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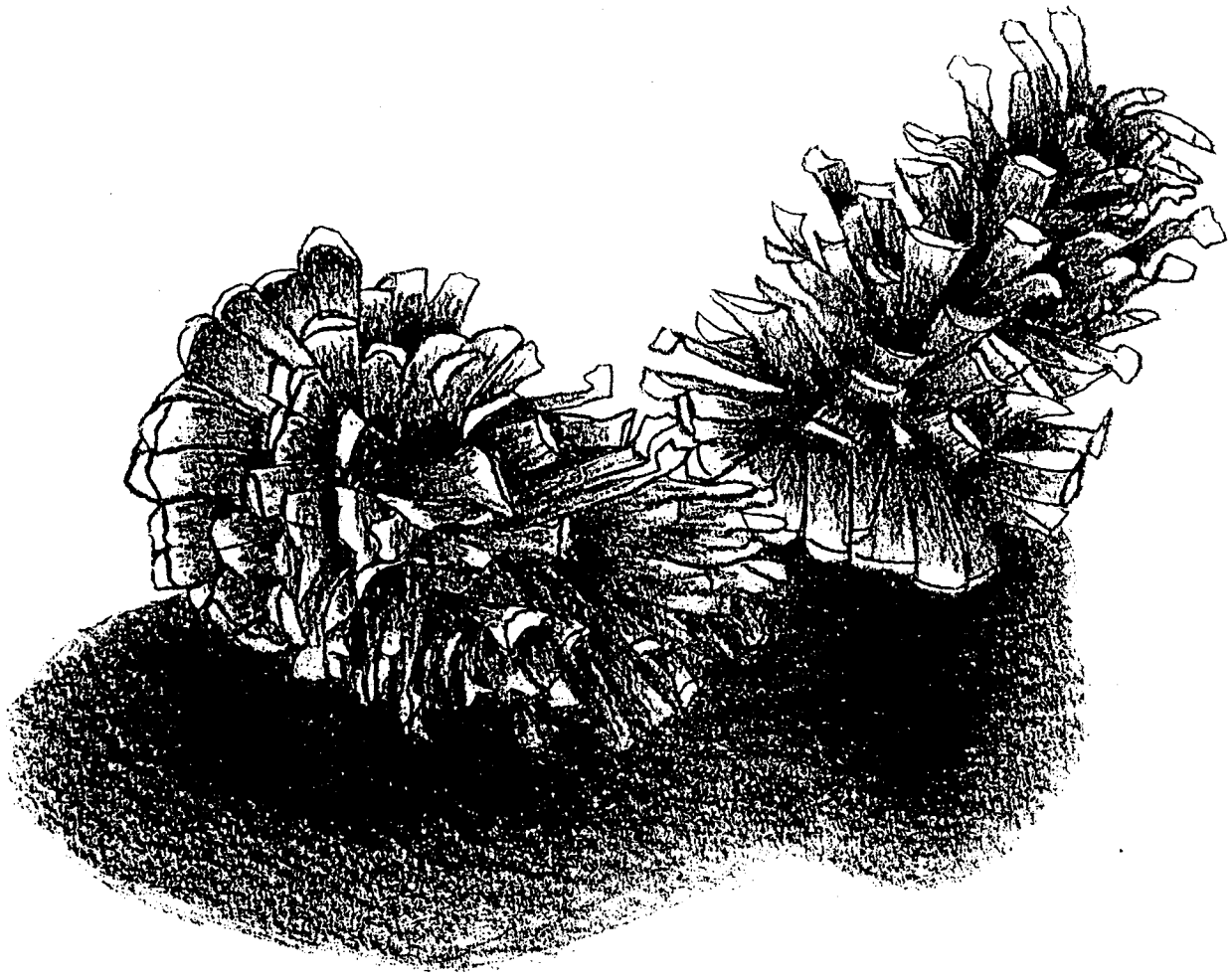

Part II of IV

This month's front cover artwork:

Artist: Joshua Smith

9th Grade

Killeen Ninth Grade Center

School children's artwork has decorated the blank filler pages of the *Texas Register* since 1987. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

We will display artwork on the cover of each *Texas Register*. The artwork featured on the front cover is chosen at random.

The artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*. The artwork does not add additional pages to each issue and does not increase the cost of the *Texas Register*.

For more information about the student art project, please call (800) 226-7199.

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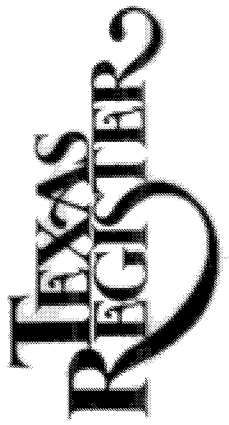

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WITHDRAWN RULES

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Comptroller of Public Accounts

Office of Consumer Credit Commissioner

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Deep East Texas Council of Governments

East Texas Council of Governments

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Employees Retirement System of Texas

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Texas Department of Health

Health and Human Services Commission

Texas Department of Housing and Community Affairs

Texas Department of Human Services

Texas Department of Insurance

Texas Natural Resource Conservation Commission

Permian Basin Workforce Development Board

Public Utility Commission of Texas

OFFICE OF THE ATTORNEY GENERAL

Under provisions set out in the Texas Constitution, the Texas Government Code. Title 4, §402.042, and numerous statutes, the attorney general is authorized to write advisory opinions for state and local officials. These advisory opinions are requested by agencies or officials when they are confronted with unique or unusually difficult legal questions. The attorney general also determines, under authority of the Texas Open Records Act, whether information requested for release from governmental agencies may be held from public disclosure. Requests for opinions, opinions, and open records decisions are summarized for publication in the ***Texas Register***. The attorney general responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion, and represents the opinion of the attorney general unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. To request copies of opinions, please fax your reuqest to (512) 462-0548 or call (512) 936-1730. To inquire about pending requests for opinions, phone (512) 463-2110.

Letter Opinions

LO-98–102(RQ-1176). The Honorable Gonzalo Barrientos Chair, Committee of the Whole on Legislative and Congressional Redistricting Texas State Senate, P.O. Box 12068, Austin, Texas 78711-2068, concerning whether a municipality and a fire fighters association may agree to exclude certain high ranking fire fighters from the collective bargaining unit.

S U M M A R Y A city and a fire fighters association may not negotiate to exclude from a collective bargaining unit certain "high ranking fire fighters" who are within the statutory definition of the term "fire fighters" entitled to participate in collective bargaining.

LO-98–103(RQ-1045). The Honorable Tod Mixson, Orange County Auditor, P.O. Box 399 Orange, Texas 77631-0399, concerning whether county may settle lawsuit relating to alleged wrongful acts of former sheriff and two deputies, where county is not named as defendant.

S U M M A R Y The Orange County Commissioners Court employed private attorneys to represent the former sheriff and his deputies in a lawsuit relating to their performance of official duties, presumably determining that the county's interest was at stake in the litigation. Under these circumstances, the commissioners court would also have authority to determine that it is in the county's interest to settle the litigation for less than the ongoing cost of defending it and to order the payment of such cost of settlement. The amount paid in settlement of the case is not indemnification of the officers, who have been sued in their official and individual capacities, since a judgment against them in their official capacities would be paid by the county as a county obligation.

LO-98–104(RQ-1125). The Honorable Charles R. Roach Hardin County District Attorney P.O. Box 1409 Kountze, Texas 77625 Letter Opinion No. 98-104 Re: Whether a commissioners court is required to vest management of the county law library in a committee of the local bar association

S U M M A R Y Section 323.024 of the Local Government Code authorizes the commissioners court to vest management of the county law library in a committee selected by the county bar association, but does not require the commissioners court to do so. The county law library fund established by section 323.023 of the Local Government Code, may be used only for library purposes. The fund may not be used to pay the salary, in whole or in part, of a deputy sheriff who escorts a prisoner from the jail to the county law library.

LO-98–105(RQ-1138). The Honorable Glen Wilson Parker, County Attorney, One Courthouse Square Weatherford, Texas 76086, concerning whether the sheriff of a county with a population of less than 110,000 that has not established a bail bond board is authorized to adopt bail bond licensing rules modeled on article 2372p-3, V.T.C.S.

S U M M A R Y The taking of bail bonds in a county with a population of less than 110,000 that has not established a bail bond board is governed by chapter 17 of the Code of Criminal Procedure. The sheriff of such a county is not authorized to adopt bail bond licensing rules modeled on article 2372p-3, V.T.C.S.

LO-98–106(RQ-1178). The Honorable Richard B. Rownsend, County and District Attorney, Morris County Courthouse, 500 Broadnax Street, Daingerfield, Texas 75638, concerning whether the 1997 amendments to Local Government code section 117.054, effective September 1, 1997, require the Morris County District Clerk to collect an amount equal to ten percent of interest earned on registry funds placed in interest-bearing accounts prior to September 1, 1997.

S U M M A R Y Local Government Code section 117.054 directs a county, district, or county and district clerk, when the funds are withdrawn, to allocate to the county general fund an amount equal to ten percent of interest earned on registry funds placed in an interest-bearing special or separate account, even interest earned prior to September 1, 1997. Section 117.054 applies to all registry funds placed in interest-bearing accounts and withdrawn on or after September 1, 1997.

LO-98–107(RQ-1184). Mr. Doyne Bailey, Administrator, Texas Alcoholic Beverage Commission, P.O. Box 13127, Austin, Texas 78711–3127, concerning whether the Alcoholic Beverage Commission may authorize the use of machines that dispense alcoholic beverages by means of a PIN number.

S U M M A R Y The Alcoholic Beverage Commission is prohibited by section 51.09 of the Alcoholic Beverage Code from authorizing the use of a machine that dispenses alcoholic beverages by means of a PIN number.

LO-98–108(RQ-1162). Ms. Eliza May, Executive Director, Texas Funeral Service Commission, 510 South Congress Avenue, Suite 206 Austin, Texas 78704-1716, authority of the Texas Funeral Service

Commission to prescribe requirements for reciprocal licensure of funeral directors and embalmers.

S U M M A R Y The Texas Funeral Service Commission may not adopt a rule prescribing the requirements of a reciprocal funeral director or embalmer license for a person holding a valid license from another state whose licensing requirements are not substantially equivalent to those of Texas.

LO-98–109(RQ-1187). The Honorable Carlos F. Truan, Chair, International Relations, Trade & Technology Texas State Senate, P.O. Box 12068, Austin, Texas 78711-2068, concerning whether a former district judge sitting by assignment may hold a compensated teaching position with a state university.

S U M M A R Y Neither article XVI, section 40 of the Texas Constitution nor the common-law doctrine of incompatibility prohibits a former district judge sitting by assignment from simultaneously holding a compensated teaching position with a state university.

TRD-9817689
Sarah Shirley
Assistant Attorney General
Office of the Attorney General
Filed: November 18, 1998

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Opinions

DM-484(RQ-983). The Honorable Sherry L. Robinson, Criminal District Attorney, Waller County, 836 Austin Street, Suite 105, Hempstead, Texas 77445, concerning whether Water Code section 53.063(2), requiring a fresh-water-supply district supervisor to own land in the district, and a parallel provision in the Brookshire-Katy Drainage District's enabling act violate the Equal Protection Clause of the United States Constitution, and related question.

S U M M A R Y Water Code section 53.063 has not been repealed. If the requirements in Water Code section 53.063(2) and the enabling act for the Brookshire-Katy Drainage District prohibiting a non-landowner from holding a position on the drainage district's governing board rationally serve a legitimate state purpose, a court would likely conclude that the requirements do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

DM-485(RQ-902). The Honorable Joe Rubio, District Attorney, 49th Judicial District, P.O. Box 1343, Laredo, Texas 78042-1343, concerning whether the colonias statute, Local Gov't Code ch. 232 subch. B, applies to employee housing provided by the Webb Consolidated Independent School District.

S U M M A R Y Local Government Code chapter 232, subchapter B, applies to the Webb Consolidated Independent School District's lease of manufactured homes on school grounds to teachers.

DM-486(RQ-1072). The Honorable Al Edwards, Chair, Committee on Rules and Resolutions, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910, concerning whether an individual convicted of a prior federal offense may apply for restoration of civil rights forfeited in the state as a result of the federal conviction if the individual has also been convicted of a misdemeanor offense.

S U M M A R Y An individual convicted of a prior federal offense may not apply for restoration of civil rights forfeited in the state as a result of the federal conviction if the individual has also been convicted of a misdemeanor offense.

DM-487(RQ-1209). The Honorable Howard Freemyer, Kent County Attorney, Kent County Courthouse, Jayton, Texas 79528, concerning whether a commissioners court may establish a neighborhood road pursuant to Transportation Code section 251.053.

S U M M A R Y A county commissioners court may not take private property for the purpose of establishing a road pursuant to Transportation Code section 251.053, the neighborhood road statute.

DM-488(RQ-1064). The Honorable Judith Zaffirini, Chair, Committee on Health and Human Services, Texas State Senate, P.O. Box 12068, Austin, Texas 78711, concerning whether the board of directors of an appraisal district may reimburse attorney fees for the chief appraiser who was a defendant in a criminal action, and related questions.

S U M M A R Y The board of directors of an appraisal district may reimburse its chief appraiser's attorney fees if it is authorized to do so by statute or under the common law. An appraisal district is not statutorily authorized to reimburse its chief appraiser's legal fees if the chief appraiser is indicted for official misconduct for an alleged failure to properly notify taxpayers of a change in use in their land. On the other hand, no statute forbids an appraisal district to reimburse the chief appraiser's legal fees. The common law permits an appraisal district to reimburse an officer's or employee's legal fees (1) if the board determines that paying for the legal representation serves a public interest, not just the officer's or employee's private interest; and (2) if the board determines that the officer or employee committed the alleged act or omission that was the basis of the suit in good faith and within the scope of his or her official duties. Whether the chief appraiser ultimately prevailed in the action is irrelevant to the board's decision to pay attorney fees. To the extent they are inconsistent with this conclusion, Attorney General Opinion DM-107 (1992) and Letter Opinion Nos. 97-065 (1997), 97-049 (1997), and 90-93 (1990) are overruled. An appraisal district board of directors need not adopt a policy regarding the payment of officers' and employees' legal expenses before it may agree to pay the expenses as they accrue. An appraisal district's common-law authority to pay an officer's or employee's attorney fees may be limited by statute. For instance, Civil Practice and Remedies Code chapters 101 or 102 may regulate the appraisal district's payment of attorney fees in certain civil actions. The fact that an officer or employee who is being sued or the subject of a criminal action for conduct that allegedly occurred during the course of the officer's or employee's work for the appraisal district is no longer an officer or employee of the district is irrelevant to the board's consideration of whether it will pay attorney fees.

DM-489(RQ-1105). Ms. Catherine A. Ghiglieri, Commissioner, Texas Department of Banking, 2601 North Lamar Boulevard, Austin, Texas 78705-4294, concerning whether Government Code chapter 2256, the Public Funds Investment Act, applies to various funds administered by the Department of Banking.

S U M M A R Y The Public Funds Investment Act, Government Code chapter 2256, subchapter A, applies only to certain public funds. Public funds are those funds belonging to the state or a political subdivision that the state has collected in accordance with a general law and that will be used to serve the public interest generally. A governmental entity may invest under the act only public funds that, among other things, the entity is authorized to invest by a statute other than the act. The Commissioner of Banking may not invest under the act funds of a liquidated, uninsured bank or a trust company in conservatorship because the funds are not public funds. Likewise, the Commissioner may not invest under the act funds of a liquidated perpetual-care cemetery. The Commissioner may not invest under the act seized prepaid-funeral-contract funds, nor may the Commissioner

invest under the act money in the prepaid- funeral-contract guaranty fund. Finally, the Commissioner may not invest travel-advance funds under the act because the Commissioner does not have statutory authority to do so.

DM-490(RQ-1140). The Honorable John Mann, District Attorney, 31st & 223rd Judicial Districts of Texas, P.O. Box 24, Shamrock, Texas 79079-0024, concerning whether a school district is entitled to assess ad valorem taxes against royalty interests in a pooled gas unit based upon the location of the well or based upon the location of the real property to which the royalty interests appertain.

S U M M A R Y A school district is entitled to assess ad valorem taxes against royalty interests in a pooled gas unit based upon the location of the real property to which the royalty interests appertain as opposed to the location of the well.

TRD-9817690
Sarah Shirley
Assistant Attorney General
Office of the Attorney General
Filed: November 18, 1998

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Request for Opinions

RQ-1214. The Honorable Carl E. Lewis Nueces County Courthouse 901 Leopard, Room 206 Corpus Christi, Texas 78401-3680 Re: Whether hospital district board of managers may form peer review committees entitled to statutory immunities if private corporation operates district's facilities and provides indigent care.

RQ-1215. Request from The Honorable Fred Hill, Chair, Committee on Urban Affairs, Texas House of Representatives, P.O. Box 2910, Austin, Texas 78768-2910, concerning authority of municipality to grant exclusive solid waste collection franchise pursuant to which all construction debris must be collected by franchisee.

RQ-1216. Request from The Honorable David Aken, San Patricio County Attorney, County Courthouse, Room 102, Sinton, Texas 78387, concerning whether commissioners court may pay sheriff the same amount of longevity pay he received as deputy.

RQ-1217. Request from Mr. Robert A. Swerdlow, Ph.D. Chair, Texas Council on Purchasing From People with Disabilities, P.O. Box 13047, Austin, Texas 78711-3047, concerning financial reporting requirements applicable to Texas Council on Purchasing From People with Disabilities under section 122.022 of Human Resources Code.

TRD-9817989
Sarah Shirley
Assistant Attorney General
Office of the Attorney General
Filed: November 25, 1998

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PROPOSED RULES

Before an agency may permanently adopt a new or amended section or repeal an existing section, a proposal detailing the action must be published in the ***Texas Register*** at least 30 days before action is taken. The 30-day time period gives interested persons an opportunity to review and make oral or written comments on the section. Also, in the case of substantive action, a public hearing must be granted if requested by at least 25 persons, a governmental subdivision or agency, or an association having at least 25 members.

Symbology in proposed amendments. New language added to an existing section is indicated by the text being underlined. [Brackets] and ~~strike-through~~ of text indicates deletion of existing material within a section.

TITLE 1. ADMINISTRATION

Part V. General Services Commission

Chapter 115. Building and Property Services Division

Subchapter A. State Owned Property

1 TAC §115.7

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

The General Services Commission proposes the repeal of Title 1, Texas Administrative Code (TAC), §115.7, concerning burial in the Texas State Cemetery in order to delete obsolete language that resulted from the creation of the Texas State Cemetery Committee ("Committee") by Senate Bill 973, 75th Legislature (1997). The Committee has proposed for adoption new rules under Title XIII, (TAC), Chapter 71, for the administration of the Texas State Cemetery that will go into effect in the latter part of November. The Committee's rulemaking authority is located under the Texas Government Code, Sections 2165.256(i) and 2165.2561(m).

Jerry Williams, Associate Deputy Director, has determined that for the first five-year period there will be no fiscal impact to state or local government as a result of repealing rule §115.7.

Jerry Williams, Associate Deputy Director, also has determined that for each of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal of rule §115.7 will be the deletion of obsolete language. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeal as proposed.

Comments on the proposals may be submitted to Judy Ponder, General Counsel, General Services Commission, P.O. Box 13047, Austin, Texas 78711-3047. Comments must be received no later than thirty days from the date of publication of the proposal to the *Texas Register*.

The repeal of rule §115.7 is proposed under the Texas Government Code, Title 10, Subtitle D, Section 2152.003, which provides the General Services Commission with the authority to promulgate rules consistent with Subtitle D.

The Texas Government Code, Chapter 2165, Sections 2165.256 and 2165.2561 are affected by the proposed repeal of rule §115.7.

§115.7. Burial in the State Cemetery.

This 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 November 16, 1998.

TRD-9817604
Judy Ponder
General Counsel
General Services Commission
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 463–3960

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Part XVI. State Council on Competitive Government

Chapter 401. Administration

The State Council on Competitive Government proposes amendments to Title 1, Texas Administrative Code, Part XVI, Chapter 401 under Subchapter A - Sections 401.1 – 401.4; Subchapter B - 401.21 – 401.28; Subchapter C - 401.42 – 401.49; Subchapter D - 401.61 and 401.62; Subchapter E - 401.81 and 401.82; and Subchapter F - 401.102 – 401.104 relating to Administration. The amendments are being proposed to clarify existing language and to update the title of the statute. The council also proposes under Subchapter F. Monitoring of Services, a new §401.105 relating to Contract Modification Notification by Contracting Agency to the Council. This new section is being proposed to clarify an executing agency's responsibilities regarding a contract.

Tom Treadway, Clerk of the Council on Competitive Government, has determined that for the first five years the proposed amendments and the new section are in effect, there will be no fiscal implications for state or local government as a result of administering the proposed changes.

Tom Treadway, Clerk of the Council on Competitive Government, has determined that for each year of the first five years the sections are in effect, the public benefit anticipated will be improved efficiency due to clarification of language. There will be no cost to small or large businesses and/or individuals.

Comments on the proposed sections may be submitted to Michelle, Director, State Council on Competitive Government, 1711 San Jacinto, Room 201-E, Austin, Texas 78711. Comments must be received no later than 30 days from the date of publication of the proposed sections in the *Texas Register.*

Subchapter A. General Rules

1 TAC §§401.1–401.4

The amended sections are proposed under Government Code, Title 10, Subtitle D, Chapter 2162, Subchapter B, Section 2162.101 (General Powers) which provide the State Council on Competitive Government with the authority to adopt a rule governing any aspect of the Council's duties or responsibilities.

The following code is affected by the proposed amendments: Government Code, Title, Subtitle D, Chapter 2162.

§401.1. General Statement of Purpose.

Pursuant to Government Code, Chapter 2162 [~~Texas Civil Statutes, Article 601b, Article 15~~], the State Council on Competitive Government shall [~~is responsible for developing a program to~~] encourage competition, innovation, and creativity in providing state services in order to improve the quality and cost-effectiveness of those services. These rules are promulgated to inform the public and provide an orderly procedure to accomplish the responsibilities provided by law.

§401.2. Definitions.

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

(1) Agency in-house cost estimate–A state agency report containing [~~that contains~~] the agency's computation of the estimated cost to the agency of producing [~~to produce~~] or delivering [~~deliver~~] a desired quality and quantity of an identified state service using agency personnel and facilities and [~~,which computation must be made using~~] the council-approved cost methodology.

(2) Clerk–The executive director of the commission, who shall serve as the clerk of the council pursuant to §401.21(b) of this title (relating to Council Officers) as follows.

[~~Commission–The General Services Commission.~~]

(3) Commercially available service–A service performed or provided by at least two private service providers within the state.

(4) Commission–The General Services Commission.

(5) Competitive process–Any procedure approved by the council [~~that is~~] designed to provide identified state services in competition with [~~private~~] service providers[~~or other state agency providers~~].

(6) Comptroller–The Comptroller of Public Accounts.

(7) Council–The State Council on Competitive Government.

(8) Council-approved cost methodology–A methodology developed or approved by the council, designed to accurately identify all direct and indirect costs incurred by a state agency in providing a particular service, for use by state agencies in preparing agency in-house cost estimates or similar reports to the council, and for other purposes specified in this chapter.

(9) Designees–Individuals designated by council members to act on their behalf pursuant to §401.22 of this title (relating to Designees) as follows.

[~~Historically underutilized business–~~]

[~~(A) a corporation formed to make for the purpose of making a profit in which at least 51% of all classes of the shares of stock or other equitable securities are owned by one or more persons who:~~]

[~~*(i)* have suffered the effects of discriminatory practices or similar insidious circumstances over which they have no control, including African Americans, Hispanic Americans, women, Asian Americans, and Native Americans; and~~]

[~~*(ii)* have a proportionate interest and demonstrate active participation in the control, operation, and management of the corporation's affairs;~~]

[~~(B) a sole proprietorship created for the purpose of making a profit that is 100% owned, operated, and controlled by a person described by subparagraph (A)(i) of this definition;~~]

[~~(C) a partnership formed for the purpose of making a profit in which at least 51% of the assets and interest in the partnership is owned by one or more persons who:~~]

[~~*(i)* are described by subparagraph (A)(i) of this definition; and~~]

[~~*(ii)* have a proportionate interest and demonstrate active participation in the control, operation, and management of the partnership affairs;~~]

[~~(D) a joint venture in which each entity in the joint venture is a historically underutilized business under this section; or~~]

[~~(E) a supplier contract between a historically underutilized business under this section and a prime contractor under which the historically underutilized business is directly involved in the manufacture or distribution of the supplies or materials or otherwise warehouses and ships the supplies.~~]

(10) Identified state service–A service provided by the state that the council identifies [~~has identified~~] as a commercially available service and is reviewed [~~brought under study~~] by the council to determine whether the service may [~~better~~] be provided more effectively through competition with private service providers and/or state agencies other than the agency currently providing the service.

(11) Management study–A state agency analysis of an activity conducted by that agency used [~~that is made~~] to determine the essential elements of an activity, [~~the~~] quality and quantity of the services delivered, and the method used by the agency to provide those services.

(12)Person–Any individual, corporation, partnership, joint venture, or other legal entity, including an agency or office of state or local government.

(13)Proposal–An offer to perform an identified state service, made within guidelines prescribed by the council.

(14)Proposer–Any person who submits a proposal to the council.

(15)Salvage property–Any personal property which through use, time, or accident is so depleted, worn out, damaged, used, or consumed that it has no value for the purpose for which it was originally intended.

(16)Service provider–A public or private entity performing an identified state service.

(17)State agency–

(A) any department, commission, board, office, or other agency in the executive branch of state government created by the constitution or a statute [~~of this state, except the Texas High-Speed Rail Authority~~];

(B) the supreme court [~~Supreme Court of Texas~~], the court of criminal appeals [~~Court of Criminal Appeals of Texas~~], a court of [~~civil~~] appeals, or the Texas [~~Civil~~] Judicial Council; or

(C) a university system or an institution of higher education as defined in the Education Code, §61.003, as amended, other than a public community/junior [~~junior~~] college.

(18)Suggestion–A solicited or unsolicited letter, memorandum, or other document submitted to the council or a state agency pursuant to §401.42 of this title (relating to Submission and Receipt of Suggestions), recommending that the council consider designating a particular state service as an identified state service.

(19) Surplus property–Any personal property exceeding [~~which is in excess of~~] the needs of any state agency and which is not required for its foreseeable needs. The term 'surplus property' includes [~~Surplus property may be~~] used or new property that retains [~~but possesses~~] some usefulness for the purpose for [~~of~~] which it was intended or for another[~~some other~~] purpose.

§401.3. Exemption from State Purchasing Laws.

Contracts awarded [~~made~~] by the council, decisions regarding whether a state agency must engage in a competitive process, the designation of services as identified state services, and all other related actions taken by the council [~~in connection therewith~~] are exempt from all state laws regulating or limiting state purchasing and purchasing decisions. [~~This exemption applies to all decisions and actions of the council directly or indirectly relating to the competitive process.~~]

§401.4. Reporting Cost Savings.

The council periodically may develop or collect information on [~~regarding~~] cost savings and enhanced revenue realized by the state [~~and~~] resulting from identified state services [~~that have been~~] subjected to competition by the council. The [~~In connection therewith, the~~] council periodically may require state agencies to identify and report to the council cost savings and enhanced revenue realized [~~by such agencies and resulting~~] from services provided by the [~~such~~] agencies which were [~~have been~~] subjected to competition by the council. The council may take appropriate steps to verify the information received from [~~state~~] agencies. The council may report its findings to the governor or the Legislative Budget Board for consideration under budget execution [~~the~~] provisions of the Government Code, Chapter 317.

This 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 November 19, 1998.

TRD-9817702

Chester Beattie
Legal Counsel
State Council on Competitive Government
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 463–3960

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Subchapter B. Council Meeting Guidelines and Requirements

1 TAC §§401.21–401.28

The amended sections are proposed under Government Code, Title 10, Subtitle D, Chapter 2162, Subchapter B, Section 2162.101 (General Powers) which provide the State Council on Competitive Government with the authority to adopt a rule governing any aspect of the Council's duties or responsibilities.

The following code is affected by the proposed amendments: Government Code, Title, Subtitle D, Chapter 2162.

§401.21. Council Officers.

(a) (No change.)

(b) The executive director of the commission is designated as the clerk of the council and shall perform the duties contained in this title [~~prescribed herein~~] and [~~such~~] other duties determined [~~as may be prescribed~~] by the council.

(c) Notices, suggestions, correspondence, or other documents to be delivered to the council shall be delivered to the clerk for distribution to the members of the council. Information [~~Such information~~] shall be delivered to the clerk of the [~~at~~] Council on Competitive Government, General Services Commission, 1711 San Jacinto, P.O. Box 13047, Austin, Texas 78711-3047, (512) 463-2169, facsimile (512) 463-3310 [~~(512)463-3446~~].

§401.22. Designees.

(a) (No change.)

(b) Designees have full power and authority to act on behalf of the members of the council whom they represent, including all power and authority vested under Government Code, Chapter 2162 [~~Texas Civil Statutes, Article 601b, Article 15~~], and under this chapter.

(c) The council may assign staff to [~~review, evaluate,~~] consider[~~,~~] or analyze any suggestions, proposals, or other information on the council's behalf. The assigned staff shall [~~may~~] perform any function deemed necessary by the council. Results [~~The results~~] of any analysis [~~reviews or evaluations~~] may be made in writing and submitted to the clerk for distribution to council members. The council may consider the written recommendations, but shall not be bound by such recommendations.

§401.23. Meetings.

(a) The council shall meet subject to [~~at least once quarterly and at other times at the~~] call of the presiding officer or upon the written request of three or more members of the council. Written [~~Any written~~] requests must be filed with the clerk. All meetings shall comply with [~~the~~] open meetings provisions in the Government Code, Chapters[~~Chapter~~] 551 and 2162 [~~;Texas Civil Statutes, Article 601b, Article 15;~~] and this chapter.

(b) The council shall maintain a written plan describing [~~that describes~~] how a person who does not speak English, or who has a physical, mental, or developmental impairment [~~handicap~~] may be provided with reasonable access to council meetings.

(c) The clerk shall file [be responsible for filing] notice of meetings as required by law. The clerk shall also give notice of the meetings to council members.

(d) (No change.)

§401.24. Agenda for Council Meetings.

(a) - (c) (No change.)

(d) If the presiding officer finds that an emergency exists requiring immediate council action, additional items may be added to the agenda in accordance with [the] provisions of Government Code, Chapter 551 [the Texas Open Meetings Act].

§401.25. Record of Meetings.

The clerk shall keep a complete record of council [the] meetings [of the council] and shall prepare written summaries or minutes reflecting actions taken by [the] council members present as required by the Government Code, Chapter 551.

§401.26. Voting Procedures.

The council may act [take action] upon a majority vote of [the] members eligible to vote on that action. A council member is not eligible to vote on the award of a contract by the council if that council member has a conflict of interest under §401.49 of this title (relating to Conflict of Interest), or is otherwise precluded from voting by §401.49 of this title.

§401.27. Public Comment.

(a) The council shall develop and implement reasonable policies providing [that provide] the public with an opportunity to appear before the council and speak on issues within the scope of the council's jurisdiction.

(b) Public comments shall be heard subject to limitations imposed at the discretion of the presiding officer, including time limits and other constraints [as] necessary for efficient and fair consideration of agenda items.

(c) (No change.)

§401.28. Public Hearings.

The council may periodically hold public hearings to obtain input regarding [the] policies and operations of the council, issues before the council, and to solicit suggestions and ideas from interested members of the public.

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

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Chester Beattie
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Subchapter C. Identification and Review of State Services

1 TAC §§401.42–401.49

The amended sections are proposed under Government Code, Title 10, Subtitle D, Chapter 2162, Subchapter B, Section 2162.101 (General Powers) which provide the State Council on Competitive Government with the authority to adopt a rule governing any aspect of the Council's duties or responsibilities.

The following code is affected by the proposed amendments: Government Code, Title, Subtitle D, Chapter 2162.

§401.42. Submission and Receipt of Suggestions.

(a) Any person may submit written suggestions to the council. Such suggestions must [should] be submitted to the council through the clerk, by means of facsimile transmission, hand delivery, or private or public mail. The clerk will promptly distribute copies of all suggestions to council members.

(b) (No change.)

(c) A state agency receiving [that receives] a suggestion or proposal shall forward a copy to the clerk within 30 calendar [10] days from [of the] receipt of the suggestion [same] by the state agency.

§401.43. Agency Information for Identification of Services [Council Mandated Information].

(a) The council may require a state agency to provide information regarding any service it provides, to assist the council in identifying state services that are commercially available and could be provided through competition with commercial sources and/or other service providers. A state agency [that has been] required by the council to provide information regarding a service must provide a written analysis of the service, within the time prescribed by the council.

(b) The written analysis must include the following:

(1) a detailed description of the service that conforms to all applicable council guidelines and instructions [a brief overview and a description of the service], including [the] technical requirements or specifications of the service to allow the council to get price data from qualified service providers;

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

(4) a detailed statement and itemization of all direct and indirect costs incurred in providing the service (including costs incurred by other agencies, e.g., [such as the] comptroller, retirement systems [treasurer], and attorney general), based on [upon] the council-approved cost methodology and conforming to all applicable council guidelines and instructions to [that will] enable the council to make meaningful and accurate cost comparisons with other potential service providers;

(5) a detailed statement of the number and salary levels of full-time employees (or full-time employee equivalents) [, and their salary levels,] used to provide the service;

[(6) a detailed description of the service that conforms to all applicable council guidelines and instructions, containing sufficient information, as determined by the council, to allow the council to obtain adequate price information from other qualified service providers;]

(6) [(7)] a detailed description of existing contractual obligations, related to all or any portion of the service, incurred by the agency within the last three calendar years;

(7) [(8)] a detailed description of the agency's level of satisfaction with the service provider and the performance records of the service providers hired as a result of the contracts described under paragraph (6) [(7)] of this subsection; and

(8) [(9)] any other information requested by the council.

