in the MQRP is for a term of two years. The acceptance letter will include the effective date and expiration date.

The provisions of §180.64(a) - (g) are necessary to establish a formalized process an applicant must follow to apply for an appointment to the MQRP, a process which requires an applicant to provide the Division with information directly related to their qualifications to be a member of the MQRP. This process is necessary in order to provide the medical advisor and Commissioner with the information they need to examine the qualifications of an applicant and to determine whether an applicant is qualified under these rules and would fill a particular need on the MQRP.

Adopted new §180.64(h) provides that membership in the MQRP is not a guarantee of any number of assignments.

Adopted new §180.64(i) provides that MQRP members are entitled to compensation for work assigned by the medical advisor at the hourly rates specified in the rule. Doctors are entitled to $150 per hour for medical case reviews, ad hoc work groups, or special projects.

Non-doctors are entitled to $100 per hour for medical case reviews, ad hoc work groups or special projects.

An MQRP member is limited to billing a maximum of five hours for a medical case review of a single case, five hours for ad hoc

work group or special project service, or 20 hours in a given calendar month, unless the medical advisor approves additional hours in writing upon review of a submitted narrative report or a report of an ad hoc work group.

Members are entitled to compensation for hearings or trial preparation. Doctors are entitled to $350 per hour for time spent in hearing or in trial preparation, in providing testimony in deposition, hearing or trial. Non-doctors are entitled to $175 per hour for time spent in hearing or in trial preparation, in providing testimony in deposition, hearing or trial. An MQRP member is not entitled to payment for more than eight hours per day for a deposition, a hearing, trial preparation or court testimony. If travel is required, the Division will pay the member for travel, lodging and per diem expenses in accordance with the Texas State Travel Management Program. The Division may vary the above reimbursement provisions if deemed by the Division to be in the best interests of the Division or the State of Texas. The compensation provisions are necessary in order to establish the compensation rates the MQRP members will be paid fairly for their work on the MQRP. The rates are the same rates that the members are currently being paid through contract.

Adopted new §180.64(j) provides that an MQRP member may not disclose confidential information, including a report or other documentation prepared by the MQRP member for the Division in accordance with Labor Code §§402.083 - 402.086, 402.091, 402.092 and 413.0513. The language was clarified from the proposal by adding the words "confidential information, including" to the text. This rule is necessary in order to ensure that MQRP members are aware of the statutory confidentiality requirements of the Labor Code that apply to information created or received by the member in the course of their activities on the MQRP.

Adopted new §180.64(k) provides that all reports and related documents prepared by or furnished to a member for the MQRP are the sole property of the Division. This provision is necessary to clarify that the Division owns all reports and related documents prepared by or furnished to a member for the MQRP. This rule also ensures that the integrity of confidential information is protected.

Adopted New §180.66.

Adopted new §180.66 provides that the MQRP may perform medical case review for the medical advisor. Medical case review may be performed for the purposes of the medical quality review process, designated doctor certification and recertification, performance based oversight, or any other medical case review necessary to assist the medical advisor in performing the medical advisor's duties under the Labor Code. Language was clarified from the proposal by adding the words "the medical advisor" after "assist." This provision is necessary to clarify the role of the MQRP in accordance with the provisions of Labor Code §413.0512(c).

Adopted New §180.68.

Adopted new §180.68(a) provides that the medical quality review process is medical case review initiated on the basis of complaints, plan-based audits, or monitoring as a result of a consent order and performed in accordance with criteria adopted under Labor Code §413.05115. The medical quality review process does not include medical case review performed for the purpose of certification and recertification of designated doctors, performance based oversight, administrative violations that do not require an expert medical opinion, or complaints regarding professionalism that do not require an expert medical opinion. This rule is necessary because it provides a definition of the medical quality review process that is consistent with the criteria adopted by the Commissioner under Texas Labor Code §413.05115 that establishes a process for handing compliant-base medical case reviews and through which the Division selects health care providers or other entities for a compliance audit or review.

Adopted new §180.68(b) provides that a complaint must be documented in accordance with the provisions of 28 TAC §180.2. This subsection is necessary because it confirms that all complaints must be documented in the same way, regardless of which program at DWC is handling the complaint.

Adopted new §180.68(c) clarifies that nothing in this subchapter prevents referrals of complaints to another licensing or law enforcement authority.

Adopted New §180.70.

Adopted new §180.70 provides that an MQRP member must receive training by the Division prior to any assignments and at least every two years thereafter on the requirements of the medical quality review process under §180.68, the Division's goals regarding the medical quality review process, administrative violations that affect the delivery of appropriate medical care, confidentiality requirements of Labor Code §§402.083, 402.091, 402.092 and 413.0513, immunity from liability under Labor Code §413.054, the medical quality review criteria adopted under Labor Code §413.05115, the current Division adopted edition of the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment and the Division's adopted treatment and return-to-work guidelines and other topics as determined by the medical advisor and Commissioner. The text was clarified by adding the reference "402.091", regarding the offense and penalty for failure to maintain confidentiality, to the list of confidentiality requirements to be trained on. The text was also clarified by replacing the acronym "AMA" with "American Medical Association." This section is necessary because Labor Code §413.05122(b) requires the Commissioner to adopt rules regarding mandatory training of MQRP members in accordance with its provisions. This rule requires training on those topics that Labor Code §413.05122(b) mandates to be addressed in the training. This rule also requires training on the current Division adopted edition of the AMA Guides to the Evaluation of Permanent Impairment and the Division's adopted treatment and return to work guidelines, because Division rules require health care providers to utilize these guides when performing their roles in the workers' compensation system, and MQRP members may be in a position where they need to examine whether the health care provider has properly utilized the AMA Guides. The rule also allows for training on other topics determined by the Medical Advisor and Commissioner in order to provide flexibility when needed under particular circumstances. Finally, this rule requires training prior to any assignments and every two years thereafter, in order to ensure that MQRP members are trained prior to performing these duties as well as kept up to date on changes and developments.

Adopted New §180.72.

Adopted new §180.72(a) sets forth procedures regarding MQRP members' conflicts of interest. If the selected MQRP member has a conflict of interest in a case under medical review, that member may not review the case or serve as an arbiter. If all MQRP members in a particular health care specialty field as the subject of a medical case review have conflicts of interest in a

case under medical case review, and the Division is unable to enter into an interagency agreement, then the Division may refer the case to the appropriate licensing authority. Language was clarified from the proposal by adding the words "in a case under medical review" and "or serve as an arbiter" to the text.

Adopted new §180.72(b) sets forth the conflicts of interest for MQRP members. It provides that, for the purposes of this subsection, a conflict of interest exists if the selected MQRP member has a familial relationship within the third degree of affinity with any party or witness related to the case, has a relationship with the subject beyond a mere acquaintance; has ever treated the injured employee whose records are being reviewed; has ever been a peer review doctor, a designated doctor or required medical examination doctor in regard to the particular claim; or has a financial interest in a matter as set forth in 28 TAC §180.24 (relating to Financial Disclosure). Further, a conflict of interest exists, for the purposes of this subsection, if the selected MQRP member is a medical director for an Insurance Carrier, Utilization Review Agent, or a workers' compensation health care network certified under Chapter 1305 of the Insurance Code or a political subdivision as described in Labor Code §504.053(b)(2). Medical directors can perform all functions of the MQRP and the QAP except performing individual medical case reviews or serving as Arbiters in a informal settlement conference (ISC). A conflict also exists, for the purposes of this subsection, if the selected MQRP member has other issues deemed to be a conflict of interest by the medical advisor. In response to a comment, language was clarified in §180.72(b)(3) by dividing it into paragraphs (3) and (4) and renumbering subsequent paragraphs accordingly. "Peer review doctor" and "required medical examination doctor" on an employee's claim were added as conflicts of interest. "Designated doctor" was added in §180.72(b)(4)(B) for purposes of consistency. The same rationale for adding peer review doctors and required medical examination doctors on an injured employee's claim to the conflict of interest list applies to designated doctors on the injured employee's claim. The rules in paragraphs (1) - (6) are intended to be objective easy to follow guidelines that include circumstances that generally constitute a conflict of interest. There could be examples of MQRP member's who do not have a conflict of interest in a specific case but are defined by rule as having a conflict. The Division believes it is best to have the clearest possible guidelines, even if those guidelines might exclude individuals who could have participated. Paragraph (7) was included because it is impossible to envision all circumstances that might constitute a conflict.

Adopted new §180.72(c) provides that if an MQRP member selected for a medical case review has a conflict of interest, the member must notify the medical advisor of the conflict before taking any further action on the case. This subsection is necessary because it provides a process by which a conflicts of interest are brought to the medical advisor's attention. This places the responsibility of disclosing conflicts on the MQRP member because the member is in the position to know when a conflict exists. This subsection also requires disclosure to occur before taking any further action in the case in order to preserve the integrity of the process.

Adopted new §180.72(d) provides that, if the medical advisor has a conflict of interest in a case, the medical advisor must recuse himself from the case and appoint the associate medical advisor to perform the role of the medical advisor in the case, including enforcement decisions and recommendations. If the associate medical advisor also has a conflict of interest in the case, the Commissioner shall delegate the duties of the medical advisor, including enforcement decisions and recommendations, for that particular case, to a member of the QAP. This subsection is necessary because situations may arise where the medical advisor is conflicted or both the medical advisor and the assistant medical advisor are conflicted. The rule provides a procedure that will be followed in such scenarios and ensures that there will be an individual responsible for performing the role of the medical advisor in the case.

Adopted new §180.72(e) provides that the Division may enter into agreements with other state agencies to access, as necessary, expertise in health care specialty fields as determined by the medical advisor. This subsection is necessary in order to provide the medical advisor access to needed expertise. This rule is consistent with the authority granted under Labor Code §413.0512(h).

Adopted New §180.74.

Adopted new §180.74 provides that the Division shall notify MQRP panel members in writing at least quarterly of the status of and enforcement outcomes resulting from cases in the medical quality review process. It also sets forth that an MQRP panel member shall comply with all confidentiality laws that apply to information provided under this section including Labor Code §§402.083 - 402.086, 402.091, 402.092 and 413.0513. This section is necessary because Labor Code §413.05122(a)(6) requires the Commissioner to adopt rules to establish a procedure through which members of the medical quality review panel are notified concerning the status and enforcement outcomes of cases resulting from the medical quality review process.

Adopted New §180.76.

Adopted new §180.76(a) specifies the rights and responsibilities of persons involved in the Medical Quality Review Process. The person subject to the medical quality review process has the right to be notified that the person has been selected for a review, to be notified of the disposition of the medical quality review process, and to communicate with the office of the medical advisor at any time during the medical quality review process.

The person also has a right to an informal settlement conference (ISC) in accordance with the provisions of §180.76 as well as a right to be represented by legal counsel. The ISC provides persons subject to the Medical Quality Review Process an opportunity to discuss and resolve their medical case review with Arbiters (i.e. QAP members). The word "person" was changed to "persons" for clarity and grammatical correctness. The case must have been referred to enforcement, the request for an ISC must be in writing, the Division will notify the requestor of the scheduled date of the ISC, and the requestor has the right to receive all documents given to the Arbiters for review for that particular case. All information the requestor wishes the Arbiters to consider at the ISC must be received by the Division no later than 15 days before the ISC, and the Arbiters may refuse to consider any information not timely received by the Division. The ISC requestor may request to reschedule the scheduled date of the ISC for good cause shown, in writing, as determined by an attorney from the Division's office of general counsel. Good cause means circumstances beyond the control of the requestor that reasonably prevent the requestor from attending the ISC or from requesting the rescheduling any sooner.

If a requestor fails to attend an ISC as scheduled, the requestor forfeits his right to an ISC but does not preclude the requestor from discussing the case with the medical advisor, from entering

a Consent Order, or from defending his enforcement case at the State Office of Administrative Hearings.

Adopted new §180.76(b) specifies the responsibilities of persons involved in the Medical Quality Review Process. A person subject to a medical case review must provide records and information requested from the office of the medical advisor in the format and manner specified by the Division, provide the records and information within the time period specified in the request, and attach an accurate and completed business records affidavit to the request for records and information.

This section is necessary to consolidate for clarity and efficiency the various rights and responsibilities of a person involved in the medical quality review process. It also provides for a process that is fair, that allows for the subject's participation in the process, and that promotes the efficient resolution of medical quality reviews. This rule is also necessary because it ensures that the Office of the Medical Advisor has the authority to obtain from the subject of the review all relevant information necessary to properly perform a review in a particular case. It also allows the Office of the Medical Advisor to obtain the information in a format that may be used in court proceedings, should those proceedings occur, thereby preventing potential duplicative requests for the information.

Adopted New §180.78.

Adopted new §180.78 provides that this subchapter is effective on January 1, 2013. Existing members of the MQRP on that date shall continue to serve through the terms of their contracts. New terms of membership after January 1, 2013 shall be established through the process in this subchapter.

This section is necessary to coordinate the transition from the prior MQRP system to the new system established under the new rules.

SUMMARY OF COMMENTS AND AGENCY RESPONSES.

§180.62(c)(2)(A): A commenter suggested that the medical advisor and the commissioner of workers' compensation select an adequate number of orthopaedic surgeons to ensure that the panel has a strong understanding of the musculoskeletal system.

Agency Response: The Division agrees and believes the rules accomplish those objectives. The Division notes that nothing prohibits adding any additional MQRP members when needed.

§180.62(c)(2): A commenter requested that subparagraph (F) be added to §180.62(c)(2) to require the MQRP to include mental health professionals in its membership. The commenter stated that the number of workers' compensation injuries that contain a mental health component necessitates the inclusion of mental health professionals on the MQRP to provide meaningful oversight of the treatment provided for those injuries in the workers' compensation system.

Agency Response: The Division agrees that there needs to be a mental health component on the MQRP, but disagrees that additional language is needed. The Division currently has psychologists on the MQRP and will add more mental health professionals as needed under the authority of §180.62(c)(3).

§180.62(d)(1): A commenter recommended adding a subparagraph (A) to §180.62(d)(1) stating that MQRP members "must not have been censured by any relevant professional organization, any regulatory agency, or certifying authority, or subject to any regulatory action."

Agency Response: The Division disagrees and declines to make the change. Section 180.64(b)(8) requires extensive disclosure of any disciplinary actions or other sanctions taken against the health care practitioner by any state licensing board, state or federal agency, and hospital or other health care institution, as well as disclosure of any voluntary relinquishments, drug and alcohol misuse, malpractice claims history and criminal history. Whether the facts of a particular case should disqualify an applicant from serving on the MQRP is within the judgment of the medical advisor and Commissioner.

§180.62(d)(3)(B): A commenter suggested that §180.62(d)(3)(B) be deleted or that the Division clarify what it means to have "performed administrative, leadership, or advisory roles in the practice of medicine." The commenter questioned how administrative, leadership, or advisory roles in the practice of medicine" can meaningfully substitute for maintaining an active practice.

Agency Response: The Division disagrees to delete §180.62(d)(3)(B). Part of the role of the MQRP is to advise the medical advisor on developing trends, issues and problems that exist in the workers' compensation system as a whole. This requires persons who have an overall view and perspective on the system, which may be gained through administrative and leadership roles.

§180.62(d)(4): A commenter requested clarification of §180.62(d)(4). The commenter does not understand why the requirements of subsection (d)(2) and (3) would need to be waived by the medical advisor and the commissioner and under what circumstances such waiver might take place.

Agency Response: The Division clarifies that the requirements of §180.62(d)(2) and (3), board certification and active practice, may need to be waived if there are problems with availability of health care practitioners and willingness to serve.

§182.62(e)(2): A commenter suggested deleting the second sentence of §182.62(e)(2) which states, "Years served prior to an appointment on or after September 1, 2013 do not count toward the 10 year limit." In the alternative, the commenter recommends that the date in this provision be changed from September 1, 2013, to January 1, 2013, the proposed effective date of the rules.

Agency Response: The Division disagrees. A clear starting date for the 10 year limit was chosen for administrative clarity and efficiency. The September 1, 2013 starting date was chosen because most current MQRP contracts began on September 1.

§180.64(i)(2) and (5)(B): A commenter seeks clarification of §180.64(i)(2) and (5)(B) because it is unclear what role non-doctors will perform in the MQRP process. There is no description of their role in the proposal.

Agency Response: The Division clarifies that there may be psychologists and other health care practitioners who are not doctors as defined by the Texas Labor Code §401.011 but who have a doctoral degree whose knowledge, skills and training may be essential to the needs of the MQRP at a given time.

§180.70(7): A commenter supported the wording of §180.70(7).

Agency Response: The Division appreciates the support.

§180.72(b)(3): A commenter suggested that the language in §180.72(b)(3) be modified to "has ever treated the injured employee whose records are being reviewed or has served as a peer review doctor or a required medical examination doctor in the injured employee's claim." The commenter stated

that the prohibition against having a doctor participate as an MQRP member needs to be expanded beyond doctors who have provided treatment. Questions could be raised about the ability of a doctor who has served as a peer review doctor or a required medical examination doctor in a claim to maintain the objectivity necessary to effectively serve in that role.

Agency Response: The Division agrees that questions of conflict of interest could arise in the situations outlined by the commenter. Section §180.72(b)(4) has been added to read:

"(4) in regard to the particular injured employee's claim, has served as a:

(A) peer review doctor;

(B) designated doctor; or

(C) required medical examination doctor."

§180.76: A commenter stated that the provisions of §180.76 appear appropriate.

Agency Response: The Division appreciates the support.

§180.76: A commenter stated that the proposed rules do not recognize any rights for persons who file complaints that result in MQRP review. The commenter recommended a new provision to address this or, in the alternative, to put a provision in the MQRP Process document.

Agency Response: The issue raised by the commenter is outside the scope of this rule and concerns a broader subject matter than just MQRP complaints. The Division will review the policy.

§180.76: A commenter recommended that the ISC process provisions that are in the MQRP process document be put in the rule instead so that any future changes will be subject to the Administrative Procedure Act.

Agency Response: The Division disagrees. The rights and responsibilities of parties to an ISC are set forth in the rule. Details of ISC administration are better placed in the process document, which is also being updated in conjunction with these rules for transparency and flexibility.

General: A commenter recommended that, to increase system transparency, the Division include in its quarterly press release on enforcement actions the information provided verbally at stakeholder meetings concerning the processing of complaints by the Office of the Medical Advisor and Texas Department of Insurance Enforcement Division.

Agency Response: This comment is outside the scope of the adopted sections. This is not a comment on adopted rule language but rather a policy on public information dissemination, which is best addressed in other forums. The Division will not address it as a comment on the rules.

General: A commenter suggested that language should be added to require the team leading the review process to be led by individuals who come from the same specialty as those who are subject to a review. For example, a case involving an orthopaedic surgeon should be led by a team of orthopaedic surgeons. Orthopaedic surgeons are the only professionals on the MQRP who have undergone the same training as the orthopaedic surgeons being reviewed.

Agency Response: The Division disagrees that the suggested language needs to be added to the rule. Labor Code §408.0043 provides that a doctor serving as a member of the medical quality review panel must hold a professional certification in a health care specialty appropriate to the type of health care that the injured employee is receiving. Labor Code §408.0044 and §408.0045 have licensing requirements for the review of chiropractors and dentists. The Commissioner is not involved in assigning an Expert to perform a particular medical quality review. The MQRP process document provides that the nurse investigator selects an Expert to perform a medical quality review in accordance with Texas Labor Code §§408.0043, 408.0044, or 408.0045 and that in cases where no Expert meets the requirements of those sections for a specific medical quality review, the Medical Advisor may contact appropriate medical licensing boards or other entities in an effort to contract with a qualified individual, or contract with a health care practitioner who possesses the professional requirements for conducting the medical quality review.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL

For: None

For, with changes: Insurance Council of Texas, Medtronic Neuromodulation, Office of Injured Employee Counsel, Property and Casualty Insurers Association of America, Texas Orthopaedic Association

Against: None

Neither for or Against: None

The new sections are adopted under the Labor Code §§402.00116, 402.00111, 402.061, 402.00128, 413.0511, 413.05115, 413.0512, 413.05121, 413.05122, 413.0513, 413.0514, 413.0515 and 415.021.

Labor Code §402.00116 grants the powers and duties of chief executive and administrative officer to the Commissioner and the authority to enforce the Labor Code, Title 5, and other laws applicable to the Division or Commissioner.

Labor Code §402.00111 provides that the Commissioner shall exercise all executive authority, including rulemaking authority, under the Labor Code, Title 5.

Labor Code §402.061 provides the Commissioner the authority to adopt rules as necessary to implement and enforce the Workers' Compensation Act.

Labor Code §402.00128 vests general operational powers to the Commissioner including the authority to delegate, and assess and enforce penalties as authorized by Labor Code, Title 5.

Labor Code §413.0511 requires the Division to employ or contract with a medical advisor as that term is defined by Labor Code §401.011, such person to make recommendations regarding rules adoption and policies to implement the Texas Workers' Compensation Act and the imposition of sanctions.

Labor Code §413.05115 requires the Division to develop and the Commissioner to adopt criteria concerning the medical case review process with input from potentially affected parties including health care providers and insurance carriers. The criteria developed and adopted must establish process or processes for handling complaint-based medical case reviews and through which the Division selects health care providers or other entities for compliance audit or review. The Division shall make the criteria developed and adopted available on the Division website.

Labor Code §413.0512 provides that the medical advisor shall establish a MQRP of health care providers to assist the medical advisor in performing the duties required under Labor Code

§413.0511. The panel is not subject to Chapter 2110, Government Code. The medical advisor shall notify the Division if he or she determines that it is no longer necessary for the panel to include a member that practices in a particular health care specialty field; or there is a need for the panel to include a member that practices in a particular health care specialty field not represented on the panel. Further, if the Division receives notice from the medical advisor of the latter situation, the Division may enter into agreements with other state agencies to access, as necessary, expertise in that health care specialty field.

Labor Code §413.05121 requires the establishment of a QAP within the MQRP to provide an additional level of evaluation in medical case reviews, assist the medical advisor and MQRP, evaluate medical care and recommend enforcement actions to the medical advisor.

Labor Code §413.05122 requires the Commissioner to adopt rules concerning the operation of the MQRP, including rules that establish the qualifications necessary for a health care provider to serve on the MQRP and the composition of the MQRP, including the number of members to be included on the panel and the health care specialty fields required to be represented.

Labor Code §413.0513 provides that information collected, assembled, or maintained by or on behalf of the Division under Labor Code §413.0511 or §413.0512 constitutes an investigation file for purposes of Labor Code §402.092 and may not be disclosed under Labor Code §413.0511 or §413.0512 except as provided by that section.

Labor Code §413.0514 allows for information sharing with occupational licensing boards and applies to information held by or for the Division, the Texas State Board of Medical Examiners, and the Texas Board of Chiropractic Examiners that relates to a person who is licensed or otherwise regulated by any of those state agencies. This section provides sharing and access to otherwise confidential information. Information received by the Division remains confidential, and may not be disclosed by the Division except as necessary to further the investigation, and shall be exempt from disclosure under Labor Code §402.092 and §413.0513.

Labor Code §413.0515 sets forth that the Division shall report physician and chiropractic violations to the Texas State Board of Medical Examiners and the Texas Board of Chiropractic Examiners if the Division or either Board discovers an act or omission by a physician or chiropractor that may constitute a felony, misdemeanor involving fraud or abuse under Medicare or Medicare or controlled substance law or a violation under the Labor Code, Title 5.

Labor Code §415.021 provides for assessment of administrative penalties if a person violates, fails to comply with, or refuses to comply with a rule or the Texas Workers' Compensation Act.

§180.62. Medical Quality Review Panel.

(a) The purpose of the Medical Quality Review Panel (MQRP) is to assist the medical advisor in the performance of the medical advisor's duties under Labor Code §413.0511 in accordance with the provisions of Labor Code §413.0512 and §413.05121.

(b) Members of the MQRP who prepare reports for medical case review shall be known as MQRP Experts.