§401.44. Designation of Identified State Services.

(a) After reviewing [~~it has reviewed~~] a state service pursuant to §401.43 of this title (relating to Agency Information for Identification of Services [~~Council Mandated Information~~]), the council may designate the service as an identified state service. The designation shall be written [~~in writing,~~] and [~~copies shall be~~] provided to the clerk and all affected state agencies.

(b) Alternatively, after reviewing [~~it has reviewed~~] a state service pursuant to §401.43 of this title (relating to Agency Information for Identification of Services [~~Council Mandated Information~~]), the council may defer a decision regarding designation of that service as an identified state service pending further study of the service. Upon completion of additional [~~such further~~] study, the council may [~~then~~] designate the service as an identified state service[~~, which designation shall be~~] in writing[,] with copies provided to the clerk and all affected state agencies.

(c) For purposes of this section, [~~and~~] §401.46 of this title (relating to Determination To Subject an Identified State Service to Competition), and §401.81 of this title (relating to Duties of Affected State Agencies), an "affected state agency" is an agency providing [~~that provides~~] all or a portion of the state service designated by the council as an identified state service.

§401.45. For Review of Identified State Services [~~Information Required for Council's Study~~].

(a) The council may require a state agency to prepare a written analysis of one or more identified state services. The council may require the [~~that any such~~] written analysis to include [~~the~~] information set forth in §401.43(b) of this title (relating to Agency Information for Identification of Services [~~Council Mandated Information~~])[,] and any other information deemed pertinent by the council.

(b) The council may request information from any source, public or private, in connection with its review of an identified state service. The council may consider:

(1) (No change.)

(2) [~~the~~] availability of potential service providers;

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

§401.46. Determination To Subject an Identified State Service to Competition. The council may determine that an identified state service may [~~better~~] be provided better through competition with private commercial sources, other state agency service providers, or consolidation of similar state services or any combination thereof [~~or both~~]. The council's determination shall be written [~~in writing~~] and [~~shall~~] contain a brief statement of the reasons for the determination. A copy of the council's written determination shall be provided to the clerk and all affected state agencies.

§401.47. Requirement that [~~That~~] State Agencies Engage in a Competitive Process.

(a) The council may at any time require a state agency to engage in any competitive process developed or described by the council to subject an identified state service to competition with private commercial sources, with other state agency service providers, or both. A state agency [~~that is~~] required to engage in such a process shall comply fully with all requirements and instructions of the council.

(b) (No change.)

§401.48. Development of Competitive Process.

(a) The council may establish procedures, issue guidelines or instructions, and take any other action [~~steps~~] to describe and identify the competitive process to be followed by a state agency in submitting an identified state service to competition. The written description of the competitive process may incorporate by reference any process or portion of a process described in another commonly available source. Such sources may include, but shall not be limited to, federal, state, and local statutes, rules, regulations, ordinances, procedures, and guidelines, as well as private commercial publications.

(b) The council may require an agency to engage in any competitive process reasonably calculated to ensure competition among service providers, including, but not limited to:

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

(3) a two-step selection process such as that described in the Professional Services Procurement Act, Government Code, Chapter 2254, Subchapter A [~~Texas Civil Statutes, Article 664-4~~]; and

(4) (No change.)

§401.49. Conflict of Interest.

(a) No person may participate in specification [~~the~~] preparation [~~of specifications~~], proposal evaluation [~~of proposals~~], or any significant administrative function related to the competitive process, if the person has or may have a conflict of interest in the proposed or resulting contract.

(b) A [~~Without limiting the foregoing, a~~] conflict of interest may be determined by the council to exist if a person participates directly or indirectly in specification [~~the~~] preparation [~~of specifications~~], proposal evaluation [~~of proposals~~], or any significant administrative function related to the competitive process knowing that:

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

(c) [~~(d)~~] In this section:

(1) "immediate family" means a person related in the first degree of consanguinity or affinity to a person that has a significant financial interest in the proposed contract or an arrangement concerning prospective employment from the proposed contract;

(2) "significant financial interest" refers to [~~either~~]:

(A) receiving [~~a personal receipt,~~] or right to receive, money or other valuable property or benefits under the actual or proposed contract;

(B) [~~the~~] holding of a position in a business such as a principal, officer, director, trustee, partner, employee, or the like, or holding any position of management;

(C) holding more than 10% of the outstanding debt of a person directly involved in the proposed or resulting contract; or

(D) owning substantial stock, or other interest in a business. "Substantial" in this context shall not include token ownership or ownership which would not normally be able to influence the decisions of the business.

[~~(C) the ownership of substantial stock, or other interest in a business. Substantial in this context shall not include token ownership or ownership which would not normally be able to influence the decisions of the business; or~~]

[~~(D) holding more than 10% of the outstanding debt of a person directly involved in the proposed or resulting contract~~].

(d) This section does not preclude a state agency or employees of a state agency from competing to provide an identified state service already being provided by that agency, if the agency or em-

ployees do not participate directly in the evaluation of proposals relating to the council's submission of such service to a competitive process.

(e) A [~~Without limiting the foregoing,~~ a] council member is not eligible to vote on awarding [~~the award of~~] a contract if the agency represented by that council member [~~has~~] submitted a proposal to the council seeking the [~~such~~] contract or if the council member has a conflict of interest with respect to the [~~such~~] contract, as defined in 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.

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Subchapter D. Evaluation of Proposals

1 TAC §401.61, §401.62

The amended sections are proposed under Government Code, Title 10, Subtitle D, Chapter 2162, Subchapter B, Section 2162.101 (General Powers) which provide the State Council on Competitive Government with the authority to adopt a rule governing any aspect of the Council's duties or responsibilities.

The following code is affected by the proposed amendments: Government Code, Title, Subtitle D, Chapter 2162.

§401.61. Minimum Requirements for Proposals.

Proposals must include:

(1) price;

(2) a detailed statement of the number and salary of individuals [~~and the salary levels of those individuals~~] connected with the performance of the work, including:

(A) employees, independent contractors or subcontractors, and others; and

(B) any contractors or subcontractors qualifying as historically underutilized businesses, as defined by Government Code, Chapter 2161, and further clarified by Chapter 111 of this title (relating to Executive Administration Division), and listed in the directory published by the commission in compliance with Government Code, §2161.064. [~~employees, independent contractors or subcontractors, and others, including detailed information regarding any contractors or subcontractors who qualify as historically underutilized businesses and are listed in the directory published by the commission in compliance with Texas Civil Statutes, Article 601b, §1.03;~~]

(3) a detailed description of health care benefits to be provided for [~~the~~] individuals receiving [~~who will receive~~] compensation in connection with the performance of the work, and the cost to the proposer of providing the [~~such~~] benefits;

(4) a detailed description of retirement benefits to be provided for [~~the~~] individuals receiving [~~who will receive~~] compensation in connection with the performance of the work, and the cost to the proposer of providing the [~~such~~] benefits;

(5) a detailed description of workers' compensation insurance to be provided for [~~the~~] individuals receiving [~~who will receive~~] compensation in connection with the performance of the work, and the cost to the proposer of providing such benefits;

(6) (No change.)

(7) a detailed description of all charges filed against the proposer, or any person or entity affiliated with the proposer, alleging discrimination or unfair labor practices with any state or federal agency or state or federal court in the five years preceding the submission of the proposal [~~bid~~], together with a description of the resolution, if any, of each charge;

(8) a detailed statement certifying that the overall package of salaries and benefits to be provided to employees performing the identified state service under the proposer's contract will be reasonably comparable to the overall package of salaries and benefits of those state employees currently performing functions similar to those performed by the proposer's employees on [~~with respect to~~] the identified state service, provided that [~~the~~] certification shall be based on the overall character of the salaries and benefits package and not on the presence, absence, or level of one particular benefit or on a specific salary level;

(9) (No change.)

(10) a detailed statement explaining how the proposer will satisfy the specifications for the contract to be awarded [~~established~~] by the council, and how the proposer's performance will be measured; and

(11) (No change.)

§401.62. Evaluation.

(a) Upon receipt of a proposal, the council may evaluate a proposal by considering the following [~~factors~~]:

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

(b) The council may provide additional [~~further~~] guidelines or procedures for evaluating proposals[,] and may include these [~~such~~] guidelines or procedures in [~~the~~] specifications for a solicitation document [~~particular contract~~] or in any related written document [~~as~~] the council deems necessary [~~or advisable~~].

(c) Following its evaluation of a proposal[,] the council may either reject the proposal or direct a state agency to:

(1) (No change.)

(2) enter into negotiations, within the time period prescribed by the council, with the proposer to reach [~~aimed at reaching~~] a contractual agreement to provide the identified state service[,] on terms consistent with the proposal and the council's actions on the proposal [~~in connection therewith~~].

(d) After all proposals are evaluated and the council determines under subsection (c) of this section the course of action to be taken with respect to a proposal, the council shall provide to any party on request a brief written statement of the results of the evaluation.

(e) [~~(d)~~] A contract executed by a state agency pursuant to subsection (c) of this section must be approved by the council before it is [~~such contract shall be~~] effective, and [~~which~~] approval must be evidenced by the signature of the presiding officer [~~an authorized member~~] of the council.

(f) [(e)] The council shall have the authority to negotiate contractual terms, require a state agency to execute a contract or execute [or enter into] a contract on behalf of a state agency, or both, if the council determines that the state agency has not made a good faith effort to comply with the council's instructions under subsection (c) of this section.

[(f) After all proposals have been evaluated fully and the council has made its determination under subsection (e) of this section regarding the course of action to be taken with respect to a proposal, the council shall provide to any party on request a brief written statement of the results of the evaluation.]

(g) Any actual bidder, offeror, proposer, or contractor, or any affected state agency, or any affected state employee who is aggrieved in connection with the award of a contract under this chapter may formally protest to the council. The council may consolidate claims by affected state employees raising [that raise] substantially similar issues. Protests must be in writing and received in the office of the clerk within ten business [five working] days after the aggrieved person knows or should have known of the award of the contract. Copies of the protest must be mailed or delivered by the protesting party to the affected state agency or agencies and all other interested parties.

(h) A protest must contain:

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

(4) a statement that copies of the protest were [have been] mailed or delivered to the affected state agency or agencies and all other interested parties; and

(5) (No change.)

(i) If the protest is not withdrawn or resolved by mutual agreement, the clerk shall issue a written recommendation regarding [the] disposition of the protest within ten business [five] days of receipt of the protest[, which recommendation shall be distributed] to members of the council. The recommendation shall suggest that the protest be sustained or denied[,] and [shall] set forth [the] reasons for the recommendation. The recommendation may also specify appropriate remedial action including, but not limited to, entry of an order declaring the contract void. In addition to members of the council, the clerk shall provide a copy of the recommendation to the protesting party, [the] affected state agency or agencies, and all other interested parties.

(j) The clerk's recommendation may be approved, rejected, or modified by the council. The council's disposition of the protest shall be made in open meeting of the council. The council's decision shall be the final administrative action of the council relating to the [such] protest.

(k) Unless the council finds good cause exists for a delay or the council determines that a protest [on appeal] raises issues significant to procurement practices or procedures, a protest [or appeal] that is not filed within the proper time period [timely] will not be considered.

(l) In this section an:

(1) "interested party" is a person submitting [who has submitted] a proposal for the contract involved; and

(2) "affected state agency" is an agency providing [that provides] all or part [a portion] of the state service that is the subject of the proposal; and

(3) "affected state employee" is a state employee whose job is [performed as] part of an identified state service subject to a contract awarded by the council.

(m) If the commission submits [clerk's agency has submitted] a proposal for the contract involved, the presiding officer shall appoint a [another] council member who is disinterested in the transaction to perform the review and make the recommendations required of the clerk under 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.

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Subchapter E. Duties of Affected Agencies

1 TAC §401.81, §401.82

The amended sections are proposed under Government Code, Title 10, Subtitle D, Chapter 2162, Subchapter B, Section 2162.101 (General Powers) which provide the State Council on Competitive Government with the authority to adopt a rule governing any aspect of the Council's duties or responsibilities.

The following code is affected by the proposed amendments: Government Code, Title, Subtitle D, Chapter 2162.

§401.81. Duties of Affected State Agencies.

(a) The council may prescribe formats for use [the format to be used] by state agencies in providing [any] information to the council, and may require an agency to adhere to any other guidelines, procedures, or instructions concerning cost accounting, auditing, or any other pertinent activity, including, but not limited to, use of [the] council-approved cost methodology.

(b) The council may require a state [an] agency to conduct one or more public hearings on any aspect of a state service, or to prepare an agency in-house cost estimate, a management study, or any other studies, reviews, cost estimates, or other information-gathering activities in connection with any aspect of a state service under review by the council.

(c) The council may require a state [an] agency to provide information to the council, perform any [such] tasks and engage in any process deemed advisable by the council in connection with any effort by the council to review a state service, or to submit an identified state service to competition, within a time period prescribed by the council.

(d) Once the council designates [has designated] a state service as an identified state service, it may instruct an affected state agency not to enter into any contract impairing [that impairs] the council's review and potential bidding of such service, including any contract directly relating to the delivery of all or a portion of the identified state service. The council may grant a waiver to an affected state agency if the agency provides [a] written justification that the council finds meritorious.

(e) A state agency shall comply fully with all requirements and instructions made or given by the council in the performance of its duties or [~~the~~] exercise of its powers.

§401.82. Disposal of Surplus and Salvage Property.

(a) State agencies that determine they have surplus or salvage property resulting from [~~as a result of~~] a contract entered into at the direction of the council must inform the council of the kind, number, location, condition, original cost or value, and date of the acquisition of the surplus or salvage [~~such~~] property.

(b) Unless the council directs a different disposition, any property determined to be surplus or salvage property by the council must be transferred, sold, or disposed of by the state agency in accordance with Government Code, Chapter 2175 and rules promulgated by the commission [~~Texas Civil Statutes, Article 601b, Article 9~~].

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

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Subchapter F. Monitoring of Services

1 TAC §§401.102–401.105

The amended sections and new section are proposed under Government Code, Title 10, Subtitle D, Chapter 2162, Subchapter B, Section 2162.101 (General Powers) which provide the State Council on Competitive Government with the authority to adopt a rule governing any aspect of the Council's duties or responsibilities.

The following code is affected by the proposed amendments: Government Code, Title, Subtitle D, Chapter 2162.

§401.102. Minimum Monitoring Guidelines.

Guidelines for monitoring must include, at a minimum, provisions for:

(1) periodic reporting in a council approved format by the service provider on [~~regarding~~] any performance standards, benchmarks, and requirements established under its contract[~~, which reports shall be reviewed by the council or its staff~~];

(2) (No change.)

(3) verifying that all services, material, labor, and equipment were actually received, used, or consumed in accordance with [~~the~~] contract provisions;

(4) (No change.)

(5) making on-site inspections, where possible, and reporting and comparing [~~the~~] findings with [~~the~~] contract provisions;

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

(9) receiving agency input.

§401.103. Security Requirements.

When directing a state agency to contract for [~~enter into contracts relating to~~] an identified state service, the council may require the state agency to use [~~utilize~~] reasonable methods of securing the successful proposer's performance, including, but not limited to, requiring performance bonds, letters of credit, or payment provisions providing [~~that provide~~] for retainage. The council shall consider the quality of any alternative security proposed relating to [~~in connection with~~] the proposal.

§401.104. Historically Underutilized Businesses.

The council [~~Council~~] is committed to assisting Historically Underutilized Businesses (HUBs), as defined by Government Code, Chapter 2161, and further clarified by Chapter 111 of this title (relating to Executive Administration Division) in their efforts to participate in contracts [~~to be~~] awarded by the council. This includes assisting HUBs to meet or exceed [~~the~~] procurement utilization goals set forth in the form of Texas Administrative Code rules at Chapter 111 of this title (relating to Executive Administration Division). These rules, which became effective October 4, 1995, were promulgated by the General Services Commission and address the State's Historically Underutilized Business Certification Program. The council shall take positive steps to inform historically underutilized businesses of opportunities to provide identified state services that it determines may better be provided through a competitive process.

§401.105. Contract Modification Notification by Contracting Agency to the Council.

(a) After a contract is executed by a state agency or by the council on behalf of a state agency based on a council award, the council retains authority to monitor the progress and development of the contract. The executing agency must notify the council of any contract awarded by the council, that will expire, be amended, or be renewed no later than 90 calendar days prior to any action to amend, terminate, or renew the contract. The council may then determine whether the agency's decision regarding the contract warrants further determination by the council of the need to resubmit the state service to competitive bidding.

(b) As an exception to subsection (a) of this section, executing agencies may notify the council of technical or correcting amendments to contracts after the 90th calendar day prior to any action to amend, terminate, or renew a contract provided that sufficient time is given to the clerk of the council to poll council members to determine whether the amendment warrants any action by the council. The clerk of the council, in consultation with the presiding officer, shall determine the time deemed sufficient for each notification on a case-by-case basis.

This 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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TITLE 7. BANKING AND SECURITIES

Part VII. State Securities Board

Chapter 101. General Administration

7 TAC §§101.1, 101.2, 101.3, 101.5

The State Securities Board proposes amendments to §§101.1, 101.2, 101.3, and 101.5, concerning general administration, application of Board rules, and copy charges. The amendments to §§101.1, 101.2, and 101.5 make nonsubstantive changes to update references and conform the sections to existing statutes and other Board rules. The amendment to §101.3 clarifies that conflicts between the regulated community and the investing public will be resolved in favor of the investing public. John R. Morgan, Deputy Securities Commissioner, and Don Raschke, Director of Staff Services, have determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Mr. Morgan and Mr. Raschke also have determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be to conform the sections with other Board rules and statutes. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rules as proposed. Comments on the proposal may be submitted in writing to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The amendments are 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 proposed amendment affects Texas Government Code §552.262.

§101.1. Authority.

(a) Introduction. Pursuant to the authority granted by the Texas Securities Act and the Administrative Procedure and Texas Register Act, Texas Government Code, Chapter 2001 [~~Civil Statutes, Article 6252-13a~~], the State Securities Board prescribes the following sections regarding the administration and implementation of the Texas Securities Act, and the procedure and practice before the Texas Securities Commissioner.

(b) (No change.)

(c) Delegated authority. The Board hereby delegates to the [~~Securities~~] Commissioner the authority to hold hearings for adoption of sections and to make or adopt sections, and to waive the requirements thereof, as the Commissioner [~~he~~] may, from time to time, deem appropriate. However, the Board may, as it deems appropriate, perform such of these acts and hold such hearings as are required in the rulemaking procedures or by the Texas Securities Act.

(d) (No change.)

§101.2. Classification of Regulatory Standards.

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

(c) Forms. Forms are regulatory standards adopted for the purpose of implementing the Texas Securities Act by prescribing initial basic requirements for completing various applications and reports filed with the Commissioner. The forms required by the Commissioner are set forth in Chapter 133 of this title (relating to Forms) and have the same force and effect as rules.

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

(f) Interpretations by General Counsel.

(1) The Board's General Counsel may respond to inquiries concerning interpretations of the Texas Securities Act or these sections, provided sufficient relevant facts are given and the situation is not hypothetical. A nonrefundable fee of $100 must accompany each inquiry. The General Counsel may refuse to respond to any inquiry. Responses to inquiries may take the following forms:

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

(C) an opinion that, under the facts as stated by the inquiring party, a specific exemption appears to be available; this opinion must be followed by a caveat that:

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

(iii) the Texas Securities Act, §37, places the burden of proof on the party claiming the exemption; and

(iv) (No change.)

(D) an explanation of relevant provisions of the Texas Securities Act or Board rules;

(E)-(F) (No change.)

§101.3. Application.

(a) Generally. All rules shall be applied collectively, to the extent relevant, in connection with specific adjudications made by the Commissioner in the course of his or her regulatory functions. The Commissioner will make his or her determination on the basis of specific characteristics and circumstances of the individual adjudications under consideration and in light of the basic statutory purposes for regulation in the particular area. The Commissioner may, in his or her discretion, waive any requirement of any rule in situations where, in his or her opinion, such requirement is not necessary in the public interest or for the protection of investors. The captions of the various rules are for convenience only. Should there be a conflict between the caption of a rule and the text of the rule, the text will be controlling. Material denoted by a cross reference caption is not a rule or part of a rule.

(b) Investor protection standard. Conflicts in the application of the Texas Securities Act and Board rules between an issuer, dealer, agent, or salesman [~~the investment banker~~] and the best interest of the investing public will be resolved in favor of the investing public. Likewise, conflicts between existing securities holders and the best interest of the prospective investor will be resolved in favor of the prospective investor.

(c) Precedent. Because rules cannot adequately anticipate all potential application requirements, the failure to satisfy all regulatory standards of the Board will not necessarily foreclose the possibility of a favorable disposition of the matter pending before the Commissioner, and, similarly, the satisfaction of all such regulatory standards will not necessarily preclude an unfavorable disposition if the specific characteristics and circumstances so warrant. For this reason, the nature of the disposition of any particular matter pending before the Commissioner is not necessarily of meaningful precedential value, and the Commissioner shall not be bound by the precedent of any previous adjudication in the subsequent disposition of any pending matter [~~pending before him~~].

§101.5. Charges for Copies of Public Records.

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

[(e) At the discretion of the Commissioner, the Commissioner may reduce or waive these charges if furnishing the information at no cost or reduced cost primarily benefits the general public.]

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

Filed with the Office of the Secretary of State, on November 16, 1998.

TRD-9817624
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 305–8300

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Chapter 103. Rulemaking Procedure

7 TAC §103.5

The State Securities Board proposes an amendment to §103.5, concerning rulemaking petitions. The amendment would make the provision gender neutral.

John R. Morgan, Deputy Securities Commissioner, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Morgan also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to update the section to use current terminology. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted in writing to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The amendment is proposed under Texas Civil Statutes, Article 581-28-1 and Texas Government Code, §2001.021. 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 2001.021 requires state agencies to adopt rules prescribing the form for a rulemaking petition and the procedure for its submission, consideration, and disposition.

The proposed amendment affects Texas Civil Statutes, Article 581-5.T, 581-7.A, 581-8, 581-12.B, 581-19.B, 581-28, 581-28-1, 581-42, and Texas Government Code, §2001.021.

§103.5. Petitions.

Any interested person may petition the Commissioner requesting the adoption of a rule, and within 60 days the Commissioner will initiate rulemaking proceedings, or deny the petition in writing, stating his or her reasons therefor. The petition must set forth the following:

(1)-(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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Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 305–8300

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Chapter 104. Procedure for Review of Applications

7 TAC §§104.2, 104.4, 104.5, 104.6

The State Securities Board proposes amendments to §§104.2, 104.4, 104.5, and 104.6, concerning the procedure for review of applications. The amendments would make nonsubstantive changes to conform language to current terminology, and add a new subsection to §104.6 to reflect statutory language regarding time periods.

Michael S. Gunst, Director, Dealer Registration Division, John R. Morgan, Deputy Securities Commissioner, and Micheal Northcutt, Director, Securities Registration Division, have determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Mr. Gunst, Mr. Morgan, and Mr. Northcutt also have determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be to conform the sections with other Board rules and statutes. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rules as proposed.

Comments on the proposal may be submitted in writing to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The amendments are proposed under Texas Civil Statutes, Article 581-28-1 and Texas Government Code, §§2005.003 and 2005.006. 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 2005.003 requires state agencies issuing permits to adopt procedural rules for processing permit applications and issuing permits and section 2005.006 requires such agencies to establish by rule a complaint procedure regarding delays in processing permits.

The proposed amendments affect Texas Civil Statutes, Articles 581-7, 581-10, 581-13, and 581-15, and Texas Government Code, §§2005.003 and 2005.006.

§104.2. Purpose.

These sections are intended to implement the provisions of House Bill 5, 70th Legislature, 1987. They are not intended to supersede any substantive requirement of the Texas Securities Act or Board rules. If a provision under one of these sections would cause such a conflict, the provision will not be given effect under the particular circumstances giving rise to the conflict.

§104.4. Securities Registration–Review of Applications.

(a) Within seven days of receipt by the Agency of an application to register securities, if the application does not contain all required information, the Securities Registration Division will send by United States mail at the Agency's expense a deficiency letter to the applicant setting forth a list of items or exhibits which have not been filed and which, pursuant to requirements of the Texas Securities Act or Board rules, must be filed with the Agency.

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

(d) An application is complete and accepted for filing upon receipt by the Agency of the following:

(1) all items and exhibits required to be filed with the Agency as set forth in subsections [~~paragraphs~~] (a)-(c) of this section; and

(2) (No change.)

(e)-(g) (No change.)

§104.5. Dealer Registration–Review of Applications.

(a) (No change.)

(b) Within 14 days of receipt by the Agency of all requested items and exhibits, the division staff shall review the file and, if necessary, shall send by United States mail at the Agency's expense a comment letter setting forth any deviations from the substantive requirements of the Texas Securities Act or Board rules relating to the registration of dealers. This process may be repeated to raise subsequent comments.

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

§104.6. Exceeding the Time Periods.

(a) The Agency may exceed the time periods set forth in these sections if:

(1) (No change.)

(2) the Securities and Exchange Commission or another public or private entity, including the applicant itself, causes the delay; [~~or~~]

(3) the applicant requests delay; or [.]

(4) other conditions exist that give the Agency good cause for exceeding the established time periods.

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

(f) If the complaint is decided in favor of the staff, the applicant may appeal the decision by requesting a hearing before the Commissioner pursuant to the Texas Securities Act, §24.A [~~§24A~~].

This 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 November 16, 1998.

TRD-9817626
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 305–8300

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Chapter 109. Transactions Exempt from Registration

7 TAC §109.13

The State Securities Board proposes an amendment to §109.13, concerning uniform limited offering exemptions. The amendment would correct a cross-reference to §114.4, pertaining to dealer and agent registration requirements applicable to federal covered securities.

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

Mr. Northcutt also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be to cross-reference correctly a provision, thereby informing persons dealing with SEC Rule 506 federal covered securities that the dealer and agent registration requirements of the Texas Securities Act and Board rules are applicable. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the rule as proposed.

Comments on the proposal may be submitted in writing to David Weaver, State Securities Board, P.O. Box 13167, Austin, Texas 78711-3167.

The amendment is proposed under Texas Civil Statutes, Articles 581-28-1 and 581-5.T. 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 5.T provides that the Board may prescribe new exemptions by rule.

The proposed amendment affects Texas Civil Statutes, Articles 581-5 and 581-7.

§109.13. Limited Offering Exemptions.

(a)-(j) (No change).

(k) Uniform limited offering exemption. In addition to sales made under the Texas Securities Act, §5.I, the State Securities Board, pursuant to the Act, §5.T, exempts from the registration requirements of the Act, §7, any offer or sale of securities offered or sold in compliance with the Securities Act of 1933, Regulation D, Rules 230.505 and/or 230.506, including any offer or sale made exempt by application of Rule 508(a), as made effective in United States Securities and Exchange Commission Release Number 33-6389 and as amended in Release Numbers 33-6437, 33-6663, 33-6758, and 33-6825, and which satisfies the following further conditions and limitations.

(1)-(15) (No change.)

(16) If the securities comply with this subsection (except for paragraphs (1)-(6), (8), and (10) of this subsection) and are federal covered securities, as that term is defined in §107.2 of this title (relating to Definitions), the issuer should refer to Chapter 114 of this title (relating to Federal Covered Securities) for the applicable filing and fee requirements. (Issuers are advised of their obligation to comply with the dealer and agent registration requirements of the Texas Securities Act and Board rules. See §114.4(g) [~~§114.4(b)(5)~~] (relating to Filings and Fees).)

(l) (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 November 16, 1998.

TRD-9817627
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 305–8300

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TITLE 10. COMMUNITY DEVELOPMENT

Part I. Texas Department of Housing and Community Affairs

Chapter 50. Low Income Tax Credit Rules-1997

10 TAC §§50.1–50.15

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of §§50.1-50.15, concerning the Low Income Tax Credit Rules. The Sections are proposed to be repealed in order to enact new sections conforming to the requirements of new regulations enacted under the Internal Revenue Code of 1986, §42, as amended, which provides for credits against federal income taxes for owners of qualified low income rental housing.

Daisy A. Stiner, Acting Executive Director, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Ms. Stiner also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be to permit the adoption of new rules for the allocation of low income housing tax credit authority within the State of Texas, thereby enhancing the State's ability to provide decent, safe and sanitary housing for Texans through the tax credit program administered by the Department. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the repeals as proposed.

The repeals are proposed pursuant to the authority of the Texas Government Code, Chapter 2306; the Internal Revenue Code of 1986, §42, as amended, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs; and Executive Order AWR-91-4 (June 17, 1991), which provides this Department with the authority to make housing credit allocations in the State of Texas.

The Texas Administrative Code is affected by this proposed repeal.

§50.1. Scope.

§50.2. Definitions.

§50.3. State Housing Credit Ceiling.

§50.4. Applications; Environmental Assessments; Market Study; Reservations; Notifications; Commitments; Extensions, Carryover Allocations; Agreements and Elections; Extended Commitments.

§50.5. Set Asides, Reservations and Preferences.

§50.6. Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects.

§50.7. Compliance Monitoring.

§50.8. Housing Credit Allocations.

§50.9. Department Records; Certain Required Filings.

§50.10. Department Responsiblities.

§50.11. Program Fees.

§50.12. Manner and Place of Filing Applications.

§50.13. Withdrawals, Amendments, Cancellations.

§50.14. Waiver and Amendment of Rules.

§50.15. Forward Reservations; Binding Commitments.

This 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 November 23, 1998.

TRD-9817909
Daisy A. Stiner
Acting Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 475–3726

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Chapter 50. Low Income Tax Credit Rules-1999

10 TAC §§50.1–50.16

The Texas Department of Housing and Community Affairs proposes new §§50.1-50.16, concerning the 1999 Low Income Housing Tax Credit Qualified Allocation Plan and Rules. The new sections are necessary to provide procedures for the allocation by the Department of certain low income housing tax credits available under federal income tax laws to owners of qualified low income rental housing developments.

Daisy A. Stiner, Acting Executive Director, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Ms. Stiner also has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing the sections will be the enhancement of the state's ability to provide safe and sanitary housing for Texans through the efficient and coordinated allocation of federal income tax credit authority available to the state for administration of state housing agencies. There will be no effect on small businesses. There is no anticipated economic costs to persons who are required to comply with the sections as proposed.

Comments may be submitted to Cherno M. Njie, Manager, Low Income Housing Tax Credit Program, Texas Department of

Housing and Community Affairs, 507 Sabine, Suite 400, Austin, Texas, 78701.

The proposed new sections are proposed under the Texas Government Code, Chapter 2306; the Internal Revenue Code of 1986, § 42, as amended, which provides the Department with the authority to adopt rules governing the administration of the Department and its programs; and Executive Order AWR-91-4 (June 17, 1991), which provides this Department with the authority to make housing credit allocations in the State of Texas.

The Texas Administrative Code is affected by these new sections.

§50.1. Scope.

The Rules in this chapter apply to the allocation by the Texas Department of Housing and Community Affairs (the Department) of certain low income housing tax credits authorized by applicable federal income tax laws. The Internal Revenue Code of 1986, §42, as amended, provides for credits against federal income taxes for owners of qualified low income rental housing Projects. That section provides for the allocation of the available tax credit amount by state housing credit agencies. Pursuant to Executive Order AWR-91-4 (June 17, 1991), the Department was authorized to make housing credit allocations for the State of Texas. As required by the Internal Revenue Code, §42(m)(1), the Department developed a Qualified Allocation Plan (QAP) which is set forth in §§50.3–50.8 of this title (relating to State Housing Credit Ceiling, Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments, Set-Asides, Commitments and Preferences, Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects; Compliance Monitoring, Housing Credit Allocations). Sections in this chapter establish procedures for applying for and obtaining an allocation of the low income housing tax credit, along with insuring that the proper Threshold Criteria, Selection Criteria, priorities and preferences are followed in making such allocations. It shall be the goal of this Department and the Board, through these provisions, to encourage diversity through broad geographic allocation of tax credits within the state and to promote maximum utilization of the available tax credit amount. The criteria utilized to realize this goal shall include, but are not limited to, evaluation of geographic location within the state of developments applying for tax credits, concentration of tax credit developments and other affordable housing developments within specific markets and submarkets, site conditions of the developments, and a development's impact on and conformance with the goals and objectives as stated in the QAP and the Rules. The foregoing shall be implemented to be consistent with ensuring that the tax credits are allocated to owners of Projects that will serve the Department's public policy objectives and federal requirements to provide housing to persons and families of very low and low income. It is the policy of the Department to encourage the use of Historically Underutilized Businesses (HUBs) in all of the Department's programs. In response to this policy, the Department has established a minimum goal of 30% participation of HUBs in the low income housing tax credit program. Project Owners are encouraged to achieve these minimum goals.

§50.2. Definitions.

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

(1) Ad Hoc Tax Credit Committee - That Committee comprised of members of the Board of the Department charged with the direct oversight of the Low Income Housing Tax Credit Program, also referred to as the "Committee."

(2) Affiliate - An individual, corporation, partnership, joint venture, limited liability company, trust, estate, association, cooperative or other organization or entity of any nature whatsoever that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with any other Person, and specifically shall include parents or subsidiaries.

(3) Agreement and Election Statement - A document in which the Project Owner elects, irrevocably, to fix the applicable credit percentage with respect to a building or buildings, as that in effect for the month in which the Department and the Project Owner enter into a binding agreement as to the housing credit dollar amount to be allocated to such building or buildings, which Agreement and Election Statement shall be executed by the Project Owner no later than five days after the end of the month of execution of the agreement as to housing credit dollar amount.

(4) Applicable Percentage - The percentage used to determine the amount of the low income housing tax credit, as defined more fully in the Code, §42(b).

(5) Applicant - Any Person and any Affiliate of such Person, corporation, a partnership, joint venture, association, or other that submits an Application to the Department requesting a tax credit allocation pursuant to the Rules and the QAP. The Applicant is also the Project Owner unless the Applicant transfers or assigns its interest in the Project (which assignment can only occur with the consent of the Department). Each Project Owner, and each of the Project Owner's successors in interest, shall be obligated to carry out the commitments made to the Department by the Applicant.

(6) Application - An Application in the form prescribed by the Department, including any required exhibits or other supporting materials, filed with the Department by a Project Owner requesting a low income housing tax credit allocation.

(7) Application Acceptance Period - That period of time as published in the Texas Register during which Applications for tax credits may be submitted to the Department.

(8) Application Round - The period beginning with the start of the Application Acceptance Period and lasting until such time as all available credits (as stipulated by the Department) are allocated, provided that the Application Round not extend beyond the last day of the calendar year. Applications for Projects which receive at least 50% of their financing from the proceeds of tax exempt bonds may be submitted at any time during the year.

(9) Application Submission Procedures Manual - That certain manual produced by the Department which sets forth procedures, forms, and guidelines for the filing of Applications for low income housing tax credits, which manual may be amended from time to time by the Department.

(10) Appraiser - A real estate professional certified or licensed by the Texas Appraiser Licensing and Certification Board who has satisfied continuing education requirements. The appraiser must have, at a minimum, five (5) years appraisal experience, preferably in the geographic area of the property to be appraised. It is desirable, but not required, that the appraiser have a professional designation or be an active member of a professional accredited appraisal institution.

(11) Area Median Gross Income (AMGI) - The tenant income requirements pursuant to the qualified low income housing project requirements of the Code, §42(g).

(12) Applicable Fraction - The fraction used to determine the Qualified Basis of the qualified low income building, which is the smaller of the Unit fraction or the floor space fraction, as defined more fully in the Code, §42(c)(1).

(13) Beneficial Owner - A "Beneficial Owner" means:

(A) Any Person who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise has or shares;

(i) voting power which includes the power to vote, or to direct the voting as any other Person or the securities thereof; and/or

(ii) investment power which includes the power to dispose, or direct the disposition of, any Person or the securities thereof.

(B) Any Person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement or device with the purpose or effect of divesting such Person of Beneficial Ownership (as defined herein) of a security or preventing the vesting of such Beneficial Ownership as part of a plan or scheme to evade inclusion within the definitional terms contained herein; and

(C) Any Person who has the right to acquire Beneficial Ownership during the Compliance Period, including but not limited to any right to acquire any such Beneficial Ownership;

(i) through the exercise of any option warrant or right,

(ii) through the conversion of a security,

(iii) pursuant to the power to revoke a trust, discretionary account or similar arrangement, or

(iv) pursuant to the automatic termination of a trust, discretionary account, or similar arrangement.

(D) Provided, however, that any Person who acquires a security or power specified in clauses (i), (ii) or (iii) of this subparagraph, with the purpose or effect or changing or influencing the control of any other Person, or in connection with or as a participant in any transaction having such purpose or effect, immediately upon such acquisition is deemed to be the Beneficial Owner of the securities which may be acquired through the exercise or conversion of such security or power. Any securities not outstanding which are subject to options, warrants, rights or conversion privileges as deemed to be outstanding for the purpose of computing the percentage of outstanding securities of the class owned by such Person but are not deemed to be outstanding for the purpose of computing the percentage of the class by any other Person.

(14) Board - The governing Board of Directors of the Department and may also denote as used in this chapter, the Committee.

(15) Carryover Allocation - An allocation of current year tax credit authority by the Department pursuant to the provisions of the Code, §42(h)(1)(E) and Treasury Regulations, §1.42-6.

(16) Carryover Allocation Document - A document issued by the Department to a Project Owner pursuant to §50.4(k) of this title (relating to Applications; Environmental Assessments; Market Study; Reservations; Notification; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments).

(17) Carryover Allocation Procedures Manual - That certain manual produced by the Department which sets forth procedures, forms, and guidelines for the filing of request for Carryover Allocations for low income housing tax credits, which said manual may be amended from time to time by the Department.

(18) Code - The Internal Revenue Code of 1986, as amended from time to time, together with any applicable regulations, rules, rulings, revenue procedures, information statements or other official pronouncements issued thereunder by the United States Department of the Treasury or the Internal Revenue Service relating to the Low Income Housing Tax Credit Program authorized by the Code, §42, and as may be amended from time to time.

(19) Commitment Notice - A notice issued by the Department to a Project Owner pursuant to §50.4(h) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments) and also referred to as the "commitment".

(20) Compliance Period - With respect to a building, the period of 15 taxable years, beginning with the first taxable year of the Credit Period pursuant to the Code, §42(i)(1).

(21) Contractor - One who contracts for the construction, or rehabilitation of an entire building or Project, rather than a portion of the work. The Contractor hires subcontractors, such as plumbing contractors, electrical contractors, etc., coordinates all work, and is responsible for payment to the said subcontractors. This party may also be referred to as the "general contractor".

(22) Control - (including the terms "controlling," "controlled by, and/or "under common control with") the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of any Person, whether through the ownership of voting securities, by contract or otherwise, including specifically ownership of more than 50% of the general partner interest in a limited partnership, or designation as a managing general partner or the managing member of a limited liability company.

(23) Cost Certification Procedures Manual - That certain manual produced by the Department which sets forth procedures, forms, and guidelines for the filing of requests for IRS Form 8609s for Projects placed in service under the Low Income Housing Tax Credit Program, which said manual may be amended from time to time by the Department.

(24) Credit Period - With respect to a building within a Project, the period of ten taxable years beginning with the taxable year the building is placed in service or, at the election of the Project Owner, the succeeding taxable year, as more fully defined in the Code, §42(f)(1).

(25) Declaration of Land Use Restrictive Covenants (LURA) - An agreement between the Department, the Project Owner and all successors in interest in the Project Owner which encumbers the Project with respect to provisions stipulated in the Code, §42, §§50.1-49.15 of this title (relating to Low Income Housing Tax Credit Qualified Allocation Plan and Rules), and the Texas Government Code, Chapter 2306 as may be amended from time to time. The LURA includes an Extended Low Income Housing Commitment Agreement.

(26) Department - The Texas Department of Housing and Community Affairs, a public and official governmental Department of the State of Texas created and organized under the Texas Department of Housing and Community Affairs Act, Texas Government Code,

Chapter 2306 and Texas Civil Statutes, Article 4413(501) as amended by the 73rd Legislature, Chapter 725 and 141.

(27) Development Team - All Persons or Affiliates thereof which play(s) a material role in the development, construction, rehabilitation, management and/or continuing operation of the subject Property, which will include any consultant(s) hired by the Applicant for the purpose of the filing of an Application for low income housing tax credits with the Department.

(28) Difficult Development Area - Any area which is so designated by the Secretary of the United States Department of Housing and Urban Development (HUD) as an area which has high construction, land, and utility costs relative to area median family income.

(29) Eligible Basis - With respect to a building within a Project, the building's Eligible Basis as defined in the Code, §42(d).

(30) Equity Gap - The difference between the total sources of financing for the Project and the total Project costs that is to be filled with the proceeds of the credit.

(31) Extended Low Income Housing Commitment Agreement - An agreement between the Department, the project owner and all successors in interest to the project owner concerning the extended low income housing use of buildings within the project throughout the extended use period as provided in the Code, §42(h)(6).

(32) Financial Statement - Document(s) which provides information about the Applicant's economic resources, claims against those resources, and the interests of owners at specific dates as more fully described in subparagraphs (A) through (D) of this definition.

(A) Statement of Financial Position/Balance Sheet - a listing, as of a particular date, of all assets and claims against those assets (liabilities). The difference is equity.

(B) Income Statement - a listing that relates to a specific period of time, presenting an entity's results of operations.

(C) Statement of Retained Earnings - reports all changes in retained earnings during the accounting period, reconciles beginning and ending retained earning balances and provides a connecting link between the income statement and the balance sheet.

(D) Cash Flow Statement - a report listing the changes in an entity's cash and cash equivalents, classified by principal sources and uses, for a given period.

(33) General Projects - Any project which is not a Qualified Nonprofit Project or is not under consideration in the Rural/Prison set-aside as such terms are defined by the Department.

(34) General Pool - The pool of credits that have been returned or recovered from prior years' allocations or current year's Commitment Notices after the Board has made its initial allocation of the current year's available credit ceiling. General pool credits will be used to fund Applications on the waiting list without regard to set-aside.

(35) Governmental Entity - Includes federal or state agencies, departments, boards, bureaus, commissions, authorities, and political subdivisions, special districts and other similar entities.

(36) Historically Underutilized Businesses - Pursuant to Texas Civil Statutes, Article 601b, §§1.02, 1.03, and 1.04, entitled State Purchasing and General Services Act which is codified at Chapter 2161, Texas Government Code, entitled Historically Underutilized Businesses, a business in the form of a corporation, partnership or joint venture which is at least 51% owned, or a sole proprietorship which is 100% owned by a person or persons who have been historically underutilized due to their identification as a member of a certain group. The following are the groups which will be considered pursuant to this definition:

(A) African Americans - persons having origins in any of the Black racial groups of Africa;

(B) Hispanic Americans - persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(C) Asian-Pacific Americans - persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, Philippines, Samoa, Guam, U.S. Trust Territories of the Pacific and the Northern Marianas;

(D) Native Americans - persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; or

(E) Women - includes all women of any ethnicity.

(37) Homeless Person - An individual or family that lacks a fixed, regular, and adequate nighttime residence as more fully defined in 24 Code of Federal Regulations, § 841.1, and as may be amended from time to time.

(38) Housing Credit Agency - A governmental entity charged with the responsibility of allocating low income housing tax credits pursuant to the Code, §42. For the proposes of these Rules, the Department is the sole "Housing Credit Agency" of the State of Texas.

(39) Housing Credit Allocation - An allocation by the Department to a Project Owner of low income housing tax credit in accordance with §50.8 of this title (relating to Housing Credit Allocations).

(40) Housing Credit Allocation Amount - With respect to a Project or a building within a Project, that amount the Department determines to be necessary for the financial feasibility of the Project and its viability as a qualified low income housing Project throughout the Compliance Period and allocates to the Project.

(41) HUD - The United States Department of Housing and Urban Development, or its successor.

(42) Ineligible Building Types - Single family detached housing (except as provided for in this definition), duplexes, and triplexes shall not be included in tax credit developments. Fourplexes are also prohibited unless they are developed in clusters of four or more contiguous property under common ownership, management and Control. Any project comprised of single family detached homes of 35 units or less that is located within a city or county with a population of not more than 20,000 or 50,000, respectfully, shall not be considered an Ineligible Building Type. The proposed single family units must be located on contiguous property under common ownership, management and control of dispersed within existing residential subdivisions. An existing Rural Project that is federally assisted within the meaning of § 42 (d)6(B) of the Code and is under common ownership, management and Control shall be considered as Ineligible Building Type. For qualifying Rural Project, construction activity must be rehabilitation only with no expansion to the existing development. Rural Projects purchased from HUD will also qualify as being federally assisted.

(43) Intermediary Costs - Costs associated with the sale or use of tax credits to raise equity capital. Such costs include but are not limited to syndication and partnership organization costs and

fees, filing fees, broker commissions, related attorney and accounting fees, appraisal, engineering, environmental site assessment, etc.

(44) IRS - The Internal Revenue Service, or its successor.

(45) Local Tax Exempt Organization - An entity which is described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time, and which is registered or qualified to conduct business in the State of Texas and/or the governmental unit wherein the Project will be situated.

(46) Person - Means, without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability company, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality or other organization of any nature whatsoever and shall include any group of Persons acting in concert toward a common goal.

(47) Persons with Disabilities - A person who:

(A) has a physical, mental or emotional impairment that;

(i) is expected to be of a long, continued and indefinite duration,

(ii) substantially impedes his or her ability to live independently, and

(iii) is of such a nature that the ability could be improved by more suitable housing conditions, or

(B) has a developmental disability, as defined in section 102(7) of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001-6007).

(48) Prison Community - A city or town which is located outside of a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA) and was awarded a state prison as set forth in the Reference Manual.

(49) Project - A low income rental housing Property the owner of which represents that it is or will be a qualified low income housing Project within the meaning of the Code, §42(g). With regards to this definition, the "Project" is that Property which is the basis for the Application for low income housing tax credits. May also be referred to as the subject "property".

(50) Project Consultant -Any Person (without ownership interest in the Project) who provides professional services relating to the filing of an Application, Carryover Allocation Document, and/or cost certification documents.

(51) Project Owner - Any Person or Affiliate thereof that owns or proposes to develop the Project or expects to acquire Control of the Project pursuant to a purchase contract satisfactory to the Department.

(52) Property - The real estate and all improvements thereon which are the subject of the Application (including all items of personal property affixed or related thereto), whether currently existing or proposed to be built thereon in connection with the Application.

(53) Qualified Allocation Plan - An allocation plan executed by the Governor of the State of Texas which sets forth the Threshold Criteria, Selection Criteria, priorities, preferences, and compliance and monitoring as provided in the Code, §42(m)(1) and as further provided in §50.3 through §50.8 of this title (relating to State Housing Credit Ceiling, Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments, Set-Asides, Commitments and Preferences, Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects; Compliance Monitoring, Housing Credit Allocations).

(54) Qualified Basis - With respect to a building within a Project, the building's Eligible Basis multiplied by the Applicable Fraction, within the meaning of the Code, §42(c)(1).

(55) Qualified Census Tract - Any census tract which is so designated by the Secretary of HUD and, for the most recent year for which census data are available on household income in such tract, in which 50% or more of the households have an income which is less than 60% of the area median family income for such year.

(56) Qualified Market Analyst - A real estate appraiser certified or licensed by the Texas Appraiser or Licensing and Certification Board or a real estate consultant or other professional currently active in the subject property's market area who demonstrates competency, expertise, and the ability to render a high quality written report. The individual's experience and educational background will provide the general basis for determining competency as a Market Analyst. Such determination will be at the sole discretion of the Department. The Qualified Market Analyst must not be related to or Affiliated with the Project Consultant, or the independent CPA employed for certifying the 10% test and/or the final Project cost certification.

(57) Qualified Nonprofit Organization - An organization that is described in the Code, §501(c)(3) or (4), as these cited provisions may be amended from time to time, that is exempt from federal income taxation under the Code, §501(a), that is not Affiliated with or Controlled by a for profit organization, and includes as one of its exempt purposes the fostering of low income housing within the meaning of the Code, §42(h)(5)(C).

(58) Qualified Nonprofit Project - A Project in which a Qualified Nonprofit Organization has Control (directly or through a partnership or wholly-owned subsidiary) and materially participates (within the meaning of the Code, §469(h), as may be amended from time to time) in its development and operation throughout the Compliance Period.

(59) Real Estate Owned (REO) Projects - Any existing residential development that is owned or that is being sold by an insured depository institution in default, or by a receiver or conservator of such an institution, or is a property owned by HUD, Federal National Mortgage Association (Fannie Mae), Federal Home Loan Mortgage Corporation (Freddie Mac), federally chartered bank, savings bank, savings and loan association, Federal Home Loan Bank or a federally approved mortgage company or any other federal agency.

(60) Reference Manual - That certain manual, and any amendments thereto, produced by the Department which sets forth reference material pertaining to the Low Income Housing Tax Credit Program.

(61) Rehabilitation Expenditure - Amounts incurred in connection with the rehabilitation which the Project Owner represents to be "Rehabilitation Expenditures" within the meaning of the Code, §42(e)(2).

(62) Residential Development - Any Project that is comprised of at least one "Unit" as such term is defined in this title.

(63) Rules - The Department's low income housing tax credit Rules, §§50.1-50.15 of this title (relating to Low Income Housing Tax Credit Qualified Allocation Plan and Rules) excluding §50.3

through §50.8 of this title (relating to State Housing Credit Ceiling, Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments, Set-Asides, Commitments and Preferences, Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects; Compliance Monitoring, Housing Credit Allocations).

(64) Rural Project - A Project located within an area which:

(A) is situated outside the boundaries of a PMSA or MSA; or

(B) is situated within the boundaries of a PMSA or MSA if it has a population of not more than 20,000 and does not share boundaries with an urbanized area; or

(C) is located in an area that is eligible for funding by TxRD.

(65) Selection Criteria - Criteria used to determine housing priorities of the State under the Low Income Housing Tax Credit Program.

(66) Small Development - A Project consisting of not more than ten single-family detached Units or 35 multifamily Units, which is not a part of, or contiguous to, a larger Project.

(67) Special Housing Project - Any Project developed specifically for Special Housing Need Groups, including mental health/mental retardation Projects, group homes, housing for the homeless, transitional housing, elderly Projects, congregate care facilities, projects for persons with HIV/AIDS, or as otherwise defined in the State Consolidated Plan.

(68) State Housing Credit Ceiling - The limitation imposed by the Code, §42(h), on the aggregate amount of housing credit allocations that may be made by the Department during any calendar year, as determined from time to time by the Department in accordance with the Code, §42(h)(3).

(69) Sustaining Occupancy - The figure at which occupancy income is equal to all operating expenses and mandatory debt service requirements for a Project.

(70) Threshold Criteria - Criteria used to determine the Project's qualifications which are the minimum level of acceptability for consideration under the Low Income Housing Tax Credit Program.

(71) Total Housing Development Cost - The total of all costs incurred or to be incurred by the Project Owner in acquiring, constructing, rehabilitating and financing a Project, as determined by the Department based on the information contained in the Project Owner's Application. Such costs include Intermediary Costs, reserves and any expenses attributable to commercial areas. Projects which include commercial space must allocate the relative portion of all applicable expenses to the commercial space and exclude the same from Total Housing Development Costs. In determining the Equity Gap calculation, the Department will not deduct from the Project's sources of funds the amount of financing associated with the commercial use, unless such financing specifically identifies in its terms that it is being provided for the commercial use.

(72) Town Home - Each Town Home living unit is one of a group of no less than four units that are adjoined by common walls. Town Homes shall not have more than two walls in common with adjacent units. Town Homes shall not have other units above or below another unit. Town Homes shall not share a common back wall. Town Homes shall have individual exterior entries.

(73) TxRD - The Rural Development (RD) services of the United States Department of Agriculture (USDA) serving the State of Texas (formerly known as TxFmHA) or its successor.

(74) Unit - Any residential rental unit in a Project consisting of an accommodation containing separate and complete physical facilities and fixtures for living, sleeping, eating, cooking and sanitation. The term "Unit" includes a single room occupancy housing unit used on a non-transient basis.

§50.3. State Housing Credit Ceiling.

(a) The Department shall determine the State Housing Credit Ceiling for each calendar year as provided in the Code, §42(h)(3)(C).

(b) The Department shall publish each such determination in the Texas Register within 30 days after notification by the Internal Revenue Service.

(c) The aggregate amount of Housing Credit Allocations made by the Department during any calendar year shall not exceed the State Housing Credit Ceiling for such year as provided in the Code, §42.

§50.4. Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments.

(a) Any Project Owner requesting a Housing Credit Allocation for a Project must submit an Application to the Department which Application shall be originally executed by the Project Owner. This Application shall contain full and complete information as to each item specified in the Application Submission Procedures Manual, as amended. The Department is also authorized to request the Project Owner to provide any additional information it deems relevant as clarification to the Application. Failure to provide any required information either in the Application Submission Procedures Manual or otherwise required by the Department will result in the Application being deemed incomplete and not accepted for filing. The Department will require, as a part of a completed Application, information to be submitted by the Project Owner which identifies the number of HUBs to be used in the development and/or continuous operation of the Project, in a form specified within the Application Submission Procedures Manual. Further, the Department will require the Project Owner to supply sufficient documentation which will represent the means by which these HUBs were or are to be selected. The Project Owner is also advised that the Department will be requesting information pertaining to the use of HUBs in the actual development of the Project at the time of final allocation of tax credits, pursuant to §50.8(c) of this title (relating to Housing Credit Allocations).

(b) As part of the complete Application the Applicant must submit the most current Phase I Environmental Assessment of the subject Property, dated not more than 12 months prior to the first day of the Application Acceptance Period. In the event that a Phase I Environmental Assessment on the Project is older than 12 months, the Project Owner may supply the Department with an update letter from the Person or organization which prepared the initial assessment; provided, however, that the Department will not accept any Phase I Environmental Assessment which is more than 24 months old. An environmental report that is not submitted with the Application will result in the Application being deemed incomplete and not accepted for filing.

(1) This environmental assessment should be conducted and reported in conformity with the standards of the American Society for Testing and Materials (ASTM) and such other recognized industry standards as a reasonable person would deem relevant in view of the Property's anticipated use for human habitation. The environmental

assessment shall be conducted by an environmental or professional engineer and be prepared at the expense of the Project Owner. The report must include, but is not limited to:

(A) a review of records, interviews with people knowledgeable about the Property;

(B) a certification that the environmental engineer has conducted an inspection of the Property, the building(s), and adjoining Properties, as well as any other industry standards concerning the preparation of this type of environmental assessment;

(C) a noise study is recommended for developments located in close proximity to industrial zones, major highways, active rail lines and civil and military airfields;

(D) a copy of the current FEMA Flood Map encompassing the site and a determination of the flood risk for the proposed development; and

(E) the report should include a statement that clearly states that the person or company preparing the environmental assessment will not materially benefit from the development in any other way than receiving a fee for the environmental assessment.

(2) If the report recommends further studies or establishes that environmental hazards currently exist on the Property, or are originating off-site but would nonetheless affect the Property, the Project Owner must act on such a recommendation or provide either a plan for the abatement or elimination of the hazard. Evidence of action or a plan for the abatement or elimination of the hazard must be presented upon Application submittal.

(3) Projects which have had a Phase II Environmental Assessment performed and hazards identified, the Project Owner is required to maintain a copy of said assessment on site available for review by all persons which either occupy the Property or are applying for tenancy.

(4) Projects whose funds have been obligated by TxRD will not be required to supply this information; however, the Project Owners of such Projects are hereby notified that it is their responsibility to ensure that the Property is maintained in compliance with all state and federal environmental hazard requirements.

(5) Those Projects which have or are to receive first lien financing from HUD may submit HUD's environmental assessment report, provided that it conforms with the requirements of this subsection.

(c) The Market Study required by the Department shall comply with the Uniform Standards of Professional Appraisal Practice paragraphs (1)-(2) of this subsection and, the Market Analysis and Appraisal Policy provided in the Reference Manual. The Market Study shall be prepared for the Department at the expense of the Project Owner. The Market Study shall follow the format of and contain at a minimum, the information required by the Market Analysis and Appraisal Policy. If any of the required information in the Market Analysis and Appraisal Policy is not obtainable, the Market Analyst shall provide a statement to such effect and offer an alternative analysis intended to address the applicable question.

(1) A Market Study (must be prepared by a Qualified Market Analyst as described in this QAP and Rules and in the Market Analysis and Appraisal Policy). This Qualified Market Analyst shall be independent of the Project Owner. A Market Study, is required as part of the complete Application, unless the Project has an obligation of TxRD funds. Projects whose funds have been obligated by TxRD are not required to provide the Department with a market study; provided that the Department may request information with respect to the operating expenses, proposed new construction or rehabilitation cost or other information. The market study should not be updated more than six months prior to the first day of the Application Acceptance Period. In the event that a Market Study on a Project is older than six months, a Project Owner may supply the Department with an updated Market Study from the entity or organization which prepared the initial report. The Department will not accept any Market Study more than 12 months old.

(2) The Department may determine from time to time that information not requested in the Market Analysis and Appraisal Policy will be relevant to the Department's evaluation of the need for the Project and the allocation of the requested Housing Credit Allocation Amount. The Department may request additional information from the Market Analyst to meet this need.

(3) A written opinion is required from the Qualified Market Analyst who prepared the Market Study required under paragraph (1) of this subsection, stating that:

(A) the projected Total Housing Development Costs of the proposed Project do or do not appear to be reasonable. The Qualified Market Analyst must provide the Department with sufficient documentation to support his/her conclusion with regards to the reasonableness of the projected development costs;

(B) the projected Total Operating Costs of the proposed Project do or do not appear to be reasonable. The Qualified Market Analyst must provide the Department with sufficient documentation to support his/her conclusions with regards to the reasonableness of the projected operating costs;

(C) the proposed Project, in light of the vacancy and absorption rates for the applicable market area and/or any applicable submarket area, is or is not likely to result in an unreasonably high vacancy rate for comparable Units within the market area and/or any applicable submarket area (i.e., standard, well maintained Units within such market area that are reserved for occupancy by low and very low income tenants). The Qualified Market Analyst must provide the Department with sufficient documentation to support his/her conclusion with regard to the effects of the Project's development on the vacancy rates for comparable Units within the market area and/or any applicable submarket area;

(D) the projected initial rents for the Project are or are not below the rental range for comparable Projects within the market area. The Qualified Market Analyst must provide the Department with sufficient documentation to support his/her conclusion with respect to the data on comparable rents in the Project's market area; and

(E) Project reserves are or are not adequate to cover operating shortfalls until the Project achieves Sustaining Occupancy. The Qualified Market Analyst must provide the Department with sufficient documentation to support his/her conclusions with regards to the adequacy of the Project reserves.

(4) All Applicants shall acknowledge by virtue of filing an Application that the Department shall not be bound by any such opinion or the Market Study itself, and may substitute its own analysis and underwriting conclusions for those submitted by the Qualified Market Analyst.

(d) A Project Owner may file an Application at any time during the Application Acceptance Period(s), as published from time to time by the Department in the Texas Register. Applicants which submit the Application prior to the close of the published Bonus

Period will be notified of Threshold Criteria deficiencies to allow for corrective action. Applicants must submit the documentation required to correct the deficiency within 10 working days from the receipt of such notice. Only one opportunity to supply the required documentation will be granted. Applications with corrected deficiencies will not be eligible for the Selection Criteria points associated with the bonus period. Applications submitted after the close of the Bonus Period that show material deficiencies will be terminated per §50.4(c)(3)(e) of this Qualified Allocation Plan and the Project Owners will only have the opportunity to re-apply if the Application Acceptance Period is still open.

(e) An Application that does not fulfill the requirements of this Qualified Allocation Plan and Rules and the current Application Submission Procedures Manual will be deemed not to have been timely filed and the Department shall not be deemed to have accepted the Application. The Department may, at its sole discretion, request supplemental information from an Applicant to clarify information contained in previously submitted documentation. The department may place additional time constraints for the timely filing of such documentation.

(f) The Department will not recommend an Application for funding if it includes a member of the Development Team who has been, or is:

(1) barred, suspended, or terminated from procurement in a state or federal program or who is listed in the List of Parties Excluded from Federal Procurement or Nonprocurement Programs, whether in the hard copy or electronic form;

(2) convicted within the past five years, under indictment for or is on probation for a state or federal crime involving fraud, bribery, theft, misrepresentations of material facts, misappropriation of funds, or other similar criminal offenses;

(3) subject to enforcement action under state or federal securities law, or is the subject of an enforcement proceeding with a state or federal agency or another governmental entity unless any such action has been concluded and no adverse action or finding (or entry into a consent order) has been taken with respect to such member; or

(4) active in the ownership or management of any other low income housing tax credit Property (or any Property pursuant to an affordable housing program administered by a local, state or federal entity) that is or was materially out of compliance with the rules or regulations of the appropriate regulatory authority. The Department may recommend an Application whose Development Team member is working to remedy the condition of non compliance under a plan which was agreed to in writing by the appropriate regulatory entity. If such a problem exists, it should be clearly identified in Exhibit 106 and a copy of the executed remediation plan should be provided. If the Department is the regulatory entity, then the remediation plan entered into with the Compliance Division should be submitted.

(g) After eligible Applications have been evaluated, ranked and underwritten in accordance with the QAP and the Rules the Department shall make its recommendations to the Committee and the Board at their next meeting for the issuance of Commitment Notices.

(h) The Board's decisions shall be based upon its evaluation of the Project's consistency with the criteria and requirements set forth in the QAP and the Rules. In making a determination to allocate tax credits, the Department and Board shall be authorized not to rely solely on the number of points scored by an Applicant. They shall in addition, be entitled to take into account, as appropriate, such factors as Project feasibility, underwriting, concentration of low income Projects within specific markets or submarkets, geographic dispersion of multifamily housing in any particular market or submarket, as well as dispersion of the credits on a state-wide basis, site conditions, the experience of the Development Team, the type of housing being proposed and/or the Project's impact on the Low Income Housing Tax Credit Program's goals and objectives as stated in the QAP and the Rules and as otherwise provided under this chapter. The Board shall authorize the Department to allocate credits among as many different entities as practicable without diminishing the quality of the housing that is built.

(1) If the Board approves the Application, the Department will issue a Commitment Notice to the Project Owner which:

(A) shall confirm that the Board has approved the Application;and

(B) shall state the Department's commitment to make a Housing Credit Allocation to the Project Owner in a specified amount, subject to the feasibility determination described at §50.8(a) of this title (relating to Housing Credit Allocations), compliance by the Project Owner with the remaining requirements of this chapter, and any other conditions set forth therein by the Department. This Commitment Notice shall expire on the date specified therein, unless the commitment has been accepted and the conditions to receipt of an allocation set forth therein shall have been met.

(2) The Department shall notify, in writing, the mayor or other equivalent chief executive officer of the municipality in which the Property is located informing him/her of the Boards issuance of a Commitment Notice.

(3) If the Board disapproves or fails to act upon the Application, the Department shall issue to the Project Owner a written notice stating the reason(s) for the Board's disapproval or failure to act.

(i) A Project Owner may request that the Department extend the expiration date of a Commitment Notice which has not expired or the date for the submission of the Carryover Allocation Document by submitting a written request for such action, accompanied by the extension fee specified in §50.11 of this title (relating to Program Fees). The request shall specify the term of the extension requested and the reason(s) why the Project Owner has been unable to satisfy the requirements of this chapter prior to the original expiration date. The Department, in its sole discretion, may consider and grant such extension requests; provided, however, that in no event shall the expiration date of a Commitment Notice be extended beyond the last business day of the applicable calendar year.

(j) A Project Owner must indicate acceptance of the Department's offer of a commitment of tax credit authority by executing the Commitment Notice and paying the commitment fee specified in §50.11 of this title (relating to Program Fees) prior to the expiration date set forth in the notice. Together with or following the Project Owner's acceptance of the commitment, the owner may request the Department to execute an Agreement and Election Statement, in the form prescribed by the Department, for the purpose of fixing the applicable credit percentage for the Project as that for the month in which the commitment was accepted, as provided in the Code, §42(b)(2). Upon receipt of a duly dated and executed Agreement and Election Statement and the accepted Commitment Notice, if the Project Owner is in compliance with the Rules of this chapter, the Department shall execute the Agreement and Election Statement and return a copy to the Project Owner. The Agreement and Election Statement shall be executed by the Project Owner no later than five days after the end of the month in which the offer of commitment was accepted. Current

Treasury Regulations, §1.42-8(a)(1)(v), suggest that in order to permit a Project Owner to make an effective election to fix the applicable credit percentage for a Project, the Commitment Notice must be executed by the Department and the Project Owner in the same month. The Department will cooperate with a Project Owner, as needed, to assure that the Commitment Notice can be so executed.

(k) Prior to the expiration of the Commitment Notice a Project Owner who has been issued a Commitment Notice may request the Department to execute a Carryover Allocation Document. The Carryover Allocation must be properly completed, signed, dated and notarized by the Project Owner and delivered to the Department along with any and all other documentation prescribed in the Carryover Allocation Procedures Manual, as amended. The commitment fee as specified in §50.11 of this title (relating to Program Fees) must be received by the Department prior to the processing of any Carryover Allocation Documentation.

(l) If the entire State Housing Credit Ceiling for the applicable calendar year has been, committed or allocated in accordance with this chapter, the Department shall place all remaining Applications which have satisfied all Threshold Criteria on a waiting list. All such waiting list Applications will be weighed one against the other and a priority list shall be developed by the Department and approved by the Committee. If at any time prior to the end of the Application Round, one or more Commitment Notices expire and a sufficient amount of the State Housing Credit Ceiling becomes available, the Department shall issue a Commitment Notice to Applications on the waiting list in order of priority. In the event that the Department makes a Commitment Notice or offers a commitment within the last month of the calendar year, it will require immediate action by the Applicant to assure that an allocation or Carryover Allocation can be issued before the end of that same calendar year.

(m) Within 15 business days of the date an Application is received, the Department shall notify in writing the mayor or other equivalent chief executive officer of the municipality, if the Project or a part thereof is located in a municipality; otherwise the Department shall notify the chief executive officer of the county in which the Project or a part thereof is located, to advise such individual that the Project or a part thereof will be located in his/her jurisdiction and request any comments which such individual may have concerning such Project. Such comments shall be part of the documents required to be reviewed by the Board under this subsection if received by the Department within 30 days after receipt of such certified mail notification to said individual; otherwise, if comments are received by the Department after 30 days, same may be reviewed at the discretion of the Board under this subsection. If the local municipal authority expresses opposition to the Project, the Department will give consideration to the objections raised and will visit the proposed site or Project within 30 days of notification.