(c) Applicants may be selected and appointed to the MQRP at the discretion of the medical advisor and the commissioner of workers' compensation (commissioner) in accordance with this section. The MQRP shall be composed of health care practitioners appointed by the medical advisor and the commissioner in accordance with this section.

(1) The MQRP must have at least 25 members.

(2) The MQRP must, at a minimum, have members in the following health care specialty fields:

(A) Orthopedic Surgery--A medical doctor (MD) or a doctor of osteopathy (DO) with board certification in orthopedic surgery.

(B) Neurosurgery--An MD or DO with board certification in neurological surgery.

(C) Chiropractic--A licensed doctor of chiropractic.

(D) Occupational Medicine--An MD or DO with board certification in occupational medicine.

(E) Pain Medicine--An MD or DO with a board certification in a subspecialty of anesthesiology, neurology or physical medicine.

(3) The MQRP may have members that include other types of health care practitioners determined to be necessary by the medical advisor and the commissioner.

(d) To be eligible to serve on the MQRP, a health care practitioner must meet the following criteria, as applicable:

(1) Possess an unrestricted license to practice in Texas with the appropriate credentials, as defined by §180.1 of this title (relating to Definitions);

(2) Board certified in a specialty or subspecialty. An MD or DO is board certified in a specialty or subspecialty if the MD or DO holds:

(A) a general certificate in the specialty or a subspecialty certificate from one of the member boards of the American Board of Medical Specialties (ABMS); or

(B) a primary certificate in the specialty and:

(i) a certificate of special qualifications from the American Osteopathic Association Bureau of Osteopathic Specialists (AOABOS); or

(ii) a certificate of added qualifications in the subspecialty from the AOABOS.

(3) An active practice in Texas. "Active practice" means, within either of the last two calendar years, at the time of appointment to the MQRP, the applicant has:

(A) actively diagnosed or treated persons at least 20 hours per week for 40 weeks duration during a given calendar year; or

(B) performed administrative, leadership, or advisory roles in the practice of medicine.

(4) The medical advisor and the commissioner may waive the requirements of paragraphs (2) and (3) of this section if needed to adequately perform medical case review.

(e) Term; Resignation; Removal.

(1) MQRP members shall be appointed for a term of two years. They shall serve until the expiration of their term, until their resignation, or until their removal from the MQRP.

(2) An MQRP member may not serve on the panel for more than 10 years. Years served prior to September 1, 2013 do not count toward the 10 year limit.

(3) An MQRP member may resign from the MQRP at any time.

(4) An MQRP member may be removed from the MQRP for cause at any time immediately upon notice to the MQRP member, or at such later date as the division may establish in such notice upon the occurrence of any of the following:

(A) Failure to maintain the eligibility requirements of this subchapter;

(B) Failure to timely inform the division of conflicts of interest;

(C) Repeated failure to timely review medical case review assignments or timely submit reports to the division;

(D) Repeated failure to prepare the reports in the prescribed format; or

(E) Other issues deemed sufficient by the medical advisor or commissioner.

(f) An MQRP member shall not use his or her position to influence an insurance carrier, agent, or other person or entity in connection with a personal or other insurance related matter beyond referring to their position to demonstrate qualifications except as otherwise provided by this subchapter.

(g) Quality Assurance Panel.

(1) The medical advisor shall establish the Quality Assurance Panel (QAP) within the MQRP. All members of the QAP are members of the MQRP. They perform all of the duties of an MQRP member under Labor Code §413.0512 as well as the duties of a QAP member under Labor Code §413.05121.

(2) A member of the QAP shall also be known as an Arbiter.

(3) QAP members may provide any services to the medical advisor provided by Labor Code §413.0512 and §413.05121, including, but not limited to:

(A) serve as the chair to the quality assurance committee;

(B) serve as expert witnesses in enforcement actions as appropriate;

(C) provide an additional level of medical expertise and quality assurance to assist the medical advisor in the medical advisor's duties under Labor Code §413.0511; and

(D) perform medical case review if no other MQRP member is available in a specific area of expertise. In this case the Arbiter would be ineligible from sitting on the ISC for the subject the Arbiter reviewed.

§180.64. MQRP Application Process.

(a) To apply to the MQRP, a person must submit an application in the form and manner required by the division demonstrating compliance with the required qualifications. The application must contain complete information as provided by subsection (b) of this section. The medical advisor and the Commissioner may select and appoint only qualified applicants to the division's MQRP but are not required to accept all applicants who meet the requirements specified in this subchapter.

(b) The division's required application form for the MQRP, at a minimum, shall include:

(1) contact information for the health care practitioner;

(2) information about the health care practitioner's education;

(3) a description of the health care practitioner's license(s), certifications, and professional specialty, if any;

(4) a description of the health care practitioner's work history and hospital or other health care practitioner affiliations;

(5) a description of any affiliations the health care practitioner has with a workers' compensation health care network certified under Chapter 1305 of the Insurance Code or a political subdivision as described in Labor Code §504.053(b)(2);

(6) identification of and a description of all current and past medical review affiliations, including but not limited to an independent review organization (IRO), utilization review agent (URA), licensing board, and insurance carrier;

(7) information regarding the health care practitioner's current practice locations;

(8) disclosure regarding the health care practitioner's professional background, education, training, and fitness to perform the duties of an MQRP member, including disclosure of any disciplinary actions or other sanctions taken against the health care practitioner by any state licensing board, state or federal agency, and hospital or other health care institution, as well as disclosure of any voluntary relinquishments, drug and alcohol misuse, malpractice claims history and criminal history;

(9) a description of all ownership interests or other financial arrangements, such as salaried or contract employment, involving a person or their agent subject to the Act or a rule, order, or decision of the commissioner;

(10) an authorization for third parties to release information relevant to the verification of the information provided on the application to the division;

(11) an affirmation that all information provided in the application is accurate and complete to the best of the health care practitioner's knowledge; and

(12) an affirmation of understanding of the legal requirements, including confidentiality provisions, for MQRP members.

(c) A credentialing application for hospital credentialing may substitute for some items under subsection (b) of this section.

(d) The health care practitioner must inform the medical advisor of any changes to this information within 30 days after the change.

(e) The application shall be reviewed by the medical advisor.

(f) The medical advisor and the commissioner have the discretion to select, appoint and remove an applicant to the MQRP.

(g) Membership in the MQRP is for a term of two years. The acceptance letter will include the effective date and expiration date.

(h) Membership in the MQRP is not a guarantee of any number of assignments.

(i) MQRP members shall be entitled to compensation for work assigned by the medical advisor at the following hourly rates:

(1) Doctors - Medical case reviews, ad hoc work groups, or special projects: $150 per hour.

(2) Non-Doctors - Medical case reviews, ad hoc work groups or special projects: $100 per hour.

(3) Limits on hours. A member shall not be paid for more than:

(A) five hours for a medical case review of a single case;

(B) five hours for ad hoc work group or special project service; or

(C) 20 hours in a given calendar month.

(4) The medical advisor may approve additional hours in writing upon review of a submitted narrative report or a report of an ad hoc work group.

(5) Hearings or trial preparation.

(A) Doctors - Payment for time spent in hearing or in trial preparation, in providing testimony in deposition, hearing or trial: $350 per hour.

(B) Non-doctors - Payment for time spent in hearing or in trial preparation, in providing testimony in deposition, hearing or trial: $175 per hour.

(C) An MQRP member shall not be paid for more than eight hours per day for a deposition, a hearing, trial preparation or court testimony. If travel is required, the division will pay the member for travel, lodging and per diem expenses in accordance with the Texas State Travel Management Program, 34 TAC §20.301 et seq.

(6) The division may vary the above reimbursement provisions if deemed by the division to be in the best interests of the division or the State of Texas.

(j) In accordance with Labor Code §§402.083 - 402.086, 402.091, 402.092, and 413.0513, an MQRP member may not disclose confidential information, including a report or other documentation prepared by the MQRP member for the division.

(k) All reports and related documents, including electronic and non-electronic data, prepared by or furnished to the member for the MQRP, are the sole property of the division.

§180.66. Medical Case Review.

The MQRP may perform medical case review for the medical advisor. Medical case review may be performed for the purposes of the medical quality review process, designated doctor certification and recertification, performance based oversight, or any other medical case review necessary to assist the medical advisor in performing the medical advisor's duties under the Labor Code.

§180.70. MQRP Training.

An MQRP member must receive training by the division prior to any assignments and at least every two years thereafter on the following topics:

(1) The requirements of this subchapter concerning the medical quality review process under §180.68 of this title (relating to Medical Quality Review Process);

(2) The division's goals regarding the medical quality review process;

(3) Administrative violations that affect the delivery of appropriate medical care;

(4) Confidentiality requirements of Labor Code §§402.083, 402.091, 402.092 and 413.0513;

(5) Immunity from liability under Labor Code §413.054;

(6) The medical quality review criteria adopted under Labor Code §413.05115;

(7) The current division adopted edition of the American Medical Association Guides to the Evaluation of Permanent Impairment and the division's adopted treatment and return-to-work guidelines; and

(8) Other topics as determined by the medical advisor and commissioner.

§180.72. Conflict of Interest.

(a) If the selected MQRP member has a conflict of interest in a case under medical review, that member may not review the case or serve as an arbiter. If all MQRP members in a particular health care specialty field as the subject of a medical case review have conflicts of interest in a case under medical case review, and the division is unable to enter into an interagency agreement pursuant to subsection (e) of this section, then the division may refer the case to the appropriate licensing authority.

(b) A conflict of interest exists if the selected MQRP member:

(1) has a familial relationship within the third degree of affinity with any party or witness related to the case;

(2) has a relationship with the subject beyond a mere acquaintance;

(3) has ever treated the injured employee whose records are being reviewed;

(4) in regard to a particular injured employee's claim, has served as a:

(A) peer review doctor;

(B) designated doctor; or

(C) required medical examination doctor.

(5) has a financial interest in a matter as set forth in §180.24 of this title (relating to Financial Disclosure);

(6) is a medical director for an Insurance Carrier, Utilization Review Agent, or a workers' compensation health care network certified under Chapter 1305 of the Insurance Code or a political subdivision as described in Labor Code §504.053(b)(2). Medical directors can perform all functions of the MQRP and the QAP except performing individual medical case reviews or serving as Arbiters in a informal settlement conference (ISC); or

(7) has other issues deemed to be a conflict of interest by the medical advisor.

(c) If an MQRP member selected for a medical case review has a conflict of interest, the member must notify the medical advisor of the conflict before taking any further action on the case.

(d) If the medical advisor has a conflict of interest in a case, the medical advisor must recuse himself from the case and appoint the associate medical advisor to perform the role of the medical advisor in the case, including enforcement decisions and recommendations. If the associate medical advisor also has a conflict of interest in the case, the commissioner shall delegate the duties of the medical advisor, including enforcement decisions and recommendations, for that particular case, to an Arbiter.

(e) The division may enter into agreements with other state agencies to access, as necessary, expertise in health care specialty fields as determined by the medical advisor.

§180.76. Rights and Responsibilities of Persons Involved in the Medical Quality Review Process.

(a) The person subject to the medical quality review process has the right:

(1) to be notified that the person has been selected for the medical quality review process;

(2) to be notified of the disposition of the medical quality review process;

(3) to communicate with the office of the medical advisor at any time during the medical quality review process;

(4) to be represented by legal counsel, including legal counsel at the informal settlement process (ISC); and

(5) to an ISC in accordance with the provisions of this section. The ISC provides persons subject to the medical quality review process an opportunity to discuss and resolve their medical case review with Arbiters. An ISC is available under the following conditions:

(A) The case has been referred to enforcement.

(B) The request for an ISC must be in writing.

(C) The division will notify the requestor of the scheduled date of the ISC.

(D) The requestor has the right to receive all documents given to the Arbiters for review for that particular case.

(E) All information the requestor wishes the Arbiters to consider at the ISC must be received by the division no later than 15 days before the ISC. The Arbiters may refuse to consider any information not timely received by the division.

(F) The requestor may request to reschedule the scheduled date of the ISC for good cause shown, in writing, as determined by an attorney from the division's office of general counsel. Good cause means circumstances beyond the control of the requestor that reasonably prevent the requestor from attending the ISC and requesting that the ISC be rescheduled any sooner.

(G) If a requestor fails to attend an ISC as scheduled, the requestor forfeits his right to an ISC, but it does not preclude the requestor from discussing the requestor's case with the medical advisor as set forth in paragraph (3) of this subsection, from entering into a Consent Order with the division, or from defending an enforcement case at the State Office of Administrative Hearings.

(b) A person subject to a medical case review must:

(1) provide records and information requested from the office of the medical advisor in the format and manner specified by the division;

(2) provide the records and information within the time period specified in the request; and

(3) attach an accurate and completed business records affidavit to the request for records and information.

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

Filed with the Office of the Secretary of State on October 18, 2012.

TRD-201205413
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
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Proposal publication date: July 27, 2012
For further information, please call: (512) 804-4703

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 290. PUBLIC DRINKING WATER

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) adopts amendments to §§290.38, 290.39, 290.46, 290.103, 290.109 - 290.112, 290.116, 290.119, 290.122, and 290.275.

Sections 290.38, 290.39, 290.46, 290.103, 290.109 - 290.112, 290.116, 290.119, 290.122, and 290.275 are adopted *without changes* to the proposed text as published in the June 15, 2012, issue of the *Texas Register* (37 TexReg 4353) and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

The commission adopts this rulemaking for several reasons. First, the commission amends Chapter 290 for consistency with the federal Ground Water Rule (GWR) and the federal Total Organic Carbon (TOC) Rule. The rulemaking also addresses an inconsistency with federal rules that resulted when the United States Environmental Protection Agency (EPA) adopted Method 334.0 for continuous chlorine residual analyzers. In addition, this rulemaking adopts an expanded definition of groundwater under the direct influence of surface water (GUI) to bring it into conformity with agency practice and federal rules. Finally, the commission changes Chapter 290 to incorporate the requirements of House Bill (HB) 805 from the 82nd Legislature, 2011.

The purpose of the GWR is to provide increased protection against microbial pathogens in public water systems (PWSs) that use groundwater sources. The EPA is particularly concerned about groundwater systems that are susceptible to fecal contamination since disease-causing pathogens may be found in fecal contamination. The GWR requires additional microbial sampling from the groundwater source in the event of a coliform-positive sample in the distribution system. The GWR also requires that "significant deficiencies" identified by the TCEQ be corrected by the water system within an established time frame. In reviewing the state rule, the EPA and the executive director determined that state revisions are needed to conform to the federal GWR. The majority of the changes are minor, such as adding the terms "raw groundwater source monitoring," "significant deficiencies," and "situations." These terms are prominent in the federal language and are adopted in several areas to provide consistency with the federal rule and add clarity to the state rule.

GWR

Federal rules for microbiological monitoring have been in place since 1989. The GWR, which focuses primarily on groundwater sources, was adopted by the EPA on October 12, 2006, to provide additional protection from fecal contamination. The commission adopted the GWR on December 19, 2008 (Rule Project No. 2006-045-290-PR). The EPA granted the TCEQ a two-year extension until October 12, 2010, to complete the TCEQ's version of the rule. Under 40 Code of Federal Regulations (CFR) §142.10, the commission must adopt rules at least as stringent as the federal rules to maintain primacy over PWSs in Texas.

The TCEQ is revising Chapter 290 to provide language that is consistent with the federal rule.

HB 805

Senate Bill (SB) 361, 81st Legislature, 2009, was incorporated into TCEQ rules in 2009. SB 361 required a retail public utility, exempt utility, or provider or conveyor of potable or raw water in a county with a population of 3.3 million or in an adjacent county with a population of 400,000 or more that furnishes water service to more than one customer to: ensure the emergency operation of its water system during an extended power outage, as soon as safe and practicable following the occurrence of a natural disaster; adopt an emergency preparedness plan (EPP) that demonstrates the affected utility's ability to provide emergency operations; and submit the plan to the commission for approval. SB 361 required TCEQ to adopt rules implementing Texas Water Code (TWC), §13.1395, that required affected utilities ensure emergency operation at 35 pounds per square inch (psi) through the adoption of an EPP. In 2010, affected utilities with customers in Harris County were required to submit and implement an EPP. Based on HB 805, affected utilities in Harris and Fort Bend Counties were required to prepare and submit an EPP for TCEQ review and approval by February 1, 2012, and to begin implementing the plan by June 1, 2012.

In a corresponding rulemaking published in this issue of the *Texas Register,* the commission also adopts revisions to 30 TAC Chapter 291, Utility Regulations.

Section by Section Discussion

In addition to implementation of the state and federal laws discussed previously, the commission adopts administrative changes throughout the adopted rules to reflect the agency's existing practices and to conform with *Texas Register* and agency guidelines. These changes include updating cross-references and correcting typographical, spelling, and grammatical errors.

Subchapter D: Rules and Regulations for Public Water Systems

§290.38, Definitions

HB 805

The commission adopts §290.38(1), the definition of "affected utility," changing the population threshold to 550,000 as required by HB 805.

GWR

The commission adopts §290.38(30) updating the definition of "groundwater under the direct influence of surface water" to better reflect the criteria the commission uses to identify these types of water sources and also provide consistency with the federal definition outlined in 40 CFR §141.2. "Groundwater under the direct influence of surface water" is mentioned in the federal GWR citation, 40 CFR §141.403(a)(3), and the commission is also adopting §290.116(a) which is the corresponding state citation for 40 CFR §141.403(a)(3) to harmonize the state definition with the federal definition. In reviewing the state definition for a GUI, the executive director determined that the definition in §290.38(30) needed to be consistent with the federal definition for a GUI. The federal definition allows for "site-specific" criteria which is not included in the state definition. Furthermore, the federal definition states that "direct influence must be determined for individual sources in accordance with criteria established by the state." The commission also adopts §290.38(71), the definition for "sanitary survey," to include all eight elements of the investigation process. The existing state definition does not include a list of the eight elements that are in the federal definition. The commission adds §290.38(75), defining "significant deficiency," because the state rules did not have such a definition, whereas the federal rules did. These amendments are necessary to provide consistency with the CFR. The commission also renumbers the existing definitions to maintain alphanumeric order.

§290.39, General Provisions

HB 805

The commission amends §290.39(o)(1) updating the due dates for submitting the EPP. The existing rule required systems that existed as of December 1, 2009 to submit the EPP by March 1, 2010. The adopted changes require a system that exists as of November 1, 2011 to submit the EPP by February 1, 2012. These dates derive from HB 805. The commission adopts §290.39(o)(4) updating the due date for implementing the EPP from July 1, 2010, to June 1, 2012, as required by HB 805.

§290.46, Minimum Acceptable Operating Practices for Public Drinking Water Systems

GWR

The commission adopts §290.46(a) to include a reference to the definition of routine sanitary surveys. EPA staff recommended this clarification as sanitary surveys are one of the primary components of the GWR. The commission adopts §290.46(b) to add the statement that samples shall be submitted in a manner prescribed by the executive director to give the commission more flexibility with how data should be reported. The commission adopts §290.46(f)(2), which requires records to be available during investigation to also require the PWS to make records available to the executive director upon request. This requirement is in the CFR but not in all the appropriate state citations. The commission adopts §290.46(f)(3)(D)(v) to add the federal requirement to retain documentation of coliform-positive samples that could have been caused by distribution deficiencies rather than source issues. The commission adopts §290.46(f)(3)(D)(vi) to delete "and" from the end of the clause because it is no longer necessary with the addition of §290.46(f)(3)(D)(viii) and (ix). The commission adopts §290.46(f)(3)(D)(vii) to delete the period at the end of the rule citation and add a semicolon because of adopted §290.46(f)(3)(D)(viii) and (ix). The commission adopts §290.46(f)(3)(D)(viii) to include the federal requirement to retain records of the lowest daily residual and of any failure to maintain 4-log treatment. The commission adopts §290.46(f)(3)(D)(ix) to include the federal requirement to retain compliance requirements and records for any executive director-approved alternative treatment techniques, including membrane filtration. These requirements were not in the state language but they are in the CFR. The commission adopts §290.46(f)(3)(E)(viii) to delete "and" from the end of the clause because it is no longer be necessary with the addition of §290.46(f)(3)(E)(x). The commission adopts §290.46(f)(3)(E)(ix) to delete the period and add a semicolon and the word "and" to the end of the clause because of adopted §290.46(f)(3)(E)(x). The commission adopts §290.46(f)(3)(E)(x) to include the federal requirement to retain records of executive director-approved minimum specified disinfectant residual for systems providing 4-log treatment.

Method 334.0

The commission adopts §290.46(s)(2)(C)(i) reducing the frequency that the manual disinfectant residual analyzer accuracy must be evaluated from at least once every 30 days to at least

once every 90 days to be consistent with the provisions of federally-approved EPA Method 334.0. The commission deletes existing §290.46(s)(2)(C)(ii) because Method 334.0 does not require on-line disinfectant residual analyzers to be recalibrated every 90 days. The commission renumbers §290.46(s)(2)(C)(iii) as §290.46(s)(2)(C)(ii). Further, in order to achieve consistency with federally-approved procedures, the commission adopts §290.46(s)(2)(C)(ii) by replacing the term "calibration" with the term "accuracy," increasing the frequency that the accuracy of on-line instruments must be checked from at least once every 30 days to at least once every seven days, and adding a reference to the federally-approved analytical methods identified in §290.119. The commission adopts §290.46(s)(2)(C)(iii), which requires a system to determine and correct the cause of a performance inaccuracy and, if necessary, to adjust, repair, or recalibrate the analyzer to be consistent with the provisions of federally-approved EPA Method 334.0.

Subchapter F: Drinking Water Standards Governing Drinking Water Quality and Reporting Requirements for Public Water Systems

§290.103, Definitions

GWR

The commission amends §290.103(20) to insert the word "days" after "30". The word was inadvertently omitted from the rule. The commission amends §290.103(31) replacing the word "sampling" with "monitoring" to provide consistency with the GWR language and prevent additional confusion among the regulated community. The commission adopts §290.103(32) defining "significant deficiency" because this term is used throughout the rule and is defined in the GWR. The commission adopts §290.103(39) defining "4-log treatment." Existing TCEQ rules did not have a definition for "4-log treatment" and it is necessary to conform to the federal rule because this term is discussed throughout the GWR. The commission further renumbers the existing definitions to maintain alphanumeric order.

§290.109, Microbial Contaminants

GWR

The commission adopts §290.109(c)(4) to include a reference to the updated analytical procedures to more accurately reflect the federal groundwater analytical methods because the state's existing methods did not include the *Escherichia coliform (E. coli)* methods. The commission amends §290.109(c)(4)(A)(i) to add a reference to the 4-log treatment definition and also remove the words "or at" to more accurately reflect the federal rule language as recommended by the EPA. The commission amends §290.109(c)(4)(A)(ii) to add a reference to the invalidation criteria specified in §290.109(d)(1). The existing reference in §290.109(c)(4)(A)(ii) and (D)(ii) says "as specified in paragraph (5)," which is incorrect. The commission amends §290.109(c)(4)(B) to specify that only "routine" coliform-positive samples trigger the raw sampling requirement because currently it can be interpreted that coliform-positive "repeat" samples trigger the GWR. The commission also amends §290.109(c)(4)(B) to specify that samples must be analyzed for *E. coli* or "other approved fecal indicator" because currently the language only includes *E. coli* and the federal rule allows for the analysis of additional fecal indicators. The commission further amends §290.109(c)(4)(B) to correct a typographical error. The commission adopts §290.109(c)(4)(C)(ii) to include a statement that wholesale systems and all consecutive systems served by that groundwater source must notify all customers in accordance with §290.109(g)(2), which is consistent with federal language. The existing language placed the requirement only on the initial wholesale system and not the consecutive systems. The commission adopts §290.109(c)(4)(D)(ii) to clarify that this exception to the triggered source monitoring is contingent on a system meeting the distribution coliform sample invalidation criteria outlined in §290.109(d)(1) and to specify that the replacement sample must be negative for coliforms to meet the criteria. These revisions are necessary to provide consistency with the federal rule language while also deleting an incorrect reference in the existing language to "paragraph (5)." The commission adopts §290.109(c)(4)(E) to add language that describes a hydrogeological sensitivity assessment to be consistent with the federal rule. The commission adopts §290.109(c)(4)(E)(i) and (ii), under the assessment source monitoring subsection that better describes the assessment source monitoring requirements because the existing language does not have all of the requirements outlined in the federal language. The commission amends §290.109(f)(4) to specify that an *E. coli*-positive is not a treatment technique violation but a situation that requires public notice and that it is a violation if corrective action is not addressed within 120 days. The existing language was incorrect in stating that collecting an *E. coli*-positive sample is a violation. The commission adopts §290.109(f)(6) to be more specific with the violation criteria and add that a violation requires public notice. Existing language was not consistent with federal language. The commission adopts §290.109(g)(2) to better reflect the intent of the federal rule, specify consecutive system requirements, and include instructions on posting the notice annually. The existing language did not include requirements for annual posting and consecutive systems.