(n) The Department shall give notice of a proposed project to the state representative and state senator representing the area where a project would be located. The state representative or senator may hold a community meeting at which the Department shall provide appropriate representation.

(o) Prior to the Department's issuance of the IRS Form 8609 declaring that the Project has been placed in service for purposes of the Code, §42, Project Owners must date, sign and acknowledge before a notary public a LURA and send the original to the Department for execution. The Project Owner shall then record said LURA, along with any and all exhibits attached thereto, in the real Property records of the county where the Project is located and return the original document, duly certified as to recordation by the appropriate county official, to the Department. If any liens (other than mechanics' or materialmen's liens) shall have been recorded against the Project and/or the Property prior to the recording of the LURA, the Project Owner shall obtain the subordination of the rights of any such lienholder, or other effective consent, to the survival of certain obligations contained in the LURA following the foreclosure of any such lien. Receipt of such certified recorded original LURA by the Department is required prior to issuance of IRS Form 8609. A representative of the Department shall physically inspect the Property for compliance with the Application and the representatives, warranties, covenants, agreements and undertakings contained therein before the IRS Form 8609 is issued.

§50.5. Set-Asides, Commitments and Preferences.

(a) At least 10% of the State Housing Credit Ceiling for each calendar year shall be allocated to Qualified Nonprofit Projects which meet the requirements of the Code, §42(h)(5). Such organizations may compete in only one of the following set-asides:

(1) Non Profit 10%;

(2) Rural Projects/Prison Communities 15%; or

(3) General Projects 75%.

(b) The Department may redistribute the credits depending on the level of demand exhibited during the Allocation Round; provided that no more than 90% of the State's Housing Credit Ceiling for the calendar year may go to Projects which are not Qualified Nonprofit Projects. The Department will reserve 25% of the 15% Rural Projects/Prison Communities set-aside for projects financed through Rural Development (TxRD) (formerly Farmer's Home). Should there not be sufficient qualified applications submitted for the TxRD set-aside, then the allocations would revert back to the Rural Projects/Prison Communities set-aside pool. Information concerning the appropriate set-aside for each Application Round will be published in the Texas Register. Applicants may submit only one Application for each site.

(c) No Commitment Notice shall be issued with respect to any Project, the total development cost of which, as determined by the Department, or the acquisition, construction or rehabilitation cost of which exceed the limitations established from time to time by the Department and the Board as more specifically provided for within the Reference Manual. The Department will reduce the Applicant's estimate of developer's and/or Contractor fees in instances where these fees are considered excessive, as more specifically provided for within the Application Submission Procedures Manual, as amended. In the instance where the Contractor is an Affiliate of the Project Owner and both parties are claiming fees, Contractor's overhead, profit, and general requirements, the Department will reduce the total fees estimated to a level that it deems appropriate. Further, the Department shall deny or reduce the amount of low income housing tax credits on any portion of costs which it deems excessive or unreasonable. The Department also may require bids in support of the costs proposed by any Applicant.

(d) The Department may, at any time and without additional administrative process, determine to award credits to projects previously evaluated and awarded credits if it determines that such previously awarded credits are or may be invalid and the owner was not responsible for such invalidity. To the maximum extent feasible, the Department will use credits carried forward from the prior year or recovered during the current year to make awards pursuant to subparagraphs (a)-(d) of this section.

§50.6. Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects.

(a) Threshold Criteria. To have an Application considered for Selection Criteria, a Project Owner must first supply all required information and demonstrate that the Project meets all of the requirements of the Threshold Criteria set forth as follows and as more specifically provided for in the Application Submission Procedures Manual, as amended. Applications not meeting Threshold Criteria may be terminated as otherwise provided under this chapter. No Ineligible Building Types will be considered for allocation of tax credits under this QAP and the Rules, and thus Ineligible Building Types do not satisfy Threshold Criteria. Project Owners whose Applications do not meet Threshold Criteria will be so informed in writing. The following are the Threshold Criteria that are mandatory requirements at the time of Application submission:

(1) EXHIBIT 101. Label as EXHIBIT 101, the following documents:

(A) A letter from the design architect specifying the type of amenities proposed for the development. If fees in addition to rent are charged for amenities reserved for an individual tenant's use (i.e. covered parking, storage), then the amenity may not be included among those provided to satisfy this exhibit. Therefore, the letter must clearly indicate those amenities for which fees may be collected. Projects larger than 35 units must provide at least four of the following amenities. Small Developments (35 Units or less) and Special Housing Projects must provide at least two of the following amenities:

(i) full perimeter fencing with controlled gate access;

(ii) designated playground and equipment;

(iii) community laundry room/laundry hook-up in Units;

(iv) furnished community room;

(v) recreation facilities;

(vi) public telephone(s) available to tenants 24 hours a day;

(vii) on-site day care, senior center, or community meals room;

(viii) storage areas;

(ix) computer facilities; or

(x) covered parking.

(B) All of the architectural drawings requested in clause (i) through (iii) of this subparagraph must be submitted. While full size design or construction documents are not required, the drawings should have a scale and/or show the dimensions:

(i) a site plan;

(ii) typical floor and unit plans of residential and common area buildings. The net rentable area as calculated in Exhibit 2A of the Reference Manual should be clearly stated on each unit floor plan; and

(iii) typical elevations of residential and common area buildings. Elevations should include a percentage estimate of exterior composition, i.e. 50% brick, 50% siding.

(C) Original photographs of the development site and the surrounding area. Rehabilitation projects must also submit original photographs of the existing signage, buildings, amenities and interior photographs.

(D) A letter from the design architect specifying that the Project will adhere to the Texas Property Code relating to security devices and other applicable requirements for residential tenancies.

(2) EXHIBIT 102. Label as EXHIBIT 102, the completed "New Construction and Rehabilitation Breakdown" form provided in the Application Submission Procedures Manual. Rehabilitation developments must establish that the rehabilitation will be substantial and will involve at least $6,000 per unit in direct hard costs. Additionally, all rehabilitation Projects must provide a detailed work write-up/physical assessment report prepared by a registered architect, professional engineer or general Contractor. The work write-up/physical assessment report must detail the scope of work to be performed throughout the rehabilitation and must specify the estimated cost associated with each item of work to be performed.

(3) EXHIBIT 103. There shall exist evidence of readiness to proceed in the form of at least one of the items under subparagraphs (A)-(E) of this paragraph:

(A) Label as EXHIBIT 103(A), evidence of site control through one of the following:

(i) a recorded warranty deed in the name of the ownership entity, or entities which comprise the Applicant;

(ii) a contract for sale or lease (the minimum term of the lease must be at least 45 years) in the name of the ownership entity, or entities which comprise the Applicant which is valid for the entire period the development is under consideration for tax credits or at least 90 days, whichever is greater; or

(iii) an exclusive option to purchase in the name of the ownership entity, or entities which comprise the Applicant which is valid for the entire period the development is under consideration for tax credits or at least 90 days, whichever is greater.

(B) Label as EXHIBIT 103(B), evidence of current and appropriate zoning in the form of a letter from the appropriate municipal authority. In lieu of such documentation the Applicant must submit evidence that a rezoning request has been filed with the appropriate municipal authority as of the date of submission of the Application. Any commitment of tax credits to the Applicant will be contingent upon proper rezoning prior to Carryover Allocation. If zoning is not required, the Applicant must submit a letter from the local municipal/county authority so stating. If the Property is currently a non-conforming use as presently zoned, provide the following:

(i) a detailed narrative of the nature of non-conformance;

(ii) the applicable destruction threshold;

(iii) owners rights to reconstruct in the event of damage; and

(iv) penalties of noncompliance.

(C) Label as EXHIBIT 103(C), evidence of the availability of all necessary utilities/services to the development site. Exhibits must be in the form of a letter from the appropriate municipal provider/local service provider, or in the form of the last monthly bill which must clearly identify the development by name and address. If utilities are not already accessible, then the letter must clearly state an estimated time frame for provision of the utilities and an estimate of the infrastructure cost that will be borne by the developer. Letters from the appropriate provider must not be older than 12 months from the first day of the Application Acceptance Period. If utilities are not already accessible (undeveloped areas), the letter should not be

older than 3 months from the first day of the Application Acceptance Period. Necessary utilities are GAS/ELECTRIC, TRASH, WATER, and SEWER.

(D) Label as EXHIBIT 103(D), evidence of permanent financing in only one of the following forms:

(i) bona fide permanent financing in place as evidenced by a valid and binding loan agreement and a deed(s) of trust in an amount not less than the projected liens to be placed upon the Project upon completion of construction in the name of the ownership entity which identifies the mortgagor as the Applicant or entities which comprise the general partner;

(ii) bona fide commitment or term sheet issued by a lending institution or mortgage company that is actively and regularly engaged in the business of lending money which is addressed to the ownership entity, or entities which comprise the Applicant and which has been executed and accepted by both parties (the term of the loan must be for a minimum of 15 years with a 25 year amortization); or

(iii) if the development will be financed through owner contributions, provide a letter from an independent CPA verifying the capacity of the Applicant to provide the proposed financing and that funds are committed solely for such purpose with a letter from the Applicant's bank or banks confirming that such funds have been provided for or deposited in a separate account at said bank(s).

(E) Label as EXHIBIT 103(E), either:

(i) a copy of the current title policy which shows that the ownership of the land/Project is vested in the exact name of the Applicant, or entities which comprise the Applicant; or

(ii) a copy of a current title commitment with the proposed insured matching exactly the name of the Applicant or entities which comprise the Applicant and the title of the land/Project vested in the name of the exact name of the seller as indicated on the sales contract.

(4) EXHIBIT 104. Label as EXHIBIT 104, evidence of pre-Application notification by the Applicant to the local chief executive officer(s) (i.e., mayor and county judge), state senator, and state representative of the locality of the development. The pre-Application notification will consist of a letter which at least includes the text described in Exhibit 113. Evidence of such notification shall be a copy of the letter sent to the official and proof of delivery in the form of a certified mail receipt, overnight mail receipt, or confirmation letter from said official. Proof of notification should not be older than three months from the first day of the Application Acceptance Period.

(5) EXHIBIT 105. Using Exhibit 105 in the Application Submission Manual, provide a current financial statement for each Applicant (as defined in the QAP). Applicant's statement must not be older than 12 months from the first day of the Application Acceptance Period. If submitting partnership and corporate financials in addition to the individual statements, the certified financial statements should not be older than 90 days.

(6) EXHIBIT 106. must contain all of the following documentation:

(A) a chart which clearly illustrates the complete organizational structure of the Project Owner. This chart should provide the names and ownership percentage of all entities and sub-entities with an ownership interest in the development. The percentage ownership of all Persons in Control of these entities and sub-entities must also be clearly defined;

(B) the original copy of the completed and executed Previous Participation and Background Certification Form, Exhibit 106(A), which is provided as part of the Application Submission Procedures Manual. This form must be completed with respect to the ownership entity, general partner, general contractor and their principals; and

(C) the Authorization To Release Credit Information, Exhibit 106(B), which is provided as part of the Application Submission Procedures Manual must be completed by all Persons in Control of the Applicant.

(7) EXHIBIT 107. Label as EXHIBIT 107, a current rent roll for occupied Projects undergoing rehabilitation. The rent roll must disclose terms and rate of the lease, rental rates offered at the date of the rent roll, Unit mix, tenant names or vacancy, dates of first occupancy and expiration of lease. Vacant and proposed new construction Projects are exempt from this requirement.

(8) EXHIBIT 108. Label as EXHIBIT 108, for new construction and rehabilitation developments, a 15-year proforma estimate of operating expenses and supporting documentation used to generate projections (excerpts from the market study, operating statements from comparable properties, etc.). Rehabilitation developments must also submit historical monthly operating statements of the subject development for 12 consecutive months ending not more than 45 days prior to the first day of the Application Acceptance Period. In lieu of the monthly operating statements, two annual operating statement summaries may be provided. If 12 months of operating statements or two annual operating summaries can not be obtained, then the monthly operating statements since the date of acquisition of the development and any other supporting documentation used to generate projections may be provided.

(9) EXHIBIT 109. Label as EXHIBIT 109 on the cover page only, a Market Study addressing all items listed in §50.4(c) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments) and/or required by the Reference Manual.

(10) EXHIBIT 110. Label as EXHIBIT 110 on the cover page only, a Phase I Environmental Study prepared in accordance with §50.4(c) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments).

(11) EXHIBIT 111. Label as EXHIBIT 111, for Applicants seeking credits from the Non Profit Set-Aside, all of the following documents that confirm that the Applicant is a Qualified Nonprofit Organization pursuant to Code, §42(h)(5)(C):

(A) an IRS determination letter which states that the Qualified Nonprofit Organization is a 501(c)(3) or (4) entity;

(B) if the Project involves a joint-venture between a Qualified Nonprofit Organization and a for-profit entity, an agreement which shows that the nonprofit organization Controls the Project (directly or indirectly) and will materially participate (within the meaning of the Code §469(h) in the development and operation of the Project throughout the Compliance Period;

(C) a current list of all directors and officers of the nonprofit organization, along with information pertaining to their primary occupations and disclosing any relationship; as an Affiliate or otherwise, with other members of the Applicant and/or any members or Affiliate of the Development Team, including any market analyst,

CPA, appraiser, or other professional performing any services with respect to the Project and/or the subject Property; and

(D) a copy of the articles of incorporation of the nonprofit organization which specifically states the fostering of affordable housing is one of the entities exempt purposes.

(12) EXHIBIT 112. Label as EXHIBIT 112, for Applicants applying for acquisition credits or if the Applicant is affiliated with the seller, all of the following documentation:

(A) an appraisal, which complies with the Market Analysis & Appraisal Policy provided in the Reference Manual, of the Property separately stating the value of the land and the improvements where applicable;

(B) a valuation report from the county tax appraisal district; and

(C) a bona fide valid contract verifying the acquisition cost and clearly identifying the selling Persons or entities, and details any relationship between the seller and the Applicant or any Affiliation with the Development Team, Qualified Market Analyst or any other professional or other consultant performing services with respect to the Project.

(13) EXHIBIT 113. Label as EXHIBIT 113, a copy of the public notice published in a widely circulated newspaper in the area in which the proposed development will be located. Such notice must run at least twice within a two week period, except on holidays, prior to the submission of the Application to the Department. The notice must be prepared in accordance with the guidelines established in the Application Submission Procedures Manual. Such notice can not be older than 3 months from the first day of the Application Acceptance Period.

(14) EXHIBIT 114. This exhibit must be the original copy of the completed and executed General Contractor Certification Form provided as part of the Application Submission Procedures Manual.

(b) Evaluation Factors. The Department will consider Applications for a housing credit allocation using the evaluation and point system described in this subsection and in the Application Submission Procedures Manual.

(1) Applications will be initially evaluated against the Threshold Criteria as they are accepted for filing in the Department during any Application Acceptance Period. Applications not meeting the Threshold Criteria may be terminated and may, at the Department's discretion, be returned to the Applicant without further review. The Department shall not be responsible for the Applicant's failure to meet the Threshold Criteria, and any oversight or failure of the Department's staff to notify the Applicant of such inability to satisfy the Threshold Criteria shall not confer upon the Applicant any rights to which it would not otherwise be entitled. All Applicants may withdraw and subsequently refile an Application, as well as file a new Application before the filing deadline.

(2) Applications will then be ranked according to the points scored under the Selection Criteria in accordance with the Rules and the Application Submission Procedures Manual. Applications not scored by the Department's staff shall be deemed to have the points allocated through self-scoring by the Applicants until actually scored. This shall apply only for ranking purposes.

(3) In addition to the number of points scored, the decision to underwrite a Project shall be subject to considerations contained in §50.4(h) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments). The Department, the Committee, and the Board shall evaluate an Application on the basis of additional factors beyond scoring criteria such as underwriting analysis, geographic dispersion of multi-family housing as well as tax credit allocation, site conditions, impact on the Low Income Housing Tax Credit Program's goals and objectives as stated in the QAP and the Rules, and as otherwise provided under this chapter. If such evaluation warrants, the Application will be forwarded to the Committee and to the Board for approval. In making its recommendation to the Board, the Department shall enumerate the reason(s) for the Project's selection, including all discretionary factors used in making its determination. The Department may have an outside third party perform the underwriting evaluation to the extent it determines appropriate. The expense of any third party underwriting evaluation shall be paid by the Applicant prior to the commencement of the aforementioned evaluation.

(4) Applications which have not received a Commitment Notice at the end of the Application Round may be placed on a waiting list to be established by the Department and approved by the Committee and the Board. At the end of each calendar year, all Applications which have not received a Commitment Notice shall be deemed terminated, unless the Department shall determine to retain or act upon such Applications as provided hereinafter at §50.15 (relating to Forward Reservations; Binding Commitments). The Applicant may re-apply to the Department during the next Application Acceptance Period.

(c) Selection Criteria. Pursuant to subsection (b) of this section, Applications receiving the highest number of points in each set aside category, in each Application Acceptance Period, if a sufficient amount of the State Housing Credit Ceiling is available, will be eligible for an evaluation by an Underwriter subject to §50.4(h) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments). All Applications will be ranked according to the Selection Criteria listed in paragraphs (1)-(9) of this subsection. If no additional set-aside credits are available, the Application shall be scored and evaluated in the General Pool using the criteria to which such General Pool Applications are subject, without special set-aside scoring points being considered.

(1) DEVELOPMENT LOCATION.

(A) EXHIBIT 201. Label as EXHIBIT 201, evidence that the subject Property is located within:

(i) a Qualified Census Tract (QCT) as defined by the Secretary of HUD and qualifies for the 30% increase in Eligible Basis, pursuant to the Code, §42(d)(5)(C), a Difficult Development Area (DDA) or a Targeted Texas County (TTC). Developments in a QCT should submit a copy of the census map must clearly show that the proposed development is located within a QCT. Census tract numbers must be clearly marked on the map, and must be identical to the QCT number stated in the Department's Reference Manual. Applicants for Projects in a Difficult Development Area or a Targeted Texas County must indicate this designation in the space provided in the Application Submission Procedures Manual;

(ii) a designated state or federal empowerment/enterprise zone. Such developments must submit a letter and a map from a city/county official verifying that the proposed development is located within such a designated zone. Letter should be no older than 90 days from the first day of Application Acceptance Period; or

(iii) a city-sponsored Tax Increment Financing Zone (TIF), Public Improvement District (PIDs), or other neighborhood preservation/redevelopment district organized under the Texas Local Government code. Such developments must submit all of the following documentation: a letter from a city/county official verifying that the proposed development is located within the city sponsored zone or district; a map from the city/county official which clearly delineates the boundaries of the district; and a certified copy of the appropriate resolution or documentation from the mayor, local city council, county judge, or county commissioners court which documents that the designated area was:

(I) created by the local city council/county commission,

(II) targets a specific geographic area which was not created solely for the benefit of the Applicant, and

(III) offers tangible and significant area-specific incentives or benefit over and above those normally provided by the city or county(5 points).

(2) HOUSING NEEDS CHARACTERISTICS.

(A) The proposed development is located in a county in which 10% or more of the households are below the poverty level as set forth in the Department's "County Data Elements Guide" incorporated into the Reference Manual. Utilize the percentages in clauses (i) through (iv) of this subparagraph to assess the appropriate score:

(i) 10% to 20% of households are below the poverty level (3 points);

(ii) 21% to 31% of households are below the poverty level (5 points);

(iii) 32% to 42% of households are below the poverty level (7 points); or

(iv) 42% + of households are below the poverty level (9 points).

(B) The proposed development is located in a county in which 20% or more of the rental units have a cost burden as set forth in the County Data Elements guide. Utilize the following percentages to assess the appropriate score:

(i) 20% to 30% of rental units have a cost burden (4 points);

(ii) 31% to 41% of rental units have a cost burden (6 points); or

(iii) 42% + of rental units have a cost burden (8 points).

(3) PROJECT CHARACTERISTICS.

(A) EXHIBIT 202. Label as EXHIBIT 202, evidence that the proposed development to be purchased qualifies as a federally assisted building within the meaning of the Code, §42(d)(6)(B), and is in danger of having the mortgage assigned to HUD, TxRD, or creating a claim on a federal mortgage insurance fund (such evidence must be a letter from the institution to which the development is in danger of being assigned); OR evidence that the Applicant is purchasing(ed) a Property owned by HUD, an insured depository institution in default, or a receiver or conservator of such an institution, or is an REO Property. Such evidence must be in the form of a binding contract to purchase from such federal or other entity as described in this paragraph, closing statements, or recorded warranty deed (5 points).

(B) EXHIBIT 203. Label as EXHIBIT 203, evidence that the proposed development is a low income building with mortgage prepayment eligibility as provided for in the Code, §42(d)(6)(C). Such evidence must be a copy of the HUD regulatory agreement which evidences the prepayment clause (5 points).

(C) The proposed development's composition offers a Unit mix which is conducive to housing large families. To qualify for these points, these Units must have at least 1000 square feet of net rentable area for three bedrooms or 1,200 square feet of net rentable area for four bedrooms. If the Project is a mixed-income development, only tax credit units should be used in computing the percentage of qualified Units for this selection item:

(i) 15% of the Units in the development are three or four bedrooms (5 points); and

(ii) an additional point will be awarded for each additional 5.0% increment of Units that are three or four bedrooms up to 30% of the Units (a maximum of three points) (3 points).

(D) EXHIBIT 204. Label as Exhibit 204, a letter from the design architect which certifies that at least four of the following energy saving devices will be utilized in the construction of each tax credit Unit. The devices selected must be certified as included in each tax credit Unit of the Project upon Cost Certification. Letter must specify where the items will be used and what efficiency standards will be met (R-values, SEER rating, flue efficiencies, etc.) (3 Points):

(i) ceiling fans in living room and each bedroom;

(ii) insulation of at least R-19 for walls and R-30 for ceilings;

(iii) solar screens;

(iv) gas heating system with a minimum 80% flue efficiency;

(v) energy efficient air conditioning system with a 12 SEER or above rating;

(vi) dual pane insulating, low-e windows;

(vii) evaporative cooling system; or

(viii) utilization of major appliances and residential light fixtures that qualify for the US EPA and the Department of Energy's Star Label.

(E) The proposed development provides low density housing of less than 16 Units per acre or as follows:

(i) 16 Units or less per acre (6 points);or

(ii) 17 to 20 Units per acre (4 points).

(F) The subject Project is an existing Residential Development without maximum rent limitations or set-asides for affordable housing seeking rehabilitation credits. If maximum rent limitations had existed previously, then the restrictions must have expired at least one year prior to the date of Application to the Department (8 points).

(G) The subject Project is a mixed-income development comprised of both market rate Units and qualified tax credit Units. To qualify for these points, the project must be located in a submarket where the rents for market rate units are at least 10% higher on a square foot basis than the maximum allowable rents under the Program. Additionally, the proposed rents for the market rate units in the project must be at least 5% higher on a per square foot basis than the maximum allowable rents under the Program.

(i) Project's Applicable Fraction is no greater than 75% (6 points).

(ii) Project's Applicable Fraction is no greater than 60% (10 points).

(H) EXHIBIT 205. Label as EXHIBIT 205, evidence that the proposed historic residential development has received an historic property designation by a federal, state or local governmental entity. Such evidence must be in the form of a letter from the designating entity identifying the development by name and address and stating that the project is:

(i) listed in the National Register of Historic Places under the U.S. Department of the Interior in accordance with the National Historic Preservation Act of 1966;

(ii) located in a registered historic district and certified by the U.S. Department of the Interior as being of historic significance to that district;

(iii) identified in a city, county, or state historic preservation list; or

(iv) designated as a state landmark (6 points).

(I) Property Owner will set-aside Units for households with incomes at 50% or less of Area Median Gross Income (AMGI). The rents for these Units must not be higher than the allowable tax credit rents at the 50% AMGI level. The property owner will set aside units at 50% AMGI and will maintain the percentage of such units continuously over the compliance and extended use period as specified in the LURA. If at re-certification the household income increases above the 50% limit, then the next available unit of the same or smaller size must be rented to an eligible 50% household. The rent for the previously qualified 50% household may be adjusted (not to exceed the 60% rent limit) only after a replacement 50% household is in place. If the Project is a mixed-income development, only tax credit units should be used in computing the percentage of qualified Units for this selection item. Utilize the percentages in clause (i) through (ii) of this subparagraph to assess the appropriate score:

(i) four points will be awarded for the first 10% of the Units in the development that are set-aside for tenants with incomes at 50% or less of AMGI (4 points);and

(ii) an additional point will be awarded for every 5% of additional Units set-aside for tenants with incomes at 50% or less of AMGI up to a maximum of four points (4 points).

(J) Proposed development is comprised of fourplexes in clusters of four or more buildings or Town Home development of at least 16 Units. To qualify for these points the development must be on contiguous property under common ownership, management, and Control and must have a density of no more than 16 Units per acre (5 points).

(K) EXHIBIT 206. Label as EXHIBIT 206, for rehabilitation evidence that a majority of the development's residential Units, as of the end of the Application Acceptance Period, are vacant and uninhabitable. Such evidence must be in the form of a letter and report from the local municipal authority citing substantial code violations. To qualify for these points, the Applicant or its Affiliates must not have owned a significant interest in, or have had Control of the Project during the period in which such Units were rendered uninhabitable (4 points).

(L) EXHIBIT 207. Label as EXHIBIT 207, evidence from the local municipal authority stating that the proposed development fulfills a need for additional affordable rental housing as evidenced in a local Consolidated Plan, Comprehensive Plan, State Low Income Housing Plan or other planning document and is supported by the local municipal authority. If the State Low Income Housing Plan is utilized for this exhibit, then a letter from the local municipal authority stating that there is no local plan and that the city supports the state plan must be submitted with the letter from the state (5 points).

(M) The Project is a Small Development. A Small Development is defined as a Project consisting of not more than 35 multifamily Units, which is not a part of, or contiguous to, a larger Project. A Project may not receive points for this characteristic if it would otherwise qualify as a Rural Project (5 points).

(4) SPONSOR CHARACTERISTICS.

(A) EXHIBIT 208. Label as EXHIBIT 208, evidence that the ownership entity, general partner, general contractor or its principals have a record of successfully constructing or developing residential units or comparable commercial property (i.e., dormitory and hotel/motel). Evidence must be one of the following documents: AIA Document A111 - Standard Form of Agreement Between Owner & Contractor, the AIA Document G704 - Certificate of Substantial Completion, IRS Form 8609, HUD Form 9822, Development Agreements, Partnership Agreements, or other appropriate documentation verifying that the ownership entity, general partner, general contractor or their principals have the required experience. The criteria and conditions related to a general contractor as outlined in §50.8(c) of this title (relating to Housing Credit Allocations) must be met in order to receive a final allocation of credits. Therefore, while points may be awarded for experience under this §50.6(c)(4)(A) during the application process, if upon review of documents required pursuant to §50.8(c) of this title (relating to Housing Credit Allocations), the general contractor is shown not to have the required experience, the conditions of the commitment notice or carryover agreement will not have been met and the final allocation of credits may be denied. If rehabilitation experience is being claimed to qualify for an Application involving new construction, then the rehabilitation must have been substantial and involved at least $6,000 of direct hard cost per unit.

(i) The evidence must clearly indicate:

(I) that the project has been completed (i.e. Development Agreements, Partnership Agreements, etc. must be accompanied by certificates of completion.);

(II) that the names on the forms and agreements tie back to the ownership entity, general partner, general contractor and their respective principals as listed in the Application; and

(III) the number of units completed or substantially completed.

(ii) The term "successfully" is defined as acting in a capacity as the general contractor or developer of:

(I) at least 100 residential units or comparable commercial property; or

(II) at least 35 residential units or comparable commercial property if the project applying for credits is a Rural Project.

(iii) Property Owners in noncompliance with HUD, TxRD, HOME, LIHTC or any other program monitored or involving funds awarded by the Department, but which are not barred from having an Application recommended by §50.4(f), or which have had

a continuing pattern of defaults and foreclosures are ineligible to claim the points for this item (10 points).

(B) EXHIBIT 209. Label as EXHIBIT 209, evidence that the Historically Underutilized Business ("HUB") has been certified by the General Services Commission and is the Project Owner or Controls the Project Owner. With respect to the filing of an Application and the development, operation and ownership of a Project, the historically underutilized person or persons whose ownership interests comprise a majority of a corporation, partnership, joint venture or other business entity, must maintain this majority and must demonstrate regular, continuous, and substantial participation in the operation and management activities of the entity. Likewise, with regard to a sole proprietorship, the individual who comprises the sole proprietorship must demonstrate regular, continuous, and substantial participation in the development, operation and ownership of the Project. The Department shall require evidence of regular, continuous and substantial participation and this evidence shall include, but not limited to, the agreement to personally guarantee the interim construction loan secured (and all other guarantees to the equity investor) relative to the development of a Project by the person or persons upon whose purported ownership interest(s) and participation form the basis for which the designation of a HUB is being claimed. Any such guarantee wherein an Affiliate, partner and or Beneficial Owner of the guarantor agrees to indemnify, in whole or in part, the guarantor from the liability arising from the guarantee, shall not constitute said evidence. The Department shall, during and after the Application Round, monitor those individuals upon whose purported ownership interest(s) and participation form the basis for which the designation of HUB is being claimed and may require the submission of any additional documentation as required to verify said evidence. To qualify for these points, in addition to the certification from the General Services Commission, the historically underutilized person or persons whose ownership interest(s) form the basis of the HUB designation must provide the necessary loan and syndication guarantees to develop the Project. The Department's goal is to have substantive participation by those individuals upon whose purported ownership interest(s) and participation form the basis for which the designation as a HUB is claimed. A determination by the Department that there has been a material misrepresentation as to such participation or that insufficient evidence has been provided to substantiate such participation will be final and points awarded for HUB participation will be withdrawn accordingly (5 points).

(5) PARTICIPATION OF LOCAL TAX EXEMPT ORGANIZATIONS. EXHIBIT 210 Label as EXHIBIT 210, evidence that the Property owner has an executed agreement with a Local Tax Exempt Organization for the provision of special supportive services that would not otherwise be available to the tenants. The supportive services will be evaluated based upon the following:

(A) the duration of the service agreement;

(B) the accessibility and appropriateness of the service to the tenants;

(C) the experience of the service provider; and

(D) the importance of the service in enhancing the tenants standard of living. The supportive service will be included in the Declaration of Land Use Restrictive Covenants ("LURA") (Up to 5 points).

(6) TENANT POPULATIONS WITH SPECIAL HOUSING NEEDS.

(A) This criterion applies to elderly Projects which must provide significant facilities and services specifically designed to meet the physical and social needs of the residents. Significant services may include congregate dining facilities, social and recreation programs, continuing education, welfare information and counseling, referral services, transportation and recreation. Other attributes of such Projects include providing hand rails along steps and interior hallways, grab bars in bathrooms, routes that allow for barrier-free lever type doorknobs and single lever faucets, as well as elevators for Projects of over two stories. Elderly Projects must not contain any Units with three or more bedrooms. Such a Project must conform to the Federal Fair Housing Act and must be a Project which:

(i) which is intended for, and solely occupied by Persons 62 years of age or older; or

(ii) in which all Units (excluding those occupied by an employee or owner) are constructed for, and occupied by at least one Person who is 60 years of age or older; and

(iii) which adheres to policies and procedures which demonstrate a firm commitment by the owner and manager to provide housing for Persons 60 years of age or older (10 points).

(B) EXHIBIT 211. Label as EXHIBIT 211, evidence which establishes that Units will be provided for persons with physical or mental disabilities as described in clause (i) or (ii) of this subparagraph.

(i) Submit evidence verifying that the subject development provides Units specifically adaptable for persons with physical or mental disabilities. Such evidence must be in the form of a certification from an accredited architect stating the number of Units which are/will be designed to meet American National Standards for buildings and facilities providing accessibility and usability for Persons with Disabilities (ANSI A117.1 - 1986) and will conform to the Fair Housing Act. The Department will require a minimum of nine months during which set-aside units must either be occupied by tenants who are physically or mentally disabled or held vacant while being marketed to such tenants. If after this nine month period, the Project Owner is unable to locate qualified Persons with disabilities following a good-faith effort, the units may be rented to tenants without disabilities, provided that the next available unit (from among those set-aside for Persons with disabilities) shall first be made available to Persons with disabilities. The nine month period will begin on the date that each building receives its certificate of occupancy. For buildings which do not receive a certificate of occupancy, the nine month period will begin on the placed in service date as provided for in the Cost Certification Manual. To comply with this provision all Project Owners must maintain a waiting list of qualified tenants with disabilities throughout the Compliance Period. When such Units become available, Project Owners must contact persons on the waiting list and/or provide notice to local service providers that such Units are available. The set-aside point systems for this subsection is as follows:

(I) 6% to 10% of Units are set-aside for persons with physical or mental disabilities (4 points);

(II) 11% to 15% of Units are set-aside for persons with physical/mental disabilities (6 points); or

(III) 16% + of Units are set-aside for persons with physical/mental disabilities (8 points).

(ii) Submit evidence verifying that the subject development provides Units specifically accessible for persons with physical, visual or hearing disabilities as required by Section 504. Such evidence must be in the form of a certification from an accredited architect stating the number of Units which are accessible per

the requirements of Section 504. Project Owners making this election must also comply with the Fair Housing Act (8 points).

(C) EXHIBIT 212. Label as EXHIBIT 212, evidence that the Project is designed solely for transitional housing for homeless persons on a non-transient basis, with supportive services designed to assist tenants in locating and retaining permanent housing. Such evidence must include a detailed narrative describing the type of proposed housing; a referral agreement with an established organization which provides services to the homeless; and a marketing plan designed to attract qualified tenants and housing providers, as well as a list of supportive services (15 points).