§290.110, Disinfectant Residuals

Method 334.0

The changes incorporate in this section a federally-approved analytical method for on-line analyzers that continuously monitor chlorine residuals and to restore consistency with the analytical methods in §290.119 which are referenced in §290.110(d). The commission adopts §290.110(d)(1) and its subdivisions to incorporate the federally-approved analytical method for on-line chlorine residual analyzers by deleting specific analytical methods. The adopted language for chloramines requires approval to use color comparator analytical methods. The commission deletes §290.110(d)(2) and its subdivisions and inserts a reference to chloramines into §290.110(d)(1). Section 290.110(d)(2) is no longer necessary because the adopted language for free chlorine and chloramines is the same; therefore, the commission renumbers §290.110(d)(3) to subsection (d)(2).

§290.111, Surface Water Treatment

Method 334.0

The changes in this section incorporate the federally-approved analytical method for on-line analyzers that continuously monitor chlorine residuals and to restore consistency with the analytical methods in §290.119 which are referenced in §290.111(d)(4). The commission adopts §290.111(d)(4)(C) and its subdivisions to incorporate the federally-approved analytical method for on-line chlorine residual analyzers by deleting specific analytical methods listed as §290.111(d)(4)(C)(i) - (iv). The adopted language references chloramines and requires approval to use color comparator analytical methods. The commission deletes §290.111(d)(4)(D) and its subdivisions and inserts a reference to

chloramines into §290.111(d)(4)(C). The remaining paragraphs are renumbered accordingly. Section 290.111(d)(4)(D) is no longer necessary because the adopted language for free chlorine and chloramines is the same; therefore, the commission deletes §290.111(d)(4)(D) and its subdivisions. As a result of these adopted amendments to §290.111(d)(4), the commission reletters the remaining subdivisions.

§290.112, Total Organic Carbon (TOC)

TOC Rule

The commission adopts §290.112(a) to correct an inaccuracy in the applicability statement that extended the state requirements of this section to treatment plants that are not subject to the corresponding federal requirements.

§290.116, Groundwater Corrective Actions and Treatment Techniques

GWR

The commission adopts §290.116(a) to include a description of mixed systems, state that significant deficiencies require corrective action, and specify that 4-log treatment is for each source. The existing language did not specify mixed systems, did not mention significant deficiencies, and implies that 4-log treatment is per PWS, not sources within a PWS. The existing language was not consistent with the federal language. The commission adopts §290.116(a)(1) to specify that 4-log treatment is on a source basis, not a system basis; remove the December 1, 2009, deadline and state that a system must notify the TCEQ in writing if it plans to discontinue the 4-log treatment to be consistent with federal rule language. The commission amends §290.116(a)(1) and (2) to replace the term "customer" with "connection" because this is more consistent with commission terminology. The commission also adopts §290.116(a)(2) to state that a system must conduct triggered source monitoring until the system is approved by TCEQ to do 4-log treatment, and that a system must conduct triggered source sampling if 4-log treatment is discontinued. The commission adopts §290.116(b) to include significant deficiencies as a reason that a corrective action may be necessary, which is included in the federal language. The commission adopts §290.116(b)(1) and (2) to include significant deficiencies as a reason that a corrective action may be necessary, which is included in the federal language. The commission adopts §290.116(b)(5)(B) to specify that by "source" the rule refers to groundwater sources as opposed to potential contaminant sources. The commission amends §290.116(b)(5)(D) to replace the term "customer" with "connection" because this is more accurate with commission terminology. The commission adopts §290.116(b)(5)(E) to include the federal corrective action option to correct all significant deficiencies. The commission adopts §290.116(b)(5)(F) to include the federal corrective action option of assessment source monitoring. The existing state language did not contain two of the federal corrective action options. To make the language consistent with the federal GWR, the commission adopts §290.116(c) to add "significant deficiency" and specify that 4-log is achieved at or before the first connection for the specified groundwater source. To add clarity and consistency with the federal rule, the commission adopts §290.116(c)(1) to specify that disinfectant levels must be maintained "every day the specified source serves the public" and to add a reference to the monitoring plans required by §290.121. The commission adopts §290.116(c)(1)(A) to reference 40 CFR §141.74(a)(2), the requirement of continuous monitoring of chlorine residuals. The commission adopts §290.116(c)(1)(A)(i) to specify that a system must conduct grab sampling every four hours if the continuous monitoring equipment fails. The commission adopts §290.116(c)(1)(A)(ii) to require the PWS to resume continuous monitoring within 14 days. These requirements are included in the federal language and need to be included within the state rule. The commission amends §290.116(c)(1)(B) to state that the system population threshold is "3,300 or fewer" not "less than 3,300" and to include the federal requirements if such systems fall below the specified disinfectant residual. This amendment to §290.116(c)(1)(B) is necessary so as not to exclude any system with a population of exactly 3,300, provide consistency with the corresponding federal citation, and give instructions for the situation described in §290.116(c)(1)(B). The commission adopts §290.116(c)(2) to reflect the federal alternative treatment requirements. The commission adopts §290.116(c)(4) to include the federal recordkeeping requirements for systems that provide 4-log treatment or other alternative treatment techniques. The amended §290.116(c)(4) will provide consistency with the corresponding federal citation, provides a reference to the recordkeeping requirements of §290.46, and also provides clarity for the regulated community. The commission amends §290.116(d) by adding the phrases "a significant deficiency" and "conducts 4-log treatment" to add clarity and consistency with the federal rule. The commission adopts §290.116(d)(1) to specify that documents must be made available upon request of the executive director because this is included in the federal rule. The commission adopts §290.116(d)(2) to remove the December 1, 2009, deadline and to add the phrase "for a specified groundwater source" to clarify that 4-log treatment is per source and not per PWS. The commission adopts §290.116(d)(4) to clarify that 4-log treatment is "for the specified groundwater source" and not the system and that when a system "met the state criteria" it is exempt from triggered source monitoring. The commission adopts §290.116(d)(5) to include the federal requirement that systems must notify the executive director if they fall below the minimum specified residual for more than four hours. The commission adopts §290.116(e) to add the 120-day time frame and remove the duplicative language which is already listed in §290.116(a). This amendment is necessary for consistency with the federal rule. The commission adopts §290.116(e)(3) to specify that systems are in violation if they do not notify the executive director that their 4-log treatment was non-operational for more than four hours, to be consistent with the federal rule. The commission adopts §290.116(f) to add the phrase "or situation" to be more specific and consistent with the federal requirements. The commission adopts §290.116(f)(1) and (2) and its subdivisions to include the special notice requirements for community and non-community systems, which would be consistent with the federal rule.

Method 334.0

The changes in this section incorporate the federally-approved analytical method for on-line analyzers that continuously monitor chlorine residuals and restore consistency with the analytical methods in §290.119 referenced in §290.116(c)(3). The commission adopts §290.116(c)(3)(C) and its subdivisions to incorporate the federally-approved analytical method for on-line chlorine residual analyzers by deleting specific analytical methods. The revision to §290.116(c)(3)(C) is necessary to provide consistency with the federally-approved methods. The adopted language is added to chloramines to provide consistency with the federal language and to require approval to use color comparator analytical methods, which gives the commission the authority to deny the use of certain inaccurate color comparator de-

vices. The commission deletes §290.116(c)(3)(D) and inserts a reference to chloramines into adopted §290.116(c)(3)(C). Section 290.116(c)(3)(D) would no longer be necessary because the adopted language for free chlorine and chloramines is the same; therefore, the commission reletters existing §290.116(c)(3)(E) and (F) to adopted §290.116(c)(3)(D) and (E). These amendments are necessary to provide consistency with the federal language.

§290.119, Analytical Procedures

GWR

The commission adopts §290.119(a)(1) to include "raw groundwater source monitoring" to be consistent with the federal GWR. The commission amends §290.119(b)(8) and (9) to delete "and" from the end of each rule citation as this word is no longer necessary with the adoption of §290.119(b)(10). The commission adopts §290.119(b)(10) include raw groundwater microbiological analyses and reference the CFR methods because existing rule language only addressed total coliform and not *E. coli* which is the fecal indicator used for the GWR. The commission also renumbers the remaining subsection.

§290.122, Public Notification

GWR

The commission adopts §290.122(a) to include "situations" because the heading refers only to violations whereas notice is also required for situations such as an *E. coli*-positive source sample. The commission amends §290.122(a)(1)(F) to include the 24-hour public notice required for systems that have detections of *E. coli* in their source samples because the existing language did not give the time frame. The commission adopts §290.122(a)(2) to add "public notice and/or boil water notice" because an *E. coli*-positive source sample requires a public notice, but not a boil water notice. The commission adopts §290.122(a)(2) to add "or situation" after "violation" because an *E. coli*-positive source sample is an acute situation, not an acute violation. The commission adopts §290.122(a)(2)(C) and (D) to include electronic delivery options for public notices to allow systems more flexibility for posting public notices. The commission deletes the term "violation" in §290.122(a)(2)(D) because the rule explains how to issue a notice, not a notice violation. This adoption also makes the rule language consistent with associated rules to prevent confusion. The commission adopts §290.122(a)(2)(E) and (4) to add "or situation" to clarify that some acute situations are not violations. The commission adopts §290.122(b)(1)(C) to add uncorrected significant deficiencies as a reason for public notice, to conform to the federal requirements. The commission adopts §290.122(b)(1)(E) to include "or situations" because an *E. coli*-positive sample at the source is not a violation, but an acute situation. The commission adopts §290.122(b)(2) to include "situation" and "significant deficiency" to be consistent with the federal rule. The commission adopts §290.122(b)(2)(A)(ii), (B)(ii), (c)(2)(A), and (B) to include electronic delivery options for public notices to allow systems more flexibility for posting public notices. The commission amends §290.122(c) to include "situations" as required by the federal rule. The commission amends §290.122(d)(1) to include significant deficiency to be consistent with the federal rule and to correct a typographical error. The commission amends §290.122(d)(2) to include "significant deficiency" and the date of its identification to be consistent with the federal rule. The commission adopts §290.122(d)(3)(A) to include "situations" and uncorrected "significant deficiencies" as required by the federal rule. The commission adopts §290.122(d)(4) to include required federal language regarding details for significant deficiencies. The commission adopts §290.122(d)(7) to include detailed instructions for multilingual notices because the existing state rules did not give instructions on how to obtain a translated notice or help with an interpretation; however, these instructions were included in the federal language.

Subchapter H: Consumer Confidence Reports

§290.275, Appendices A - D

GWR

The commission adopts the figures in §290.275(1) and (2), Appendices A and B, to show that an uncorrected significant deficiency is a treatment technique violation for the GWR and not a Maximum Contaminant Level violation. This provides consistency with the federal language. The commission also adopts language in the figures in §290.275(1) and (2), Appendices A and B, to address raw groundwater source positive samples. This provides consistency with the federal language and differentiates between distribution system positive samples for the Total Coliform Rule and raw groundwater source positive samples for the GWR to prevent confusion among the regulated community.

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined by that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state (Texas Government Code, §2001.0225(g)(3)).

This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of the HB 805 amendments to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the HB 805 amendments is to require certain water utilities, providers, and conveyors, to have EPPs for maintaining water pressure following a disruption in service caused by a natural disaster. These rules are not required by federal regulations.

The amendments to Chapter 290 made in response to HB 805 change the county population threshold for identifying affected utilities from 400,000 to 550,000 and provide a timetable for newly affected utilities to comply with TWC, §13.1395.

Further, this rulemaking does not meet the statutory definition of a "major environmental rule" because the amendments do not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Although the specific intent of the amendments made in response to the federal regulations is to reduce risks to human health from environmental exposure, it is not a rulemaking that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the rules is to bring Chapter 290 into conformity with HB 805, the federal GWR, TOC rule, the National Primary Drinking Water Regulations (NPDWR), and the chlorine

residual analyzer Method 334.0. The federal regulations implement the federal Safe Drinking Water Act (40 CFR §141.1 and §142.1). The amendments made by HB 805 expand the counties to which the EPP requirement applies and provide a timeline for newly affected utilities to comply. The amendments based on the GWR would establish definitions consistent with those used in the federal regulations. The amendments based on the TOC rule are to correct a typographical error that extended the state requirements of this section to treatment plants that are not subject to the corresponding federal requirements. The amendments based on NPDWR would expand the definition of GUI to bring it into conformity with agency practice and 40 CFR §141.2. The amendments based on EPA Method 334.0 would make it an approved method for measuring contaminants in drinking water. It is not anticipated that the cost of complying with the amendments would be significant with respect to the economy as a whole; therefore, the adopted amendments would not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Additionally, this rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). This section only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law; 2) does not exceed an express requirement of state law; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program in the regulation of PWSs, but rather is adopted to be consistent with state law, to ensure that emergency operations of water systems following a natural disaster, and with federal regulations in order to ensure consistency of definitions and monitoring requirements across federal and state regulations; and 4) is not adopted solely under the general powers of the agency, but rather specifically under TWC, §13.041, which allows the commission to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission, and under Texas Health and Safety Code, §341.031(a), which allows the commission to adopt and enforce rules implement the federal Safe Drinking Water Act (42 United States Code, §300f *et seq.).*

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. The commission did not receive any comments regarding the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated these rules and performed an analysis of whether they constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these rules is to implement certain recently enacted legislation relating to the emergency preparedness of affected utilities and federal drinking water regulations. The rules change the number of counties in which an EPP is required (HB 805); certain definitions relating to groundwater sourced drinking water (federal GWR); the reach of the TOC rule, expanding the definition of GUI; and add Method 334.0 as an alternative method of continuous residual chlorine analysis. This rulemaking substantially advances this stated purpose by making the commission's rules consistent with HB 805 and the federal regulations. The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply because this action does not affect private real property.

Promulgation and enforcement of these rules will constitute neither a statutory nor a constitutional taking of private real property. These regulations do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because this rulemaking does not burden nor restrict the owner's right to property. More specifically, these rules implement legislation addressing the adoption of EPPs by "affected utilities" (HB 805), the federal GWR, the TOC rule, the NPDWR, and the chlorine analyzer Method 334.0. These provisions do not impose any burdens or restrictions on private real property. Therefore, the amendments do not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the adopted rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor would they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission did not receive any comments regarding the adopted rulemaking's consistency with the CMP.

Public Comment

The commission held a public hearing on July 10, 2012. The comment period closed on July 16, 2012. The commission did not receive any comments on this rulemaking.

SUBCHAPTER D. RULES AND REGULATIONS FOR PUBLIC WATER SYSTEMS

30 TAC §§290.38, 290.39, 290.46

Statutory Authority

These amendments are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the commission's general authority to perform any act necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's authority to adopt any rules necessary to carry out its powers and duties; TWC, §5.105, which establishes the commission's authority to set policy by rule; Texas Health and Safety Code (THSC), §341.031(a), which establishes the commission's authority to adopt and enforce rules to implement the federal Safe Drinking Water Act (42 United States Code, §§300f *et seq.);* and THSC, §341.0315, which requires public drinking water systems to comply with commission rules adopted to ensure the supply of safe drinking water.

The amendments implement TWC, §13.1395, as amended by House Bill 805, the federal Ground Water Rule, the National Pri-

mary Drinking Water Regulations, and the chlorine residual analyzer Method 334.0, which implement the federal Safe Drinking Water 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 October 19, 2012.

TRD-201205444
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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Proposal publication date: June 15, 2012
For further information, please call: (512) 239-2548

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SUBCHAPTER F. DRINKING WATER STANDARDS GOVERNING DRINKING WATER QUALITY AND REPORTING REQUIREMENTS FOR PUBLIC WATER SYSTEMS

30 TAC §§290.103, 290.109 - 290.112, 290.116, 290.119, 290.122

Statutory Authority

These amendments are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the commission's general authority to perform any act necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's authority to adopt any rules necessary to carry out its powers and duties; TWC, §5.105, which establishes the commission's authority to set policy by rule; Texas Health and Safety Code (THSC), §341.031(a), which establishes the commission's authority to adopt and enforce rules to implement the federal Safe Drinking Water Act (42 United States Code, §§300f *et seq.);* and THSC, §341.0315, which requires public drinking water systems to comply with commission rules adopted to ensure the supply of safe drinking water.

The amendments implement the federal Ground Water Rule, Total Organic Carbon Rule, and the chlorine residual analyzer Method 334.0, which implement the federal Safe Drinking Water 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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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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SUBCHAPTER H. CONSUMER CONFIDENCE REPORTS

30 TAC §290.275

Statutory Authority

The amendment is adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the commission's general authority to perform any act necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's authority to adopt any rules necessary to carry out its powers and duties; TWC, §5.105, which establishes the commission's authority to set policy by rule; Texas Health and Safety Code (THSC), §341.031(a), which establishes the commission's authority to adopt and enforce rules to implement the federal Safe Drinking Water Act (42 United States Code, §§300f *et seq.);* THSC, §341.0315, which requires public drinking water systems to comply with commission rules adopted to ensure the supply of safe drinking water.

The amendment implements the federal Ground Water Rule, which implements the federal Safe Drinking Water 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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CHAPTER 291. UTILITY REGULATIONS SUBCHAPTER L. STANDARDS OF EMERGENCY OPERATIONS

30 TAC §291.161, §291.162

The Texas Commission on Environmental Quality (TCEQ or commission) adopts amendments to §291.161 and §291.162.

Section 291.161 and §291.162 are adopted *without changes* to the proposed text as published in the June 15, 2012, issue of the *Texas Register* (37 TexReg 4398) and will not be republished.

Background and Summary of the Factual Basis for the Adopted Rules

This rulemaking amends Chapter 291 to incorporate the requirements of House Bill (HB) 805 from the 82nd Legislature, 2011. Senate Bill (SB) 361, 81st Legislature, 2009, was incorporated into the TCEQ rules in 2009. SB 361 required a retail public utility, exempt utility, or provider or conveyor of potable or raw water in a county with a population of 3.3 million or in an adjacent county with a population of 400,000 or more that furnishes water service to more than one customer to: ensure the emergency

operation of its water system during an extended power outage, as soon as safe and practicable following the occurrence of a natural disaster; adopt an emergency preparedness plan (EPP) that demonstrates the affected utility's ability to provide emergency operations; and submit the plan to the commission for approval. SB 361 required TCEQ to adopt rules implementing Texas Water Code (TWC), §13.1395, that required affected utilities ensure emergency operation at 35 pounds per square inch through the adoption of an EPP. In 2010, affected utilities with customers in Harris County were required to submit and implement an EPP. Based on HB 805, affected utilities in Harris and Fort Bend Counties were required to prepare and submit an EPP for TCEQ review and approval by February 1, 2012, and to begin implementing the plan by June 1, 2012.

In a corresponding rulemaking published in this issue of the *Texas Register,* the commission also adopts revisions to 30 TAC Chapter 290, Public Drinking Water.

Section by Section Discussion

§291.161, Definitions

The commission adopts §291.161(1)(B), the definition of "Affected utility," changing the population threshold from 400,000 to 550,000 as required by HB 805.

§291.162, Emergency Operation of an Affected Utility

The commission adopts §291.162(j) updating the due dates for submitting the EPP. The existing rule requires systems that exist as of December 1, 2009, to submit an EPP by March 1, 2010. The adopted changes require a system that exists as of November 1, 2011, to submit an EPP by February 1, 2012. These dates were included in HB 805. The commission adopts §291.162(k) to include the due date for implementing an EPP as June 1, 2012, as required by HB 805. As a result of adopted §291.162(k), the commission reletters existing §291.162(k) - (m).

Final Regulatory Impact Analysis Determination

The commission reviewed the adopted rules in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking does not meet the definition of a "major environmental rule" as defined by that statute. A "major environmental rule" means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state, Texas Government Code, §2001.0225(g)(3).

This rulemaking does not meet the statutory definition of a "major environmental rule" because it is not the specific intent of these rules to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the rules are to require certain water utilities, providers, and conveyors to have EPPs for maintaining water pressure following a disruption in service caused by a natural disaster. These rules are not required by federal regulations.

The amendments to Chapter 291 made in response to HB 805 change the county population threshold from 400,000 to 550,000 for identifying affected utilities, as well as providing time tables for newly affected utilities to comply with the requirements of TWC, §13.1395.

Further, this rulemaking does not meet the statutory definition of a "major environmental rule" because the amendments would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The specific intent of the rules is to bring Chapter 291 into conformity with HB 805. The amendments expand the counties to which the EPP requirement applies and provides a timeline for newly affected utilities to comply. It is not anticipated that the cost of complying with the amendments will be significant with respect to the economy as a whole; therefore, the amendments will not adversely affect in a material way the economy, a sector of the economy, competition, or jobs.

Additionally, the rulemaking does not meet any of the four applicability criteria for requiring a regulatory impact analysis for a major environmental rule, which are listed in Texas Government Code, §2001.0225(a). This section only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law.

This rulemaking does not meet any of these four applicability requirements because this rulemaking: 1) does not exceed any standard set by federal law; 2) does not exceed an express requirement of state law; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement any state and federal program on treatment of water used in public water systems, but rather is adopted to be consistent with state law, to ensure the emergency operation of water systems following a natural disaster; and 4) is not adopted solely under the general powers of the agency, but rather specifically under TWC, §13.041, which allows the commission to adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission.

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. The commission did not receive any comments regarding the draft regulatory impact analysis determination.

Takings Impact Assessment

The commission evaluated these rules and performed an analysis of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of the rules is to implement legislation relating to the emergency preparedness of affected utilities. The rules change the number of counties in which "affected utility" will be required to have EPPs. This rulemaking substantially advances this stated purpose by making the commission's rules consistent with HB 805. The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these rules because this action does not affect private real property.

Promulgation and enforcement of these rules will constitute neither a statutory nor a constitutional taking of private real property. The adopted regulations do not adversely affect a landowner's rights in private real property, in whole or in part, temporarily or permanently, because this rulemaking does not burden nor restrict the owner's right to property. More specifically, these rules

implement legislation addressing the adoption of EPPs by "affected utilities." These provisions do not impose any burdens or restrictions on private real property. Therefore, the amendments do not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the rules are not subject to the Texas Coastal Management Program (CMP).

The commission invited public comment regarding the consistency with the CMP during the public comment period. The commission did not receive any comments regarding the rulemaking's consistency with the CMP.

Public Comment

The commission held a public hearing on July 10, 2012. The comment period closed on July 16, 2012. The commission did not receive any comments on this rulemaking.

Statutory Authority

These amendments are adopted under Texas Water Code (TWC), §5.013, which establishes the general jurisdiction of the commission; TWC, §5.102, which establishes the commission's general authority to perform any act necessary to carry out its jurisdiction; TWC, §5.103, which establishes the commission's authority to adopt any rules necessary to carry out its powers and duties; TWC, §5.105, which establishes the commission's authority to set policy by rule. In addition, TWC, §13.041 states that the commission may regulate and supervise the business of every water and sewer utility within its jurisdiction and may do all things, whether specifically designated or implied by TWC, Chapter 13, necessary and convenient to the exercise of this power and jurisdiction. Further, TWC, §13.041 states that the commission shall adopt and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission.