(7) PUBLIC HOUSING WAITING LISTS. EXHIBIT 213. Label as EXHIBIT 213, evidence that the Property owner has committed in writing to the local public housing authority (PHA) the availability of Units and that the Property owner agrees to consider households on the PHA's waiting list as potential tenants. Evidence of this commitment must include all of the following documentation:

(A) a copy of the Property owner's letter to the PHA. If no PHA is within the locality of the development, the Property owner must utilize the nearest authority or office responsible for administering Section 8 programs;

(B) a copy of the marketing plan submitted with letter to the local PHA;

(C) verification of receipt by the PHA in the form of certified return receipt or overnight mail receipt; and

(D) a letter received from an appropriate municipal authority or local PHA stating the need for additional affordable housing Units within its jurisdiction (3 points).

(8) SUBSTANTIAL READINESS TO PROCEED. EXHIBIT 214. Label as EXHIBIT 214, evidence of substantial readiness to proceed. Such evidence must be in the form of an enforceable construction financing commitment from a regulated financial institution that is actively and regularly engaged in the business of lending money. Such a commitment must be a written approval of a loan or grant (i.e., preliminary approval by the lender's loan committee) and be subject only to conditions fully under the control of the Applicant to satisfy (excluding the allocation of tax credits) (4 Points).

(9) BONUS POINTS.

(A) EXHIBIT 215. Label as Exhibit 215, evidence that Sponsor agrees to provide a right of first refusal to purchase the Project upon or following the end of the Compliance Period for the minimum purchase price provided in, and in accordance with the requirements of, § 42(i)(7) of the Code (the "Minimum Purchase Price"), to (a) a Qualified Nonprofit Organization, (b) the Department, and (c) an individual tenant with respect to a single family building or a tenant cooperative and/or a resident management corporation in the Project or other association of tenants in the Project with respect to multifamily developments (together, including the tenants of a single family building, a "Tenant Organization"). Sponsor may qualify for this bonus by agreeing that the LURA with respect to the Project will, in substance, contain the following terms.

(i) Upon the earlier to occur of:

(I) the Sponsor's determination to sell the Project, or

(II) the Sponsor's request to the Department, pursuant to §42 (h)(6)(I) of the Code, to find a buyer who will purchase the Project pursuant to a "qualified contract" within the meaning of §42 (h)(6)(F) of the Code, the Sponsor shall provide a notice of intent to sell the Project ("Notice of Intent") to the Department and to such other parties as the Department may direct at that time. If the Sponsor determines that it will sell the Project at the end of the Compliance Period, the Notice of Intent shall be given no later than two years prior to expiration of the Compliance Period.

(ii) During the two years following the giving of Notice of Intent, the Sponsor may enter into an agreement to sell the Project only in accordance with a right of first refusal for sale at the Minimum Purchase Price with parties in the following order of priority:

(I) during the first six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization that is also a community housing development organization, as defined for purposes of the federal HOME Investment Partnerships Program at 24 C.F.R. § 92.1 (a "CHDO") and is approved by the Department,

(II) during the second six-month period after the Notice of Intent, only with a Qualified Nonprofit Organization or a Tenant Organization; and during the second year after the Notice of Intent, only with the Department or with a Qualified Nonprofit Organization approved by the Department or a Tenant Organization approved by the Department.

(iii) After the later to occur of:

(I) the end of the Compliance Period; or

(II) two years from delivery of a Notice of Intent, the Sponsor may sell the Project without regard to any right of first refusal established by the LURA if no offer to purchase the Project at or above the Minimum Purchase Price has been made by a Qualified Nonprofit Organization, a Tenant Organization or the Department, or a period of 120 days has expired from the date of acceptance of such offer without the sale having occurred, provided that the failure to close within such 120-day period shall not have been caused by the Sponsor or matters related to the title for the Project.

(iv) At any time prior to the giving of the Notice of Intent, the Sponsor may enter into an agreement with one or more specific Qualified Nonprofit Organizations and/or Tenant Organizations to provide a right of first refusal to purchase the Project for the Minimum Purchase Price, but any such agreement shall only permit purchase of the Project by such organization in accordance with and subject to the priorities set forth in paragraph (ii) of this section.

(v) The Department shall, at the request of the Sponsor, identify in the LURA a Qualified Nonprofit Organization or Tenant Organization which shall hold a limited priority in exercising a right of first refusal to purchase the Project at the Minimum Purchase Price, in accordance with and subject to the priorities set forth in paragraph (ii) of this section (5 points).

(B) Application is received within the first ten working days of the Application Acceptance Period (2 points).

(d) Final Ranking. The Department will evaluate Projects according to the strength of the Project in meeting the Threshold and Selection Criteria. In the event that two or more Applications receive the same number of points in any given set-aside category, the Department in addition to factors outlined in §50.4(h) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments) will utilize the following factors in the order presented in paragraphs (1)-(7) of this subsection in

making a determination as to which Project will receive a preference in consideration for a tax credit commitment:

(1) which serve the lowest income tenants;

(2) which serve low income tenants for the longest period of time, in the form of a longer Compliance Period and/or extended low income use period (as set forth in the Extended Low Income Housing Commitment Agreement);

(3) which is a Special Housing Project as defined in §50.2 of this title (relating to Definitions);

(4) which have substantial community support as evidenced by the commitment of local public funds toward the construction, rehabilitation and acquisition and subsequent rehabilitation of the Project;

(5) which demonstrates the highest substantial readiness to proceed as evidenced by the Selection Criteria, more specifically provided for in subsection (c)(8) of this section;

(6) which provide for the most efficient usage of the low income housing tax credit on a per Unit basis; and

(7) whose Unit composition provides the highest percentage of three bedrooms or greater sized Units.

(e) Past Performance. In reaching the final ranking of an Application, the Department will take into consideration the Project Owner's history in the tax credit program and other affordable housing programs. The Department may disqualify from this allocation round, any Applicant, Project Owner, developer and its partners, principals, and/or Affiliates who have received an allocation of credits in the 1997 round and who have not yet finalized the closing of the construction loan as of the close of this Application Acceptance Period. The Department may deduct up to ten points from the final score of any Applicant (or an Affiliate of which), in the past, has not placed into service developments for which the Department has made an allocation, or if a Property Owner has failed to perform under the obligations of any previous Commitment Notice. The Department may, at its sole discretion disqualify or impose limitation or disabilities upon an Applicant, Project Owner, developer, and its partners, principals and/or Affiliates with respect to the competition for allocations of tax credits as a consequence of material misstatement or omission, noncompliance with any Code requirements, or any of the terms, conditions or obligations of the program for any Project that has received a commitment or allocation, or for failure to place in service buildings for which credits were allocated. The Department will disqualify an Applicant who has been convicted of fraud, theft, misappropriation of funds; who has made misrepresentations to the Department; who is in noncompliance with the LURA or other similar agreement for any other Project monitored by the Department, or who is in noncompliance under this program or another program administered by this Department or other governmental entities. Additionally, Applicants are advised that the Department reserves the right to reject Applications which include principals who have been:

(1) excluded from federal and non federal procurement programs (either debarment or suspension);

(2) convicted of a felony offense;

(3) indicted or subject to enforcement action under state of federal securities law; and

(4) negligent in the physical upkeep of subject Property, or negligent in the operation of the subject Property, as deemed so by another federal or state authority. All such rejections of Applications shall be at the sole discretion of the Department.

(f) Credit Amount.

(1) The Department shall issue tax credits only in the amount needed for the financial feasibility and viability of a Project throughout the Compliance Period. The issuance of tax credits or the determination of any allocation amount in no way represents or purports to warrant the feasibility or viability of the Project by the Department. The Department will limit the allocation of tax credits to no more than $1.2 million per Project or $2.4 million per Applicant. For these purposes this limitation will apply to all Affiliates of any Applicant, developer, Project Owner, general partner, sponsor or their Affiliates or related entities unless otherwise provided for by the Department.

(2) In making determinations with respect to the limitation the Department may take into account such factors as the percentage of interest held by a particular individual or any Affiliate thereof in a Project, the amount of fees or other compensations paid to a particular individual or any Affiliate thereof with respect to a Project, any other financial benefits, either directly or indirectly through Beneficial Ownership received by a particular individual or any Affiliate thereof with respect to a Project. The Committee, in its sole discretion, may allocate credits to a Project Owner in addition to those awarded at the time of the initial Carryover Allocation in instances where there is bona fide substantiation of cost overruns and the Department has made a determination that the allocation is needed to maintain the Project's financial viability as a qualified low income Project. The limitation does not apply:

(A) to an entity which raises or provides equity for one or more Projects, solely with respect to its actions in raising or providing equity for such Projects (including syndication related activities as agent on behalf of investors);

(B) to the provision by an entity of "qualified commercial financing" within the meaning of the Code, §49(a)(1)(D)(ii) (without regard to the 80% limitation thereof);

(C) to a Qualified Nonprofit Organization or other not-for-profit entity, to the extent that the participation in a Project by such organization consists of the provision of loan funds or grants; and

(D) to a Project Consultant with respect to the provision of consulting services.

(g) Limitations on the Size of Projects.

(1) Minimum Project size will be limited to 16 units unless otherwise provided for under the Ineligible Building Types definition.

(2) Rural Projects involving new construction must not exceed 76 Units. All other Projects involving new construction or requesting a combination of rehabilitation and new construction tax credits will be limited to 250 Units. (248 Units if fourplexes).

(h) Tax Exempt Bond Financed Projects.

(1) Applications for Projects which receive at least 50% of their financing from the proceeds of tax-exempt bonds which are subject to the state volume cap as described in the Code, §42(h)(4)(B) are also subject to evaluation under the QAP and Rules.

(2) Submission Requirements. Unless an exemption is granted by the Department, an Application must be filed with the Department at least 30 days prior to the Ad Hoc Tax Credit Committee meeting at which the decision to issue a Determination

Notice will be discussed. With the exception of the Selection Criteria documentation as described in paragraph (3) of this subsection, the Application will contain all documentation required by the Reference Manual for developments not financed from the proceeds of tax-exempt bonds. Tax Exempt Bond Applications are subject to the requirements and underwriting review criteria described in the Application Submission Procedures Manual. Such projects must meet all Threshold Criteria requirements stipulated in the most recently approved QAP and Rules. Tax Exempt Bond Financed Projects are not subject to the Selection Criteria and related items and are not required to submit such documentation.

(3) Such Projects must also demonstrate consistency with the bond issuer's local Consolidated Plan as more fully described in §50.6(c)(O), Exhibit 208.

(4) Tax Exempt Bond Applications are not subject to the credit limitations of §50.6(f) Credit Amount.

(5) Tax Exempt Bond Applications are subject to the size restrictions specified in §50.6(g).

(6) The issuer (if other than the Department) may, at its discretion, enter into a contractual agreement to allow the Department to underwrite the Project. If the Department does not underwrite the Project for feasibility, it will require evidence that such a determination has been made by the issuer of the bonds.

(7) Tax Exempt Bond Applications are subject to review and approval by the Ad Hoc Tax Credit Committee of the concentration of low income Projects within specific markets or submarkets, geographic dispersion of multifamily housing in any particular market or submarket and site conditions.

(8) If the Department determines that all requirements have been met, the Ad Hoc Tax Credit Committee, without further action, shall authorize the Department to issue an appropriate notice to the Sponsor that the Project satisfies the requirements of the QAP and Rules in accordance with §42(m)(1)(D).

(i) Adherence to Obligations. All representations, undertakings and commitments made by an Applicant in the applications process for a Project, whether with respect to Threshold Criteria, Selection Criteria or otherwise, shall be deemed to be a condition to any Commitment Notice and/or Carryover Allocation for such Project, the violation of which shall be cause for cancellation of such Commitment Notice or Carryover Allocation by the Department, and if concerning the ongoing features or operation of the Project, shall be reflected in the LURA. All such representations are enforceable by the Department, including enforcement by administrative penalties for failure to perform as stated in the representation and enforcement by inclusion in deed restrictions to which the Department is a party.

§50.7. Compliance Monitoring.

(a) The Code, §42 (m)(1)(B)(iii), requires each State Allocating Agency to include in its "Qualified Allocation Plan" a procedure that the agency (or an agent or other private Contractor of such agency) will follow in monitoring Projects for noncompliance with the provisions of the Code, §42 and in notifying the Internal Revenue Service (the "Service"), or its successor, of such noncompliance of which such agency becomes aware. This procedure does not address forms and other records that may be required by the Service on examination or audit.

(b) The Department will also monitor compliance with any additional covenants made by the Project Owner in the Extended Low Income Housing Commitment Agreement.

(c) The owner of a low income housing Project must keep records for each qualified low income building in the Project showing:

(1) the total number of residential rental Units in the building (including the number of bedrooms and the size in square feet of each residential rental Unit);

(2) the percentage of residential rental Units in the building that are low income Units;

(3) the rent charged on each residential rental Unit in the building including documentation to support the utility allowance;

(4) the number of occupants in each low income Unit;

(5) the low income Unit vacancies in the building and information that shows when, and to whom, the next available Units were rented;

(6) the annual income certification of each low income tenant per Unit, in the form designated by the Department in the Compliance Reference Guide, as may be amended;

(7) documentation to support each low income tenant's income certification, consistent with the verification procedures required by HUD under §8 of the United States Housing Act of 1937 (§8). In the case of a tenant receiving housing assistance payments under §8, the documentation requirement is satisfied if the public housing authority provides a statement to the Project Owner declaring that the tenant's income does not exceed the applicable income limit under the Code, §42(g) as described in the Compliance Reference Guide;

(8) the Eligible Basis and Qualified Basis of the building at the end of the first year of the Credit Period;

(9) the character and use of the nonresidential portion of the building included in the building's Eligible Basis under the Code, §42(d), (e.g. tenant facilities that are available on a comparable basis to all tenants and for which no separate fee is charged for use of the facilities, or facilities reasonably required by the Project); and

(10) additional information as required by the Department.

(d) Record retention provision. The owner of a low income housing Project is required to retain the records described in subsection (c) of this section for at least six years after the due date (with extensions) for filing the federal income tax return for that year; however, the records for the first year of the tax Credit Period must be retained for at least six years beyond the due date (with extensions) for filing the federal income tax return for the last year of the Compliance Period of the building.

(e) Certification and Review.

(1) On or before February 1st of each year, the Department will send each Project Owner of a completed Project an Owner's Certification of Program Compliance to be completed by the Owner and returned to the Department on or before the first day of March of each year in the Compliance Period. Any Project for which the certification is not received by the Department, is received past due, or is incomplete, improperly completed or not signed by the Project Owner, will be considered not in compliance with the provisions of the Code. The Owner Certification of Program Compliance shall cover the proceeding calendar year and shall include the following statements of the Owner:

(A) the Project met the minimum set-aside test which was applicable to the Project;

(B) there was no change in the Applicable Fraction of any building in the Project, or that there was a change, and a description of the change;

(C) the owner has received an annual income certification from each low income tenant and documentation to support that certification;

(D) each low income Unit in the Project was rent-restricted under the Code, §42(g)(2) and Internal Revenue Service Final Regulation §1.42 - 10 regarding utility allowances;

(E) all Units in the Project were for use by the general public and used on a non-transient basis (except for transitional housing for the homeless provided under the Code, §42(i)(3)(B)(iii));

(F) each building in the Project was suitable for occupancy, taking into account local health, safety, and building codes;

(G) either there was no change in the Eligible Basis (as defined in the Code, §42(d)) of any building in the Project, or that there has been a change, and the nature of the change;

(H) all tenant facilities included in the Eligible Basis under the Code, §42(d), of any building in the Project, such as swimming pools, other recreational facilities, and parking areas, were provided on a comparable basis without charge to all tenants in the building;

(I) if a low income Unit in the Project became vacant during the year, reasonable attempts were, or are being, made to rent that Unit or the next available Unit of comparable or smaller size to tenants having a qualifying income before any other Units in the Project were, or will be, rented to tenants not having a qualifying income;

(J) if the income of tenants of a low income Unit in the Project increased above the limit allowed in the Code, §42(g)(2)(D)(ii), the next available Unit of comparable or smaller size in the Project was, or will be, rented to tenants having a qualifying income;

(K) a LURA including an extended low income housing commitment agreement as described in the Code, §42(h)(6)(B), was in effect for buildings subject to the Revenue Reconciliation Act of 1989, §7106(c)(1) (generally any building receiving an allocation after 1989);

(L) no change in the ownership of a Project has occurred during the reporting period;

(M) the Project Owner has not been notified by the Internal Revenue Service that the Project is no longer "a qualified low income housing project" within the meaning of the Code, §42; and

(N) the Project met all terms and conditions which were recorded in the LURA, or if no LURA was required to be recorded, the Project met all representations of the Project Owner in the Application for credits.

(2) Review.

(A) The Department will review each Owner's Certification of Program Compliance for compliance with the requirements of the Code, §42.

(B) Each year, the Department will perform monitoring reviews of at least 20% of the low income housing Projects. A monitoring review will include an inspection of the income certification, the documentation the Project Owner has received to support that certification, the rent record for each low income tenant, and any additional information that the Department deems necessary, for at least 20% of the low income Units in those Projects. The Department shall give reasonable notice to the Project Owner that an inspection will occur; however, the Projects and records to be reviewed will be selected by the Department in its discretion. Monitoring reviews will be performed at the location of the Project, unless the Project is required to have fewer than ten low income Units.

(C) The Department may, at the time and in the form designated by the Department, require the Project Owners to submit for compliance review, information on tenant income and rent for each low income Unit, and may require a Project Owner to submit for compliance review a copy of the income certification, the documentation the Project Owner has received to support that certification and the rent record for any low income tenant.

(3) Exception. The Department may, at its discretion, enter into a Memorandum of Understanding with the TxRD, whereby the TxRD agrees to provide to the Department information concerning the income and rent of the tenants in buildings financed by the TxRD under its §515 program. Owners of such buildings may be excepted from the review procedures of paragraph (2)(B) or (C) of this subsection or both; however, if the information provided by TxRD is not sufficient for the Department to make a determination that the income limitation and rent restrictions of the Code, §42(g)(1) and (2), are met, the Project Owner must provide the Department with additional information.

(f) Inspection provision. The Department retains the right to perform an on site inspection of any low income housing Project including all books and record pertaining thereto through either the end of the Compliance Period or the end of the period covered by any Extended Low Income Housing Commitment Agreement, whichever is later. An inspection under this subsection may be in addition to any review under subsection (e)(2) of this section.

(g) Notices to Owner. The Department will provide prompt written notice to the owner of a low income housing Project if the Department does not receive the certification described in subsection (e)(1) of this section or discovers through audit, inspection, review or any other manner, that the Project is not in compliance with the provisions of the Code, §42. The notice will specify a correction period which will not exceed 90 days, during which the owner may respond to the Department's findings, bring the Property into compliance, or supply any missing certifications. The Department may extend the correction period for up to six months if it determines there is good cause for granting an extension. If any communication to the Project Owner under this section is returned to the Department as unclaimed or undeliverable, the Project may be considered not in compliance without further notice to the Project Owner.

(h) Notice to the Internal Revenue Service.

(1) Regardless of whether the noncompliance is corrected, the Department is required to file IRS Form 8823, Low Income Housing Credit Agencies Report of Noncompliance, with the Internal Revenue Service. IRS Form 8823 will be filed not later than 45 days after the end of the correction period specified in the Notice to Owner, but will not be filed before the end of the correction period. The Department will explain on IRS Form 8823 the nature of the noncompliance and will indicate whether the Project Owner has corrected the noncompliance or has otherwise responded to the Department's findings.

(2) The Department will retain records of noncompliance or failure to certify for six years beyond the Department's filing of the respective IRS Form 8823. In all other cases, the Department will retain the certification and records described in this section for three years from the end of the calendar year the Department receives the certifications and records.

(i) Notices to the Department.

(1) A Project Owner must notify the Department in writing prior to any sale, transfer, exchange, or renaming of the Project or any portion of the Project, and this notification requirement shall be included in a LURA with respect to each Project. For Rural Projects that are federally assisted or purchased from HUD, the Department shall not authorize the sale of any apportionment of the entire tax credit development.

(2) A Project Owner must notify the Department in writing of any change of address to which subsequent notices or communications shall be sent.

(j) Liability. Compliance with the requirements of the Code, §42 is the sole responsibility of the owner of the building for which the credit is allowable. By monitoring for compliance, the Department in no way assumes any liability whatsoever for any action or failure to act by the owner including the owner's noncompliance with the Code, §42.

(k) These provisions apply to all buildings for which a low income housing credit is, or has been, allowable at any time. The Department is not required to monitor whether a building or Project was in compliance with the requirements of the Code, §42, prior to January 1, 1992. However, if the Department becomes aware of noncompliance that occurred prior to January 1, 1992, the Department is required to notify the Service in a manner consistent with subsection (g) of this section.

§50.8. Housing Credit Allocations.

(a) The Housing Credit Allocation Amount shall not exceed the dollar amount the Department determines is necessary for the financial feasibility and the long term viability of the Project throughout the Compliance Period. Such determination shall be made by the Department at the time of issuance of the Commitment Notice; at the time the Department makes a housing credit allocation; and/or the date the building is placed in service. Any housing credit allocation amount specified in a Commitment Notice, allocation and/or Carryover Allocation Document is subject to change by the Department dependent upon such determination. Such a determination shall be made by the Department based on its evaluation and procedures, considering the items specified in the Code, §42(m)(2)(B), AND THE DEPARTMENT IN NO WAY OR MANNER REPRESENTS OR WARRANTS TO ANY PROJECT OWNER, SPONSOR, INVESTOR, LENDER OR OTHER ENTITY THAT THE PROJECT IS, IN FACT, FEASIBLE OR VIABLE.

(b) When the Project Owner is in full compliance with the QAP and the Rules in this chapter, the Commitment Notice, the Carryover Allocation Procedures Manual and all fees as specified within §50.11 of this title (relating to Program Fees) have been received by the Department, the Department, if requested, shall execute a Carryover Allocation Document which has been properly completed, executed and notarized by the Project Owner. The Department shall return one executed copy to the Project Owner.

(c) The General Contractor hired by the Project Owner must meet specific criteria as defined by the Seventy-fifth Legislature. A general contractor hired by an applicant or an applicant , if the applicant serves as general contractor must demonstrate a history of constructing similar types of housings without the use of federal tax credits. Evidence must be submitted to the Department which sufficiently documents that the general contractor has constructed some housing without the use of low income housing credits. This documentation will be required as a condition of the commitment notice or carryover agreement, and must be complied with prior to commencement of construction and at cost certification and final allocation of credits.

(d) All Carryover Allocations will be contingent upon the following:

(1) the Project Owner's closing of the construction loan shall occur within 150 days from the date of the execution of the Carryover Allocation Document with a one-time 30 day extension. All requests for extensions by Applicants shall be submitted to the Department for review. The Committee may grant extensions, in its sole discretion, on a case-by-case basis. The Committee may, in its sole discretion, waive related fees. Copies of the closing documents must be submitted to the Department within two weeks after the closing. The Carryover Allocation will automatically be revoked if the Project Owner fails to meet the aforementioned closing deadline, and all credits previously allocated to that Project will be returned to the general pool for reallocation; and

(2) the Project Owner must commence and continue substantial construction activities within a year of the execution of the Carryover Allocation document and evidence such activity in a format prescribed by the Department, (as more fully defined in the Carryover Allocation Procedures Manual), outlining progress towards placing the Project in service in an expeditious manner. All requests for extensions by Applicants shall be submitted to the Department for review, and the Committee may grant extensions, in its sole discretion, on a case-by-case basis.

(e) The Department shall not allocate additional credits to a developer/Project Owner who is unable to provide evidence, satisfactory to the Department, of progress towards placements in service for a Project(s) that is in carryover. An allocation will be made in the name of the Applicant identified in the related Commitment Notice. If an allocation is made in the name of the party expected to be the general partner in an eventual owner partnership, the Department may, upon request, approve a transfer of allocation to such owner partnership in which such party is the sole general partner. Any other transfer of an allocation will be subject to review and approval by the Department. The approval of any such transfer does not constitute a representation to the effect that such transfer is permissible under the Code or without adverse consequences thereunder, and the Department may condition its approval upon receipt and approval of complete documentation regarding the new owner including all the criteria for scoring, evaluation and underwriting, among others, which were applicable to the original Applicant.

(f) The Department shall make a housing credit allocation, either in the form of IRS Form 8609, with respect to current year allocations for buildings placed in service, or in the Carryover Allocation Document, for buildings not yet placed in service, to any Project Owner who holds a Commitment Notice which has not expired, and for which all fees as specified in §50.11 of this title (relating to Program Fees), have been received by the Department. In order for an IRS Form 8609 to be issued with respect to a building in a Project, satisfactory evidence must be received by the Department that such building is completed and has been placed in service in accordance with the provisions of the Department's Cost Certification Procedures Manual. The Department shall mail or deliver IRS Form

8609 (or any successor form adopted by the Internal Revenue Service) to the Project Owner, with Part I thereof completed in all respects and signed by an authorized official of the Department. The delivery of the IRS Form 8609 will only occur only after the Project Owner has complied with all procedures and requirements listed within the Cost Certification Procedures Manual. Regardless of the year of Application to the Department for low income housing tax credits, the current year's Cost Certification Procedures Manual must be utilized when filing all cost certification requests. A separate housing credit allocation shall be made with respect to each building within a Project which is eligible for a housing credit; provided, however, that where an allocation is made pursuant to a Carryover Allocation Document on a project basis in accordance with the Code, §42(h)(1)(F), a housing credit dollar amount shall not be assigned to particular buildings in the Project until the issuance of IRS Form 8609s with respect to such buildings.

(g) In making a housing credit allocation, the Department shall specify a maximum Applicable Percentage, not to exceed the Applicable Percentage for the building permitted by the Code, §42(b), and a maximum Qualified Basis amount. In specifying the maximum applicable percentage and the maximum Qualified Basis amount, the Department shall disregard the first-year conventions described in the Code, §42(f)(2)(A) and §42(f)(3)(B). The housing credit allocation made by the Department shall not exceed the amount necessary to support the extended low income housing commitment as required by the Code, §42(h)(6)(C)(i).

(h) Project inspections shall be required to show that the Project is built or rehabilitated according to required plans and specifications. At a minimum, all Project inspections must include an inspection for quality during the construction process while defects can reasonably be corrected and a final inspection at the time the Project is placed in service. All such Project inspections shall be performed by the Department or by an independent, third party inspector acceptable to the Department. The Project Owner shall pay all fees and costs of said inspections.

(i) After the entire Project is placed in service, which must occur prior to the deadline specified in the Carryover Allocation Document, the Project Owner shall be responsible for furnishing the Department with documentation which satisfies the requirements set forth in the Cost Certification Procedures Manual. A newly constructed or rehabilitated building is not placed in service until all units in such building have been completed and certified by the appropriate local authority or registered architect as ready for occupancy. The Cost Certification must be submitted for the entire project, therefore partial Cost Certifications are not allowed. The Department may require copies of invoices and receipts and statements for materials and labor utilized for the new construction or rehabilitation and, if applicable, a closing statement for the acquisition of the Project as well as for the closing of all interim and permanent financing for the Project. If the Applicant does not fulfill all representations made in the Application, the Department may make reasonable reductions to the tax credit amount allocated via the IRS Form 8609 or may withhold issuance of the IRS Form 8609s until these representations are met.

§50.9. Department Records; Certain Required Filings.

(a) At all times during each calendar year the Department shall maintain a record of the following:

(1) the cumulative amount of the State Housing Credit Ceiling that has been reserved pursuant to reservation notices during such calendar year;

(2) the cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Commitment Notices during such calendar year;

(3) the cumulative amount of the State Housing Credit Ceiling that has been committed pursuant to Carryover Allocation Documents during such calendar year;

(4) the cumulative amount of housing credit allocations made during such calendar year; and

(5) the remaining unused portion of the State Housing Credit Ceiling for such calendar year.

(b) Not less frequently than quarterly during each calendar year, the Department shall publish in the Texas Register each of the items of information referred to in subsection (a) of this section.

(c) The Department shall mail to the Internal Revenue Service, not later than the 28th day of the second calendar month after the close of each calendar year during which the Department makes housing credit allocations, the original of each completed (as to Part I) IRS Form 8609, a copy of which was mailed or delivered by the Department to a Project Owner during such calendar year, along with a single completed IRS Form 8610, Annual Low Income Housing Credit Agencies Report. When a Carryover Allocation is made by the Department, a copy of IRS Form 8609 will be mailed or delivered to the Project Owner by the Department in the year in which the building(s) is placed in service, and thereafter the original will be mailed to the Internal Revenue Service in the time sequence in this subsection. The original of the Carryover Allocation Document will be filed by the Department with IRS Form 8610 for the year in which the allocation is made. The original of all executed Agreement and Election Statements shall be filed by the Department with the Department's IRS Form 8610 for the year a housing credit allocation is made as provided in this section.

§50.10. Department Responsibilities.

In making a housing credit allocation under this chapter, the Department shall rely upon information contained in the Project Owner's Application to determine whether a building is eligible for the credit under the Code, §42. The Project Owner shall bear full responsibility for claiming the credit and assuring that the Project complies with the requirements of the Code, §42. The Department shall have no responsibility for ensuring that a Project Owner who receives a housing credit allocation from the Department will qualify for the housing credit. The Department will reject, and consider barring the Project Owner from future participation in the Department's tax credit program as a consequence thereof, any Application in which fraudulent information, knowingly false documentation or other misrepresentation has been provided. The aforementioned policy will apply at any stage of the evaluation or approval process.

§50.11. Program Fees.

(a) Each Project Owner that submits an Application shall submit to the Department, along with such Application, a non refundable Application fee, as set forth in the Application Submission Procedures Manual.

(b) For each Project that is to be evaluated by an independent third party underwriter in accordance with §50.6(b)(3) of this title (relating to Threshold Criteria; Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects), the Project Owner will be so informed in writing prior to the commencement of any reviews by said underwriter. The cost for the third party underwriting will be set forth in the Application Submission Procedures Manual, and must be received by the Department prior to the engagement of the underwriter. The

fees paid by the Project Owner to the Department for the third party underwriting will be credited against the commitment fee established in subsection (c) of this section, in the event that a Commitment Notice is issued by the Department to the Project Owner.

(c) Each Project Owner that receives a Commitment Notice shall submit to the Department, not later than the expiration date on the commitment billing notice, a non refundable commitment fee, as set forth in the Application Submission Procedures Manual. The commitment fee shall be paid by cashier's check. Projects located within one of the targeted Texas counties, as indicated in the Reference Manual, will be exempt from the requirement to pay a commitment fee, in the event that Commitment Notice is issued.

(d) Each Project Owner that requests an extension of the expiration date of a Commitment Notice, or an extension of the documentation submission date for Carryover, Closing of Construction Loan, Substantial Construction Commencement, Placed in Service and Cost Certification, shall submit to the Department, along with such request, a non refundable extension fee. The amount of the extension fee shall be set forth in the Application Submission Procedures Manual. This fee shall be paid by cashier's check and shall be submitted as discussed in §50.12 of the QAP and Rules. All extensions shall be granted at the discretion of the Department.

(e) Upon the Project being placed in service, the Project Owner will pay a compliance monitoring fee in the form of a cashier's check, as set forth in the Application Submission Procedures Manual. The compliance monitoring fee must be received by the Department prior to the release of the IRS Form 8609 on the Project.

(f) Public information requests are processed by the Department in accordance with the provisions of Texas Civil Statutes, Article 6252-17a, codified as Government Code, Chapter 552, and as amended by the Acts during the 73rd Legislature, and as may be amended from time to time. The General Services Commission and the Department determine the cost of copying, and other costs of production.

(g) The amounts of the Application fee, commitment fee, compliance monitoring fee, administrative fees, extension fee, and other applicable fees as specified in the Application Submission Procedures Manual will be revised by the Department from time to time as necessary to ensure that such fees compensate the Department for its administrative costs and expenses.

§50.12. Manner and Place of Filing Applications.

(a) All Applications, letters, documents, or other papers filed with the Department will be received only between the hours of 8:00 a.m. and 5:00 p.m. on any day which is not a Saturday, Sunday or a holiday established by law for state employees.

(b) All Applications and related documents submitted to the Department shall be mailed or delivered to Low Income Housing Tax Credit Program, Texas Department of Housing and Community Affairs, 507 Sabine, Suite 400, Austin, Texas 78701.

§50.13. Withdrawals, Cancellations, Amendments.

(a) A Project Owner may withdraw an Application prior to receiving a commitment, Carryover Allocation Document or Housing Credit Allocation, or may cancel a Commitment Notice by submitting to the Department a notice, as applicable, of withdrawal or cancellation.

(b) The Department may consider an amendment to a Commitment Notice, Carryover Allocation or other requirement with respect to a Project if the revisions:

(1) are consistent with the Code and the tax credit program;

(2) do not occur while the Project is under consideration for tax credits;

(3) do not involve a change in the number of points scored (unless the Project's ranking is adjusted because of such change);

(4) do not involve a change in the Project's site; or

(5) do not involve a change in the set-aside election.

(c) The Department may cancel a Commitment Notice or Carryover Allocation prior to the issuance of IRS Form 8609 with respect to a Project if:

(1) the Project Owner or any member of the Development Team, or the Project, as applicable, fails to meet any of the conditions of such Commitment Notice or Carryover Allocation or any of the undertakings and commitments made by the Project Owner in the applications process for the Project;

(2) any statement or representation made by the Project Owner or made with respect to the Project Owner, the Development Team or the Project is untrue or misleading;

(3) an event occurs with respect to any member of the Development Team which would have made the Project's Application ineligible for funding pursuant to §50.4(f) of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments), if such event had occurred prior to issuance of the Commitment Notice or Carryover Allocation; or

(4) the Project Owner, any member of the Development Team, or the Project, as applicable, fails to comply with these Rules or the procedures or requirements of the Department.