The amendments implement TWC, §13.1395 as amended by HB 805.

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

Filed with the Office of the Secretary of State on October 19, 2012.

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Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER O. STATE SALES AND USE TAX

34 TAC §3.346

The Comptroller of Public Accounts adopts amendments to §3.346, concerning use tax, without changes to the proposed text as published in the May 18, 2012, issue of the *Texas Register* (37 TexReg 3677).

The agency has determined that amendments to this section effective February 9, 2011, relating to direct pay permit holders and local tax allocations are inconsistent with the Tax Code and do not clearly state agency policy. Accordingly, subsections (f) and (g) are updated to reflect the correct information and a cross reference is added to subsection (b)(2) of this section.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

This amendment implements Tax Code, §§321.205(c) and (d), 322.105(c), and 323.205(c) and (d).

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

Filed with the Office of the Secretary of State on October 22, 2012.

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Ashley Harden
General Counsel
Comptroller of Public Accounts
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Proposal publication date: May 18, 2012
For further information, please call: (512) 475-0387

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Reviews

Texas Department of Criminal Justice

Title 37, Part 6

The Texas Board of Criminal Justice files this notice of intent to review §163.3, concerning Objectives. This review is conducted pursuant to Texas Government Code §2001.039, which requires rule review every four years.

Comments should be directed to Sharon Felfe Howell, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711 or Sharon.Howell@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposed rule review.

TRD-201205497
Sharon Felfe Howell
General Counsel
Texas Department of Criminal Justice
Filed: October 23, 2012

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The Texas Board of Criminal Justice files this notice of intent to review §163.31, concerning Sanctions, Programs, and Services. This review is conducted pursuant to Texas Government Code §2001.039, which requires rule review every four years.

Comments should be directed to Sharon Felfe Howell, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711 or Sharon.Howell@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposed rule review.

TRD-201205498
Sharon Felfe Howell
General Counsel
Texas Department of Criminal Justice
Filed: October 23, 2012

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The Texas Board of Criminal Justice files this notice of intent to review §163.36, concerning Mentally Impaired Offender Supervision. This review is conducted pursuant to Texas Government Code §2001.039, which requires rule review every four years.

Comments should be directed to Sharon Felfe Howell, General Counsel, Texas Department of Criminal Justice, P.O. Box 13084, Austin, Texas 78711 or Sharon.Howell@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this proposed rule review.

TRD-201205499
Sharon Felfe Howell
General Counsel
Texas Department of Criminal Justice
Filed: October 23, 2012

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Texas Department of Insurance, Division of Workers' Compensation

Title 28, Part 2

The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) will review and consider for readoption, revision, or repeal all sections of the following chapter of Title 28, Part 2 of the Texas Administrative Code, in accordance with the Texas Government Code §2001.039: Chapter 49, Procedures for Formal Hearings by the Board.

Chapter 49. Procedures for Formal Hearings by the Board

Subchapter A. Formal Hearings

§49.5. Schedule of Hearings.

§49.10. Timely Acceptance of Evidence.

§49.15. Formal Statement of Position.

§49.20. Request for Cancellation.

§49.25. Delay or Postponement of Hearing.

§49.30. Filing of Medical Bills.

§49.35. Filing of Medical Reports and Records.

§49.40. Carrier Attendance.

§49.45. Contents of Formal Statement of Position.

§49.50. Sanctions.

Subchapter B. Special Formal and Other Investigative Hearings

§49.105. Procedures.

§49.110. Commencement of Hearings.

§49.115. Notice.

§49.120. Special Statutory Notice.

§49.125. Notice of Special Formal Hearing.

§49.130. Personal Appearance Hearings in Austin.

§49.131. Withdrawal of Attorney.

§49.135. Use of Court Reporters.

§49.140. Continuance.

§49.145. Recess.

§49.150. Complaint Specifications.

§49.155. Documentary Evidence.

§49.160. Filing of Formal Statement of Position.

§49.165. Subpoenas and Subpoenas Duces Tecum.

The Division will consider whether the reasons for initially adopting these rules continue to exist and whether these rules should be repealed, readopted, or readopted with amendments. Any repeals or necessary amendments identified during the review of these rules will be proposed and published in the *Texas Register* in accordance with the Administrative Procedures Act, Texas Government Code Chapter 2001.

To be considered, written comments relating to whether these rules should be repealed, readopted, or readopted with amendments must be submitted by 5:00 p.m. CST December 3, 2012. Comments may be submitted by email at RuleReviewComments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Office of Workers' Compensation Counsel, MS-4D, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

Comments should clearly specify the particular section of the rule to which they apply. Comments should include proposed alternative language as appropriate. General comments should be designated as such.

TRD-201205491
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: October 22, 2012

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The Texas Department of Insurance (Department), Division of Workers' Compensation (Division) will review and consider for readoption, revision, or repeal all sections of the following chapter of Title 28, Part 2 of the Texas Administrative Code, in accordance with the Texas Government Code §2001.039: Chapter 116, General Provisions--Subsequent Injury Fund.

Chapter 116. General Provisions--Subsequent Injury Fund.

§116.11. Request for Reimbursement from the Subsequent Injury Fund.

§116.12. Subsequent Injury Fund Payment/Reimbursement Schedule.

The Division will consider whether the reasons for initially adopting these rules continue to exist and whether these rules should be repealed, readopted, or readopted with amendments. Any repeals or necessary amendments identified during the review of these rules will be proposed and published in the *Texas Register* in accordance with the Administrative Procedures Act, Texas Government Code Chapter 2001.

To be considered, written comments relating to whether these rules should be repealed, readopted, or readopted with amendments must be submitted by 5:00 p.m. CST December 3, 2012. Comments may be submitted by email at RuleReviewComments@tdi.state.tx.us or by mailing or delivering your comments to Maria Jimenez, Office of Workers' Compensation Counsel, MS-4D, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, Austin, Texas 78744-1645.

Comments should clearly specify the particular section of the rule to which they apply. Comments should include proposed alternative language as appropriate. General comments should be designated as such.

TRD-201205492
Dirk Johnson
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: October 22, 2012

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Texas State Library and Archives Commission

Title 13, Part 1

The Texas State Library and Archives Commission (commission) proposes to review Chapter 3, concerning State Publications Depository Program, in accordance with Government Code, §2001.039, which require state agencies to review and consider for re-adoption each of their rules every four years.

The rules were adopted pursuant to the Government Code, §441.102(a), which requires the commission to adopt policies to ensure the distribution of state publications to depository libraries; Government Code, §441.103(b), which requires the commission to adopt policies to ensure the acquisition of state publications from state agencies and institutions of higher education; Government Code, §441.104(7) - (9), which requires the commission to adopt policies to provide indexes of and electronic access to all state publications in electronic format; and Government Code, §441.010(b), which establishes an electronically searchable central grant database. The rules are necessary to carry out the statutory obligations of the commission for the establishment and maintenance of a state publications depository program.

Written comments on the commission's review of Chapter 3 rules may be directed to Diana Houston, Archives and Information Services Division, Texas State Library and Archives Commission, Box 12927, Austin, Texas 78711-2927; by email to dhouston@tsl.state.tx.us; or by fax to (512) 463-5430.

TRD-201205488
Edward Seidenberg
Deputy Director
Texas State Library and Archives Commission
Filed: October 22, 2012

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The Texas State Library and Archives Commission (commission) proposes to review Chapter 6, concerning the management, retention, microfilming, and electronic storage of state agency records and the fee schedules for the commission's imaging and records storage services, in accordance with the requirements of the Government Code, §2001.039, which require state agencies to review and consider for re-adoption each of their rules every four years.

The rules were adopted pursuant to the Government Code, §441.185(e) that requires the Texas State Library and Archives Commission to adopt rules concerning the submission of records schedules to the state records administrator; Government Code, §441.185(f) that permits the commission to prescribe minimum retention periods for state records; Government Code, §441.188 that permits the commission to establish standards and procedures for the microfilming of state records; Government Code, §441.189 that permits the commission to establish

standards and procedures for the electronic storage of state records; and the Business and Commerce Code, §43.017 that permits the commission to adopt rules concerning the management of electronic transactions and signed records. The commission has authority to recover the costs of its imaging and records storage services through the assessment of fees. The commission has chosen to adopt its fee schedules for these services as administrative rules under authority of the Government Code, §441.199, which gives the commission broad rulemaking authority in the management and preservation of state's records.

Written comments on the review of Chapter 6 may be submitted to Nanette Pfiester, State and Local Records Management Division, Texas State Library and Archives Commission, Box 12927, Austin, Texas 78711; by email to nanette.pfiester@tsl.state.tx.us; or by fax to (512) 463-5477.

TRD-201205487
Edward Seidenberg
Deputy Director
Texas State Library and Archives Commission
Filed: October 22, 2012

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Adopted Rule Reviews

Office of Consumer Credit Commissioner

Title 7, Part 5

The Finance Commission of Texas (commission) has completed the review of Texas Administrative Code, Title 7, Part 5, Chapter 84, concerning Motor Vehicle Installment Sales. Chapter 84 contains Subchapter A, concerning General Provisions (§§84.101 - 84.105); Subchapter B, concerning Retail Installment Contract (§§84.201 - 84.205); Subchapter C, concerning Insurance and Debt Cancellation Agreements (§§84.301 - 84.305, 84.307, and 84.308); Subchapter D, concerning Acquisition of Contract or Balance (§84.401); Subchapter E, concerning Holder's Rights, Duties, and Limitations (§§84.501, 84.503, and 84.504); Subchapter F, concerning Licensing (§§84.601 - 84.616); Subchapter G, concerning Examinations (§§84.702 - 84.709); and Subchapter H, concerning Retail Installment Sales Contract Provisions (§§84.801 - 84.809). The rule review was conducted pursuant to Texas Government Code, §2001.039.

Notice of the review of 7 TAC Part 5, Chapter 84, was published in the August 10, 2012, issue of the *Texas Register* (37 TexReg 6097), as required. The commission received no comments in response to that notice. The commission believes that the reasons for initially adopting the rules contained in this chapter continue to exist.

As a result of internal review by the Office of Consumer Credit Commissioner, the agency that administers these rules, the commission has determined that certain revisions are appropriate and necessary. The commission proposed amendments to 7 TAC Chapter 84, in the August 31, 2012, issue of the *Texas Register* (37 TexReg 6854). The commission is concurrently adopting those amendments published elsewhere in this issue of the *Texas Register*.

Subject to the concurrently adopted amendments to Chapter 84, the commission finds that the reasons for initially adopting these rules continue to exist, and readopts this chapter in accordance with the requirements of Texas Government Code, §2001.039.

This concludes the review of 7 TAC Part 5, Chapter 84.

TRD-201205459
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: October 19, 2012

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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: 22 TAC §75.7(a)

Schedule of Fees

	Fee Description	Board Fee	Professional Fee (78th Leg)	Texas Online	Patient Protection	Newsletter Fee	Total Fee
1.	DC Initial Application (includes $50 transcript verification)	$198.00	$200.00	$0.00	$0.00	$0.00	$398.00
2.	DC Jurisprudence Examination (Repeat Exam)	$148.00	$200.00	$0.00	$0.00	$0.00	$348.00
3.	DC Initial License - Prorated	$138.00	$0.00	$0.00	$5.00	$0.00	$143.00
4.	DC License Renewal - On Time	$148.00	$200.00	$5.00	$1.00	$8.00	$362.00
5.	DC License Renewal - Late under 90 days	$215.50	$200.00	$5.00	$1.00	$8.00	$429.50
6.	DC License Renewal - Late 90 days to 1 year	$283.00	$200.00	$5.00	$1.00	$8.00	$497.00
7.	DC License Renewal - Late up to 3 years for good cause	Calculated	Calculated	$0.00	$0.00	$8.00	Calculated
8.	DC License Reinstatement - Out of State	$148.00	$200.00	$0.00	$0.00	$0.00	$348.00
9.	DC License - [~~Put on~~] Inactive **License Processing** [~~Status~~]	**$50.00** [~~None~~]	**$0.00** [~~None~~]	**$0.00** [~~None~~]	**$0.00** [~~None~~]	**$0.00** [~~None~~]	**$50.00** [~~None~~]
10.	DC License - Reactivate from Inactive Status	$148.00	$200.00	$5.00	$1.00	$8.00	$362.00
11.	DC License - Duplicate Copy (Replacement)	$25.00	$0.00	$0.00	$0.00	$0.00	$25.00
12.	DC Annual Certificate - Duplicate Copy (Replacement)	$10.00	$0.00	$0.00	$0.00	$0.00	$10.00
13.	Facility Registration - Initial Registration	$70.00	$0.00	$0.00	$5.00	$0.00	$75.00
14.	Facility Registration Renewal - On Time	$70.00	$0.00	$2.00	$1.00	$0.00	$73.00
15.	Facility Registration Renewal - Late under 90 days	$120.00	$0.00	$4.00	$1.00	$0.00	$125.00
16.	Facility Registration Renewal - Late 90 days to 1 year	$170.00	$0.00	$5.00	$1.00	$0.00	$176.00
17.	Facility Registration - Duplicate Copy (Replacement)	$25.00	$0.00	$0.00	$0.00	$0.00	$25.00
18.	Radiologic Technician Initial Registration	$35.00	$0.00	$0.00	$0.00	$0.00	$35.00
19.	Radiologic Technician Annual Renewal	$35.00	$0.00	$0.00	$1.00	$0.00	$36.00
20.	Continuing Education Course Approval Fee (annual)	$165.00	$0.00	$0.00	$0.00	$0.00	$165.00

21.	TBCE Online Jurisprudence CE Course	$55.00	$0.00	$0.00	$0.00	$0.00	$55.00
22.	Certification of DC License (to another state board)	$25.00	$0.00	$0.00	$0.00	$0.00	$25.00
23.	Verification of DC License (not certification letter) + postage	$2.00	$0.00	$0.00	$0.00	$0.00	$2.00
24.	Verification of Educational Courses/Grades	$50.00	$0.00	$0.00	$0.00	$0.00	$50.00
25.	Printed Copy of Statutes and Rules	$10.00	$0.00	$0.00	$0.00	$0.00	$10.00
26.	Returned Check Fee	$25.00	$0.00	$0.00	$0.00	$0.00	$25.00
27.	College Faculty License - Original	$150.00	$0.00	$0.00	$0.00	$0.00	$150.00
28.	College Faculty License - Renewal	$135.00	$0.00	$0.00	$0.00	$0.00	$135.00
29.	Criminal History Letter Fee	$150.00	$0.00	$0.00	$0.00	$0.00	$150.00

Figure: 28 TAC §3.3705(f)(1)

Texas Department of Insurance Notice

- *You have the right to an adequate network of preferred providers (also known as "network providers").*
    - *If you believe that the network is inadequate, you may file a complaint with the Texas Department of Insurance.*
    - *If you obtain out-of-network services because no preferred provider was reasonably available, you may be entitled to have the claim paid at the in-network [~~in-network coinsurance~~] rate and your out-of-pocket expenses counted toward your in-network deductible and [~~, out-of-network, or general~~] out-of-pocket maximum[~~, as appropriate~~].*
- *You have the right to obtain advance estimates:*
    - *of the amounts that the providers may bill for projected services, from your out-of-network provider; and*
    - *of the amounts that the insurer may pay for the projected services, from your insurer.*
- *You may obtain a current directory of preferred providers at the following website:* [website address to be filled out by the insurer or marked inapplicable if the insurer does not maintain an Internet website providing information regarding the insurer or the health insurance policies offered by the insurer for use by current or prospective insureds or group contract holders] *or by calling* [to be filled out by the insurer] *for assistance in finding available preferred providers. If the directory is materially inaccurate, you may be entitled to have an out-of-network claim paid at the in-network level of benefits.*
- *If you are treated by a provider or hospital that is not a preferred provider [~~contracted with your insurer~~], you may be billed for anything not paid by the insurer.*
- *If the amount you owe to an out-of-network hospital-based radiologist, anesthesiologist, pathologist, emergency department physician, or neonatologist is greater than $1,000 (not including your copayment, coinsurance, and deductible responsibilities) for services received in a network hospital, you may be entitled to have the parties participate in a teleconference, and, if the result is not to your satisfaction, in a mandatory mediation at no cost to you. You can learn more about mediation at the Texas Department of Insurance website: www.tdi.texas.gov/consumer/cpmmediation.html [~~www.tdi.state.tx.us/consumer/cpmmediation.html~~].*

Figure: 28 TAC §3.3705(f)(2)

Texas Department of Insurance Notice

- *An exclusive provider benefit plan provides no benefits for services you receive from out-of-network providers, with specific exceptions as described in your policy and below.*

- *You have the right to an adequate network of preferred providers (known as "network providers").*

    - *If you believe that the network is inadequate, you may file a complaint with the Texas Department of Insurance.*

- *If your insurer approves a referral for out-of-network services because no preferred provider is available, or if you have received out-of-network emergency care, your insurer must, in most cases, resolve the nonpreferred provider's bill so that you only have to pay any applicable coinsurance, copay, and deductible amounts.*

- *You may obtain a current directory of preferred providers at the following website:* [website address to be filled out by the insurer or marked inapplicable if the insurer does not maintain an Internet website providing information regarding the insurer or the health insurance policies offered by the insurer for use by current or prospective insureds or group contract holders] *or by calling* [to be filled out by the insurer] *for assistance in finding available preferred providers. If the directory is materially inaccurate, you may be entitled to have an out-of-network claim paid at the in-network level of benefits.*

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas State Affordable Housing Corporation

Notice of Request for Proposals

The Texas State Affordable Housing Corporation (Corporation) is issuing Requests for Proposals (RFPs) for the following services: Bond Counsel Services, Issuer Counsel Services, and Financial Advisor Services. A copy of each RFP can be found on the Corporation's website www.tsahc.org.

The deadline for submitting responses to these RFPs is 5:00 p.m. on Friday, November 15, 2012. Responses may be emailed or mailed; however, faxed responses will not be accepted. For questions or comments, please contact David Danenfelzer at (512) 477-3562 or by email at ddanenfelzer@tsahc.org.

TRD-201205469
David Long
President
Texas State Affordable Housing Corporation
Filed: October 19, 2012

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Office of the Attorney General

Notice of Settlement of a Texas Water Code and Texas Health and Safety Code Enforcement Action

Notice is hereby given by the State of Texas of the following proposed resolution of an environmental enforcement lawsuit under the Texas Water Code and Texas Health and Safety Code. Before the State may settle a judicial enforcement action under the Texas Water Code, the State shall permit the public to comment in writing on the proposed judgment. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed agreed judgment if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Texas Water Code and Texas Health and Safety Code.

Case Title and Court: Harris County, Texas and the State of Texas acting by and through the Texas Commission on Environmental Quality v. Larry D. Weise, Cause No. 2012-20953, in the 80th Judicial District Court, Harris County, Texas.

Nature of Defendant's Operations: Defendant Larry Weise owns two residential lots in Harris County on which he has been illegally dumping municipal solid waste (MSW). Claims settled include allegations that the Defendant caused, suffered, or allowed the disposal of MSW without authorization.

Proposed Agreed Judgment: The Agreed Final Judgment orders Larry Weise to pay $15,000 in civil penalties to be divided equally between Harris County and the State of Texas. Defendant shall pay $1,000 upon entry of judgment, while $14,000 shall be permanently deferred if Defendant completely removes and properly disposes of all MSW within 45 days of the effective date of the Agreed Final Judgment. Defendant shall pay the State's attorney's fees in the amount of $500. Defendant shall pay all court costs.

For a complete description of the proposed settlement, the complete proposed Agreed Final Judgment should be reviewed. Requests for copies of the judgment, and written comments on the proposed settlement, should be directed to Ryan P. Fite, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

TRD-201205493
Katherine Cary
General Counsel
Office of the Attorney General
Filed: October 22, 2012

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Automobile Burglary and Theft Prevention Authority

Request for Applications under the Automobile Burglary and Theft Prevention Authority Fund

The Automobile Burglary and Theft Prevention Authority (ABTPA) is soliciting applications for grants to be awarded for projects under the ABTPA Fund. This grant cycle will be one year in duration, and will begin on September 1, 2013. One or more of the following types of projects may be awarded, depending on the availability of funds:

Law Enforcement/Detection/Apprehension Projects, to establish motor vehicle burglary and theft enforcement teams and other detection/apprehension programs. Priority funding may be provided to state, county, precinct commissioner, general or home rule cities for enforcement programs in particular areas of the state where the problem is assessed as significant. Enforcement efforts covering multiple jurisdictional boundaries may receive priority for funding.

Prosecution/Adjudication/Conviction Projects, to provide for prosecutorial and judicial programs designed to assist with the prosecution of persons charged with motor vehicle burglary and theft offenses.

Prevention, Anti-Theft Devices and Automobile Registration Projects, to test experimental equipment which is considered to be designed for auto theft deterrence and registration of vehicles in the Texas Help End Auto Theft (H.E.A.T.) Program.

Reduction of the Sale of Stolen Vehicles or Parts Projects, to provide vehicle identification number labeling, including component part labeling and etching methods designed to deter the sale of stolen vehicles or parts.

Public Awareness and Crime Prevention/Education/Information Projects, to provide education and specialized training to law enforcement officers in auto burglary and theft prevention procedures, provide information linkages between state law enforcement agencies on auto theft crimes, and develop a public information and education program on theft prevention measures.

Eligible Applicants

State agencies, local general-purpose units of government, independent school districts, nonprofit, and for profit organizations are eligible to apply for grants for automobile burglary and theft prevention assistance projects. Nonprofit and profit organizations shall be required to provide with their grant applications sufficient documentation to evaluate the credibility and the community support of the organization and the viability of the organization's existing activities in the context of providing automobile burglary and theft prevention assistance.

Contact Person

Detailed specifications, including selection process and schedule for workshops for applicants will be made available through ABTPA. Copies of the Administrative Guide and the application can be found at www.txwatchyourcar.com.

Contact Charles Caldwell, ABTPA Director, Texas Automobile Burglary and Theft Prevention Authority, (512) 374-5101.

Application Workshops

A **mandatory workshop** for all applicants that wish to apply for the Texas Automobile Burglary and Theft Prevention Grant funds with at least **one (1)** representative has been selected to be held:

Monday - Wednesday, January 28-30, 2013, Austin, Texas, 1:30 p.m. - 5:00 p.m., Doubletree Hotel Austin, 6505 IH-35 North, Austin, Texas 78752, 1-800-347-0330, *Group Code: Texas Department of Motor Vehicles.*

Attendees are responsible for making individual hotel reservations. Registration for the workshops must be done on the ABTPA Website at www.txwatchyourcar.com.

Application Deadline and Submission Requirements

Submission of the Application will be via the ABTPA website at www.txwatchyour.com Grant System. In addition, one hardcopy of the original application must be submitted. The Authority must receive applications by 5:00 p.m., Friday, May 3, 2013 or postmarked by May 3, 2013. Each Application must:

1. Include all signed certifications and signature pages.

2. If submitting hardcopy, application can be mailed or delivered to: **Texas Automobile Burglary and Theft Prevention Authority, 4000 Jackson Avenue, Austin, Texas 78731**

3. Submit the **original copy** of the proposal.

4. Facsimile transmissions will not be accepted.

If mailed, applications must be marked "Personal and Confidential" and addressed to the contact person listed above. If delivered, please leave application with the contact person (or designee) at the address listed.

Selection Process

Applications will be selected according to §§57.2, 57.4, 57.7, and 57.14, as published in Title 43, Part 3, Chapter 57 of the Texas Administrative Code. Grant award decisions by ABTPA are final and not subject to judicial review. Grants will be awarded on or before September 1, 2013.

TRD-201205490
Charles Caldwell
Director
Automobile Burglary and Theft Prevention Authority
Filed: October 22, 2012

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Cancer Prevention and Research Institute of Texas

Request for Applications C-13-COMP-2 Company Commercialization Award

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks applications from Texas-based companies for innovative products addressing critically important needs related to diagnosis, prevention, and/or treatment of cancer and the product development infrastructure needed to support these efforts.

The goal of the Company Commercialization Award is to finance the development of innovative products, services, and infrastructure with significant potential impact on patient care. These investments will provide companies or limited partnerships located and headquartered in Texas, or those that are willing to relocate to Texas, with the opportunity to further the development of new products for the diagnosis, treatment, or prevention of cancer; to establish infrastructure that is critical to the development of a robust industry; or to fill a treatment or research gap. This award is intended to support companies that will be staffed with a majority of Texas-based employees, including C-level executives. The long-term objective of this award is to support commercially oriented therapeutic and medical technology products, diagnostic- or treatment-oriented information technology products, diagnostics, tools, services, and infrastructure projects. Eligible products or services include--but are not limited to--therapeutics (e.g., small molecules and biologics), diagnostics, devices, and potential breakthrough technologies, including software and research discovery techniques. Eligible stages of development include translational research, proof-of-concept studies, preclinical studies, and Phase I or Phase II clinical trials. By exception, Phase III clinical trials and later stage commercialization projects will be considered where circumstances warrant CPRIT investment.

To be eligible for the three (3) year funding award, company applicants must have already received at least one round of professional institutional investment and must have or must commit to headquartering and registration in Texas; the majority of staff residing in or relocated to Texas; and use of Texas-based subcontractors and suppliers, unless adequate justification is provided for the use of out-of-state entities. No maximum is set on the amount of funding that can be requested. Funding will be tranched and will be tied to the achievement of contract-specified milestones. Funds may be used for salary and fringe benefits, research supplies, equipment, clinical trial expenses, intellectual property protection, external consultants and service providers, and other appropriate development costs, subject to certain limitations set forth by Texas state law.

A detailed Request for Applications (RFA) is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on October 25, 2012 through 3:00 p.m. Central Time on November 15, 2012, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). CPRIT will not accept applications that are not submitted via the CPRIT Application Receipt System.

TRD-201205470
William "Bill" Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Filed: October 22, 2012

♦ ♦ ♦

Request for Applications C-13-FORM-2 Company Formation Award

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks applications from Texas-based companies for innovative products addressing critically important needs related to diagnosis, prevention, and/or treatment of cancer and the product development infrastructure needed to support these efforts.

The goal of the Company Formation Award is to support the formation and establishment of new start-up companies in Texas that will develop products to significantly impact cancer care. These companies must be Texas-based or be willing to relocate to and remain in Texas for a specified period upon funding. Eligible products or services include, but are not limited to, therapeutics (e.g., small molecules and biologics), diagnostics, devices, and potential breakthrough technologies, including software and research discovery techniques. Eligible stages of development include translational research, proof-of-concept studies, preclinical studies, and Phase I or Phase II clinical trials. By exception, Phase III clinical trials and later stage commercialization projects will be considered where circumstances warrant CPRIT investment.

To be eligible for the award, company applicants must be early-stage start-up companies with no previous rounds of professional institutional investment (i.e., those that have not yet received Series A financing.) Successful applicants must commit to headquarters or substantial business functions of the company in Texas; personnel sufficient to operate the Texas-based research and/or development activities of the company, along with appropriate management, relocated to or hired from within Texas. This is a three-year funding program with an opportunity for renewal after the term expires. No maximum is set on the amount of funding that can be requested. Funding will be tranched and will be tied to the achievement of contract-specified milestones. Funds may be used for salary and fringe benefits, research supplies, equipment, clinical trial expenses, intellectual property protection, external consultants and service providers, and other appropriate development costs, subject to certain limitations set forth by Texas state law.

A detailed Request for Applications (RFA) is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on October 25, 2012 through 3:00 p.m. Central Time on November 15, 2012, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). CPRIT will not accept applications that are not submitted via the CPRIT Application Receipt System.

TRD-201205471
William "Bill" Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Filed: October 22, 2012

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Request for Applications C-13-RELO-2 Company Relocation Award

The Cancer Prevention and Research Institute of Texas (CPRIT) seeks applications from existing oncology-focused companies or limited partnerships that are willing to relocate to Texas for innovative products addressing critically important needs related to diagnosis, prevention, and/or treatment of cancer and the product development infrastructure needed to support these efforts.

The goal of the Company Relocation Award is to attract industry partners in the field of cancer care to advance economic development and cancer care efforts in the State by recruiting to Texas companies with proven management teams who are focused on exceptional product opportunities to improve cancer care. CPRIT expects outcomes of supported activities to directly and indirectly benefit subsequent cancer research efforts, cancer public health policy, or the continuum of cancer care--from prevention to treatment and cure. To fulfill this vision, applications may address any product development topic or issue related to cancer biology, causation, prevention, detection or screening, treatment, or cure. The overall goal of this award program is to improve outcomes of patients with cancer by increasing the availability of Food and Drug Administration (FDA)-approved therapeutic interventions with a primary focus on Texas-centric programs. Eligible products or services include--but are not limited to--therapeutics (e.g., small molecules and biologics), diagnostics, devices, and potential breakthrough technologies, including software and research discovery techniques. Eligible stages of development include translational research, proof-of-concept studies, preclinical studies, and Phase I or Phase II clinical trials. By exception, Phase III clinical trials and later stage commercialization projects will be considered where circumstances warrant CPRIT investment.

To be eligible for the award, company applicants must presently be based outside Texas and must have already received at least one round of professional institutional investment (e.g., Series A financing). In addition, award recipients must commit to headquarters or substantial business functions of the company in Texas; personnel sufficient to operate the Texas-based research and/or development activities of the company, along with appropriate management, relocated to or hired from within Texas; and use of Texas-based subcontractors and suppliers unless adequate justification is provided for the use of out-of-state entities. This is a three-year funding program with an opportunity for renewal after the term expires. Financial support will be awarded based upon the breadth and nature of the development program proposed. While requested funds must be well justified, no maximum is set on the amount that may be requested. Funding will be tied to the achievement of contract-specified milestones. Funds may be used for salary and fringe benefits, research supplies, equipment, clinical trial expenses, intellectual property protection, external consultants and service providers, and other appropriate development costs, subject to certain limitations set forth by Texas state law.

A detailed Request for Applications (RFA) is available online at www.cprit.state.tx.us. Applications will be accepted beginning at 7:00 a.m. Central Time on October 25, 2012 through 3:00 p.m. Central Time on November 15, 2012, and must be submitted via the CPRIT Application Receipt System (www.CPRITGrants.org). CPRIT will not accept applications that are not submitted via the CPRIT Application Receipt System.

TRD-201205473
William "Bill" Gimson
Executive Director
Cancer Prevention and Research Institute of Texas
Filed: October 22, 2012

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Comptroller of Public Accounts

Certification of the Average Taxable Price of Gas and Oil - September 2012

The Comptroller of Public Accounts, administering agency for the collection of the Crude Oil Production Tax, has determined as required by Tax Code, §202.058, that the average taxable price of crude oil for reporting period September 2012, is $67.47 per barrel for the three-month period beginning on June 1, 2012, and ending August 31, 2012. Therefore, pursuant to Tax Code, §202.058, crude oil produced during the month of August 2012, from a qualified Low-Producing Oil Lease, is not eligible for exemption from the crude oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined as required by Tax Code, §201.059, that the average taxable price of gas for reporting period September 2012, is $2.23 per mcf for the three-month period beginning on June 1, 2012, and ending August 31, 2012. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of September 2012, from a qualified Low-Producing Well, is eligible for 100% credit on the natural gas production tax imposed by Tax Code, Chapter 201.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of West Texas Intermediate crude oil for the month of September 2012, is $94.56 per barrel. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall not exclude total revenue received from oil produced during the month of September 2012, from a qualified low-producing oil well.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of gas for the month of September 2012, is $2.92 per MMBtu. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall exclude total revenue received from gas produced during the month of September 2012, from a qualified low-producing gas well.

Inquiries should be directed to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

TRD-201205510
Ashley Harden
General Counsel
Comptroller of Public Accounts
Filed: October 24, 2012

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Notice of Intent to Amend Contract

Pursuant to Chapter 2254, Subchapter B, Texas Government Code, the Comptroller of Public Accounts (Comptroller) announces this notice of intent to amend an existing major consulting services contract with StatCom (Consultant), located at 3399 F.M. 102 North, Eagle Lake, Texas 77434.

The contract was awarded previously under Request for Proposals (RFP 202a) issued in the June 24, 2011, issue of the *Texas Register* (36 TexReg 3975), for the provision of statistician consulting services to the Comptroller on statistical issues and related issues in connection with the Comptroller's Annual Property Value Study. The current term of the contract is September 14, 2011 through August 31, 2013.

The total amount of the contract budget, as amended, is not to exceed $90,000. The Consultant will report to the Comptroller on an as-needed, as requested basis with multiple reports submitted no later than August 31, 2013.

TRD-201205523
Jason C. Frizzell
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: October 24, 2012

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Notice of Request for Proposals

Pursuant to §1201.027, Texas Government Code; Chapter 2254, Subchapter B, Texas Government Code; and Chapter 404, Subchapter H, Texas Government Code, the Texas Comptroller of Public Accounts ("Comptroller") announces its Request for Proposals No. 206a ("RFP") from qualified, independent firms to serve as Financial Advisor to Comptroller. Comptroller desires to obtain the services of a Financial Advisor related to the document preparation, issuance, sale, and delivery of Tax and Revenue Anticipation Notes, including Commercial Paper Notes ("Notes") as well as assistance in handling of disclosure issues relating to the Notes. The successful respondent will be expected to begin performance of the contract on or after January 1, 2013.

Contact: The RFP will be available electronically on the Electronic State Business Daily at: http://esbd.cpa.state.tx.us on Friday, November 2, 2012, after 10:00 a.m., CT. Parties interested in obtaining a hard copy of the RFP should contact Jennifer W. Sloan, Assistant General Counsel, Contracts, Texas Comptroller of Public Accounts, 111 E. 17th St., Rm. 201, Austin, Texas 78774 ("Issuing Office"), telephone number: (512) 305-8673.

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and non-mandatory Letters of Intent must be received at the above-referenced address not later than 2:00 p.m., CT, on Wednesday, November 14, 2012. Questions received after this time and date will not be considered. Prospective respondents are encouraged to fax or e-mail questions and non-mandatory Letters of Intent to (512) 463-3669 or contracts@cpa.state.tx.us to ensure timely receipt. On or about Friday, November 16, 2012, Comptroller expects to post responses to questions as a revision to the Electronic State Business Daily notice on the issuance of the RFP.

Closing Date: Proposals must be delivered to the Issuing Office no later than 2:00 p.m., CT, on Friday, December 7, 2012. Proposals received after this time and date will not be considered under any circumstances.

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. Comptroller shall make the final decision on any contract award or awards resulting from the RFP. Comptroller reserves the right, in its sole discretion, to accept or reject any or all proposals submitted. Comptroller is not obligated to award or execute any contracts on the basis of this notice or the distribution of any RFP. Comptroller shall not pay for any costs incurred by any entity in responding to this notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - November 2, 2012, 10:00 a.m., CT; Questions and Non-Mandatory Letter of Intent Due - November 14, 2012, 2:00 p.m., CT; Official Responses to Questions posted - November 16, 2012, or as soon thereafter as practical; Proposals Due - December 7, 2012, 2:00 p.m., CT, Contract Execution - December 14, 2012, or as soon thereafter as practical; and Commencement of Project Activities - on or after January 1, 2013.

TRD-201205508
Jennifer W. Sloan
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: October 24, 2012

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Notice of Request for Proposals

Pursuant to §1201.027, Texas Government Code; Chapter 2254, Subchapter A, Texas Government Code; and Chapter 404, Subchapter H, Texas Government Code, the Texas Comptroller of Public Accounts ("Comptroller") announces its Request for Proposals No. 206b ("RFP") from qualified, independent law firms to serve as Bond Counsel to Comptroller. Comptroller desires to obtain the services of Bond Counsel in connection with a variety of issues related to the issuance, sale, and delivery of Tax and Revenue Anticipation Notes, including Com-

mercial Paper Notes ("Notes") as well as assistance in handling all disclosure issues relating to the Notes. The successful respondent will be expected to begin performance of the contract on or after January 1, 2013.

Contact: The RFP will be available electronically on the Electronic State Business Daily at: http://esbd.cpa.state.tx.us on Friday, November 2, 2012, after 10:00 a.m., CT. Parties interested in a hard copy of the RFP should contact Jennifer W. Sloan, Assistant General Counsel, Contracts, Texas Comptroller of Public Accounts, 111 E. 17th St., Rm. 201, Austin, Texas 78774 ("Issuing Office"), telephone number: (512) 305-8673.

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and non-mandatory Letters of Intent must be received at the above-referenced address not later than 2:00 p.m., CT, on Wednesday, November 14, 2012. Questions received after this time and date will not be considered. Prospective respondents are encouraged to fax or e-mail questions and non-mandatory Letters of Intent to (512) 463-3669 or contracts@cpa.state.tx.us to ensure timely receipt. On or about Friday, November 16, 2012, Comptroller expects to post responses to questions as a revision to the Electronic State Business Daily notice on the issuance of the RFP.

Closing Date: Proposals must be delivered to the Issuing Office no later than 2:00 p.m., CT, on Friday, December 7, 2012. Proposals received after this time and date will not be considered under any circumstances.

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. Comptroller shall make the final decision on any contract award or awards resulting from the RFP. Comptroller reserves the right, in its sole discretion, to accept or reject any or all proposals submitted. Comptroller is not obligated to award or execute any contracts on the basis of this notice or the distribution of any RFP. Comptroller shall not pay for any costs incurred by any entity in responding to this notice or the RFP.

The anticipated schedule of events is as follows: Issuance of RFP - November 2, 2012, 10:00 a.m., CT; Questions and Non-Mandatory Letter of Intent Due - November 14, 2012, 2:00 p.m., CT; Official Responses to Questions posted - November 16, 2012, or as soon thereafter as practical; Proposals Due - December 7, 2012, 2:00 p.m., CT, Contract Execution - December 14, 2012, or as soon thereafter as practical; and Commencement of Project Activities - on or after January 1, 2013.

TRD-201205509
Jennifer W. Sloan
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: October 24, 2012

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005, and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/29/12 - 11/04/12 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 10/29/12 - 11/04/12 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-201205489
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: October 22, 2012

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Texas Education Agency

Request for Reading Diagnostic Instruments

Description. The Texas Education Agency (TEA) is notifying publishers that reading diagnostic instruments for Prekindergarten-Grade 12 may be submitted for review for inclusion on the 2013-2014 Commissioner's List of Reading Instruments.

Kindergarten, Grade 1, and Grade 2

Reading diagnostic instruments for Kindergarten, Grade 1, and Grade 2 may be submitted for review. Texas Education Code (TEC), §28.006, authorizes the commissioner of education to develop recommendations for school districts to administer reading instruments to diagnose student reading development and comprehension.

In accordance with the TEC, §28.006(b), the commissioner shall adopt a list of reading instruments that school districts may use to diagnose student reading development and comprehension. Reading instruments placed on the list must be based on scientific research, evaluate individual student reading progress, and be used to identify students at risk for dyslexia or other reading difficulties. The list of reading instruments adopted under the TEC, §28.006(b), must also provide for diagnosing the reading development and comprehension of students participating in a program under the TEC, Chapter 29, Subchapter B (Bilingual Education and Special Language Programs).

Program Requirements. Since the 1998-1999 school year, school districts have been required to administer early reading instruments. Results from the reading instruments are used to inform instruction and provide additional support assistance for students struggling to achieve literacy success. Results from these reading instruments must be reported to the commissioner, the local school board, and the parent and/or guardian of students tested.

Due to continued budgetary limitations, a cap of $5 per student every four years will remain on each complete Test Option for Kindergarten, Grade 1, and Grade 2 on the 2013-2014 Commissioner's List of Reading Instruments. For the 2013-2014 school year, school districts and open-enrollment charter schools will purchase reading instruments directly from the publisher/vendor and file for reimbursements accordingly. If the cost of the Test Option exceeds the $5 per student limit established, the state will reimburse the school district or open-enrollment charter school at the limit established. The school district or open-enrollment charter school is responsible for the remainder of the cost of the Test Option.

Selection Criteria Specific to Reading Diagnostic Instruments for Kindergarten, Grade 1, and Grade 2. Publishers will be responsible for submitting tests they wish to have considered for inclusion on the 2013-2014 Commissioner's List of Reading Instruments. All tests submitted for review must be based on scientific research and must be submitted with evidence of reliability and validity for assessing key reading domains and identifying children at risk of reading failure, including the identification of children with dyslexia. Submitted evidence must demonstrate that the test meets the state criteria for reliability and validity. Instruments will be evaluated in terms of validity, reliability, and ease of administration/implementation by the classroom teacher. Consideration will also be given to the number of domains covered by the test and the number of additional tests that

would need to be purchased by schools in order to cover all required domains. Reading instruments (English and Spanish) submitted for review must address at least one of the following five domains: (1) phonological awareness; (2) graphophonemic knowledge; (3) word reading; (4) oral reading accuracy; and (5) comprehension of text, as appropriate for Kindergarten, Grade 1, and Grade 2. As in previous years, it may be necessary to use a combination of instruments to form a Test Option to assess all required domains.

Grade 7

Reading diagnostic instruments for Grade 7 also may be submitted for review. In accordance with the TEC, §28.006(c-1), each school district shall administer at the beginning of Grade 7 a reading instrument adopted by the commissioner to each student whose performance on the assessment instrument in reading administered under the TEC, §39.023(a), to the student in Grade 6 did not demonstrate reading proficiency, as determined by the commissioner. The district shall administer the reading instrument in accordance with the commissioner's recommendations under the TEC, §28.006(a)(1).

Program Requirements. Since the 1998-1999 school year, school districts have been required to administer early reading instruments. Results from the reading instruments are used to inform instruction and provide additional support for students struggling to achieve literacy success. Results from these reading instruments must be reported to the commissioner, the local school board, and the parent and/or guardian of students tested.

For the Grade 7 reading diagnostic instrument, school districts and open-enrollment charter schools have the option to use the state-owned Texas Middle School Fluency Assessment (TMSFA). The TMSFA and training on how to administer and interpret results of the instrument are provided through the regional education service centers at no cost to school districts and open-enrollment charter schools. The TMSFA also provides reading instruments for Grades 6 and 8. If school districts or open-enrollment charter schools opt to use a Grade 7 reading instrument other than the TMSFA, they must cover the full cost of the instrument.

For the Grade 7 reading diagnostic instrument, 19 TAC §101.6001, Texas Middle School Diagnostic Reading Assessment, states that an alternate diagnostic reading instrument (an instrument used in place of the TMSFA) must: (1) be based on published scientific research in reading; (2) be age and grade-level appropriate, valid, and reliable; (3) identify specific skill difficulties in word analysis, fluency, and comprehension; and (4) assist the teacher in making individualized instructional decisions based on the assessment results.

Information on how reading instruments will be evaluated can be found in the *Guidelines for the Implementation of TEA Criteria for the Evaluation of English Reading Instruments* section of this notice.

Prekindergarten and Grades 3, 4, 5, 6, 8, 9, 10, 11, and 12

In order to create a comprehensive list of reading diagnostic instruments from Prekindergarten-Grade 12, publishers are also invited to submit early literacy and reading instruments for Prekindergarten and Grades 3, 4, 5, 6, 8, 9, 10, 11, and 12. Information on how early literacy and reading instruments will be evaluated can be found in the *Guidelines for the Implementation of TEA Criteria for the Evaluation of English Reading Instruments* section of this notice. All instruments found to be conforming to the specified guidelines will be published in the 2013-2014 Commissioner's List of Reading Instruments. While school districts and open-enrollment charter schools will not be reimbursed or provided no-cost copies of instruments in Prekindergarten and Grades 3, 4, 5, 6, 8, 9, 10, 11, and 12, they may refer to the list to ensure that they are selecting instruments that are based on scientific research, valid, and reliable and that measure the appropriate set of reading skills.

2013-2014 Commissioner's List of Reading Instruments. The list of early literacy and reading instruments will be made available late spring/early summer so that school districts and open-enrollment charter schools may order instruments for the 2013-2014 school year. Instruments selected for the Commissioner's List of Reading Instruments will remain on the list for four years unless the approved instrument is no longer available from the publisher or the publisher submits an updated version of the instrument prior to the end of the four-year approval cycle. Reading instruments approved in earlier years do not need to be resubmitted this year if still within the four-year approval cycle but must be resubmitted when the four-year cycle has expired.

Please note: The allocation of $5 per student every four years is only for Kindergarten, Grade 1, and Grade 2. There is no reimbursement for other grades, but the TEA will include approved instruments on the Commissioner's List of Reading Instruments for the 2013-2014 school year.

Guidelines for the Implementation of TEA Criteria for the Evaluation of English Reading Instruments

1. The instrument must be intended for use in Prekindergarten-Grade 12.

2. The length of time needed to administer the instrument, plus other instruments necessary to assess all relevant domains, must be less than 60 minutes per student. That is, total assessment time for evaluation of all relevant skills at each grade level must not exceed 60 minutes.

3. The domains addressed by the instrument must directly assess early literacy skills or reading skills, preferably as they are specified in the Texas Prekindergarten Guidelines and the Texas Essential Knowledge and Skills, respectively. Because measurement of early reading skills is desired, instruments that only measure reading-related skills (e.g., book and print awareness) are insufficient as measures of early reading.

4. The instrument should have a scoring structure that yields a separate score for each early literacy skill or reading skill included at each grade level. For this review, an instrument is only considered to "assess" a domain if it provides a score for that domain. See Table 1 for the recommended and required domains for each grade.

Table 1. Reading Assessment Domains for PreK-12 public and charter schools - Required and Recommended

Domain		Pre-K	Kindergarten	First Grade	Second Grade	Third Grade
Phonemic Awareness (PA)		Required	Required	Required	n/a	n/a
Phonics (PH/GK)		n/a	Required	Required	Required	*Recommended*
Comprehension (CO)	Listening	n/a	Required	n/a	n/a	n/a
	Reading	n/a	n/a	Required	Required	Required
Reading Fluency (FL)		n/a	n/a	*Recommended*	*Recommended*	Required
Vocabulary (VO)		*Recommended*	*Recommended*	*Recommended*	*Recommended*	*Recommended*

Domain		Fourth-Eighth Grade	Ninth-Twelfth Grade
Phonemic Awareness (PA)		n/a	n/a
Phonics (PH/GK)		n/a	n/a
Comprehension (CO)	Listening	n/a	n/a
	Reading	*Recommended*	*Recommended*
Reading Fluency (FL)		*Recommended*	*Recommended*
Vocabulary (VO)		*Recommended*	*Recommended*

5. The instrument must be individually administered. Although technically group-administered assessments may be individually administered, House Bill (HB) 107, 75th Texas Legislature, 1997, specifically mandated assessments intended for individual administration. Thus, tests primarily intended for group administration were not considered to meet the intent of HB 107.

6. Administration of the instrument by a classroom teacher must be allowable. Specifically, the qualifications for those who administer and interpret the instrument (as specified in publisher's guidelines) should be within the coursework and/or licenses typically completed by teachers with education certification. Administration procedures requiring timing, basals, ceilings, complex judgments, and/or subjective ratings require the special training of a diagnostician and may be inappropriate for teacher administration.

7. If the instrument is norm-referenced, it must have an appropriate national norming sample as evidenced by the size of the sample and groups represented. Norm-referenced tests must be representative of the population of students in Prekindergarten-Grade 12. Criterion-referenced decisions about criterion mastery, non-mastery, risk, and impairment have special requirements for reliability and validity (see Guidelines 8 and 9).