§50.14. Waiver and Amendment of Rules.

(a) The Board, in its discretion, may waive any one or more of these Rules in cases of natural disasters such as fires, hurricanes, tornadoes, earthquakes, or other acts of nature as declared by Federal or State authorities.

(b) The Department may amend this chapter and the Rules contained herein at any time in accordance with the provisions of Texas Civil Statutes, Article 6252-13a, codified as Government Code, Chapter 2001, and as amended by the Acts of the Seventy-third Legislature, and as may be amended from time to time.

§50.15. Forward Reservations; Binding Commitments.

(a) Anything in §50.4 of this title (relating to Applications; Environmental Assessments; Market Study; Commitments; Extensions; Carryover Allocations; Agreements and Elections; Extended Commitments) or elsewhere in this chapter to the contrary notwithstanding, the Department with approval of the Board may determine to issue commitments of tax credit authority with respect to Projects from the State Housing Credit Ceiling for the calendar year following the year of issuance (each a "forward commitment"). The Department may make such forward commitments:

(1) with respect to Projects placed on a waiting list in any previous Application Round during the year; or

(2) pursuant to an additional Application Round.

(b) If the Department determines to make forward commitments pursuant to a new Application Round, it shall provide information concerning such round in the Texas Register. In inviting and evaluating Applications pursuant to an additional Allocation Round,

the Department may waive or modify any of the set-asides set forth in §50.5(a) and (b) of this title (relating to Set-Asides, Commitments and Preferences) and make such modifications as it determines appropriate in the Threshold Criteria, evaluation factors and Selection Criteria set forth in §50.6 of this title (relating to Threshold Criteria, Evaluation Factors; Selection Criteria; Final Ranking; Credit Amount; Tax Exempt Bond Financed Projects) and in the dates and times by which actions are required to be performed under this chapter. The Department may also, in an additional Application Round, include Projects previously evaluated within the calendar year and rank such Projects together with those for which Applications are newly received.

(c) Unless otherwise provided in the Commitment Notice with respect to a Project selected to receive a forward commitment or in the announcement of an Application Round for Projects seeking a forward commitment, actions which are required to be performed under this chapter by a particular date within a calendar year shall be performed by such date in the calendar year of the anticipated allocation rather than in the calendar year of the forward commitment.

(d) Any forward commitment made pursuant to this section shall be made subject to the availability of State Housing Credit Ceiling in the calendar year with respect to which the forward commitment is made. No more than 15% of the per capita component of State Housing Credit Ceiling anticipated to be available in the State of Texas in a particular year shall be allocated pursuant to forward commitments to Project Applications carried forward without being ranked in the new Application Round pursuant to subsection (f) of this section. If a forward commitment shall be made with respect to a Project placed in service in the year of such commitment, the forward commitment shall be a "binding commitment" to allocate the applicable credit dollar amount within the meaning of the Code, §42(h)(1)(C).

(e) If tax credit authority shall become available to the Department later in a calendar year in which forward commitments have been awarded, the Department may allocate such tax credit authority to any eligible Project which received a forward commitment, in which event the forward commitment shall be canceled with respect to such Project.

(f) In addition to or in lieu of making forward commitments pursuant to subsection (a) of this section, the Department may determine to carry forward Project Applications on a waiting list or otherwise received and ranked in any Application Round within a calendar year to the subsequent calendar year, requiring such additional information, Applications and/or fees, if any, as it determines appropriate. Project Applications carried forward may, within the discretion of the Department, either be awarded credits in a separate allocation round on the basis of rankings previously assigned or may be ranked together with Project Applications invited and received in a new Application Round. The Department may determine in a particular calendar year to carry forward some Project Applications under the authority provided in this subsection, while issuing forward commitments pursuant to subsection (a) of this section with respect to others.

§50.16. Deadlines for Allocation of Low Income Housing Tax Credits.

(a) Not later than November 15 of each year, the Department shall prepare and submit to the Board for adoption the draft Qualified Allocation Plan required by federal law for use by the Department in setting criteria and priorities for the allocation of tax credits under the low income housing tax credit program.

(b) The Board shall adopt and submit to the governor the Qualified Allocation Plan not later than January 31.

(c) The governor shall approve, reject, or modify and approve the Qualified Allocation Plan not later than February 28.

(d) An Applicant for a low income housing tax credit to be issued a Commitment Notice during the initial Application Round in a calendar year must submit an Application to the Department not later than May 15.

(e) The Board shall authorize the Department to issue a Commitment Notice for allocation for the initial Application Round of low income housing tax credits each year in accordance with the Qualified Allocation Plan not later than July 31.

This 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 November 23, 1998.

TRD-9817911
Daisy A. Stiner
Acting Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 475–3726

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TITLE 16. ECONOMIC REGULATION

Part II. Public Utility Commission of Texas

Chapter 23. Substantive Rules

Subchapter F. Quality of Service

16 TAC §23.69

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

The Public Utility Commission of Texas (commission) proposes the repeal of §23.69 relating to Integrated Services Digital Network (ISDN). Project Number 17709 has been assigned to this proceeding. The Appropriations Act of 1997, House Bill 1, Article IX, §167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to: (1) satisfy the requirements of §167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) re-

organize the rules according to the industry to which they apply. As a result of this reorganization, §23.69 will be duplicative of proposed new §26.142 of this title (relating to Integrated Services Digital Network (ISDN)) in Chapter 26, Substantive Rules Applicable to Telecommunications Service Providers.

Mr. Martin Wilson, assistant general counsel, Office of Regulatory Affairs, has determined that for each year of the first five-year period the repeal is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Mr. Wilson has determined that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of the repeal will be the elimination of a duplicative rule. There will be no effect on small businesses as a result of repealing this section. There is no anticipated economic cost to persons as a result of repealing this section.

Mr. Wilson has also determined that the proposed repeal should not affect a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act §2001.022.

Comments on the proposed repeal (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, PO Box 13326, Austin, Texas 78711-3326, within 30 days after publication. All comments should refer to Project Number 17709, repeal of §23.69.

This repeal is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction.

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

§23.69. Integrated Services Digital Network (ISDN).

This 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 November 20, 1998.

TRD-9817790
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 936–7308

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Chapter 26. Substantive Rules Applicable to Telecommunications Service Providers

Subchapter G. Advanced Services

16 TAC §26.142

The Public Utility Commission of Texas (commission) proposes new §26.142 relating to Integrated Services Digital Network (ISDN). The proposed section will replace §23.69 of this title (relating to Integrated Services Digital Network (ISDN)). The proposed section establishes the minimum criteria for the provision of ISDN to customers of dominant certificated telecommunications utilities (DCTU). Project Number 17709 has been assigned to this proceeding.

The Appropriations Act of 1997, House Bill 1, Article IX, §167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include, at a minimum, an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The commission held three workshops to conduct a preliminary review of its rules. As a result of these workshops, the commission is reorganizing its current substantive rules located in 16 Texas Administrative Code (TAC) Chapter 23 to: (1) satisfy the requirements of §167; (2) repeal rules no longer needed; (3) update existing rules to reflect changes in the industries regulated by the commission; (4) do clean-up amendments made necessary by changes in law and commission organizational structure and practices; (5) reorganize rules into new chapters to facilitate future amendments and provide room for expansion; and (6) reorganize the rules according to the industry to which they apply. Chapter 26 has been established for all commission substantive rules applicable to telecommunications service providers. The duplicative sections of Chapter 23 will be proposed for repeal as each new section is proposed for publication in the new chapter.

General changes to rule language:

The proposed new sections reflect different section, subsection, and paragraph designations due to the reorganization of the rules. Citations to other sections of the commission's rules have been updated to reflect their new section designations. Some text has been proposed for deletion as unnecessary in the new section because the dates and requirements in the text no longer apply due to the passage of time and/or fulfillment of the requirements. References to the Office of Consumer Affairs have been updated to reflect the commission's current organization. The *Texas Register* will publish this section as all new text. Persons who desire a copy of the proposed new section as it reflects changes to the existing section in Chapter 23 may obtain a redlined version from the commission's Central Records under Project Number 17709.

Other changes specific to each section:

Proposed new §26.142 does not include §23.69(c) concerning definitions. The definitions in §23.69(c) have been moved to §26.5 of this title (relating to Definitions). Subsequently, the subsections in proposed new §26.142 have been reordered, and any references to specific subsections have been changed accordingly. In addition, §26.142 does not include §23.69(d)(4)-(6), and (h)(2)(A)-(B), which reference an initial implementation process for §23.69.

Proposed new §26.142(f)(1) contains an updated reference to the Office of Customer Protection and the Office's toll-free telephone number. Proposed new §26.142(f)(2)-(3), (h)(1)(C)-(D) contain updated references to the Office of Regulatory Affairs, and proposed new §26.142(h)(3) contains a more specific reference to a Procedural Rule.

Proposed new §26.142(g)(1)(A)(ii), (g)(1)(B)(i) and (g)(1)(D)(i) all contain corrected references to other subsections within the rule.

Proposed new §26.142(b) and (f)(2)(J) include updated references to §26.121, §26.122 and §26.123, relating to privacy

issues, Customer Proprietary Network Information, and Caller Identification.

Mr. Martin Wilson, assistant general counsel, has determined that for each year of the first five-year period the proposed section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Wilson has determined that for each year of the first five years the proposed section is in effect the public benefit anticipated as a result of enforcing the section will be the availability of ISDN to customers of dominant certificated telecommunications utilities. ISDN provides the public switched telephone network with the capability for end-to-end digital connectivity. Examples of uses for ISDN are telecommuting, teleconferencing, distance learning, and telemedicine. There will be no effect on small businesses as a result of enforcing this section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Mr. Wilson has also determined that for each year of the first five years the proposed section is in effect there will be no impact on employment in the geographic area affected by implementing the requirements of the section.

Comments on the proposed section (16 copies) may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 30 days after publication. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed section. The commission will consider the costs and benefits in deciding whether to adopt the section. The commission also invites specific comments regarding the §167 requirement as to whether the reason for adopting §23.69 continues to exist in the proposed new section. All comments should refer to Project Number 17709 - §26.142 relating to Integrated Services Digital Network.

This section is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction, and specifically, PURA §55.001 which requires public utilities to furnish service, instrumentalities, and facilities that are safe, adequate, efficient, and reasonable; and §55.002(1) which grants the commission authority to adopt rules a public utility must follow in furnishing a service.

Cross Index to Statutes: Public Utility Regulatory Act §§14.002, 55.001 and 55.002(1).

§26.142. Integrated Services Digital Network (ISDN).

(a) Purpose. The commission finds that Integrated Services Digital Network (ISDN) is an alternative to "plain old telephone service." At this time, ISDN is not a replacement for "plain old telephone service," but rather ISDN provides the public switched telephone network with end-to-end digital connectivity. As such, ISDN should be made available to customers at a reasonable price, should be as accessible as possible to customers who want ISDN, should meet minimum standards of quality and consistency, and should be provided in such a manner that permits the dominant certificated telecommunications utility (DCTU) a reasonable opportunity to earn a reasonable return on invested capital. The provisions of this section are intended to establish the minimum criteria for the provision of ISDN.

(b) Application.

(1) This section applies to DCTUs.

(2) All DCTUs providing ISDN must do so in accordance with the requirements of this section.

(3) An application to make ISDN available under this section shall comply with the requirements of §26.121 of this title (relating to Privacy Issues), §26.122 of this title (relating to Customer Proprietary Network Information, and §26.123 of this title (relating to Caller Identification Services).

(c) Availability of ISDN.

(1) Each DCTU shall make ISDN available to all customers in exchange areas having 50,000 or more access lines as of February 22, 1995. For purposes of this section, making ISDN available means providing ISDN to a customer within 30 days of that customer's request. Nothing in this section shall be construed as requiring a DCTU to provide ISDN to any customer prior to that customer's request for ISDN. The requirements of this paragraph shall not be met by making ISDN available to the customers of these exchange areas using a foreign exchange (FX) arrangement.

(2) Each DCTU subject to the requirements of paragraph (1) of this subsection shall make ISDN available to all customers in exchange areas having less than 50,000 access lines as of February 22, 1995. The requirements of this paragraph may be met by making ISDN available to the customers of these exchange areas using a FX arrangement, if that is the most economically efficient means for the DCTU to make ISDN available.

(3) It is the goal of the commission that ISDN should be made available to customers in all exchange areas not included in paragraphs (1) and (2) of this subsection. To this end, all telecommunications providers are encouraged to work together to make ISDN available to the customers of the DCTUs that do not have the facilities with which to make ISDN available to their customers. In the exchange areas not included in paragraph (1) of this section, the commission recognizes that ISDN may be made available using a FX arrangement, if that is the most economically efficient means for the DCTU to make ISDN available.

(d) ISDN standards and services.

(1) ISDN standards.

(A) At a minimum, all ISDN shall comply with National ISDN-1 and National ISDN-2 Standards as promulgated by Bellcore as of February 22, 1995.

(B) All ISDN shall be capable of providing end-to-end digital connectivity.

(2) ISDN services. At a minimum, the DCTU shall make available the ISDN services listed in the National ISDN-1 and National ISDN-2 Standards promulgated by Bellcore as of February 22, 1995.

(3) Existing customers. Existing customers as of February 22, 1995 may continue to receive ISDN irrespective of whether that ISDN complies with this subsection. Those customers may continue to receive such ISDN and shall be required to receive ISDN under the requirements of this subsection only if there is at least a 30 day customer-caused cessation of the ISDN service provided by the DCTU.

(4) Waiver provision. A DCTU may request, and the presiding officer may grant for good cause, modification or waiver of paragraphs (1) and/or (2) of this subsection. Such a request may be reviewed administratively. Any request for modification or waiver of

the requirements of paragraphs (1) and/or (2) of this subsection shall include a complete statement of the DCTU's arguments and factual support for that request.

(e) Costing and pricing of ISDN.

(1) Costing of ISDN. The cost standard for ISDN shall be the long run incremental cost (LRIC) of providing ISDN.

(2) Pricing of ISDN.

(A) Rates and terms.

(i) The rates and terms of ISDN, including basic rate interface (BRI), primary rate interface (PRI) and other ISDN services, shall be just and reasonable and shall not be unreasonably preferential, prejudicial, or discriminatory, subsidized directly or indirectly by regulated monopoly services, or predatory or anticompetitive.

(ii) The annual revenues for ISDN, including BRI, PRI, and other ISDN services, shall be sufficient to recover the annual long run incremental cost and a contribution for joint and/or common costs, in the second year after it is first offered under the tariffs approved pursuant to this section.

(B) Foreign serving office (FSO) rate. Where the DCTU makes ISDN available by designating a foreign serving office (FSO) arrangement, the DCTU shall not charge an FSO rate.

(C) Foreign exchange (FX) rate.

(i) Except as provided in clause (ii) of this subparagraph, where the DCTU is allowed to make ISDN available by designating a FX arrangement, the DCTU may charge an FX rate. A new FX rate shall be developed specifically for ISDN and this rate shall not be usage based. If the FX rate is priced at not less than 100% of LRIC and at not more than 105% of LRIC, there shall be a rebuttable presumption that the amount of joint and/or common costs recovered is appropriate.

(ii) Where the DCTU can make ISDN available to a customer by designating an FSO arrangement, the DCTU shall not charge a FX rate.

(D) Pricing of BRI. To further the commission's policy that ISDN be made available at a reasonable price and that ISDN be as accessible as possible to those customers who want ISDN, BRI should be priced to recover its LRIC plus a minimal amount of joint and/or common costs. If BRI is priced at not less than 100% of LRIC and at not more than 105% of LRIC, there shall be a rebuttable presumption that the amount of joint and/or common costs recovered is appropriate.

(E) Existing customers. Existing customers as of February 22, 1995 shall be subject to the rates set in compliance with this subsection, notwithstanding their choice to continue receiving ISDN under subsection (d) of this section.

(3) Pricing of ISDN for small LECs. After a Class A DCTU is in compliance with this section, a small local exchange carrier (SLEC) as defined in §26.5 of this title (relating to Definitions) may price ISDN services at plus or minus 25% of the rates approved by the commission for that Class A DCTU providing the service within the State of Texas or at the rates for ISDN services approved by the commission for a similar SLEC. For the purpose of this section a similar SLEC is defined as a SLEC having a total number of access lines within 5,000 access lines of the applying SLEC.

(f) Requirements for notice and contents of application in compliance with this section.

(1) Notice of application. The presiding officer may require notice to the public as required by the commission's Procedural Rules, Subchapter D, and shall require direct notice to all existing ISDN customers. Unless otherwise required by the presiding officer or by law, the notice shall include at a minimum a description of the service, the proposed rates and other terms of the service, the types of customers likely to be affected if the application is approved, the proposed effective date for the application, and the following language: "Persons who wish to comment on this application should notify the commission by (specified date, ten days before the proposed effective date). Requests for further information should be mailed to the Public Utility Commission of Texas, PO Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's Office of Customer Protection at (512) 936-7120 or toll free at (888) 782-8477. Hearing- and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136."

(2) Contents of application for each DCTU not electing the SLEC pricing provisions of subsection (e)(3) of this section. A DCTU that makes ISDN available shall file with the commission an application complying with the requirements of this section. In addition to copies required by other commission rules, one copy of the application shall be delivered to the Office of Regulatory Affairs and one copy shall be delivered to the Office of Public Utility Counsel. The application shall contain the following:

(A) the proposed tariff sheets to implement the requirements of subsections (c), (d), and (e) of this section as required by subsection (g) of this section;

(B) a statement by the DCTU describing how it intends to comply with this section, including how it intends to comply with subsections (c), (d) and (e) of this section as required by subsection (g) of this section;

(C) a description of the proposed service(s) and the rates, terms, and conditions under which the service(s) are proposed to be offered and an explanation of how the proposed rates and terms of the service(s) are just and reasonable and are not unreasonably preferential, prejudicial, or discriminatory, subsidized directly or indirectly by regulated monopoly services, or predatory or anticompetitive;

(D) a statement by the DCTU of whether the application contains a rate change;

(E) the proposed effective date of the service;

(F) a statement detailing the method and content of the notice, if any, the utility has provided or intends to provide to the public regarding the application and a brief statement explaining why the DCTU's notice proposal is reasonable and that the DCTU's notice proposal complies with applicable law;

(G) a copy of the text of the notice, if any;

(H) a long run incremental cost study (LRIC) supporting the proposed rates;

(I) projections of revenues, demand, and costs demonstrating that in the second year after the ISDN service is first offered under the tariffs approved pursuant to this section, the proposed rates will generate sufficient annual revenues to recover the annual long run incremental costs of providing the service, as well as a contribution for joint and/or common costs;

(J) the information required by §26.121 - §26.123 of this title;

(K) a statement specifying the exchanges in which the DCTU proposes to offer ISDN, the exchanges in which the DCTU proposes to offer ISDN using an FSO arrangement, the exchanges in which the DCTU proposes to offer ISDN using an FX arrangement, and the exchanges in which the DCTU does not propose to offer ISDN; and

(L) any other information which the DCTU wants considered in connection with the commission's review of its application.

(3) Contents of application for a SLEC. A SLEC that makes ISDN available and elects to price ISDN services under subsection (e)(3) of this section shall file with the commission an application complying with the requirements of this section. In addition to copies required by other commission rules, one copy of the application shall be delivered to the Office of Regulatory Affairs and one copy shall be delivered to the Office of Public Utility Counsel. The application shall contain the following:

(A) contents of application required by paragraph (2)(A), (B), (D), (E), (F), (G), (J), (K), and (L) of this subsection;

(B) a description of the proposed service(s) and the rates, terms, and conditions under which the service(s) are proposed to be offered and an affidavit from the general manager or an officer of the SLEC approving the proposed ISDN service;

(C) a notarized affidavit from a representative of the SLEC:

(i) verifying the number of access lines, including the access lines of affiliates of such SLEC providing local exchange telephone service within the state, the SLEC has in service in the State of Texas;

(ii) verifying that the rates have been determined by the SLEC independently;

(iii) including a statement affirming that the rates are just and reasonable and are not unreasonably preferential, prejudicial, or discriminatory; subsidized directly or indirectly by regulated monopoly services; or predatory, or anticompetitive; and

(D) an explanation demonstrating that the rates for the proposed ISDN service are within the guidelines provided by subsection (e)(3) of this section; and

(E) projections of the amount of revenues that will be generated by the ISDN service.

(g) Timing of and requirements for each DCTU's compliance with this section.

(1) Each DCTU that is required to make ISDN available under subsection (c)(1) and (2) of this section shall file with the commission an application as described in subsection (f) of this section. Pursuant to subsection (f)(2)(A) and (B) of this section, the DCTU shall show its compliance with the requirements of:

(A) subsection (c)(1) and (2) of this section;

(B) subsections (d)(1)(A) and (B), (d)(2) and (d)(3) of this section or request a waiver pursuant to subsection (d)(4) of this section and provide sufficient justification for the good cause exception; and

(C) subsection (e)(2)(B), (C), and (D) of this section.

(2) Each DCTU having ISDN tariffs in effect as of February 22, 1995 and that is not subject to paragraph (1) of this subsection shall file with the commission an application as described in subsection (f) of this section. Pursuant to subsection (f)(2)(A) and (B) of this section, the DCTU shall show its compliance with the requirements of:

(A) subsections (d)(1)(A) and (B), (d)(2) and (d)(3) of this section or request a waiver pursuant to subsection (d)(4) of this section and provide sufficient justification for the good cause exception; and

(B) subsection(e)(2)(B), (C), and (D) of this section.

(3) Rates proposed for services pursuant to paragraphs (1)(B) and (2)(A) of this subsection that are not tariffed as of the effective date of this section and rates proposed under paragraphs (1)(C) and (2)(B) of this subsection shall comply with the requirements of subsections (e)(1) and e(2)(A) and (E) of this section.

(4) Each DCTU offering ISDN after the effective date of this section shall file with the commission an application as described in subsection (f) of this section. Pursuant to subsection (f)(2)(A) and (B) of this section the DCTU shall show its compliance with the requirements of:

(A) subsections (d)(1)(A) and (B) and (d)(2) of this section or request a waiver pursuant to subsection (d)(4) of this section and provide sufficient justification for the good cause exception; and

(B) subsection (e)(1) and (2) of this section for each DCTU not electing the SLEC pricing provisions of subsection (e)(3) of this section or subsection (e)(3) of this section for a SLEC.

(h) Commission processing of application.

(1) Administrative review. An application considered under this section may be reviewed administratively unless the DCTU requests the application be docketed or the presiding officer, for good cause, determines at any point during the review that the application should be docketed.

(A) The operation of the proposed rate schedule may be suspended for 35 days after the effective date of the application. The effective date shall be no earlier than 30 days after the filing date of the application or 30 days after public notice is completed, whichever is later.

(B) The application shall be examined for sufficiency. If the presiding officer concludes that material deficiencies exist in the application, the applicant shall be notified within ten working days of the filing date of the specific deficiency in its application, and the earliest possible effective date of the application shall be no less than 30 days after the filing of a sufficient application with substantially complete information as required by the presiding officer. Thereafter, any time deadlines shall be determined from the 30th day after the filing of the sufficient application and information or from the effective date if the presiding officer extends that date.

(C) While the application is being administratively reviewed, the staff of the Office of Regulatory Affairs and the staff of the Office of Public Utility Counsel may submit requests for information to the DCTU. Six copies of all answers to such requests for information shall be filed with Central Records and one copy shall be provided the Office of Public Utility Counsel within ten days after receipt of the request by the DCTU.

(D) No later than 20 days after the filing date of the sufficient application, interested persons may provide to the staff of the Office of Regulatory Affairs written comments or recommendations concerning the application. The staff of the Office of Regulatory Affairs shall and the Office of Public Utility

Counsel may file with the presiding officer written comments or recommendations concerning the application.

(E) No later than 35 days after the effective date of the application, the presiding officer shall issue an order approving, denying, or docketing the DCTU's application.

(2) Approval or denial of application. The application shall be approved by the presiding officer if the proposed ISDN offered by the DCTU complies with each requirement of this section. If, based on the administrative review, the presiding officer determines that one or more of the requirements not waived have not been met, the presiding officer shall docket the application.

(3) Standards for docketing. The application may be docketed pursuant to Procedural Rule §22.33(b) of this title (relating to Tariff Filings).

(4) Review of the application after docketing. If the application is docketed, the operation of the proposed rate schedule shall be automatically suspended to a date 120 days after the applicant has filed all of its direct testimony and exhibits, or 155 days after the effective date, whichever is later. Affected persons may move to intervene in the docket, and the presiding officer may schedule a hearing on the merits. The application shall be processed in accordance with the commission's rules applicable to docketed cases.

(5) Interim rates. For good cause, interim rates may be approved after docketing. If the service requires substantial initial investment by customers before they may receive the service, interim rates shall be approved only if the DCTU shows, in addition to good cause, that it will notify each customer prior to purchasing the service that the customer's investment may be at risk due to the interim nature of the service.

(i) Commission processing of waivers. Any request for modification or waiver of the requirements of this section shall include a complete statement of the DCTU's arguments and factual support for that request. The presiding officer shall rule on the request expeditiously.

This 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 November 20, 1998.

TRD-9817789
Rhonda Dempsey
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 936–7308

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Part VI. Texas Motor Vehicle Board

Chapter 101. Practice and Procedure

The Texas Motor Vehicle Board of the Texas Department of Transportation proposes amendments to §§101.1-101.7, 101.9-101.13, 101.15-101.16, and new §101.14, relating to General Rules of agency operation; amendments to §§101.22-101.25, 101.27-101.28, relating to Rulemaking and amendments to §§101.41-101.47, 101.49, 101.51-101.52, 101.55, 101.57-101.64, relating to Adjudicative Proceedings and Hearings.

The Appropriation Act of 1997, House Bill 1, Article IX, §167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The Board conducted a review of Title 16, Chapter 101, relating to Practice and Procedure, at its November 12, 1998 meeting.

General changes to rule language:

As a result of its review, the Board is dividing previously undesignated heads into three subchapters. These are Subchapter A, General Rules (§§101.1-101.16); Subchapter B, Rulemaking (§§101.22-101.28); and Subchapter C, Adjudicative Proceedings and Hearings (§§101.41-101.66). The Texas Motor Vehicle Commission was renamed the Texas Motor Vehicle Board in 1992. The amendments change all references from "commission" to "Board" throughout the chapter. Additionally, the Motor Vehicle Board acquired jurisdiction over Chapter 503 of the Transportation Code in 1995. The amendments clarify that Board rules apply to actions brought under or pertaining to the Transportation Code as well as the Motor Vehicle Commission Code (TEX. REV. CIV. STAT., art. 4413(36)).

Other changes specific to each section:

In Subchapter A, General Rules, proposed amendments to §101.1 clarify that the rules in Chapter 101 apply only as reasonably practical in Lemon Law and warranty performance cases where parties may appear without legal representation. Proposed changes to §101.2 require that, in the event of a conflict in language between the Motor Vehicle Commission Code and the Transportation Code, the definition or procedure described in the Motor Vehicle Commission Code will control, and also clarify the definition of "governmental agency". Portions of §101.3 and §101.5 are being deleted to conform Board rules to the Public Information Act. Section 101.4 is amended to distinguish informal opinions from formal opinions described in §101.3. Proposed amendments to §107.7 add the requirement that complaints alleging violations of the codes shall be under oath and filed in the same manner as petitions for relief. Proposed changes to §101.9 describe the document format of pleadings and petitions.

Section 101.10 is amended to require complaints alleging violations of the codes be in writing and eliminates the requirement that the agency refer complaints outside its jurisdiction to another appropriate governmental agency having jurisdiction. Proposed changes to §101.11 eliminate the requirement for a bound hearing docket, thereby allowing computerization of master docket files. Section 101.13(e) states that for a document to be timely filed, it must be received pursuant to requirements in statutes or Board rules. Proposed amendments to §101.13 add orders of the Board, director or hearing examiner to those items that may require filing deadlines.

Existing §101.14 is repealed and new §101.14 is simultaneously proposed concerning Cease and Desist Orders. The new section clarifies the requirements to obtain a cease and desist order and the manner in which a cease and desist order may be appealed.

In Subchapter B, Rulemaking, the Board proposes to repeal §101.21 and §101.26, because the authority to promulgate rules is in the statute and the rules are unnecessary. The word "party"

is changed to "person" in §§101.23, 101.24, 101.25, 101.27 to conform to the language in Chapter 552 of the Government Code pertaining to rulemaking. Proposed amendments to §101.22 and §101.25 allow the options of electronic recording or court reporter transcription of rulemaking hearings. Proposed changes to §101.23 state that public comment will be accepted before or during a rulemaking hearing and eliminate acceptance of comment after the hearing is held. Proposed amendments to §101.27 allow the Board to notify interested persons of proposed or final rule action instead of requiring notification to interested persons. Proposed changes to §101.28 add formal and informal opinions to matters that are exempt from rulemaking requirements.

Subchapter C refers to Adjudicative Proceedings and Hearings. Proposed changes to §101.42 clarify requirements for notices of hearing and add a presumption of service if the notice of hearing is sent by certified mail. Proposed amendments to §101.43 no longer require a reply to a notice of hearing, and add a section stating that if a responding party does not reply nor appear at the hearing on the merits, allegations contained in the notice of hearing will be deemed admitted. Section 101.44 is amended to no longer require hearings be held in Austin. Section 101.45 allows court reporter transcription or electronic recording at the discretion of the hearing officer and allows waiver of the cost of preparation of the agency record for court appeal.

Proposed amendments to §101.46 allow a hearing officer to consolidate proceedings in the interest of judicial efficiency and no longer require a formal notice of hearing to that effect. Section 101.47 is amended to state that agreed orders proposed by the parties remain subject to Board approval. Proposed amendments to §101.51 properly cite the Texas Disciplinary Rules of Professional Conduct and Texas Lawyer's Creed. Proposed changes to §101.52 no longer allow introduction of testimony by affidavit and require two copies of exhibits in adjudicative proceedings. Amendments to §101.57 allow for delivery of pleadings to be, in addition to United States mail, by actual delivery or telephonic document transfer. Section 101.58 is amended to allow the hearing officer to set a schedule for submission of written summations at the close of a hearing on the merits. Proposed amendments to §101.59 clarify that a hearing officer shall serve his proposal for decision upon all parties. Proposed changes to §101.60 and §101.62 reflect that the hearing officer may allow extensions of times to file exceptions and replies to exceptions to a proposal for decision. Proposed amendments to §101.61 conform language to the Administrative Procedure Act.

Brett Bray, Director, Motor Vehicle Division, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Bray has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of the amendments and new section will be to clarify agency procedure by streamlining rule language and to codify agency policies. There will be no effect on small businesses as a result of complying with these sections. Mr. Bray has also determined that for each year of the first five years the proposals are in effect there will be no impact on employment in the geographic areas affected by the implementing the requirements of these sections.

Comments on the proposals (15 copies) may be submitted to Brett Bray, Director, Motor Vehicle Division, P. O. Box 2293, Austin, Texas, 78768. The Texas Motor Vehicle Board will consider final adoption of the proposals at its March 4, 1999 meeting. The deadline for comments is February 3, 1999.

Subchapter A. General Rules

16 TAC §§101.1–101.7, 101.9–101.13, 101.15–101.16

The amendments are proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules necessary and convenient to effectuate the provisions of the act.

Texas Motor Vehicle Commission Code §§1.02, 1.03, 2.01, 2.08, 2.09, 3.01, 3.02, 3.03, 3.04, 3.05, 3.06, 3.07A, 3.08, 3.08A, 4.06, 5.01A, 5.01B, 6.01, 6.01A, 6.07, 7.01 are affected by the proposed amendments.

§101.1. Scope and Purposes.

These rules govern practice and procedure before the Texas Motor Vehicle Board [~~commission~~]. The objective of these rules is to insure fair, just, and impartial adjudication of the rights of parties in all matters within the jurisdiction of the Texas Motor Vehicle Commission Code and Chapter 503 of the Texas Transportation Code, hereinafter referred to as the "codes" [~~"code"~~] and to insure fair, just, and effective administration of said codes [~~code~~] in accordance with the intent of the legislature as declared in the Texas Motor Vehicle Commission Code, §1.02. This chapter shall apply only as reasonably practicable to cases brought under §6.07 (the Lemon Law) or §3.08(i) (warranty performance) of the Texas Motor Vehicle Commission Code.

§101.2. Definitions; Conformity with Statutory Requirements.

The definitions contained in the Texas Motor Vehicle Commission Code and Chapter 503 of the Texas Transportation Code [~~code~~] are hereby adopted by reference. All matters of practice and procedure set forth in the codes [~~code~~] shall govern and these rules shall be construed to conform with the codes [~~code~~] in every relevant particular, it being the intent of these rules only to supplement the codes [~~code~~] and to provide procedures to be followed in instances not specifically governed by the codes [~~code~~]. In the event of a conflict, the definition or procedure referenced in the Texas Motor Vehicle Commission Code shall control.

(1) "Party in interest" means a party against whom a binding determination cannot be had in a proceeding before the Board [~~commission~~] without having been afforded notice and opportunity for hearing.

(2) "Governmental agency" means all other state and local governmental agencies of the State of Texas and all agencies of the United States government, whether executive, legislative, or judicial.

§101.3. Formal Opinions.

(a) General. Any person may request a formal opinion from the Board [~~commission~~] on any matter within the jurisdiction of the Texas Motor Vehicle Board [~~Commission~~]. It is the policy of the Board [~~commission~~] to consider requests for formal opinions and, where practicable, to inform the requesting party of the Board's [~~commission's~~] views; provided, however, that a request will be considered inappropriate for a formal opinion where the request involves a matter which is under investigation or is the subject of a current proceeding by the Board [~~commission~~] or another governmental agency, or where the request is such that an informed opinion thereon can be given only after extensive investigation, research, or collateral inquiry.