8. The instrument must have, at a minimum, adequate reliability established by independent research as evidenced by internal consistency, alternate form and/or test-retest reliability data, or must provide suitable psychometric data from the test development process for tests based on Item Response Theory, including, but not limited to, the standard error of measurement, indices of item discrimination and difficulty, and total test information. Classifications resulting from criterion-referenced tests must be shown to be reliable. Instruments that depend on examiner ratings must demonstrate appropriate forms of interrater reliability.

9. Decisions based on test results must be supported by validity evidence established by independent research such as evidence of criterion validity (either concurrent or predictive), construct and content validity data, and discriminant and convergent validity. Studies of test dimensionality (e.g., factor analysis), differential item functioning, or predictive utility involving multiple measures should be provided wherever available. Classifications resulting from criterion-referenced tests must be shown to be valid and must demonstrate both sensitivity and specificity.

10. Normative and technical data for the instrument must be no more than 15 years old.

11. While it is desirable to determine risk of dyslexia and other reading-related difficulties, there exists no single reliable and valid measurement method for determining such risks. According to research in measuring reading disabilities, instruments that measure phonological awareness and single-word decoding may have utility in making judgments about dyslexia and other reading disabilities. Therefore, instruments that include measures of phonological awareness and single-word decoding will be identified, but the validity and utility of using such instruments in identifying disabilities must be the subject of specific follow-up research.

Please note: All submissions will be reviewed using the *Guidelines for the Implementation of TEA Criteria for the Evaluation of English Reading Instruments* as an outline for evaluation; thus, it is highly recommended that all submissions directly address each guideline. Further, online or electronic tests submitted for evaluation must include online access information (e.g., web address, login, and password) and/or an installable copy of the software; in addition, a paper version of the submission must be received by the deadline. Lastly, submissions must include the name, direct line phone number, and email address for a primary contact person who can be contacted in the event reviewers need to ask questions or request more information pertaining to the submission. Delays in responding to reviewers' questions may result in an incomplete review; incomplete reviews will not be considered for inclusion on the Commissioner's List of Reading Instruments.

Proposals must be submitted to Dr. Gregory Roberts; The University of Texas at Austin; 1 University Station D4900; Austin, Texas 78712 by 5:00 p.m. (Central Time), Friday, January 11, 2013, to be considered for inclusion on the 2013-2014 Commissioner's List of Reading Instruments.

Further Information. For clarifying information, contact the TEA Division of Federal and State Education Policy at (512) 463-7540.

TRD-201205516
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Filed: October 24, 2012

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Employees Retirement System of Texas

Request for Proposal to Provide Succession Planning Consulting Services

The Employees Retirement System of Texas ("ERS") is issuing a Request for Proposal ("RFP") seeking proposals from firms interested in providing succession planning consulting services. The initial term of the Contractual Agreement ("Contract") will begin upon Contract execution and extend through August 31, 2013. The RFP may be obtained from the Electronic State Business Daily ("ESBD") on or after November 2, 2012 by going to the following link: *http://esbd.cpa.state.tx.us.*

Anyone wishing to respond to the RFP shall meet the following preferred criteria: (a) maintain a principal place of business in the United States of America; (b) have been in existence as a business entity and providing succession planning consulting services for a minimum of three (3) years; (c) have all necessary permits, licenses, and other professional credentials; (d) be in good financial standing, not in any form of bankruptcy, and current in the payment of all taxes and fees; and (e) maintain applicable liability insurance at the time its proposal is submitted and throughout the term of the Contract. Further requirements are set out in the RFP.

Questions should be submitted no later than November 14, 2012, at 4:00 p.m. Central Time, by forwarding them to Chris Wood, ERS Purchasing Team Lead, at *chris.wood@ers.state.tx.us.* For questions submitted prior to the inquiry deadline, ERS shall post the question and response on the ESBD by 5:00 p.m. Central Time on November 20, 2012.

The deadline for submitting proposals is December 3, 2012, at 12:00 p.m. Central Time. ERS will base its evaluation and selection of a consulting firm on factors including, but not limited to, the following (which are not necessarily listed in order of priority): (a) responsiveness to the RFP; (b) experience in conducting succession planning consulting services within the past five (5) years (preference will be given for experience specific to the area of leadership development); (c) references; (d) experience, qualifications and past performance of staff who will work on the project; (e) the proposed work plan (including the methodology and substance of the work plan); (f) the ability to work within the timeframe established by ERS; (g) financial stability; (h) cost; and (i) other factors as determined during the evaluation process. ERS may also give preference to an entity whose principal place of business is within the state of Texas or that uses Texas-based personnel to provide the services.

ERS reserves the right to reject any proposal submitted that does not fully comply with the RFP's instructions and criteria, to vary any RFP provision at any time prior to execution of a Contract and to call for new proposals if deemed by ERS to be in its best interests. ERS retains the right to approve the proposal that is in its best interests, and is under no legal requirement to execute a Contract on the basis of this notice or upon issuance of the RFP. ERS will not pay any costs incurred by anyone in responding to the RFP.

TRD-201205503
Paula A. Jones
General Counsel and Chief Compliance Officer
Employees Retirement System of Texas
Filed: October 23, 2012

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ, agency 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 December 3, 2012. TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be received by 5:00 p.m. on December 3, 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: American Concrete & Gunite, LP; DOCKET NUMBER: 2012-0890-IWD-E; IDENTIFIER: RN103152757; LOCATION: Weatherford, Parker County; TYPE OF FACILITY: ready-mix concrete plant; RULE VIOLATED: 30 TAC §§305.125(1) and (17), 319.1, and 319.7(d), and Texas Pollution Discharge Elimination System (TPDES) General Permit Number TXG110488, Part IV, Standard Permit Conditions Number 7(f), by failing to timely submit effluent monitoring results at the intervals specified in the permit; TWC, §26.121(a)(1), 30 TAC §305.125(1), and TPDES General Permit Number TXG110488, Part III, Permit Requirements Section A(1), by failing to comply with permitted effluent limits; and 30 TAC §§305.125(1) and (17), 319.1, and 319.4, and TPDES General Permit Number TXG110488, Part III, Permit Requirements Section A(2), by failing to monitor effluent at the intervals specified in the permit; PENALTY: $2,450; ENFORCEMENT COORDINATOR: Heather Brister, (254) 761-3034; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Aqua Utilities, Incorporated; DOCKET NUMBER: 2012-0858-MWD-E; IDENTIFIER: RN102956448; LOCATION: Wimberley, Hays County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and TCEQ Permit Number WQ0013989001, Permit Conditions Number 2.g, by failing to prevent the unauthorized discharge of wastewater into or adjacent to water in the state; TWC, §26.121(a)(1), 30 TAC §305.125(1), and TCEQ Permit Number WQ0013989001, Effluent Limitations and Monitoring Requirements Number IV. A, by failing to comply with permitted effluent limitations; and 30 TAC §305.125(1), and §319.5(d) and TCEQ Permit Number WQ0013989001, Monitoring Requirements Number 1 and Special Provisions Number 9, by failing to obtain and analyze soil samples from the root zones of the land application site; PENALTY: $21,089; ENFORCEMENT

COORDINATOR: JR Cao, (512) 239-2543; REGIONAL OFFICE: 12100 Park 35 Circle, Austin, Texas 78753, (512) 339-2929.

(3) COMPANY: ASAA Investment, Incorporated dba In & Out Express 2; DOCKET NUMBER: 2012-1051-PST-E; IDENTIFIER: RN102270691; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $1,625; ENFORCEMENT COORDINATOR: Jorge Ibarra, P.E., (817) 588-5890; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(4) COMPANY: Bandera Shell LLC dba Bandera Shell Car Care; DOCKET NUMBER: 2012-0904-PST-E; IDENTIFIER: RN101433076; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $5,000; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(5) COMPANY: Batesville Water Supply Corporation; DOCKET NUMBER: 2012-0743-MWD-E; IDENTIFIER: RN102940053; LOCATION: Batesville, Zavala County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §§305.125(17), 319.1, and 319.7(d) and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0014394001, Monitoring and Reporting Requirements Number 1, by failing to timely submit discharge monitoring reports for the monitoring period ending August 31, 2011 - December 31, 2011; and 30 TAC §305.125(17), and TPDES Permit Number WQ0014239001, Sludge Provisions, by failing to submit the annual sludge report for the monitoring period ending July 31, 2011 by September 30, 2011; PENALTY: $2,550; ENFORCEMENT COORDINATOR: Jeremy Escobar, (361) 825-3422; REGIONAL OFFICE: 707 East Calton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(6) COMPANY: BLACKLANDS INVESTMENT CORPORATION dba Bluff Dale Country Store; DOCKET NUMBER: 2012-1217-PST-E; IDENTIFIER: RN102270055; LOCATION: Bluff Dale, Erath 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: $3,750; ENFORCEMENT COORDINATOR: Andrea Park, (512) 239-4575; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: BURMHI & SONS, INCORPORATED dba Kilgore Food Mart; DOCKET NUMBER: 2012-1053-PST-E; IDENTIFIER: RN102457504; LOCATION: Kilgore, Gregg 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: $2,500; ENFORCEMENT COORDINATOR: Andrea Park, (512) 239-4575; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(8) COMPANY: City of Blanket; DOCKET NUMBER: 2011-2220-MWD-E; IDENTIFIER: RN104606561; LOCATION: Blanket, Brown County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0014618001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limits; 30 TAC §305.125(1) and (17) and §319.7(d), and TPDES Permit Number WQ0014618001, Monitoring and Reporting Requirements Number 1, by failing to timely submit discharge monitoring reports for the monitoring period ending July 31, 2011; and 30 TAC §305.125(1) and §319.4, and TPDES Permit Number WQ0014618001, Monitoring and Reporting Requirements Number 1, by failing to monitor effluent at intervals specified in the permit; PENALTY: $7,257; Supplemental Environmental Project offset amount of $7,257 applied to City-wide Collection Event and Erosion Control Project; ENFORCEMENT COORDINATOR: Heather Brister, (254) 761-3034; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(9) COMPANY: City of Moulton; DOCKET NUMBER: 2012-1107-PWS-E; IDENTIFIER: RN101391787; LOCATION: Moulton, Lavaca County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.113(f)(4) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligrams per liter for total trihalomethanes based on the running annual average; PENALTY: $168; ENFORCEMENT COORDINATOR: Jim Fisher, (512) 239-2537; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(10) COMPANY: City of Naples; DOCKET NUMBER: 2012-0048-MWD-E; IDENTIFIER: RN101918779; LOCATION: Naples, Morris County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010230001, Effluent Limitations and Monitoring Requirements Numbers 1, 3, and 6, by failing to comply with the permitted effluent limitations; and 30 TAC §305.125(1) and (17) and §319.7(d), and TPDES Permit Number WQ0010230001, Monitoring and Reporting Requirements Number 1, by failing to submit a complete discharge monitoring report for the monitoring period ending February 28, 2011, by the 20th day of the following month; PENALTY: $8,730; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 430-6023; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(11) COMPANY: COUSIN BROTHERS CORPORATION dba Express Truck Stop; DOCKET NUMBER: 2012-0675-PST-E; IDENTIFIER: RN101724235; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to 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 USTs; and 30 TAC §115.242(3) and Texas Health and Safety Code, §382.086(b), by failing to maintain the Stage II vapor recovery system in proper operating condition; PENALTY: $2,801; ENFORCEMENT COORDINATOR: Thomas Greimel, (512) 239-5690; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(12) COMPANY: David Fogle dba Enviro Waste Systems; DOCKET NUMBER: 2012-0997-MSW-E; IDENTIFIER: RN104557343; LOCATION: Willis, San Jacinto County; TYPE OF FACILITY: unauthorized municipal solid waste (MSW) transfer facility; RULE VIOLATED: 30 TAC §330.103(b)(3), by failing to ensure that MSW is unloaded and stored only at a facility authorized to accept the type of waste being transported; PENALTY: $7,875; ENFORCEMENT COORDINATOR: Thomas Greimel, (512) 239-5690; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(13) COMPANY: Greif Packaging LLC; DOCKET NUMBER: 2012-1099-IWD-E; IDENTIFIER: RN105204564; LOCATION: La Porte, Harris County; TYPE OF FACILITY: steel drum manufacturing plant with an associated wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1) and (17), and §319.7(d), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0004823000, Monitoring and Reporting Requirements Number 1, by failing to timely submit monitoring results at the intervals specified in the permit; and 30 TAC §305.125(1) and (17), and §319.1, and TPDES Permit Number WQ0004823000, Monitoring and Reporting Requirements Number 1, by failing to submit complete monitoring results at the intervals specified in the permit; PENALTY: $800; ENFORCEMENT COORDINATOR: Heather Brister, (254) 761-3034; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(14) COMPANY: KARS, INCORPORATED dba NW Highway Chevron; DOCKET NUMBER: 2012-1120-PST-E; IDENTIFIER: RN102009446; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $2,250; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(15) COMPANY: Khaled Karim and Shaki Pyakurel dba Kwick Korner Shell; DOCKET NUMBER: 2012-0340-PST-E; IDENTIFIER: RN102012473; LOCATION: Lufkin, Angelina County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.48(b), by failing to operate and maintain the underground storage tank (UST) system in accordance with accepted industry practices; 30 TAC §334.7(d)(3), by failing to notify the agency of any change or additional information regarding the USTs within 30 days of the occurrence of the change or addition; 30 TAC §334.50(a)(1)(A) and TWC, §26.3475(c)(1), by failing to provide a method of release detection capable of detecting a release from any portion of the UST system which contains regulated substances; 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 a month, in a manner sufficiently accurate to detect a release which equals or exceeds the sum of 1.0% of the total substance flow through for the month plus 130 gallons; and 30 TAC §334.50(d)(1)(B)(iii)(I) and TWC, §26.3475(c)(1), by failing to record inventory volume measurement for regulated substance inputs, withdrawals, and the amount still remaining in the tank each operating day; PENALTY: $10,132; ENFORCEMENT COORDINATOR: Maggie Dennis, (512) 239-2578; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(16) COMPANY: Kiewit Texas Construction L.P.; DOCKET NUMBER: 2011-0399-WR-E; IDENTIFIER: RN105966394; LOCATION: Comanche, Comanche County; TYPE OF FACILITY: construction site; RULE VIOLATED: TWC, §11.121 and 30 TAC §297.11, by failing to obtain authorization prior to impounding, diverting, storing or using state water; and TWC, §5.702 and 30 TAC §290.51(a)(3), by failing to pay public health service fees and associated late fees for TCEQ Financial Account Number 92200357; PENALTY: $615; ENFORCEMENT COORDINATOR: Jeremy Escobar, (361) 825-3422; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

(17) COMPANY: Melissa Lee Carpenter and Lynn Morren dba Chaplines Mobile Home Park; DOCKET NUMBER: 2012-0523-PWS-E; IDENTIFIER: RN101232536; LOCATION: Pearland, Brazoria County; TYPE OF FACILITY: mobile home park with a public water supply; RULE VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3), and §290.122(c)(2)(A), by failing to submit a Disinfectant Level Quarterly Operating Report (DLQOR) to the executive director each quarter by the tenth day of the month following the end of the quarter and by failing to provide public notice of the failure to submit a DLQOR to the executive director; 30 TAC §290.109(c)(3)(A)(ii) and §290.122(c)(2)(A), by failing to collect a set of repeat distribution coliform samples within 24 hours of being notified of a total coliform-positive sample result on a routine sample and by failing to provide public notification regarding the failure to conduct repeat sampling; 30 TAC §290.122(c)(2)(A), by failing to provide public notification regarding the failure to conduct raw groundwater source sampling; and 30 TAC §290.109(c)(2)(F) and §290.122(c)(2)(A), by failing to collect at least five routine distribution coliform samples the month following a total coliform-positive result and by failing to provide public notification regarding the failure to sample; PENALTY: $2,035; ENFORCEMENT COORDINATOR: Michaelle Sherlock, (210) 403-4076; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: OXID L.P.; DOCKET NUMBER: 2012-1136-IWD-E; IDENTIFIER: RN100210350; LOCATION: Houston, Harris County; TYPE OF FACILITY: organic chemical processing and blending; RULE VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0002102000, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; PENALTY: $2,500; ENFORCEMENT COORDINATOR: Jacquelyn Green, (512) 239-2587; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(19) COMPANY: PDK LIQUID STONE PARTNERS, L.P. dba Liquid-Stone Concrete; DOCKET NUMBER: 2012-0836-IWD-E; IDENTIFIER: RN105501852; LOCATION: Midlothian, Ellis County; TYPE OF FACILITY: ready-mix concrete; RULE VIOLATED: 30 TAC §§305.125(1) and (17), 319.1, and 319.7(d), and Texas Pollutant Discharge Elimination System General Permit Number TXG110728, Part IV, Standard Permit Conditions Number 7(f), by failing to timely submit effluent monitoring results at the intervals specified in the permit; PENALTY: $2,300; ENFORCEMENT COORDINATOR: Heather Brister, (254) 761-3034; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(20) COMPANY: Port of Houston Authority; DOCKET NUMBER: 2012-1042-MWD-E; IDENTIFIER: RN103123113; LOCATION: Houston, Harris County; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: Texas Pollutant Discharge Elimination System Permit Number WQ0012375001, Effluent Limitations and Monitoring Requirements Numbers 1, 2 and 3, 30 TAC §305.125(1) and TWC, §26.121(a), by failing to comply with permitted effluent limits; PENALTY: $8,250; Supplemental Environmental Project offset amount of $3,300 applied to Houston Arboretum and Nature

Center - Hurricane Ike Habitat Restoration and Removal of Invasive Species and $3,300 applied to Bayou Land Conservancy fka Legacy Land Trust - Spring Creek Greenway Project; ENFORCEMENT COORDINATOR: Jorge Ibarra, P.E., (817) 588-5890; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(21) COMPANY: SHAMU CORPORATION dba EZ for U Food Store; DOCKET NUMBER: 2012-0814-PST-E; IDENTIFIER: RN101854636; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.242(3)(K) and Texas Health and Safety Code, §382.085(b), by failing to maintain the Stage II vapor recovery system in proper operating condition and free of defects that would impair the effectiveness of the system, including but not limited to a system monitor or printer that is malfunctioning or out of paper; and 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $5,082; ENFORCEMENT COORDINATOR: Maggie Dennis, (512) 239-2578; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(22) COMPANY: T & C OLIVER LLC dba Oliver's Place; DOCKET NUMBER: 2012-1332-PST-E; IDENTIFIER: RN102315447; LOCATION: Goldthwaite, Mills 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 release detection for the piping associated with the underground storage tanks; PENALTY: $4,993; ENFORCEMENT COORDINATOR: Joel McAlister, (512) 239-2619; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(23) COMPANY: Targa Downstream LLC; DOCKET NUMBER: 2012-0654-AIR-E; IDENTIFIER: RN102583291; LOCATION: Mont Belvieu, Chambers County; TYPE OF FACILITY: hydrocarbon and gasoline products terminal; RULE VIOLATED: 30 TAC §122.143(4), Federal Operating Permit (FOP) Number O615, General Terms and Conditions (GTC) and Special Terms and Conditions (STC) Number 3.B.(iv)(3), and Texas Health and Safety Code (THSC), §382.085(b), by failing to maintain records of quarterly visible emissions observations from stationary vents for emissions units; 30 TAC §115.354(2) and THSC, §382.085(b), by failing to conduct Leak Detection and Repair monitoring on 10,863 components in volatile organic compound service; 30 TAC §115.356(2)(E)(iv) and §122.143(4), FOP Number O615, STC 1.A., and THSC, §382.085(b), by failing to maintain records of the date leaking components were repaired; 30 TAC §§115.352(4), 116.115(c), and 122.143(4), Permit Number 18929, Special Conditions (SC) Number 3.E., Permit Number 22088, SC Number 9.E., FOP Number O615, STC 1.A. and 8, and THSC, §382.085(b), by failing to equip each open-ended line or valve with a cap, blind flange, plug, or a second valve; 30 TAC §117.310(f) and §122.143(4), FOP Number O615, STC Number 1.A., and THSC, §382.085(b), by failing to restrict the operation of stationary diesel or dual-fuel engines for testing and maintenance to between the hours of 12:00 p.m. and 5:59 a.m.; 30 TAC §122.142(b)(2)(B) and THSC, §382.085(b), by failing to include applicable requirements of 30 TAC Chapter 115, Subchapter D, Division 3 for Emission Point Numbers 1 - 5 in FOP Number O615; and 30 TAC §122.143(4) and §122.145(2)(A), FOP Number O615, GTC, and THSC, §382.085(b), by failing to report all instances of deviation; PENALTY: $30,264; Supplemental Environmental Project offset amount of $12,106 applied to Houston - Galveston Area Emission Reduction Credit Organization's Clean Cities/Clean Vehicles Program; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 422-8938; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(24) COMPANY: TERRILL PETROLEUM COMPANY, INCORPORATED; DOCKET NUMBER: 2012-0428-PST-E; IDENTIFIER: RN101724318 (Facility Number 1), RN101757151 (Facility Number 2), and RN101907335 (Facility Number 3); LOCATION: Hemphill and Pineland, Sabine County; TYPE OF FACILITY: convenience store with retail sales of gasoline, wholesale gasoline facility, and a fleet refueling facility; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2)(B) and TWC, §26.3475(b) and (c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and by failing to provide proper release detection for the product piping associated with the UST system at Facility Number 1, Facility Number 2, and Facility Number 3; PENALTY: $9,050; ENFORCEMENT COORDINATOR: Jacquelyn Green, (512) 239-2587; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(25) COMPANY: Todd Helms dba Superior Auto Sales; DOCKET NUMBER: 2012-0620-MSW-E; IDENTIFIER: RN106149289; LOCATION: Buna, Jasper County; TYPE OF FACILITY: auto body shop; RULE VIOLATED: 30 TAC §324.4(1), by failing to prevent the unauthorized discharge of used oil; PENALTY: $262; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(26) COMPANY: Tri-Community Water Supply Corporation; DOCKET NUMBER: 2012-0891-PWS-E; IDENTIFIER: RN101176816; LOCATION: Fentress, Caldwell County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §§290.42(c)(1), 290.110(e)(2), 290.111(a)(2), and 290.122(c)(2)(A), by failing to provide a minimum treatment consisting of coagulation with direct filtration for ground water under the influence of surface water and by failing to submit surface water monthly operating reports (SWMORs) for systems that use groundwater under the influence of surface water, and also by failing to notify persons served by the facility of the failure to submit SWMORs; PENALTY: $2,193; ENFORCEMENT COORDINATOR: Michaelle Sherlock, (210) 403-4076; REGIONAL OFFICE: 12100 Park 35 Circle, Austin, Texas 78753, (512) 339-2929.

(27) COMPANY: United States Postal Service; DOCKET NUMBER: 2011-2234-PWS-E; IDENTIFIER: RN101223675; LOCATION: Spring, Harris County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and §290.122(c)(2)(B) and Texas Health and Safety Code, §341.033(d), by failing to collect routine distribution water samples for coliform analysis and by failing to provide public notification of the failure to collect routine samples; 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfectant Level Quarterly Operating Report (DLQOR) to the executive director each quarter by the tenth day of the month following the end of the quarter; 30 TAC §290.109(c)(3)(A)(ii), by failing to collect a set of repeat distribution coliform samples within 24 hours of being notified of a total coliform-positive result on a routine distribution coliform sample collected; 30 TAC §290.109(c)(4)(B), by failing to collect raw groundwater source *escherichia coli* samples from all sources within 24 hours of being notified of a distribution total coliform-positive sample; and 30 TAC §290.109(c)(2)(F), by failing to collect at least five distribution coliform samples the month following a coliform-positive sample result; PENALTY: $3,864; ENFORCEMENT COORDINATOR: Katy Schumann, (512) 239-2602; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(28) COMPANY: WEST AVENUE EXPRESS, INCORPORATED dba Fuel station #3; DOCKET NUMBER: 2012-0228-PST-E; IDEN-

TIFIER: RN102063757; 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 system; PENALTY: $5,000; ENFORCEMENT COORDINATOR: Steve Villatoro, (512) 239-4930; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(29) COMPANY: Yedneckachew Worke dba Longview TD Mart; DOCKET NUMBER: 2012-0920-PST-E; IDENTIFIER: RN102425816; LOCATION: Longview, Gregg County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the underground storage tanks (USTs) for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and by failing to provide release detection for the 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: $3,629; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5825; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

TRD-201205496
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 23, 2012

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Notice of Public Hearing on a Proposed Revision to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding the proposed Houston-Galveston-Brazoria (HGB) 1997 Eight-Hour Ozone Standard Nonattainment Area Motor Vehicle Emissions Budgets (MVEB) Update State Implementation Plan (SIP) Revision, under the requirements of Texas Health and Safety Code, §382.012 and §382.013; and 40 Code of Federal Regulations §51.102 of the United States Environmental Protection Agency (EPA) regulations concerning SIPs.

The proposed HGB SIP revision would update the HGB attainment demonstration and reasonable further progress SIP revisions for the 1997 eight-hour ozone standard that were adopted by the commission on March 10, 2010, by revising on-road mobile source emissions inventories for nitrogen oxides (NO_x) and volatile organic compounds (VOC) based on the EPA's latest mobile source emissions estimation model, Motor Vehicle Emission Simulator (MOVES), which was released on March 2, 2010. The 2008, 2011, 2014, 2017, and 2018 NO_x and VOC MVEBs would also be updated using the MOVES-based emissions inventories. The proposed revision also includes a review of emissions inventory data, photochemical modeling, and the quantitative and qualitative corroborative analyses used as weight of evidence supporting the March 2010 HGB attainment demonstration SIP revision. The proposed SIP revision would also address the outstanding contingency obligations for the HGB area and Federal Clean Air Act requirements for transportation control measures in severe nonattainment areas.

A public hearing on this proposal will be held in Houston on November 19, 2012, at 2:00 p.m. in Conference Room B of the Houston-Galveston Area Council at 3555 Timmons Lane. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes before the hearing.

Persons planning to attend the hearing who have special communication or other accommodation needs should contact Lola Brown, Air Quality Division, at (512) 239-0348. Requests should be made as far in advance as possible.

Comments may be submitted to Lola Brown, MC 206, State Implementation Plan Team, Office of Air, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-6188. Electronic comments may be submitted at *http://www5.tceq.texas.gov/rules/ecomments.* File size restrictions may apply to comments being submitted electronically. All comments should reference the "HGB MVEB Update SIP Revision" and Project Number 2012-002-SIP-NR. The comment period closes November 26, 2012. Copies of the proposed SIP revision and associated appendices can be obtained from the commission's website at *http://www.tceq.texas.gov/airquality/sip/hgb/hgb-latest-ozone.* For additional information regarding the proposed SIP revision, please contact Lola Brown, Air Quality Division, at (512) 239-0348.

TRD-201205495
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: October 23, 2012

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapters 101 and 117 and to the State Implementation Plan

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 TAC Chapter 101, General Air Quality Rules, and Chapter 117, Control of Air Pollution from Nitrogen Compounds, and corresponding revisions to the state implementation plan (SIP) under the requirements of Texas Health and Safety Code, §382.017; Texas Government Code, Chapter 2001, Subchapter B; and 40 Code of Federal Regulations §51.102, and the United States Environmental Protection Agency concerning SIPs.

The proposed rulemaking would revise Chapters 101 and 117 to update references to Electric Reliability Council of Texas, Incorporated (ERCOT) protocols and reflect changes to ERCOT's new Emergency Response Service program. The proposed rulemaking would revise §101.379 and the definition of emergency situation in §117.10 to reference the most recent version of the ERCOT protocols. The proposed rulemaking would also revise the definition of emergency situation in §117.10 to reflect changes made by ERCOT to promote reliability during energy emergencies by allowing the operation of generators for purposes of selling power to the electric grid under limited circumstances.

The commission will hold a public hearing on this proposal in Austin on November 28, 2012, at 2:00 p.m., at the Texas Commission on Environmental Quality, Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy

Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Bruce McAnally, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the *eComments* system. All comments should reference Rule Project Number 2012-025-117-AI. The comment period closes December 5, 2012. Copies of the proposed rulemaking can be obtained from the commission's website at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Ray Schubert, Air Quality Planning Section, (512) 239-6615.

TRD-201205433
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: October 19, 2012

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapters 291 and 293

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony regarding proposed revisions to 30 Texas Administrative Code (TAC) Chapter 291, Utility Regulations, §§291.22, 291.102, 291.105, and 291.113, and 30 TAC Chapter 293, Water Districts, §§293.11, 293.32, 293.41, 293.51, and 293.81, under the requirements of Texas Water Code, §5.103, and Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would implement House Bill (HB) 679, HB 1901, Senate Bill (SB) 18, SB 512, SB 573, SB 914, and SB 1234, 82nd Legislature, 2011. The proposed amendments would: impact a district's ability to increase the allowable change order amount; exempt bonds issued by a public utility agency from executive director approval; alter eminent domain powers of a municipal utility district outside its boundary; modify the election qualifications for a fresh water supply district director; exempt bonds issued by certain multi-county districts from executive director approval; limit the time for certain municipalities to consent to certificates of public convenience and necessity (CCN) within the corporate limits or extraterritorial jurisdiction (ETJ) of the municipality and set conditions for granting the CCN without the consent; alter a city's ability to extend a CCN beyond its ETJ if a landowner elects to exclude property; add a provision that a CCN applicant or CCN holder that has land removed by landowner election is not required to provide service to the removed land for any reason; change the requirements for a release from a CCN; specify that having federal loans is not a bar to release; and add requirements for notice of utility rate changes.

The commission will hold a public hearing on this proposal in Austin on December 4, 2012, at 2:00 p.m., in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802. Requests should be made as far in advance as possible.

Written comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.texas.gov/rules/ecomments/.* File size restrictions may apply to comments being submitted via the *eComments* system. All comments should reference Rule Project Number 2011-055-293-OW. The comment period closes December 10, 2012. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.texas.gov/nav/rules/propose_adopt.html.* For further information, please contact Kent Steelman, Utilities and Districts Section, (512) 239-5143.

TRD-201205442
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: October 19, 2012

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Notice of Water Quality Applications

The following notices were issued on October 12, 2012 through October 19, 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

STAGECOACH PROPERTIES INC has applied for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0010884001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 50,000 gallons per day. The facility is located at 401 South Stagecoach Road, Salado, 200 feet west of Farm-to-Market Road 2268, 300 feet south of Salado Creek, and 400 feet southeast of the crossing of Salado Creek by the Interstate Highway 35 east frontage road, in the community of Salado in Bell County, Texas.

GEORGIA PACIFIC WOOD PRODUCTS SOUTH LLC which operates Camden Plywood Plant, a lumber, chip, and plywood manufacturing plant, has applied for a major amendment to TPDES Permit No. WQ0001598000 to authorize: (a) the disposal of kiln condensate, treated domestic wastewater, and stormwater runoff at a daily average flow not to exceed 15,000 gallons per day and at an application rate not to exceed 0.8 acre-feet per acre per year within the proposed 24.7-acre and 26.1-acre tracts that are covered with pine trees, and (b) the construction of proposed Pond No. 9 for the storage of kiln condensate, treated domestic wastewater, and stormwater runoff prior to irrigation. The existing permit authorizes the discharge of non-contact cooling water, boiler blowdown, boiler feed pre-treatment water, treated domestic wastewater (previously monitored) wet deck runoff, fire deluge water, boiler scrubber water, log flume water, vehicle wash water and stormwater runoff on an intermittent and flow variable basis via Outfall 001; stormwater overflow including wet deck runoff, fire deluge water and wash water from the Regenerative Catalytic Oxidizer (RCO) and Regenerative Thermal Oxidizer (RTO) Units on an intermittent and flow variable basis via Outfall 002; stormwater overflow including non-contact cooling water, boiler blowdown, boiler scrubber water, log flume water, vehicle wash water, boiler feed pre-treatment water and treated domestic wastewater from the equalization pond on an intermittent and flow variable basis via Outfall 004; stormwater runoff

on an intermittent and flow variable basis via Outfalls 005, 006, and 007; and irrigation of 20.97-acre tract of land using kiln condensate and treated domestic wastewater with a volume not to exceed 0.8 acre-feet per acre per year. The facility is located at 20125 East Farm-to-Market Road 942, on the south side of the intersection of Farm-to-Market Road 942 and Farm-to-Market Road 62, Camden, Polk County, Texas 75934. The irrigation area is located on the north side of Farm-to-Market Road 942 and Farm-to-Market Road 62, directly across from the mill site.

CITY OF CHILDRESS has applied for a new permit, proposed TPDES Permit No. WQ0010076004, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 495,000 gallons per day. The facility was previously permitted under TPDES Permit No. WQ0010076002 which expired December 1, 2010. The facility is located approximately 0.5 mile south of U.S. Highway 287 and approximately one mile east of Farm-to-Market Road 2530 in Childress County, Texas 79201.

CITY OF BRYAN has applied for a renewal of TPDES Permit No. WQ0010426004, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 4,000,000 gallons per day. The facility will be located at 6189 Foster Road, approximately 8,500 feet south-southeast of the intersection of Texas Highway 47 at Leonard Road (Farm-to-Market Road 1688) and adjacent to Thompsons Creek near its confluence with the Brazos River in Brazos County, Texas 77845.

CITY OF LINDEN has applied for a renewal of TPDES Permit No. WQ0010429003, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 450,000 gallons per day. The facility is located approximately 7,000 feet southeast of the intersection of Farm-to-Market Road 125 and U.S. Highway 59 (Jefferson Highway) in Cass County, Texas 75563.

SPRING CREEK UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0011574001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 930,000 gallons per day. The facility is located at 2300 Leichester Drive, approximately one mile west of the intersection of Riley Fuzzel Road and Rayford Road, in Spring, Texas in Montgomery County, Texas 77386.

HARRIS COUNTY has applied for a renewal of TPDES Permit No. WQ0013027001, 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 25011 West Hardy Road in Harris County, Texas 77373.

HUFFMAN INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. WQ0011518001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 35,000 gallons per day. The facility is located at 3407 Huffman - Eastgate Road in the southeast corner of the Willie J. Hardgrave Senior High School site, approximately 0.5 mile west of the intersection of Huffman - Eastgate Road and Farm-to-Market Road 1960 in Harris County, Texas 77336.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 150 has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0011863001, 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 11621 C Walters Road, Houston, approximately three miles west of the intersection of Interstate Highway 45 and Greens Bayou Crossing in Harris County, Texas 77067.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 196 has applied for a renewal of TPDES Permit No. WQ0012447001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,400,000 gallons per day. The facility is located at 11202 Barker Cypress Road, approximately 1.7 miles south of the intersection of U.S. Highway 290 and Barker-Cypress Road, approximately 3,000 feet east of Barker-Cypress Road in Harris County, Texas 77095.

UNIVERSAL SERVICES FORT HOOD INC has applied for a renewal of TPDES Permit No. WQ0013358001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 90,000 gallons per day. The facility is located approximately 500 feet north of Water Crest Road, 3,700 feet east of Clear Creek Road, and approximately 4,400 feet southeast of the intersection of Clear Creek Road and U.S. Highway 190 in Bell County, Texas 76544.

CITY OF BARDWELL has applied for a renewal of TPDES Permit No. WQ0013675001, 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 approximately 1,500 feet northeast of the intersection of Farm-to-Market Road 984 and State Highway 34, approximately 1,000 feet northwest of State Highway 34 and Farm-to-Market Road 985, and 1/4 mile east of Bardwell City limits on the north side of State Highway 34 in Ellis County, Texas 75101.

DONALD WAYNE BAYER has applied for a renewal of TPDES Permit No. WQ0013819001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 60,000 gallons per day. The facility is located adjacent to the east right-of-way of Lemm Gully, approximately 1,400 feet south of Spring-Cypress Road in Harris County, Texas 77383.

WALTON TEXAS LP has applied for a renewal of TPDES Permit No. WQ0014439001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 700,000 gallons per day. The facility will be located approximately 7,000 feet southwest of the intersection of State Highway 21 and Farm-to-Market Road 2720 in northwest Caldwell County, Texas 78656.

SENTRY TITLE COMPANY INCORPORATED has applied for a renewal of TCEQ Permit No. WQ0014845001, which authorizes the disposal of treated domestic wastewater at a daily average flow not to exceed 19,250 gallons per day via surface irrigation of 4.23 acres of non-public access agricultural land. This permit will not authorize a discharge of pollutants into waters in the State. The wastewater treatment facility and disposal site are located at 15575 Pearl Harbor Road, Malakoff, approximately 0.5 mile west of the intersection of State Highway 90 and Farm-to-Market Road 3054 in Henderson County, Texas 75148.

MASON WESTGREEN LP has applied for a renewal of TPDES Permit No. WQ0014896001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility will be located approximately 1.2 miles south of the intersection of Highway 290 and Mason Road in Harris County, Texas 77433.

SOUTH CENTRAL WATER COMPANY has applied for a new permit, proposed TPDES Permit No. WQ0015046001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 300,000 gallons per day. The facility will be located 2000 feet southwest of the intersection of Ranch Road 869 and County Road 133 in Reeves County, Texas 79772.

SOUTH CENTRAL WATER COMPANY has applied for a new permit, TPDES Permit No. WQ0015049001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed

300,000 gallons per day. The facility is located on the south side of Highway 85, approximately 1,700 feet southwest of the intersection of Highway 85 and Wilson Road in Dimmit County, Texas 78834.

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 on our web site at www.tceq.texas.gov. Si desea información en español, puede llamar al 1-800-687-4040.

TRD-201205518
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 24, 2012

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Notice of Water Rights Applications

Notices issued October 16, 2012 through October 19, 2012.

APPLICATION NO. 08-2361A; Old WR Ranch I, L.P., 5001 Spring Valley Road, Suite 1040E, Dallas, Texas, 75244, Applicant, seeks to amend Certificate of Adjudication No. 08-2361 to modify a dam and reservoir (Furst Ranch Lake) located on an unnamed tributary of Whites Branch, Trinity River Basin, in Denton County, to impound an additional 183 acre-feet of water. Applicant also seeks to add recreation use to the impoundment; to delete Special Condition 4.B. which states the permit shall expire; and to request authorization for the use of the bed and banks of several unnamed tributaries of Whites Branch to convey groundwater to the reservoir and maintain the reservoir full at all times. The applicant also requests to include special conditions concerning the use of groundwater as an alternate source for the reservoir. The application and partial fees were received on May 14, 2009. Additional information and fees were received on August 14 and November 16, 2009, and March 15, September 2, and December 10, 2010. The application was declared administratively complete and filed with the Office of the Chief Clerk on December 21, 2010. The Executive Director completed the technical review of the application and prepared a draft amendment. The draft amendment, if granted, would contain special conditions including, but not limited to, maintaining an alternate source for the impoundment of additional water. The application, technical memoranda, and Executive Director's draft amendment are available for viewing and copying at the Office of the Chief Clerk, 12100 Park 35 Circle, Building F, Austin, Texas 78753. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

APPLICATION NO. 12627; TransCanada Keystone Pipeline, LP, 2700 Post Oak Boulevard, Suite 400, Houston, Texas 77056, Applicant, seeks a temporary water use permit to divert and use not to exceed 38.99 acre-feet of water within a period of 21 months from the North Sulphur River, Sulphur River Basin for industrial purposes in Delta County, Texas. The application was received on September 9, 2010. Additional information and fees were received on November 22, 2010 and March 2, 2011. The application was declared administratively complete and filed with the Office of the Chief Clerk on March 31, 2011. The Texas Commission on Environmental Quality (TCEQ) Executive Director has completed the technical review of the application and prepared a draft temporary permit. The draft temporary permit, if granted, would contain special conditions, including but not limited to, streamflow restrictions and the installation of screens on diversion structures. 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, by November 5, 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 on our web site at www.tceq.texas.gov. Si desea información en español, puede llamar al 1-800-687-4040.

TRD-201205517
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 24, 2012

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Texas Ethics Commission

List of Late Filers

Listed below are the names of filers from the Texas Ethics Commission who did not file reports, or failed to pay penalty fines for late reports in reference to the listed filing deadline. If you have any questions, you may contact Robbie Douglas at (512) 463-5800.

Deadline: Semiannual Report due July 16, 2012 for Candidates and Officeholders

Jose A. "Joseph" Campos, 400 W. 6th St., PMB 1048, Weslaco, Texas 78596-5312

Joe A. Foster Jr., P.O. Box 611, Alpine, Texas 79831

Raymond W. Hill, 414 Marshall St. #3, Houston, Texas 77006

Jack C. Lee, P.O. Box 218394, Houston, Texas 77218

Michael W. McClure, 3813 Pack Saddle Trail, Fort Worth, Texas 76108

Borris Lee Miles, 5302 Almeda Rd., Houston, Texas 77004

Sergio C. Mora Jr., 119 W. Village Blvd., Laredo, Texas 78041

Donald R. Mullins, 1431 Dominion Dr., Katy, Texas 77450

Robert Pena Jr., P.O. Box 1847, Edinburg, Texas 78540

Rebecca E. RuBane, 847 E. Harrison St., Brownsville, Texas 78520

Frank Salazar, 15721 Garlang St., Channelview, Texas 77530

David L. Scott, 8007 Sunburst Pkwy., Round Rock, Texas 78681-3443

Deadline: Semiannual Report due July 16, 2012 for Committees

Billie W. James, Arlington Republican Club PWR PAC, P.O. Box 14095, Arlington, Texas 76094-1095

Deadline: Monthly Report due September 5, 2012 for Committees

Laura N. Hernandez, Travis County Democratic Party, P.O. Box 684263, Austin, Texas 78768-4263

Richard Christopher Nevills, Bayou City P.A.C., 414 Marshall St. #1, Houston, Texas 77006

TRD-201205502
David Reisman
Executive Director
Texas Ethics Commission
Filed: October 23, 2012

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Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rate for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Dental Services

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on November 14, 2012, at 1:30 p.m., to receive comment on proposed Medicaid payment rate for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) Dental Services.

The public hearing will be held in the Lone Star Conference Room of HHSC, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Title 1 Texas Administrative Code (1 TAC) §355.201, which require public notice of and hearings on proposed Medicaid reimbursements.

Proposal. The payment rate for Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Dental Services is proposed to be effective January 1, 2013.

Methodology and Justification. The proposed payment rate was calculated in accordance with 1 TAC §355.8441, which addresses the reimbursement methodology for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) services.

The proposed reimbursement rates reflect applicable reductions directed by the 2012 - 2013 General Appropriations Act, H.B. 1, 82nd Legislature, Regular Session, 2011 (Article II, All Health and Human Services Agencies, §16, at II-108). Detailed information related to specifics of the reductions can be found on the Medicaid fee schedules at http://public.tmhp.com/FeeSchedules/Default.aspx.

Briefing Package. A briefing package describing the proposed payments will be available at http://www.hhsc.state.tx.us/rad/rate-packets.shtml on or after November 1, 2012. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Rate Analysis by telephone at (512) 491-1445; by fax at (512) 491-1998; or by e-mail at esther.brown@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Rate Analysis, HHSC, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Rate Analysis at (512) 491-1998; or by e-mail to esther.brown@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to HHSC Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 491-1445 at least 72 hours in advance, so that appropriate arrangements can be made.

TRD-201205472
Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
Filed: October 22, 2012

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout TX" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Waller	Vitalrads, P.L.L.C.	L06509	Waller	00	10/12/12

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Austin	Cardinal Health	L02117	Austin	86	10/01/12
Baytown	PMI Specialist, Inc.	L04686	Baytown	19	10/01/12
Bellaire	Texas Nuclear Imaging, Inc. dba Excel Diagnostics Imaging Clinic Medical Center	L05009	Bellaire	41	10/12/12
Benbrook	Weatherford International, Inc.	L04286	Benbrook	92	10/01/12
College Station	Texas A&M University	L00448	College Station	138	10/04/12
College Station	Texas A&M University	L05683	College Station	23	10/02/12
Dallas	The University of Texas Southwestern Medical Center at Dallas	L00384	Dallas	114	10/12/12
Dallas	Cardinal Health	L05610	Dallas	23	10/04/12
Dallas	Cardinal Health	L05610	Dallas	24	10/12/12
Fort Worth	Radiology Associates	L03953	Fort Worth	68	10/02/12
Gainesville	Alliance Imaging, Inc.	L05336	Gainesville	14	10/05/12
Harker Heights	HH/Killeen Health System, L.L.C. dba Seton Medical Center Harker Heights	L06481	Harker Heights	01	10/05/12
Harlingen	VHS Harlingen Hospital Company, L.L.C. dba Valley Baptist Medical Center Harlingen	L06499	Harlingen	01	10/05/12
Houston	Westhollow Technology Center	L02116	Houston	51	10/05/12
Houston	The University of Texas Health Science Center at Houston	L02774	Houston	65	10/05/12
Houston	The PET Scan Center	L05411	Houston	14	10/02/12
Houston	American Diagnostic Tech, L.L.C.	L05514	Houston	81	10/05/12
Houston	American Diagnostic Tech, L.L.C.	L05514	Houston	82	10/10/12
Houston	Cambridge Heart Center, P.A.	L05623	Houston	16	10/09/12
Houston	NIS Holdings, Inc. dba Nuclear Imaging Services	L05775	Houston	84	10/05/12
Houston	Statewide Maintenance Company dba Diamond G Inspection, Inc.	L06229	Houston	07	10/10/12
Houston	The University of Texas M.D. Anderson Cancer Center	L06366	Houston	02	10/12/12
Longview	Longview Medical Center, L.P. dba Longview Regional Medical Center	L02882	Longview	43	10/04/12
Midland	Texas Oncology, P.A. dba Allison Cancer Center	L04905	Midland	16	10/03/12
Mont Belvieu	Sonic Surveys, Ltd.	L02622	Mont Belvieu	27	10/10/12
North Richland Hills	Columbia North Hills Hospital Subsidiary, L.P. dba North Hills Hospital	L02271	North Richland Hills	72	10/05/12
Paris	Advanced Heart Care, P.A.	L05290	Paris	34	10/04/12
Plano	Texas Health Presbyterian Hospital Plano	L04467	Plano	64	10/04/12

AMENDMENTS TO EXISTING LICENSES ISSUED (CONTINUED):

Location	Name	License #	City	Amend-ment #	Date of Action
Plano	Texas Heart Hospital of the Southwest, L.L.P. dba The Heart Hospital Baylor Plano	L06004	Plano	21	10/05/12
Rosharon	Pioneer Wireline Services, L.L.C.	L06220	Rosharon	21	10/01/12
Round Rock	Scott and White Community Hospital Corp. dba Scott and White Healthcare-Round Rock	L06085	Round Rock	08	10/04/12
Round Rock	Scott and White Community Hospital Corp. dba Scott and White Healthcare-Round Rock	L06085	Round Rock	09	10/10/12
Round Rock	Wind Consultants, L.L.C. dba Renewable Resource Consultants, L.L.C.	L06105	Round Rock	05	10/05/12
San Antonio	South Texas Radiology Imaging Centers	L00325	San Antonio	204	10/01/12
San Antonio	South Texas Radiology Imaging Centers	L00325	San Antonio	205	10/04/12
San Antonio	Trinity University	L01668	San Antonio	47	10/02/12
San Antonio	Adult Cardiovascular Consultants, P.A.	L05836	San Antonio	06	10/05/12
San Antonio	University of Texas Health Science Center at San Antonio Edinburg	L06029	San Antonio	08	10/03/12
Sugar Land	Schlumberger Technology Corporation	L00764	Sugar Land	132	10/11/12
The Woodlands	Memorial Hermann Hospital System dba Memorial Hermann Hosp. The Woodlands	L03772	The Woodlands	100	10/04/12
Throughout TX	Texas Department of Transportation	L00197	Austin	160	10/10/12
Throughout TX	Tapco International, Inc. dba Tapco Enpro International	L04990	Channelview	31	10/09/12
Throughout TX	Fugro Consultants, Inc.	L03461	Dallas	29	10/01/12
Throughout TX	Probe Technology Services, Inc.	L05112	Fort Worth	26	10/04/12
Throughout TX	Bonded Inspections, Inc.	L00693	Garland	85	10/09/12
Throughout TX	AGD Inspection Services	L06368	Houston	04	10/01/12
Throughout TX	Allied Wireline Services, L.L.C.	L06374	Houston	04	10/01/12
Throughout TX	Baker Hughes Oilfield Operations, Inc.	L06453	Houston	03	10/08/12
Throughout TX	Spectral Oil & Gas Corporation	L06231	Humble	03	10/08/12
Throughout TX	J. Z. Russell Industries, Inc.	L06459	La Porte	02	10/12/12
Throughout TX	Techcorr USA, L.L.C. dba AUT Specialists, L.L.C.	L05972	Palestine	92	10/08/12
Throughout TX	Caribbean Inspection & NDT Services, Inc.	L06420	Port Lavaca	02	10/02/12
Tyler	Physician Reliance Network, Inc. dba Tyler Cancer Center	L04788	Tyler	17	10/03/12
Victoria	Invista Sarl	L00386	Victoria	86	10/09/12

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Throughout TX	TAPCO International, Inc. dba TAPCO International	L04990	Channelview	30	10/02/12

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Arlington	Irfan Shah, M.D.	L06109	Arlington	03	10/01/12
Spring Branch	Richard L. Gonzales dba Nuclear Imaging Services	L06255	Spring Branch	01	10/01/12
Throughout TX	East Texas Geotech	L06196	Clarksville	01	10/04/12

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of 25 Texas Administrative Code (TAC) Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, Radiation Material Licensing - Mail Code 2835, P.O. Box 149347, Austin, Texas 78714-9347. For information call (512) 834-6688.