(b) Procedure. Requests for formal opinions are to be submitted to the Board [~~commission~~] in writing and shall include full and complete information on the matter with respect to which the formal opinion is requested. The request must affirmatively state that the matter involved is not the subject of an investigation or other proceeding by the Board [~~commission~~] or any other governmental agency. The submission of additional information may be required by the Board [~~commission~~].

(c) Formal opinions rendered without prejudice. Any formal opinion so given is without prejudice to the right of the Board [~~commission~~] to reconsider the matter and, where the public interest requires, to modify or revoke the formal opinion. Notice of such modification or revocation will be given to the party who originally requested the opinion so that he may modify or discontinue any action which may have been taken pursuant to the Board's [~~commission's~~] formal opinion. The Board [~~commission~~] will not proceed against such party with respect to any action taken in good faith reliance upon the Board's [~~commission's~~] formal opinion where all relevant facts were fully, completely, and accurately presented to the Board [~~commission~~] and where such action was promptly discontinued or appropriately modified upon notification of the Board's [~~commission's~~] modification or revocation of the formal opinion.

(d) Publication. Texts or digests of formal opinions of general interest will be made available to any person upon written request to the Board [~~commission~~], subject to statutory and other restrictions against disclosure, and to meritorious objections by the person who requested the formal opinion.

§101.4. Informal Opinions.

Any other advice, opinion, or information received from the Texas Motor Vehicle Board or the staff of the Board [~~commission~~] in response to an [~~any~~] inquiry [~~which~~] is not a formal opinion of the Board [~~commission~~] and shall be considered an informal opinion. No informal opinion, whether written or oral, by the Board [~~commission~~], the [~~executive~~] director, or any employee will be binding upon the Board [~~commission~~] in any subsequent proceeding involving the same or similar issue.

§101.5. Prohibited Disclosures and Communications.

~~[(a) In addition to information the disclosure of which is prohibited by statute, the Texas Motor Vehicle Commission will not, except where material and necessary in formal proceedings, disclose information contained in the investigation reports of its staff, staff recommendations and interoffice communications, or any other matter relating to investigation, administration, and enforcement which in the judgment of the commission is private or confidential.]~~

~~[(b)]~~ No party in interest, his attorney, or authorized representative in any proceeding shall submit, directly or indirectly, any ex parte communication concerning the merits of such proceeding to the members of the Board [~~commission~~], the [~~executive~~] director, or any employee of the Board [~~commission~~]. Violations of this section shall be promptly reported in writing, and if in the opinion of the Board [~~commission~~] such communication is prohibited and was made in willful violation of this section, or the dictates of fairness require that the communication be made public, a copy thereof (or a summary thereof if the same was oral) shall be filed with the records of such proceeding and a copy forwarded to all parties of record.

§101.6. Appearances.

(a) General. Any party to a proceeding before the Texas Motor Vehicle Board [~~Commission~~] may appear to represent, prosecute, or defend his rights or interests, either in person, by an attorney, or by any other authorized representative. Any individual may appear for himself; and any member of a partnership which is a party to a proceeding or any bona fide officer of a corporation or association may appear for the partnership, corporation, or association. An authorized full-time employee may enter an appearance for his employer.

(b) Agreements of representation. The Board may require agreements between a party in interest and an attorney or other authorized representative concerning any pending proceeding to be in writing, signed by the party in interest, and filed as a part of the record of the proceeding.

(c) Leading counsel. The attorney or other authorized representative of a party in interest shall be considered that party's leading counsel in any proceeding and, if present, shall have control in the management of the cause pending before the Texas Motor Vehicle Board [~~Commission~~].

(d) Intervention. Any public official or other person having an interest in a proceeding may, upon request to the Board [~~commission~~] or hearing officer, be permitted to intervene and present any relevant and proper evidence, data, or argument bearing upon the issues involved in the particular proceeding. Any person desiring to intervene in a proceeding may be required to disclose his interest in the proceeding before permission to appear will be granted.

(e) Limitation on appearances. The Board [~~commission~~] may limit or exclude entirely an attempt by persons to appear in a proceeding when such appearance would be irrelevant or would unduly broaden the scope of the proceeding.

§101.7. Petitions.

Petitions for relief under the codes or complaints filed alleging violations of the codes [~~code~~] other than those specifically provided for in these rules shall be in writing and under oath, shall state clearly and concisely the petitioner's grounds of interest in the subject matter, the facts relied upon, and the relief sought, and shall cite by appropriate reference the article of the code or other law relied upon for relief and, where applicable, the proceeding to which the petition refers.

§101.9. Form of Petitions, [~~Applications, Reports,~~] Pleadings, and the Like.

The original copy of every petition [~~application, report~~], pleading, motion, brief, or other instrument permitted or required to be filed with the Texas Motor Vehicle Board in a contested case proceeding [~~Commission~~] shall be signed by the party in interest, his attorney, or his authorized representative. All pleadings filed in any proceeding shall be printed or typed on 8 1/2 inch by 11 inch bond paper in no smaller than 11 point type with margins of at least one inch at the top, bottom, and each side. Pages shall be numbered in the 1 inch margin at the bottom of each page. All typewriting except block quotations and footnotes shall be double spaced. [~~typewritten or printed. If typewritten, the impression shall be on one side of the paper, and lines shall be double-spaced, except that long quotations, schedules of data, etc., may be singled-spaced, and indented. Mimeographed, multigraphed, hectographed, photostated, planographed, or xeroxed papers, and the like, will be accepted as typewritten. If printed, the paper shall be unglazed, and the printing shall be in clear type, adequately leaded.~~]

§101.10. Complaints.

All complaints alleging violations of the codes shall [~~code should~~] be in writing addressed to the Board [~~commission~~] and signed by the complainant. Complaint forms will be supplied and assistance may be afforded by the Board [~~commission~~] for the purpose of filing complaints. A complaint shall [~~should~~] contain the name and address of the complainant, the name and address of the party

against whom the complaint is made, and a brief statement of the facts forming the basis of the complaint. If requested by the Board [~~commission~~], complaints shall be under oath, and before initiating an investigation or other proceeding to determine the merits of the complaint, the Board [~~commission~~] may require from the complainant such additional information as may be necessary to evaluate the merits of the complaint. [~~Complaints alleging violations of state or federal law outside the jurisdiction of the commission will be referred to the appropriate governmental agency having jurisdiction over such alleged violation.~~]

§101.11. Hearing Docket.

The Board [~~commission~~] will maintain a [~~bound~~] hearing docket containing a record of all formal proceedings instituted. The hearing docket shall be a public file and shall be open for inspection at all reasonable times. Filing of hearing notices in the hearing docket will be deemed notice to the public. A [~~The commission, in assigning a~~] docket number assigned by the Board to any formal proceeding[~~, shall assign a number which~~] will be carried forward throughout the proceeding.

§101.12. Computing Time.

In computing any period of time prescribed or allowed by these rules, by order of the Board [~~commission~~], or by any applicable statute, the date of the act or event after which the designated period of time begins to run is not to be included; but the last day of the period so computed is to be included unless it be a Saturday, Sunday, or legal holiday in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

§101.13. Filing of Documents.

(a) Every application, petition, notice, motion, brief, or other document required or permitted to be filed at the office of the Texas Motor Vehicle Board [~~Commission~~] in Austin, may be filed by delivering an original of such document to said office, either: in person, by agent, by courier receipted delivery, by mail to the address of said office, or by telephonic document transfer to the current telecopier number at said office.

(b) (No change.)

(c) Except as provided in subsection (e) of this section, with respect to a document which, to be timely filed under these rules, must be filed on or before a specified date, delivery by mail shall be complete only if such deposit is made on or before said date and the document is received in hand by the Board [~~commission~~] at its office in Austin not later than the fifth Board [~~commission~~] business day after the date of such deposit. Delivery by telephonic document transfer after 5 p.m. local time of said office shall be deemed delivered on the following day. Where the filing of a document is made by mail but the document is not received by the Board [~~commission~~] within five business days after the date of deposit of the document in the mail, nothing herein shall preclude the delivery of the document to the Board's [~~commission's~~] office by other means of delivery, such as delivery in person or by telephonic document transfer, within the said five-day period, provided that the party filing the document furnishes the Board [~~commission~~] with proof of deposit of the document in the mail prior to the filing date, as provided herein.

(d) Such document may be delivered by a party to a matter, an attorney of record, or by any other person competent to testify. A certificate by an attorney of record or the affidavit of any person competent to testify, showing timely delivery of a document in a manner described in this section shall be prima facie evidence of the fact of timely delivery, although nothing herein shall preclude the Board [~~commission~~] or any party from offering proof that the subject document was not timely delivered.

(e) Notwithstanding the foregoing, where by statute, Board [~~or commission~~] rule, or order of the Board, director or hearing officer, a document, to be timely filed, must be received in the Board's [~~commission's~~] office by a specified time, then the requirements of such statute, [~~or~~] rule, or order shall govern the filing of that document, and any such document received at the Board's [~~commission's~~] office after the specified time, notwithstanding the date of mailing or other means of delivery, shall be deemed not timely filed.

§101.15. Enlargement of Time.

(a) When by these rules or by a notice given thereunder or by order of the Board [~~commission~~] or the hearing officer [~~examiner~~] having jurisdiction, as the case may be, an act is required or allowed to be done at or within a specified time, except as provided in subsection (b) of this section, the Board [~~commission~~] or the hearing officer [~~examiner~~] for cause shown may, at any time in the Board's [~~commission's~~] or the hearing officer's [~~examiner's~~] discretion:

(1) with or without motion or notice, order the period enlarged if application therefore is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) upon motion permit the act to be done after the expiration of the specified period where good cause is shown for the failure to act.

(b) Notwithstanding anything contained in subsection (a) of this section, neither the Board [~~commission~~] nor a hearing officer [~~examiner~~] may enlarge the time for filing a document with the Board [~~commission~~] where by statute or Board [~~commission~~] rule, the document, to be timely filed, must be received in the Board's [~~commission's~~] office by a specified time, and the requirements of such statute or rule shall govern the filing of that document and any such document received at the Board's [~~commission's~~] office after the specified time, notwithstanding the date of mailing or other means of delivery, shall be deemed not timely filed.

§101.16. Expenses of Witness or Deponent.

A witness or deponent in a contested case who is not a party and who is subpoenaed or otherwise compelled to attend a hearing or proceeding to give testimony or a deposition or to produce books, records, papers, or other objects that may be necessary and proper for the purposes of a proceeding under the codes [~~code~~] is entitled to receive expenses pursuant to provisions of the Texas Government Code §2001. Such witness or deponent is entitled to receive reimbursement for mileage at the current state employee rate for each mile, for going to and returning from the place of the hearing or deposition, if the place is more than 25 miles from the person's place of residence and the person uses a personally owned or leased motor vehicle for the travel.

This 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 November 20, 1998.

TRD-9817858
Brett Bray
Director, Motor Vehicle Division
Texas Motor Vehicle Board
Proposed date of adoption: March 4, 1999
For further information, please call: (512) 416–4899

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16 TAC §101.14

The new rule is proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules necessary and convenient to effectuate the provisions of the act.

Texas Motor Vehicle Commission Code §§1.02, 1.03, 2.01, 2.08, 2.09, 3.01, 3.02, 3.03, 3.04, 3.05, 3.06, 3.07A, 3.08, 3.08A, 4.06, 5.01A, 5.01B, 6.01, 6.01A, 6.07, 7.01 are affected by the proposed rule.

§101.14. Cease and Desist Orders.

(a) Whenever it appears to the Board that any person is violating any provision of the codes or any regulation promulgated thereunder, it may, directly or through its representative, enter an interlocutory order requiring such person to cease and desist.

(1) No interlocutory cease and desist order shall be granted without notice to the person against whom the order is requested unless it clearly appears from specific facts shown by affidavit or by the verified complaint that one or more of the situations enumerated in Texas Motor Vehicle Commission Code §6.01A(a)(1)-(4) will occur before notice can be served and a hearing had thereon;

(2) Every interlocutory cease and desist order granted without notice shall include the date and hour of issuance; shall state which of the situations enumerated in Texas Motor Vehicle Commission Code §6.01A(a)(1)-(4) is found to necessitate the issuance of the order without notice; and shall set a date certain for a hearing as provided in the Board's rules relating to adjudicative proceedings to determine the validity of the order and to allow the person against whom the order is issued to show good cause why the order should not remain in effect during the pendency of the proceeding;

(3) The person against whom the interlocutory cease and desist order has been issued without notice may request that the hearing to determine the validity of the order be held earlier than the date set by the order;

(4) Every cease and desist order granted with or without notice shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document the act or acts sought to be restrained;

(5) No cease and desist order, whether interlocutory or permanent, shall be granted unless the person requesting the order shall present his petition or complaint to the Board or its designated representative verified by affidavit and containing a plain and intelligible statement of the grounds for such relief.

(b) To expedite the resolution of appeals of interlocutory cease and desist orders as contemplated in §6.01A(b) of the Texas Motor Vehicle Commission Code, the director of the Motor Vehicle Division is authorized to hear appeals of interlocutory cease and desist orders on behalf of the Motor Vehicle Board. Any decision rendered by the director shall be interlocutory and does not affect the logical course of a proceeding whereby the Board makes the ultimate decision on the merits and on whether the interlocutory cease and desist order should be made permanent. However, the director's interlocutory decision shall be sufficient for a complaining party to seek judicial review of the matter as set out in §6.01A(b). Upon appeal of an order issued pursuant to this subsection to the district court, as provided in the code, the order may be stayed by the director upon a showing of good cause by a party of interest.

This 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 November 20, 1998.

TRD-9817857
Brett Bray
Director, Motor Vehicle Division
Texas Motor Vehicle Board
Proposed date of adoption: March 4, 1999
For further information, please call: (512) 416–4899

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Subchapter B. Rulemaking

16 TAC §§101.22–101.25, 101.27–101.28

The amendments are proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules necessary and convenient to effectuate the provisions of the act.

Texas Motor Vehicle Commission Code §§1.02, 1.03, 2.01, 2.08, 2.09, 3.01, 3.02, 3.03, 3.04, 3.05, 3.06, 3.07A, 3.08, 3.08A, 4.06, 5.01A, 5.01B, 6.01, 6.01A, 6.07, 7.01 are affected by the proposed amendments.

§101.22. Proceedings To Be Public.

All rulemaking proceedings shall be open to the public. The proceedings shall be recorded electronically or transcribed by a court reporter and the recording or transcription of the proceedings shall be filed as part of the record.

§101.23. Written Presentation.

Written data, evidence, or arguments may be filed by any interested person [~~party~~] in advance of or during[~~,or after~~] the hearing [~~provided, however, that no written presentation will be considered by the commission if filed more than five days after the close of the hearing unless an extension of time is granted by the commission~~].

§101.24. Oral Presentation.

Any interested person [~~party~~] may present data, evidence, or arguments in oral form at the hearing.

§101.25. Procedure.

The Board [~~commission~~] may establish an order of appearance for oral presentation at the hearing and may also impose reasonable limitations on the time allotted to any interested person [~~party~~]. The order of appearance and time limitations shall be strictly observed unless an exception thereto is granted by the Board [~~commission~~]. A transcript or electronic recording of the hearing shall be made and shall constitute the record of the proceeding. The Board [~~commission~~] may close the hearing at any time after all interested persons [~~scheduled parties~~] have been heard.

§101.27. Publication.

Notice of promulgation, amendment, or repeal of any rule or regulation may [~~shall~~] be forwarded to all persons [~~parties~~] known by the Board [~~commission~~] to have an interest therein. Such notice shall contain a copy of the rule or regulation acted upon, statement of the action taken, and the date on which such action becomes effective.

§101.28. Exempted Actions.

The requirements of subchapter B of this chapter [~~§§101.21-101.27 of this title~~] (relating to Rulemaking Proceedings and Hearings) shall not apply to general statements of policy, informal opinions, or formal opinions. [~~interpretive rulings, or rules of agency organization, practice, or procedure.~~]

This 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 November 20, 1998.

TRD-9817859
Brett Bray
Director, Motor Vehicle Board
Texas Motor Vehicle Board
Proposed date of adoption: March 4, 1998
For further information, please call: (512) 416–4899

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Subchapter C. Adjudicative Proceedings and Hearings

16 TAC §§101.41–101.47, 101.49, 101.51–101.52, 101.55, 101.57–101.64

The amendments are proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules necessary and convenient to effectuate the provisions of the act.

Texas Motor Vehicle Commission Code §§1.02, 1.03, 2.01, 2.08, 2.09, 3.01, 3.02, 3.03, 3.04, 3.05, 3.06, 3.07A, 3.08, 3.08A, 4.06, 5.01A, 5.01B, 6.01, 6.01A, 6.07, 7.01 are affected by the proposed amendments.

§101.41. Institution of Adjudicative Proceedings.

Adjudicative proceedings may be instituted by the Board [~~commission~~] on its own motion at any time with reference to any matter, function, or duty having to do with enforcement of the codes [~~code~~]. Actions instituted by the Board [~~commission~~] may be heard at any time subsequent to the giving of proper notice as required by the codes [~~code~~]. In addition to those adjudicative proceedings instituted by the Board [~~commission~~] on its own motion, the Board [~~commission~~] shall institute adjudicative proceedings upon issuance of an order to cease and desist by serving notice of hearing, as provided in subchapter C of this chapter (relating to Adjudicative Proceedings and Hearings [~~below~~], upon the party against whom the cease and desist order has been issued.

§101.42. Notice of Hearing in Adjudicative Proceedings.

(a) In any adjudicative proceeding before [~~instituted by~~] the Board [~~commission~~], the notice of hearing shall state:

(1) the name of the party or parties in interest, [~~designated as the respondent~~];

(2)-(4) (No change.)

(5) [~~shall contain~~] a clear and concise factual statement sufficient to identify [~~inform the respondent~~] with reasonable definiteness the matters at issue [~~of the type of acts or practices alleged to be in violation of the code.~~] This can be satisfied by attaching and incorporating by reference the complaint or amended complaint.

(b) Notice of hearing shall be served upon the parties in interest [~~respondent~~] either in person or by certified mail, return receipt requested [~~registered mail~~] addressed to the parties in interest [~~respondent~~] or their agents [~~his agent~~] for service of process.

(c) Notice of hearing shall be presumed to have been received by a person if notice of the hearing was mailed by certified mail, return receipt requested, to the last known address of any person known to have legal rights, duties, or privileges that could be determined at the hearing.

(d) [~~(c)~~] Notice of hearing may be amended [~~by the commission~~] at the hearing or at any time prior thereto.

§101.43. Reply.

Within 20 days after service of notice of hearing, or within 10 days after service of amended notice of hearing, a responding party [~~the respondent~~] may [~~shall~~] file a reply thereto in which the matters at issue are specifically admitted, denied or otherwise explained [~~he specifically admits, denies, or otherwise explains each of the allegations of the notice of hearing unless the respondent is without knowledge thereof in which case he shall so state, such statement operating as a denial. All allegations not so answered shall be deemed to have been admitted.~~]

(1) Form and filing of replies. All replies shall include a reference to the docket number of the hearing and shall be sworn to by the responding party [~~respondent~~] or his attorney of record. The original [~~and two copies~~] of the reply shall be filed with the Board, and [~~commission, ant~~] one copy shall be served upon other parties [~~respondents~~] to the proceeding, if any.

(2) Amendment. A responding party [~~The respondent~~] may amend his reply at any time prior to the hearing, and in any case where the notice of hearing has been amended at the hearing, a responding party [~~the respondent~~] shall be given an opportunity to amend his reply.

(3) Extension of time. Upon the motion of a responding party [~~respondent~~], with good cause shown, the Board [~~commission~~] may extend the time within which the reply may be filed.

(4) Default. All allegations not so answered shall be deemed admitted by any party who does not appear at the hearing on the merits.

§101.44. Hearings To Be Public.

Hearings in adjudicative proceedings shall be open to the public. [~~All hearings shall be held in Austin, unless for good and sufficient cause the commission by order shall designate another place of hearing in the interest of the public.~~]

§101.45. Recording and Transcriptions of Hearing Cost.

(a) Except as provided in §107.6 of this title (relating to Hearings), hearings in contested cases will be transcribed by a court reporter or recorded electronically at the discretion of the hearing officer. [~~unless the recording of the hearing by a tape recording is determined to be appropriate by the hearing examiner and agreed to by the parties. When requested by any party to a proceeding, the hearing shall be transcribed by a court reporter.~~] Any request regarding recording or transcription must be made to the hearing officer at least two days prior to the hearing.

(b) In those contested cases in which the hearing is transcribed by a court reporter, the costs of transcribing the hearing and for the preparation of an original transcript of the record for the Board [~~commission~~] shall be assessed equally among all parties to the proceeding, unless ordered otherwise by the Board

(c) Copies of tape recordings of a hearing will be provided to any party upon written request and upon payment for the cost of the tapes.

(d) In the event a final decision of the Board [~~commission~~] is appealed to the district court and the Board [~~commission~~] is required to transmit to the court [~~a copy of~~] the original or a certified copy of the agency record [~~of the agency proceeding~~], or any part thereof, the

appealing party shall, unless waived by the Board or Director, pay the costs of preparation of the [~~original or a certified copy of the~~] record [~~of the agency proceeding~~] that is required to be transmitted to the court.

§101.46. Joint Report.

No adjudicative proceedings embracing two or more complaints or petitions shall be heard on a joint record without the consent of all parties in interest unless the hearing officer [~~commission~~] shall find, prior to the consolidation of the proceedings, that justice and efficiency are better served by [~~cannot be afforded without~~] the consolidation. [~~and shall so state in the notice of hearing.~~]

§101.47. Waiver of Hearing.

Subsequent to the issuance of a notice of hearing as provided in §101.42 of this title (relating to Notice of Hearing in Adjudicative Proceedings), a responding party [~~respondent~~] may waive such hearing and consent to the entry of an agreed order by the Board. [~~commission after review of the facts.~~] Agreed orders proposed by the parties remain subject to Board approval.

§101.49. Presiding Officials.

The Board [~~commission~~] may preside or it may designate one of its members, the [~~executive~~] director, or any other person to preside over any hearing held in any adjudicative proceeding. The term "hearing officer" as used herein includes the Board [~~commission~~] when it presides over a hearing.

(1) (No change.)

(2) Disqualification. When a hearing officer or any one of the members of the Board [~~commission~~] deems himself disqualified to preside in a particular hearing, he shall withdraw therefrom by notice on the record and shall notify the Board [~~commission~~] of his withdrawal. Whenever any party [~~respondent~~] shall deem the hearing officer to be disqualified to preside in a particular hearing, he may file with the Board [~~commission~~] a motion to disqualify and remove the hearing officer which motion shall be supported by affidavits setting forth the alleged grounds for disqualification. A copy of the motion shall be served by the Board [~~commission~~] on the hearing officer who shall have 10 days within which to reply. If the hearing officer contests the alleged grounds for disqualification, the Board [~~commission~~] shall promptly determine the validity of the grounds alleged, such decision being determinative of the issue.

(3) Substitution of hearing officer. If the hearing officer is disqualified, dies, becomes disabled, or withdraws during any proceeding, the Board [~~commission~~] may appoint another hearing officer who may perform any function remaining to be performed without the necessity of repeating any proceedings theretofore had in the case.

§101.51. Conduct and Decorum.

Every party, witness, attorney, or other representative shall comport himself in all proceedings with proper dignity, courtesy, and respect for the Board [~~commission~~], the hearing officer, and all other parties. Disorderly conduct will not be tolerated. Attorneys and other representatives of parties shall observe and practice the standards of ethical behavior prescribed for attorneys at law by the Texas Disciplinary Rules of Professional Conduct and Texas Lawyer's Creed. [~~Texas State Bar Act.~~] No party to a pending case, and no representative or witness of such a party, shall discuss the merits of such case with the hearing officer outside of the presence of all other parties, or their representatives. Upon violation of this section, any party, witness, attorney, or other representative may be excluded from any hearing for such period and upon such conditions as are just; or may be subject to such other just, reasonable, and lawful disciplinary action as the hearing officer or Board [~~commission~~] may prescribe.

§101.52. Evidence.

(a) General. The Texas Rules of Evidence [~~rules of evidence~~] shall be applied in all adjudicative hearings to the end that needful and proper evidence shall be conveniently, inexpensively, and speedily adduced while preserving the rights of the parties to the proceeding.

(b) Admissibility. All relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious or cumulative evidence shall be excluded. Immaterial or irrelevant parts of an otherwise admissible document shall be segregated and excluded so far as practicable. [~~Testimony may be introduced by affidavits properly executed according to §101.8 of this title (relating to Affidavits).~~]

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

(e) Documents in Board's [~~board's~~] files. Documents or information in the licensing files of the Board [~~board~~] may be officially noticed and may be admitted and considered by the hearing officer [~~Administrative Law Judge~~], as described in Chapter 2001 of the Texas Government Code.

(f) Abstracts of documents. When documents are numerous, the hearing officer may refuse to receive in evidence more than a limited number of said documents which are typical and representative, but [~~he~~] may require the abstraction of the relevant information from the documents and the presentation of the abstract in the form of an exhibit; provided, however, that before admitting such abstract the hearing officer shall afford all parties in interest the right to examine the documents from which the abstract was made.

(g) Exhibits. Exhibits shall be limited to facts with respect to the relevant and material issues involved in a particular proceeding. Exhibits of documentary character shall be of such size as not to unduly encumber the record of the proceeding. Where practicable, the sheets of each exhibit shall not be more than 8 1/2 inches by 11 inches in size and shall be numbered, and there shall be a brief statement on the first sheet of the exhibit of what the exhibit purports to show. The original and one copy of each exhibit offered shall be tendered to the reporter or hearing officer for identification, and a copy shall be furnished to each party in interest. In the event an exhibit has been identified, objected to, and excluded, the hearing officer shall determine whether or not the party offering the exhibit withdraws the offer, and if so, return the exhibit [~~to him~~]. If the excluded exhibit is not withdrawn, it shall be given an exhibit number for identification and be included in the record only for the purpose of preserving the exception together with the hearing officer's ruling.

§101.55. Motions.

Every motion relating to a pending proceeding shall, unless made during a hearing, be written, and shall set forth the relief sought and the specific reasons and grounds therefor. If based upon matters which do [~~to~~] not appear of record, it shall be supported by affidavit. Any motion not made during a hearing shall be filed with the hearing officer.

§101.57. Service of Pleading, Petitions, Briefs, and the Like.

A copy of every pleading, petition, brief, or other document filed in any adjudicative proceeding, after appearances shall have been entered of record therein, shall be served upon all other parties in interest or their leading counsel and upon the Board [~~commission~~] by sending a copy thereof properly addressed to each such party by first-class United States mail, postage prepaid, by actual delivery, or by telephonic document transfer. A certificate of such fact shall

accompany the original of each such instrument filed with the Board [~~commission~~].

§101.58. Submission.

Adjudicative proceedings will be deemed submitted to the hearing officer as soon as the hearing and record are completed and briefs, if any, are filed. At the discretion of the hearing officer, parties [~~Parties~~] or their attorneys, in lieu of oral closing arguments or closing statements at the conclusion of an adjudicative proceeding, shall file a written summation or brief containing the statements, arguments and conclusions, together with references to supporting authorities, which might normally be presented orally at the conclusion of such hearing. [~~The written summation in behalf of an applicant shall be submitted to the commission within five days after the conclusion of the hearing, with copies to protestants and other parties who participated in the hearing, and written summations in behalf of protestants and other parties entitled to present same shall be submitted to the commission within five days after receipt of a copy of applicant's summation, or within 12 days after the conclusion of the hearing, whichever is earlier.~~] A schedule for submission of written closing summations or briefs will be established by the hearing officer at the conclusion of the hearing on the merits

§101.59. Findings and Recommendations of Hearing Officer.

As soon as practicable after the submission of the proceeding, the hearing officer shall prepare certify and file with the commission a copy of his findings of fact, conclusions of law and a recommended decision and order. A copy of said report shall be served by the hearing officer [~~commission~~] upon all parties or their leading counsel.

§101.60. Filing of Exceptions.

Any party in interest may, within 20 days after the date of service of the hearing officer's report and recommended decision and order, file exceptions to such report and recommended decision and order. Requests for extension of time within which to file exceptions shall be filed with the hearing officer [~~commission~~] and a copy of such request shall be served on all other parties in interest. The hearing officer [~~commission~~] shall promptly notify the parties of its action upon the request and shall allow additional time only in extraordinary circumstances where the interest of justice so requires.

§101.61. Form of Exceptions.

Exceptions to findings of fact conclusions of law or to any other matters of law in any report and recommended decision and order of a hearing officer shall be specific and shall be stated and numbered separately. When exception is taken to a statement of fact, specific reference must be made to the evidence relied upon to support the specification of error and a statement in the form claimed to be correct must be suggested. When exception is taken to a particular finding or conclusion, whether of fact, law, or a mixed question of fact and law, the evidence, if any, and the law relied upon to support the specification of error must be suggested.

§101.62. Replies to Exception.

Replies to exceptions may be filed within 10 days after the date of filing such exceptions. It is within the hearing officer's discretion[~~The commission may, in its discretion~~], upon notice to all parties in interest, to extend the time for filing such reply.

§101.63. Filing of Documents for Consideration by Board [~~Commission~~] Members.

Any document filed by a party to a contested case for consideration by the members of the Board [~~commission~~] in their decision of the case must be filed with the Board [~~commission~~] at least 15 days prior to the date of the Board [~~commission~~] meeting at which the case is scheduled for consideration and decision. Any document not filed within such time will not be considered by the members of the Board [~~commission~~] at that meeting. No contested case will be scheduled for consideration and decision so as to preclude any party from filing any document required or permitted to be filed in a contested case by law or under the Board's [~~commission's~~] rules, in compliance with the previous filing requirement. For good cause shown, the Board [~~commission~~] may waive or shorten the requirement for the filing of all documents prior to any Board [~~commission~~] meeting.

§101.64. Final Decision.

In all contested cases except those brought under the Texas Motor Vehicle Commission Code, §3.08(i) and §6.07, after a matter has been heard and submitted to the Board [~~commission~~] for decision, and the Board [~~commission~~] has considered all exceptions and replies thereto, if any, and has issued its order in connection therewith, such order shall be deemed final and binding on all parties thereto and all administrative remedies are deemed to be exhausted as of the effective date stated therein, unless a motion for rehearing be filed as provided by law.

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

Filed with the Office of the Secretary of State, on November 20, 1998.

TRD-9817860
Brett Bray
Director, Motor Vehicle Board
Texas Motor Vehicle Board
Proposed date of adoption: March 4, 1999
For further information, please call: (512) 416–4899

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Chapter 101. Practice and Procedure

The Texas Motor Vehicle Board of the Texas Department of Transportation proposes the repeal of §101.14, Cease and Desist Orders, §101.21, Institution of Rulemaking Proceedings, §101.26, Promulgation by the Commission and §101.65, Reports of Compliance.

The Appropriation Act of 1997, House Bill 1, Article IX, §167 (Section 167) requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Such reviews shall include an assessment by the agency as to whether the reason for adopting or readopting the rule continues to exist. The Board conducted a review of 16 TAC Chapter 101, relating to Practice and Procedure, at its November 12, 1998 meeting.

As a result of its review, the Board determined that §101.14, Cease and Desist Orders, should be repealed and new §101.14, which more clearly describes the procedures for obtaining and appealing cease and desist orders, should be proposed in its place. The Board also determined that §101.21 and §101.26 (Institution of Rulemaking Proceedings and Promulgation by the Commission) are not necessary because the authority to promulgate rules and institute rulemaking hearings is inherent in the statute. The Board proposes repeal of §101.65, Reports of Compliance, because notice of failure to comply with a cease and desist order is generally brought to the Board's attention by other means, making this requirement unnecessary.

Brett Bray, Director, Motor Vehicle Division, has determined that for the first five-year period the repeals are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the repeals.

Mr. Bray has determined that for each year of the first five years the repeals are in effect, the public benefit anticipated as a result of the repeal will be elimination of unnecessary rules. There will be no effect on small businesses as a result of repealing these sections. Mr. Bray has also determined that for each year of the first five years the repeals are in effect there will be no impact on employment in the geographic areas affected by the repeal of these sections.

Comments on the proposed repeals (15 copies) may be submitted to Brett Bray, Director, Motor Vehicle Division, P.O. Box 2293, Austin, Texas, 78768. The Texas Motor Vehicle Board will consider final adoption of the repeals at its March 4, 1999 meeting. The deadline for comments is February 3, 1999.

Subchapter A. General Rules

16 TAC §101.14

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

This repeal is proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules necessary and convenient to effectuate the provisions of the act.

Texas Motor Vehicle Commission Code §§3.06, 3.08(a) and (c), and 6.01A(b) are affected by the proposed repeals.

§101.14. Cease and Desist Orders.

This 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 November 20, 1998.

TRD-9817854
Brett Bray
Director, Motor Vehicle Division
Texas Motor Vehicle Board
Proposed date of adoption: March 4, 1999
For further information, please call: (512) 416–4899

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Subchapter B. Rulemaking

16 TAC §101.21, §101.26

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Motor Vehicle Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

These repeals are proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules necessary and convenient to effectuate the provisions of the act.

Texas Motor Vehicle Commission Code §§3.06, 3.08(a) and (c), and 6.01A(b) are affected by the proposed repeals.

§101.21. Institution of Rulemaking Proceedings.