TRD-201205474
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: October 22, 2012

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Texas Department of Housing and Community Affairs

HOME Investment Partnerships Program 2012 HOME Single Family Programs Reservation System Notice of Funding Availability

(1) Summary. The Texas Department of Housing and Community Affairs (the "Department") announces the availability of approximately $16,768,903 in funding from the HOME Investment Partnerships Program (HOME) for single family housing programs under a Reservation System. The availability and use of these funds is subject to the state Single Family Programs Umbrella Rule at 10 TAC Chapter 20, §§20.1 - 20.15, and the state HOME Rules at 10 TAC Chapter 23, concerning Single Family HOME Program in effect at the time the Reservation System Participation (RSP) application is submitted, the federal HOME regulations governing the HOME program (24 CFR Part 92, as amended), and Texas Government Code, Chapter 2306. Other federal regulations apply, including but not limited to, 24 CFR Parts 50 and 58 for environmental requirements, 24 CFR §84.42 and §85.36 for conflict of interest, 24 CFR §135.38 for §3 requirements and 24 CFR Part 5, Subpart A for fair housing. Applicants are encouraged to familiarize themselves with all of the applicable state and federal rules that govern the program.

(2) Allocation of HOME Funds.

(a) The funds are made available through the Department's 2012 allocation of HOME funds from the U.S. Department of Housing and Urban Development (HUD), deobligated HOME funds and HOME Program Income funds. Funds in the amount of $5,346,102 under this Notice of Funding Availability (NOFA) are subject to the Regional Allocation Formula (RAF). Refer to the RAF tables located on the Department's website at www.tdhca.state.tx.us. The remaining funds are not subject to the RAF because funds were regionally allocated during the release of previous HOME Program NOFAs or are a legislative mandated set-aside.

(b) Approximately $10,346,102 in funds is available under this NOFA, of which $5,346,102 is subject to the RAF and $5,000,000 is not subject to the RAF and, may be reserved for individual households for the following Program Activities:

(i) Homeowner Rehabilitation Assistance (HRA). HRA provides funds to eligible for the rehabilitation, or demolition and reconstruction of single family residences owned and occupied by low-income eligible households. Specific program guidelines can be found at 10 TAC Chapter 23, Single Family HOME Program, Subchapter C, Homeowner Rehabilitation Assistance Program, §§23.30 - 23.32.

(ii) Homebuyer Assistance (HBA). HBA provides down payment and closing cost assistance to eligible low-income homebuyers. Specific program guidelines can be found at 10 TAC Chapter 23, Single Family HOME Program, Subchapter D, Homebuyer Assistance Program, §§23.40 - 23.42.

(iii) Tenant-Based Rental Assistance (TBRA). TBRA provides rental subsidies to eligible low-income households. Assistance may include rental deposit and utility deposits. Specific program guidelines can be found at 10 TAC Chapter 23, Single Family HOME Program, Subchapter F, Tenant-Based Rental Assistance Program, §§23.60 - 23.62.

(c) Approximately $6,422,801 in funds available under this NOFA, and not subject to the RAF, may be reserved for individual households for the following set-aside Program Activities:

(i) Persons with Disabilities (PWD) Set-Aside. Approximately $3,208,569 in funding is set-aside to assist Persons with Disabilities with TBRA, HRA, or HBA.

(ii) Contract for Deed Conversion (CFDC) Set-Aside. Approximately $2,000,000 in funding is set-aside to assist eligible households until March 29, 2013 at which time Staff may re-direct (reprogram) $1,000,000 if insufficient demand exists in this set-aside and these funds are needed in order to satisfy excess (higher) demand of other Single Family HOME Program Activities. An additional $250,000 will be re-directed on July 1, 2013 if insufficient demand still exists and there is a need to satisfy excess demands of other Single Family HOME Program Activities. CFDC provides funds for the conversion of a contract for deed to a traditional mortgage. Additional funds for rehabilitation or reconstruction are also available. Specific program guidelines can be found at 10 TAC Chapter 23, Single Family HOME Program, Subchapter E, Contract for Deed Conversion Program, §§23.50 - 23.52.

(iii) Disaster Relief Set-Aside. Approximately $1,214,232 in funding is set-aside to assist eligible households. Disaster Relief assistance may provide HRA, HBA, or TBRA to eligible households directly affect by a natural disaster.

(d) Staff may re-direct (reprogram) funds, except for the PWD set-aside funds, at anytime as specified in this NOFA, to the Reservation System in order to satisfy excess (higher) demand of other Single Family HOME Program Activities.

(e) HOME funds subject to the RAF are reserved for HRA, HBA, and TBRA HOME Activities until Tuesday, December 4, 2012. Refer to the RAF tables located on the Department's website at www.tdhca.state.tx.us.

(f) After Tuesday, December 4, 2012 any funds which have not been requested under §2(a) of this NOFA will collapse and be made available statewide for any activity under this NOFA.

(g) Applications to participate in the Reservation System will be accepted by the Department on an on-going basis until **5:00 p.m. Friday, March 29, 2013 except for applications submitted under the Disaster Relief set-aside which may be submitted at any time the Department is accepting applications.**

(h) Updated balances for the reservation system may be accessed online at www.tdhca.state.tx.us/home-division/home-reservation-summary.htm. Reservations of funds may be submitted at any time during the term of a Reservation System Participation Agreement, or until such time as RSP funds are exhausted, whichever comes first.

(3) Eligible and Prohibited Activities.

(a) Prohibited activities include those at 24 CFR §92.214 and 10 TAC Chapter 23, concerning Single Family HOME Program.

(b) Funds will not be eligible for use in a Participating Jurisdiction (PJ) except for Applications receiving funds under the Persons with Disabilities Set-Aside.

(c) Eligible Applicants are Units of General Local Government, Nonprofit Organizations, and Public Housing Authorities.

(4) Application Threshold Requirements.

(a) Threshold Criteria. Threshold criteria in 10 TAC Chapter 23, concerning Single Family HOME Program are mandatory requirements at the time of application submission, unless specifically indicated otherwise, and will be included in the written agreement.

(5) Application Submission.

(a) All applications for a Reservation System Participation Agreement submitted under this NOFA must be received on or before **5:00 p.m. Friday, March 29, 2013,** regardless of method of delivery, except for applications submitted under the Disaster Relief set-aside which may be submitted at any time the Department is accepting applications. The Department will accept applications from 8:00 a.m. to 5:00 p.m. each business day, excluding federal and state holidays, from the date this NOFA is published in the *Texas Register* until the deadline date. For questions regarding this NOFA, please contact the HOME Division at (512) 463-8921 or via email at HOME@tdhca.state.tx.us.

(b) All applications must be submitted and documentation provided as described in 10 TAC Chapter 23, Single Family HOME Program and the Application Submission Procedures Manual (ASPM).

(c) All Application materials including manuals, NOFA, program guidelines, and all applicable HOME rules, will be available on the Department's website at www.tdhca.state.tx.us. Applications will be required to adhere to the HOME Rule and threshold requirements in effect at the time of Application submission. Applications must be on forms provided by the Department, cannot be altered or modified, and must be in final form before submitting them to the Department.

(d) Applicants are required to remit a non-refundable Application fee payable to the Texas Department of Housing and Community Affairs in the amount of $30 per Application. Payment must be in the form of a check, cashier's check, or money order. Do not send cash. The Application fee is not an allowable or reimbursable cost under the HOME Program. An Applicant that is a Nonprofit Organization may request a fee waiver in accordance with Texas Government Code, §2306.147(b).

(e) This NOFA does not include text of the various applicable regulatory provisions pertinent to the HOME Program. For proper completion of the application, the Department strongly encourages potential applicants to review the state and federal regulations, and contact the HOME Division for guidance and assistance.

(f) Applications must be sent via overnight delivery to:

Texas Department of Housing and Community Affairs

HOME Single Family Division

221 East 11th Street

Austin, Texas 78701-2410

Or via the U.S. Postal Service to:

Texas Department of Housing and Community Affairs

HOME Single Family Division

P.O. Box 13941

Austin, Texas 78711-3941

TRD-201205515
Timothy K. Irvine
Executive Director
Texas Department of Housing and Community Affairs
Filed: October 24, 2012

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Texas Department of Insurance

Company Licensing

Application to change the name of MUNICIPAL AND INFRASTRUCTURE ASSURANCE CORPORATION to MUNICIPAL ASSURANCE CORPORATION, a Fire and/or Casualty company. The home office is in New York City, New York.

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-201205475
Sara Waitt
General Counsel
Texas Department of Insurance
Filed: October 22, 2012

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Lone Star Rail District

Notice of Request for Qualifications

Lone Star Rail District (Rail District) seeks responses from qualified consultants to provide On-Call Program Support Services related to the Rail District's passenger and freight rail program.

The Request for Qualifications (RFQ) is available for download on the Rail District web site: www.LoneStarRail.com.

Responses to the RFQ must be received by the Rail District no later than **2:00 p.m. CDT on December 12, 2012** to be considered.

TRD-201205504
Ross Milloy
Executive Director
Lone Star Rail District
Filed: October 23, 2012

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Texas Lottery Commission

Instant Game Number 1506 "Star Trek™"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1506 is "STAR TREK™". The play style is "key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1506 shall be $3.00 per Ticket.

1.2 Definitions in Instant Game No. 1506.

A. Display Printing - That area of the Instant Game Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Ticket.

C. Play Symbol - The printed data under the latex on the front of the Instant Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: $3.00, $5.00, $10.00, $20.00, $50.00, $100, $300, $1,000, $50,000, 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, and PLANET SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO.1506 - 1.2D

PLAY SYMBOL	CAPTION
$3.00	THREE$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND
$300	THR HUND
$1,000	ONE THOU
$50,000	50 THOU
01	ONE
02	TWO
03	THR
04	FOR
05	FIV
06	SIX
07	SVN
08	EGT
09	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
PLANET SYMBOL	WINALL

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the Ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $3.00, $5.00, $9.00, $10.00, $15.00, or $20.00.

G. Mid-Tier Prize - A prize of $30.00, $50.00, $75.00, $100, $150, or $300.

H. High-Tier Prize - A prize of $1,000 or $50,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1506), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 125 within each Pack. The format will be: 1506-0000001-001.

K. Pack - A pack of "STAR TREK™" Instant Game Tickets contains 125 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket 001 will be shown on the front of the Pack; the back of Ticket 125 will be revealed on the back of the Pack. There will be no breaks between the Tickets in a Pack. Every other book will reverse i.e., reverse order will be: the back of Ticket 001 will be shown on the front of the Pack and the front of Ticket 125 will be shown on the back of the Pack.

L. Non-Winning Ticket - A Ticket which is not programmed to be a winning Ticket or a Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "STAR TREK™" Instant Game No. 1506 Ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each Instant Ticket. A prize winner in the "STAR TREK™" Instant Game is determined once the latex on the Ticket is scratched off to expose 35 (thirty-five) Play Symbols. If a player matches any of the YOUR NUMBERS Play Symbols to any of the WINNING NUMBER Play Symbols, the player wins the PRIZE for that number. If a player reveals a "Planet" Play Symbol, the player wins all PRIZES instantly. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game Ticket, all of the following requirements must be met:

1. Exactly 35 (thirty-five) Play Symbols must appear under the Latex Overprint on the front portion of the Ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The Ticket shall be intact;

6. The Serial Number, Retailer Validation Code, and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Ticket;

8. The Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted, or tampered with in any manner;

9. The Ticket must not be counterfeit in whole or in part;

10. The Ticket must have been issued by the Texas Lottery in an authorized manner;

11. The Ticket must not have been stolen, nor appear on any list of omitted Tickets or non-activated Tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code, and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The Ticket must be complete and not miscut, and have exactly 35 (thirty-five) Play Symbols under the Latex Overprint on the front portion of the Ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the Ticket;

14. The Serial Number of an apparent winning Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Tickets, and a Ticket with that Serial Number shall not have been paid previously;

15. The Ticket must not be blank or partially blank, misregistered, defective, or printed or produced in error;

16. Each of the 35 (thirty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 35 (thirty-five) Play Symbols on the Ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Ticket. In the event a defective Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Ticket with another unplayed Ticket in that Instant Game (or a Ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive Non-Winning Tickets within a Pack will not have identical patterns.

B. A Ticket will win as indicated by the prize structure.

C. Players can win up to fifteen (15) times on a Ticket.

D. No duplicate non-winning YOUR NUMBERS on a Ticket.

E. Non-winning prize symbols will not match a winning prize symbol on a Ticket.

F. Non-Winning Tickets will not contain more than two identical prize symbols.

G. No duplicate WINNING NUMBER will appear on a Ticket.

H. The "planet" symbol will never appear as a WINNING NUMBER.

I. The "planet" symbol will automatically win all 15 prizes on a Ticket and will win as per the prize structure.

J. The "planet" symbol will never appear more than once on a Ticket.

K. The "planet" symbol will never appear on a Non-Winning Ticket.

L. On "planet" winning Tickets, no YOUR NUMBERS will match any of the WINNING NUMBER.

M. A YOUR NUMBERS Play Symbol will never be the same number as the corresponding PRIZE symbol (i.e., 5 and $5).

2.3 Procedure for Claiming Prizes.

A. To claim a "STAR TREK™" Instant Game prize of $3.00, $5.00, $9.00, $10.00, $15.00, $20.00, $30.00, $50.00, $75.00, $100, $150, or $300, a claimant shall sign the back of the Ticket in the space designated on the Ticket and present the winning Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $30.00, $50.00, $75.00, $100, $150, or $300, Ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "STAR TREK™" Instant Game prize of $1,000 or $50,000, the claimant must sign the winning Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "STAR TREK™" Instant Game prize, the claimant must sign the winning Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. a sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

F. If a person is indebted or owes delinquent taxes to the State, and is selected as a winner in a promotional second-chance drawing, the debt to the State must be paid within 30 days of notification or the prize will be awarded to an Alternate.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under $600 from the "STAR TREK™" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of $600 or more from the "STAR TREK™" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Tickets ordered. The number of actual prizes available in a game may vary based on number of Tickets manufactured, testing, distribution, sales, and number of prizes claimed. An Instant Game Ticket may continue to be sold even when all the top prizes have been claimed.

2.9 Promotional Second-Chance Drawings. Any non-winning "STAR TREK™" Instant Game scratch-off Ticket may be entered into one of five promotional drawings for a chance to win a promotional second-chance drawing prize. See instructions on the back of the Ticket for information on eligibility and entry requirements.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game Ticket in the space designated, a Ticket shall be owned by the physical possessor of said Ticket. When a signature is placed on the back of the Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Ticket in the space designated. If more than one name appears on the back of the Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game Tickets and shall not be required to pay on a lost or stolen Instant Game Ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 7,680,000 Tickets in the Instant Game No. 1506. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1506 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$3	1,116,160	6.88
$5	542,720	14.15
$9	61,440	125.00
$10	133,120	57.69
$15	61,440	125.00
$20	81,920	93.75
$30	23,040	333.33
$50	10,560	727.27
$75	1,024	7,500.00
$100	3,616	2,123.89
$150	992	7,741.94
$300	2,560	3,000.00
$1,000	20	384,000.00
$50,000	11	698,181.82

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.77. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1506 without advance notice, at which point no further Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Instant Game closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing an Instant Game Ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1506, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201205412

Bob Biard
General Counsel
Texas Lottery Commission
Filed: October 18, 2012

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Panhandle Regional Planning Commission

Request for Qualifications for the Development of a Regional FMD Protection Plan or Plans

The Panhandle Regional Planning Commission (PRPC) is requesting Statements of Qualifications for a consultant to assist with the development of a Regional FMD Protection Plan(s). Responses will be received at the offices of the Panhandle Regional Planning Commission, 415 West Eighth Avenue, Amarillo, TX 79101, until 4:00 p.m. (CST), Friday, November 21, 2012.

Full information and a Request for Qualifications (RFQ) package may be obtained from the PRPC Regional Services Director, 415 West Eighth Avenue, Amarillo, TX 79101, by phoning (806) 372-3381 or by emailing: jkiehl@theprpc.org. This process is intended to result in the development of a consultant services agreement. As such, the PRPC reserves the right to negotiate an agreement based on fair and reasonable compensation for the scope of work described in this RFQ, as well as the right to reject any and all responses deemed unqualified, unsatisfactory or inappropriate.

TRD-201205500
John Kiehl
Regional Services Director
Panhandle Regional Planning Commission
Filed: October 23, 2012

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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 October 22, 2012, for a service provider certificate of operating authority, pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of MassComm, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 40873.

Applicant intends to provide resale-only telecommunications services.

Applicant proposes to provide service within the exchanges currently being served by Southwestern Bell Telephone Company d/b/a AT&T Texas, Verizon Southwest, CenturyLink, and Windstream.

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 November 9, 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 40873.

TRD-201205511
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 24, 2012

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Notice of Application for Designation as an Eligible Telecommunications Carrier

Notice is given to the public of a petition filed with the Public Utility Commission of Texas on October 16, 2012, for designation as an eligible telecommunications carrier (ETC) in the State of Texas pursuant to P.U.C. Substantive Rule §26.418.

Docket Title and Number: Application of Assist Wireless, LLC for Designation as an Eligible Telecommunications Carrier. Docket Number 40860.

The Application: Assist Wireless, LLC (Assist Wireless) requests ETC designation for wireless operations in all the requested non-rural wire centers of AT&T Texas, Verizon and Central Telephone Co. of Texas d/b/a CenturyLink. A list of requested wire centers is attached to the application as Exhibit 3. Assist Wireless provides wireless telecommunications services to consumers by using the Sprint Nextel network.

Persons who wish to comment on this application should notify the Public Utility Commission of Texas by November 16, 2012. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989 to reach the commission's toll-free number (888) 782-8477. All comments should reference Docket Number 40860.

TRD-201205467
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 19, 2012

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Notice of Application to Amend a Certificate of Convenience and Necessity for a Proposed Transmission Line

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on October 18, 2012, to amend a certificate of convenience and necessity for a proposed transmission line in Jackson County, Texas.

Docket Style and Number: Application of South Texas Electric Cooperative, Inc. to Amend a Certificate of Convenience and Necessity for the Proposed ETP Hairpin Double-Circuit 138-kV Transmission Line within Jackson County. Docket Number 40838.

The Application: The application of South Texas Electric Cooperative, Inc. (STEC) for a double-circuit 138-kV transmission line in the area of Jackson County about 2.5 miles north of Ganado is designated as the ETP Hairpin Transmission Line Project. Both circuits will be designed and operated at 138-kV and will terminate at the new ETP substation. The total estimated cost for the line and associated station are expected to cost $4,855,000 depending on the route chosen.

The proposed project is presented with three (3) alternate routes and is estimated to be approximately 2.25 miles in length. Any of the routes or route segments presented in the application could, however, be approved by the commission.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. The deadline for intervention in this proceeding is December 3, 2012. 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 40838.

TRD-201205465
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 19, 2012

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Notice of Application to Amend Designation as an Eligible Telecommunications Carrier

Notice is given to the public of a petition filed with the Public Utility Commission of Texas on October 16, 2012, to amend designation as an eligible telecommunications carrier (ETC) in the State of Texas pursuant to P.U.C. Substantive Rule §26.418.

Docket Title and Number: Application of True Wireless, LLC to Amend Designation as an Eligible Telecommunications Carrier for the Limited Purpose of Offering Lifeline Service. Docket Number 40861.

The Application: In Docket Number 36164, True Wireless received ETC designation in certain non-rural wire centers in the Texas Rio Grande Valley. The company now seeks to amend its ETC designation to expand the existing service area to provide service in all wire centers of non-rural ILECs AT&T Texas, Verizon and Central Telephone Co. of Texas d/b/a CenturyLink as indicated in Exhibit A of the application.

True Wireless seeks to expand its ETC designation solely to provide lifeline service to qualifying Texas households as a prepaid wireless carrier. It will not seek access to funds from the federal universal service fund for the purpose of providing service to high cost areas. True Wireless is a reseller of commercial mobile radio service (CMRS) throughout the United States. True Wireless provides prepaid wireless telecommunications services to consumer by using the wireless networks of national facilities-based carriers on a wholesale basis to offer nationwide service.

Persons who wish to comment on this application should notify the Public Utility Commission of Texas by November 16, 2012. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326 or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989 to reach the commission's toll-free number (888) 782-8477. All comments should reference Docket Number 40861.

TRD-201205468
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 19, 2012

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Notice of Filing to Withdraw Services Pursuant to P.U.C. Substantive Rule §26.208(h)

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) to withdraw services pursuant to P.U.C. Substantive Rule §26.208(h).

Docket Title and Number: Application of Southwestern Bell Telephone Company d/b/a AT&T Texas to Withdraw Prepaid Home Service for Residence Customers. Docket Number 40818.

The Application: On October 2, 2012, pursuant to P.U.C. Substantive Rule §26.208(h), Southwestern Bell Telephone Company d/b/a AT&T Texas (AT&T Texas or the applicant) filed an application with the Public Utility Commission of Texas (commission) to withdraw Prepaid Home Service for Residence Customers. AT&T Texas stated that it seeks to align its product offering and simplify doing business with AT&T Texas in all 22 states and prepaid home service was identified as a service which is no longer relevant in today's market. AT&T Texas also noted that the number of prepaid homes service customers has declined dramatically in the last few years. The applicant is currently servicing two customers. The proceedings were docketed and suspended on October 3, 2012, to allow adequate time for review and intervention.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) (800) 735-2989. All inquiries should reference Docket Number 40818.

TRD-201205466
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 19, 2012

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Texas Department of Transportation

Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and Texas Administrative Code, Title 43, §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following website:

http://www.txdot.gov/inside-txdot/get-involved/about/hearings-meetings.

Or visit www.txdot.gov, How Do I Find Hearings and Meetings, choose Hearings and Meetings, and then choose Schedule.

Or contact Texas Department of Transportation, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4501 or 1-800-68-PILOT.

TRD-201205501
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: October 23, 2012

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 36 (2011) is cited as follows: 36 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "36 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 36 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online at: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The following companies also provide complete copies of the TAC: Lexis-Nexis (800-356-6548), and West Publishing Company (800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Index of Rules***. The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register***. If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with the ***Texas Register*** page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
40 TAC §3.704.....950 *(P)*