§101.26. Promulgation by the Commission.

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

Filed with the Office of the Secretary of State, on November 20, 1998.

TRD-9817855
Brett Bray
Director, Motor Vehicle Board
Texas Motor Vehicle Board
Proposed date of adoption: March 4, 1998
For further information, please call: (512) 416–4899

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Subchapter C. Adjudicative Proceedings and Hearings

16 TAC §101.65

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

This repeal is proposed under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules necessary and convenient to effectuate the provisions of the act.

Texas Motor Vehicle Commission Code §§3.06, 3.08(a) and (c), and 6.01A(b) are affected by the proposed repeals.

§101.65. Reports of Compliance.

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

Filed with the Office of the Secretary of State, on November 20, 1998.

TRD-9817856
Brett Bray
Director, Motor Vehicle Division
Texas Motor Vehicle Board
Proposed date of adoption: March 4, 1999
For further information, please call: (512) 416–4899

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TITLE 19. EDUCATION

Part I. Texas Higher Education Coordinating Board

Chapter 5. Program Development

Subchapter E. Presentation of Request for New Academic Degree Programs

19 TAC §5.101

The Texas Higher Education Coordinating Board proposes Chapter 5, Subchapter E, new §5.101, concerning Program Development (Presentation of Request for New Academic Degree Programs). The new rules would allow the Coordinating

Board to concentrate its efforts on setting major policy issues and spending less time on applying policy. The new rules will give more responsibility to governing boards to ensure that proposals for new degree programs and for facilities meet Coordinating Board policy.

Marshall Hill, Assistant Commissioner for Universities and Health-Related Institutions has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Marshall Hill also has determined that for the first five years the rule is in effect the public benefit will be that it will allow the Coordinating Board greater time to focus on issues of statewide importance to Texas public higher education and will allow institutions of higher education to respond more quickly to changing needs and demands of students, business and industry, taxpayers, etc. There will be no effect on state or local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the new rules may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The new rules are proposed under Texas Education Code, Section 61.051 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Program Development (Presentation of Request for New Academic Degree Programs).

There were no other sections or articles affected by the proposed amendments.

§5.101. Approvals by the Commissioner.

(a) The Commissioner of Higher Education may approve proposals from the public universities and health-related institutions for new baccalaureate or master's degree programs and academic administrative change requests on behalf of the Board in accordance with the procedures and criteria specified in this section.

(b) A proposal for a new degree program must include certification in writing from the Board of Regents of a proposing institution, in a form prescribed by the Commissioner, that the following criteria have been met:

(1) The proposed degree program is within the Table of Programs previously approved by the Coordinating Board for the requesting institution.

(2) The curriculum, faculty, resources, support services, and other components of a proposed degree program are comparable to those of high quality programs in the same or similar disciplines offered by other institutions.

(3) Clinical or in-service placements, if applicable, have been identified in sufficient number and breadth to support the proposed program.

(4) The program is designed to be consistent with the standards of the Commission on Colleges of the Southern Association of Colleges and Schools, and with the standards of other applicable accrediting agencies; and is in compliance with appropriate licensing authority requirements.

(5) The institution has provided credible evidence of long-term student interest and job-market needs for graduates; or, if proposed by a university, the program is appropriate for the development of a well-rounded array of basic baccalaureate degree programs at the institution where the principal faculty and other resources are already in place to support other approved programs and/or the general core curriculum requirements for all undergraduate students.

(6) The program would not be unnecessarily duplicative of existing programs at other institutions.

(7) Implementation and operation of the program would not be dependent on future Special Item funding.

(8) New costs to the institution over the first five years after implementation of the program would not exceed $1,000,000.

(c) A proposal for a new degree program or administrative change must include a statement from the institution's chief executive officer certifying adequate financing and explaining the sources of funding to support the first five years of operation of the program or administrative change.

(d) If a proposal meets the criteria specified in this section, the Commissioner may either approve it or forward it to the Board for consideration at an appropriate quarterly meeting.

(e) At the beginning of each month, the Commissioner will make available to the public universities, health-related institutions, community/technical colleges, and Independent Colleges of Texas, Inc. a list of all pending proposals for new degree programs and administrative changes. If an institution wishes to provide the Commissioner information supporting a concern it has about the approval of a pending proposal for a new degree program at another institution, it must do so within one month of the initial listing of the proposal, and it must also forward the information to the proposing institution.

(f) Each quarter, the Commissioner shall send a list of his approvals under this section to Board members. A list of the approvals shall also be attached to the minutes of the next quarterly Board meeting.

This 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 November 19, 1998.

TRD-9817726
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: January 29, 1999
For further information, please call: (512) 483–6162

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Chapter 9. Program Development in Public Community/Junior College Districts and Technical Colleges

Subchapter E. Certificate and Associate Degree Programs

19 TAC §9.93

The Texas Higher Education Coordinating Board proposes amendments to Chapter 9, Subchapter E, §9.93 concerning Program Development in Public Community/Junior College Dis-

trict and Technical Colleges (Application, Approval, and Revision Procedures for Instructional Programs in Workforce Education). The proposed amendments would allow the Coordinating Board to concentrate its efforts on setting major policy issues and spending less time on applying policy. The proposed amendments to the rules will give more responsibility to governing boards to ensure that proposals for new degree programs and for facilities meet Coordinating Board policy.

Glenda Barron, Assistant Commissioner for Community and Technical Colleges has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Dr. Barron also has determined that for the first five years the rule is in effect the public benefit will be that it will allow the Coordinating Board greater time to focus on issues of statewide importance to Texas public higher education and will allow institutions of higher education to respond more quickly to changing needs and demands of students, business and industry, taxpayers, etc. There will be no effect on state or local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The amendments to the rules are proposed under Texas Education Code, Sections 61.061, 61.062 and 130.001 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Program Development in Public Community/Junior College District and Technical Colleges (Application, Approval, and Revision Procedures for Instructional Programs in Workforce Education).

There were no other sections or articles affected by the proposed amendments.

§9.93. Application, Approval, and Revision Procedures for Instructional Programs in Workforce Education.

(a) In accordance with the Guidelines for Instructional Programs in Workforce Education as approved by the Board, each institution wishing to offer a new certificate or applied associate degree program must have completed the following procedures:

(1) Completion of the Application for the Approval of a New Technical or Continuing Education Program. Completed application forms and a statement of assurances must be approved by the governing board and the chief executive officer of the institution, and forwarded to the Board's Community and Technical Colleges Division. The statement of assurances must certify that the following criteria have been met:

(A) The institution has documented local and/or regional workforce demand for the program.

(B) Basic and workforce skills have been integrated into the curriculum.

(C) The institution has an enrollment management plan for the program.

(D) The institution has or will initiate a process to establish articulation agreements for the program with secondary and/or senior level institutions.

(E) The program is designed to be consistent with the standards of the Commission on Colleges of the Southern Association of Colleges and Schools, and with the standards of other applicable accrediting agencies, and is in compliance with appropriate licensing authority requirements.

(F) The program would not unnecessarily duplicate existing programs at other institutions.

(G) Representatives from private sector business and industry have been involved in the creation of the program through participation in an advisory committee.

(H) Adequate funding is available to cover all new costs to the institution over the first five years after the implementation of the program.

(I) At least 80 percent of existing workforce education programs at the institution currently meet Board standards for both graduation and placement.

(J) The appropriate Higher Education Regional Council has been notified in writing of the proposal for a new program.

(2) (No change.)

(3) Completion of Formal Program Review.

(A) Once the program requirements have been met, the Board staff may [~~shall~~] schedule the program for formal program review. This review process shall include representatives from the institution, the Board staff, and other appropriate agencies and institutions of higher education.

(B) The Assistant Commissioner for Community and Technical Colleges Division shall recommend certificate and applied associate degree programs to the Commissioner for approval or referral to [~~disapproval by~~] the Board.

(4) New Program Approval.

[~~(A)~~] The Board delegates to the Commissioner final approval authority for all certificate programs, and for

[~~(B)~~] applied associate degree programs that meet Board policies for approval as outlined in the Guidelines for Instructional Programs in Workforce Educcation [~~shall be approved by the Board or if such a program has been approved by the Commissioner on an emergency basis as outlined under Section 9.94 of this title (relating to Provisions for Emergency Approval of Associate Degree Programs), the Board may ratify or reject such approval as provided in that section~~].

(5) Each quarter, the Commissioner shall send a list of his approvals under this section to Board members. A list of the approvals shall also be attached to the minutes of the next appropriate quarterly meeting.

(6) The Commissioner must forward a program to the Board for consideration at an appropriate quarterly meeting if any of the following conditions are met:

(A) The proposing institution's institutional effectiveness report or annual data profile indicate that more than 20 percent of the institution's eligible workforce education programs have failed to meet standards for graduation and/or placement.

(B) The proposed program is the subject of an unresolved grievance or dispute between institutions.

(C) The Commissioner does not recommend approval of the program.

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

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

Filed with the Office of the Secretary of State, on November 19, 1998.

TRD-9817721
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: January 29, 1999
For further information, please call: (512) 483–6162

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19 TAC §§9.94, 9.95, 9.96, 9.97

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Higher Education Coordinating Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Higher Education Coordinating Board proposes the repeal of Chapter 9, Subchapter E, §§9.94–9.97, concerning Program Development in Public Community/Junior College District and Technical Colleges (Certificate and Associate Degree Programs). The repeal of the rules would allow the Coordinating Board to concentrate its efforts on setting major policy issues and spending less time on applying policy. The repeal of the rules will give more responsibility to governing boards to ensure that proposals for new degree programs and for facilities meet Coordinating Board policy.

Glenda Barron, Assistant Commissioner for Community and Technical Colleges has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Dr. Barron also has determined that for the first five years the rule is in effect the public benefit will be that it will allow the Coordinating Board greater time to focus on issues of statewide importance to Texas public higher education and will allow institutions of higher education to respond more quickly to changing needs and demands of students, business and industry, taxpayers, etc. There will be no effect on state or local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the repeal of the rules may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The repeal of the rules are proposed under Texas Education Code, Sections 61.061, 61.062 and 130.001 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Program Development in Public Community/Junior College District and Technical Colleges (Application, Approval, and Revision Procedures for Instructional Programs in Workforce Education).

There were no other sections or articles affected by the proposed amendments.

§9.94. Provisions for Emergency Approval of Associate Degree Programs.

§9.95. Action and Order of the Board.

§9.96. Reporting to the Board.

§9.97. Disapproval of Programs; Noncompliance.

This 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 November 19, 1998.

TRD-9817723
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: January 29, 1999
For further information, please call: (512) 483–6162

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19 TAC §§9.94–9.96

The Texas Higher Education Coordinating Board proposes to Chapter 9, Subchapter E, new §§9.94–9.96, concerning Program Development in Public Community/Junior College District and Technical Colleges (Certificate and Associate Degree Programs). The new rules would allow the Coordinating Board to concentrate its efforts on setting major policy issues and spending less time on applying policy. The new rules will give more responsibility to governing boards to ensure that proposals for new degree programs and for facilities meet Coordinating Board policy.

Glenda Barron, Assistant Commissioner for Community and Technical Colleges has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Dr. Barron also has determined that for the first five years the rule is in effect the public benefit will be that it will allow the Coordinating Board greater time to focus on issues of statewide importance to Texas public higher education and will allow institutions of higher education to respond more quickly to changing needs and demands of students, business and industry, taxpayers, etc. There will be no effect on state or local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the new rules may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The new rules are proposed under Texas Education Code, Sections 61.061, 61.062 and 130.001 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Program Development in Public Community/Junior College District and Technical Colleges (Certificate and Associate Degree Programs).

There were no other sections or articles affected by the proposed amendments.

§9.94. Action and Order of the Board.

(a) Board action on the request for approval of a new applied associate degree program in a postsecondary institution that requires Board consideration shall be taken at the next quarterly Board meeting.

(b) A resolution shall be entered in the minutes of the Board and conveyed in writing by the Commissioner to the governing board or the chief executive officer of the postsecondary institution.

§9.95. Reporting to the Board.

(a) Contact hours for courses in approved workforce education certificate and applied associate degree programs from public postsecondary institutions must be determined and reported in compliance with Board rules and policy as outlined in the Workforce Education Course Manual and state law.

(b) Contact hours for courses in approved academic certificate and associate degree programs at public postsecondary institutions must be determined and reported in compliance with Board policy as outlined in the Academic Course Guide Manual and state law.

§9.96. Disapproval of Programs; Noncompliance.

No funds appropriated to any public postsecondary institution shall be expended for any program which has not been approved by the Commissioner or, when applicable, by the Board.

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

Filed with the Office of the Secretary of State, on November 19, 1998.

TRD-9817722
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: January 29, 1999
For further information, please call: (512) 483–6162

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Subchapter G. Contractual Agreements

19 TAC §9.128

The Texas Higher Education Coordinating Board proposes amendments to Chapter 9, Subchapter G, §9.128, concerning Program Development in Public Community/Junior College District and Technical Colleges (Disapproval of Courses; Noncompliance). The proposed amendments would allow the Coordinating Board to concentrate its efforts on setting major policy issues and spending less time on applying policy. The proposed amendments to the rules will give more responsibility to governing boards to ensure that proposals for new degree programs and for facilities meet Coordinating Board policy.

Glenda Barron, Assistant Commissioner for Community and Technical Colleges has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Dr. Barron also has determined that for the first five years the rule is in effect the public benefit will be that it will allow the Coordinating Board greater time to focus on issues of statewide importance to Texas public higher education and will allow institutions of higher education to respond more quickly to changing needs and demands of students, business and industry, taxpayers, etc. There will be no effect on state or local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The amendments to the rules are proposed under Texas Education Code, Sections 61.061, 61.062 and 130.001 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Program Development in Public Community/Junior College District and Technical Colleges (Disapproval of Courses; Noncompliance).

There were no other sections or articles affected by the proposed amendments.

§9.128. Disapproval of Courses; Noncompliance.

No funds appropriated to any public community/junior college district or technical college may be expended for any course taught which has not been approved by the Commissioner ~~[Board]~~, even if such course is taught under a contractual agreement.

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

Filed with the Office of the Secretary of State, on November 19, 1998.

TRD-9817724
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: January 29, 1999
For further information, please call: (512) 483–6162

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Chapter 11. Texas State Technical College System

Subchapter B. General Provisions

19 TAC §§11.26, 11.27, 11.29

The Texas Higher Education Coordinating Board proposes amendments to Chapter 11, Subchapter B, §§11.26, 11.27, and 11.29, concerning Texas State Technical College System (General Provisions). The proposed amendments would allow the Coordinating Board to concentrate its efforts on setting major policy issues and spending less time on applying policy. The proposed amendments to the rules will give more responsibility to governing boards to ensure that proposals for new degree programs and for facilities meet Coordinating Board policy.

Glenda Barron, Assistant Commissioner for Community and Technical Colleges has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Dr. Barron also has determined that for the first five years the rule is in effect the public benefit will be that it will allow the Coordinating Board greater time to focus on issues of statewide importance to Texas public higher education and will allow institutions of higher education to respond more quickly to changing needs and demands of students, business and industry, taxpayers, etc. There will be no effect on state or local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The amendments to the rules are proposed under Texas Education Code, Sections 61.061, 61.062 and 135.04 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Texas State Technical College System (General Provisions).

There were no other sections or articles affected by the proposed amendments.

§ 11.26. TSTC-Marshall Prohibitions.

The Texas State Technical College extension center in Marshall shall not offer general academic or technical courses or programs that duplicate the general academic or technical courses and programs offered by Panola College, Northeast Texas Community College, and Kilgore College. The Commissioner [~~Board~~] shall determine whether proposed courses and programs are duplicative.

§11.27. New Program and Course Approval.

(a) Courses and programs wholly or partially financed from state funds are subject to the prior approval and continuing review of the Board or as delegated to the Commissioner as specified in Chapter 9, Subchapter E of this title (relating to Certificate or Associate Degree Programs).

(b) Before any new course or program may be offered by a campus or extension center within the taxing district of a public community/junior college, it must be established that the public community/junior college is not capable of offering or chooses not to offer the program. The campus or extension center must present evidence to the Commissioner [~~Board~~] that the public community/junior college is not capable of offering the program. After it has demonstrated to the Commissioner [~~Board~~] that the need for the program exists and that the program is not locally available, the campus or extension center may offer the program, provided approval is secured from the Commissioner [~~Board~~]. Approval of technical and vocational programs under this section does not apply to McLennan, Cameron, and Potter counties.

(c) Where a local government, business, or industry located in a county or a portion of a county that is not operating a public community/junior college district requests that the campus or extension center offer a program, the campus or extension center must request approval from the Board or as delegated to the Commissioner, to offer the program.

(d) Approval of any courses or programs offered at a campus or extension center under subsections (a), (b), and (c) of this section must be requested from the Board according to procedures prescribed in Chapter 9, Subchapter E of this title (relating to [~~New~~] Certificate and Associate Degree Programs), and Chapter 9, Subchapter F of this title (relating to Workforce Continuing Education Courses).

(e) (No change.)

§11.29. Action and Order of the Board.

(a) Board action on the approval of additional campuses or extension centers, acquisition of land, or new program requests which are not delegated to the Commissioner shall be taken at the quarterly Board meeting after the request has been submitted.

(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 November 19, 1998.

TRD-9817725
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: January 29, 1999
For further information, please call: (512) 483–6162

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Chapter 17. Campus Planning

Subchapter B. Application for Approval of New Construction and Major Repair and Rehabilitation

19 TAC §17.46

The Texas Higher Education Coordinating Board proposes amendments to Chapter 17, Subchapter B, §17.46, concerning Application for Approval of New Construction and Major Repair and Rehabilitation (Special Approval Procedures). The proposed amendments will establish processes by which the Coordinating Board's responsibilities for approval of construction projects and land acquisitions might be implemented. The proposed rules revise existing rules in such a way as to delegate additional responsibility to the Board's Campus Planning Committee and the Commissioner. The proposed rules are intended to allow the Board to restructure their meetings to spend less time on routine, operational issues and more time on long-range policy issues.

Roger Elliott, Assistant Commissioner for Finance, Campus Planning, and Research has determined that for the first five-year period the rule is in effect there will be no fiscal implications as a result of enforcing or administering the rule.

Dr. Elliott also has determined that for the first five years the rule is in effect the public benefit will be that the rules will improve the quality of higher education oversight, planning, service, and guidance provided by the Board to the Governor, the Legislature, and the institutions. There will be no effect on state or local government or small businesses. There is no anticipated economic costs to persons who are required to comply with the rule as proposed.

Comments on the proposed amendments may be submitted to Dr. Don W. Brown, Commissioner of Higher Education, Texas Higher Education Coordinating Board, P.O. Box 12788, Capitol Station, Austin, Texas 78711.

The amendments to the rules are proposed under Texas Education Code, Section 61.058 which provides the Texas Higher Education Coordinating Board with the authority to adopt rules concerning Application for Approval of New Construction and Major Repair and Rehabilitation (Special Approval Procedures).

There were no other sections or articles affected by the proposed amendments.

§17.46. Special Approval Procedure.

(a) The Coordinating Board authorizes the Campus Planning Committee to review and approve the following types of projects [~~Under this procedure the Coordinating Board delegates to the~~

~~Campus Planning Committee the review and approval of the following types of projects~~]:

(1) gifts, purchase or acquisition of real property having a value of $5,000,000 or less; and [~~Auxiliary enterprise projects being acquired, constructed or renovated without the use of state funds. In addition, no state funds may be used to operate and maintain such projects. Total project cost for such projects shall be no more than $3 million.~~]

(2) construction of new educational and general space having a value of $5,000,000 or less. [~~Major repair and rehabilitation of existing education and general buildings that will not add educational and general space and whose total project cost is no more than $3 million. However, in the case of energy conservation performance projects, additional space may be added.~~]

[~~(3) Gifts, purchase or acquisition of real property having a value of $100,000 or less.~~]

(b) The Campus Planning Committee will be guided in its decision in part by its judgement as to whether or not the full Board would approve the project were the request being brought to the Board at this time. The committee may approve a request, or refer the request to the next meeting of the Board. [~~In deciding whether to refer a proposed project to the Board, the committee will give particular attention to the total project cost, source of funding, and likelihood that the proposing institution will eventually seek state general revenue to operate or maintain any portion of the building.~~] Moreover, any Board Member can request that a particular project under consideration by the Campus Planning Committee be referred to the full Board for consideration. The committee shall report all actions to the Board at its next meeting. [~~The action by the committee will be final, subject to appeal to the full Board at its next meeting.~~]

(c) The Coordinating Board authorizes the Commissioner to review and approve the following types of projects on certification by the proposing institution's governing board that Coordinating Board-approved criteria are met:

(1) auxiliary enterprise projects being acquired, constructed or renovated without the use of state general revenue funds and with a total projected cost of less than $20,000,000; and

(2) major repair and rehabilitation of existing education and general buildings that will not add educational and general space with a total projected project cost of less than $10,000,000.

(d) The Commissioner shall be guided in making a decision in part by his or her judgment as to whether or not the full Board would approve the project, were the request being brought to the Board. The Commissioner may approve a request or refer the request to a subsequent meeting of the Board. Each quarter, the Commissioner will send a list of all actions to the Board. The list of all approvals shall be attached as an addendum to the minutes of the Board's next quarterly meeting.

This 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 November 19, 1998.

TRD-9817720
James McWhorter
Assistant Commissioner for Administration
Texas Higher Education Coordinating Board
Proposed date of adoption: January 29, 1999

For further information, please call: (512) 483–6162

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TITLE 22. EXAMINING BOARDS

Part XII. Board of Vocational Nurse Examiners

Chapter 239. Contested Case Procedure

Subchapter B. Enforcement

22 TAC §239.11, 239.12, 239.16, 239.18

The Board of Vocational Nurse Examiners proposes amendment of §239.11 relating to Unprofessional Conduct, §239.12 relating to Licensure of Persons with Criminal Convictions, §239.16 relating to Peer Assistance Programs, and §239.18 relating to Penalties and Sanctions. On September 14, 1998, the Board reviewed Chapter 239 relating to Contested Case Procedure as outlined in the Board Rule Review Plan and determined that §239.11 be amended for clarification. §239.12 is amended for consistency with 6252-13c. §239.16 is amended reflect current TCADA language and for clarification. §239.18 is amended for consistency.

Mary M. Strange, Executive Director, has determined that for the first five year period the rule is in effect, there will be no fiscal implication for state or local government as a result of enforcing the rule.

Mrs. Strange has also determined that for the first five years the rule as proposed is in effect, the public benefits anticipated as a result of enforcing the rule will be more comprehensive and accurate definitions. There will no cost to small or large businesses. The only individuals that there will be a fiscal impact are those that have had disciplinary action and required to pay a fine or a probation monitoring fee or a hearings fee.

Comments may be submitted to Mary M. Strange, Executive Director, Board of Vocational Nurse Examiners, 333 Guadalupe, Suite 3-400, Austin, Texas 78701.

The amendment is proposed under Texas Civil Statutes, Article 4528c, Section 5(f), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this proposal.

§239.11. Unprofessional Conduct.

Unprofessional or dishonorable conduct, likely to deceive, defraud, or injure the public, may include the following described acts or omissions:

(1)- (26) (No change.)

(27) failing to conform to the minimal standards of acceptable prevailing practice, regardless of whether or not actual injury to any person was sustained, including but not limited to:

(A) (No change.)

(E) assigning [~~delegating~~] nursing care functions or responsibilities to an individual lacking the ability or knowledge to perform the function or responsibilities [~~responsibility~~] in question;

(F) causing or permitting physical, sexual, emotional or verbal abuse or injury to the patient/client or the public, or failing

to report same to the employer, appropriate legal authority and/or licensing Board:

(G)-(K) (No change.)

(28)-(29) (No change.)

§239.12. Licensure of Persons With Criminal Convictions.

(a) [~~Effective January 1, 1996,~~ a] A person who has been convicted of a felony that relates to the duties and responsibilities of a licensed vocational nurse may [~~shall~~] be disqualified from obtaining licensure as a licensed vocational nurse. [~~The Board shall not license such a person, and shall upon conviction of a felony, suspend or revoke the license of a person previously licensed.~~]

(b) Upon conviction of a felony, the Board may suspend or revoke the license of a person previously licensed.

(c) [~~(b)~~] For the purposes of this section, a person is convicted of a felony if a court of competent jurisdiction enters an adjudication of guilt against the person on a felony offense under the laws of this or another state or the United States, regardless of whether:

(1) the sentence is subsequently probated and the person is discharged from probation;

(2) the accusation, complaint, information, or indictment against the person is dismissed and the person is released from all penalties and disabilities resulting from the offense; or

(3) the person is pardoned for the offense, unless the pardon is granted expressly for subsequent proof of innocence.

(d) [~~(c)~~] In review of a complaint alleging that the respondent/applicant has been convicted of a crime which directly relates to the duties and responsibilities of a licensed vocational nurse, the Board shall consider the following evidence in determining the respondent's/applicant's present fitness to practice vocational nursing:

(1) the extent and nature of the person's past criminal activity;

(2) the age of the person at the time of commission of the crime;

(3) conduct and work activity of the person prior to and after criminal activity;

(4) evidence of rehabilitation while incarcerated or following release;

(5) notarized letters of recommendation from prosecution, law enforcement, and correctional officers, who prosecuted, arrested, or had custodial responsibility for the person; letters from the sheriff or chief of police where the person resides; and other persons having contact with the convicted person; and

(6) records of steady employment, provision of dependents, payment of all court costs, supervision, fines and restitution if ordered as a result of the person's conviction.

(e) [~~(d)~~] The burden and expense of providing and presenting the foregoing documentation to the Board shall be solely at the expense of the respondent/applicant.

§239.16. Peer Assistance Programs.

(a) A peer assistance program for Licensed Vocational Nurses will identify, assist and monitor colleagues with mental health, alcohol, or drug problems that are or are likely to be job-impairing so that individuals may return to safe practice. [~~job impairing alcohol or drug problems, and/or mental health impairment.~~]

(1) The program will provide statewide peer advocacy services available to all Licensed Vocational Nurses impaired by alcohol or drug abuse and/or certain mental illnesses. [~~illness.~~]

(2) The program shall have a statewide monitoring system that will be able to track the nurse while preserving confidentiality. [~~anonymity.~~]

(3) The program shall provide a network of trained peer volunteers [~~interveners~~] located throughout the state.

(4) The program shall have a written plan for the education and training of volunteers [~~interveners~~] and other program personnel.

(5)-(8) (No Change.)

(9) The program shall have a written plan for a systematic total program evaluation and shall be subject to evaluation by the Board or its designee.

(10)-(12) (No change.)

(b) Contractual Agreement. The approved program(s) will enter into a contractual agreement with the Board to provide the services for nurses with certain mental health, alcohol or drug problems that are likely to be job impairing [~~of an impaired professional program~~]. Said contract can be withdrawn for noncompliance and is subject to review and renewal.

§239.18. Penalties and Sanctions.

If the Board finds that a person has violated any of the provisions of the Vocational Nurse Act, or a rule or Order of the Board, the Board may impose one or more of the following:

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

(9) assess a monetary fine and/or assess a probationary monitoring fee and/or hearings fees.

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

Filed with the Office of the Secretary of State, on November 18, 1998.

TRD-9817671
Mary M. Strange, RN, BSN, CNA
Executive Director
Board of Vocational Nurse Examiners
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 305–8100

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Subchapter C. Hearings Process

22 TAC §239.21

The Board of Vocational Nurse Examiners proposes amendment of §239.21 relating to subpoenas. On September 14, 1998, the Board reviewed Chapter 239 relating to Contested Case Procedure as outlined in the Board Rule Review Plan and determined that §239.21 should be amended to reflect new information technologies.

Mary M. Strange, Executive Director, has determined that for the first five year period the rule is in effect, there will be no fiscal implication for state or local government as a result of enforcing the rule.

Mrs. Strange has also determined that for the first five years the rule as proposed is in effect, no public benefits are anticipated as a result of enforcing the rule. There will be no cost to large or small business or to individuals as a result of enforcing the rule.

Comments may be submitted to Mary M. Strange, Executive Director, Board of Vocational Nurse Examiners, 333 Guadalupe, Suite 3-400, Austin, Texas 78701.

The amendment is proposed under Texas Civil Statutes, Article 4528c, Section 5(f), which provides the Board of Vocational Nurse Examiners with the authority to make such rules and regulations as may be necessary to carry in effect the purposes of the law.

No other statute, article or code will be affected by this proposal.

§239.21. Subpoenas.

The Board or its designee shall have the power to issue subpoenas, and subpoenas duces tecum to compel the attendance of witnesses, the production of books, records, audio/video, electronic data and documents; to administer oaths and to take testimony concerning all matters within its jurisdiction.

This 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 November 18, 1998.

TRD-9817672
Mary M. Strange, RN, BSN, CNA
Executive Director
Board of Vocational Nurse Examiners
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 305–8100

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Part XXII. Texas State Board of Public Accountancy

Chapter 501. Professional Conduct

Subchapter C. Professional Standards

22 TAC §501.26

The Texas State Board of Public Accountancy (Board) proposes new §501.26 concerning Incompatible Occupations.

The proposed new rule §501.26 will clarify that a CPA's independence and objectivity may be compromised by engaging in an incompatible occupation and that these incompatible occupations are prohibited.

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed rule will be in effect:

A. the additional estimated cost to the state expected as a result of enforcing or administering the rule will be zero because the state is not required to do or not do anything.

B. the estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule will be zero because the state and local governments are not required to do or not do anything, and;

C. The estimated loss or increase in revenue to the state as a result of enforcing or administering the rule will be zero because this proposed new rule has no impact at all on state revenues.

Mr. Treacy has determined that for the first five-year period the rule is in effect the public benefits expected as a result of adoption of the proposed amendment will be a clear understanding by CPA's and consumers that CPA's are not allowed to engage in incompatible occupations if they are to remain independent and objective.

The probable economic cost to persons required to comply with the rule will be zero because the proposed new rule does not require CPA's to do anything or take any action.

Mr. Treacy has determined that a Local Employment Impact Statement is not required because the proposed rule will not affect a local economy.

The Board requests comments on the substance and effect of the proposed amendment from any interested person. Comments must be received at the Board no later than noon on January 8, 1998. Comments should be addressed to Amanda G. Birrell, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower III, Suite 900, Austin, Texas 78701 or faxed to her attention at (512) 305-7854.

Mr. Treacy has determined that the proposed rule will not have an adverse economic effect on small businesses because CPA's are not required to do anything or take any action. The Board specifically invites comments from the public on the issues of whether or not the proposed rule will have an adverse economic effect on small business; if the rule is believed to have such an effect, then how may the Board legally and feasibly reduce that effect considering the purpose of the statute under which the rule is to be adopted; and if the rule is believed to have such an effect, how the cost of compliance for a small business compares with the cost of compliance for the largest business affected by the rule under any of the following standards: (a) cost per employee; (b) cost for each hour of labor; or (c) cost for each $100 of sales. See Texas Government Code, §2006.002(c).

The proposed rule is proposed under the Public Accountancy Act, Texas Civil Statutes, Article 41a-1, 6(a) (Vernon Supp. 1998), which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§501.26. Incompatible Occupations.

A licensee shall not concurrently engage in the practice of public accountancy and in any other business or occupation which impairs independence or objectivity in rendering professional services, or which is conducted so as to augment or benefit the accounting practice unless these Rules are observed in the conduct thereof.

This 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 November 20, 1998.

TRD-9817797
William Treacy
Executive Director
Texas State Board of Public Accountancy

Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 305-7848

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TITLE 25. HEALTH SERVICES

Part I. Texas Department of Health

Chapter 1. Texas Board of Health

The Texas Department of Health (department) proposes the repeal of §§1.71 - 1.74 and proposes new §1.71 concerning the use of departmental facilities. Specifically, the new section addresses the use of departmental facilities by public health-related organizations and public employee organizations. The repeal is necessary in order to reorganize the four sections proposed for repeal into a new section.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, requires each state agency to review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 1.71-1.74 has been reviewed and the department has determined that the reasons for adopting the sections continue to exist; however, the sections should be reorganized into a single section.

The Administrative Procedure Act, §2001.021 requires each state agency to adopt rules of practice stating the nature and requirements of all available formal and informal procedures. Section 2001.003 defines the term "rule" to include a state agency statement of general applicability that implements or prescribes policy or describes the procedure or practice requirements of a state agency but does not include a statement regarding only the internal management of an agency not affecting private rights or procedures. New §1.71 fits within the definition of a "rule". This section informs readers that there are procedures for public health-related organizations and public employee organizations to obtain approval for limited use of departmental facilities. The rule is further supplemented and explained in the department's Administrative Policy Executive Order XO-1003.

The department published a notice of intention to review the four sections proposed for repeal as required by Rider 167 in the *Texas Register* (23 TexReg 9075) on September 4, 1998. No comments were received by the department on these sections.

Susan K. Steeg, General Counsel, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the sections as proposed.

Ms. Steeg has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be the continuation of notice to public health-related organizations and public employee organizations that a process is available for them to obtain approval for limited use of department facilities. There will be no effect on small businesses. There is no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local government.

Comments on the proposal may be submitted to Susan K. Steeg, General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7236. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

Subchapter E. Use of Department Facilities by Public Health Related Organizations and Public Employee Organizations.

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

25 TAC §§1.71– 1.74

The repeal is proposed under the Administrative Procedure Act, §2001.004 which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures and the Health and Safety Code, §12.001 which provides the Texas Board of Health (board) with the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, and the commissioner of health.

The repeal affects the Government Code, Chapter 2001; the Health and Safety Code, Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§1.71. Purpose.

§1.72. Application.

§1.73. Definitions.

§1.74. Limited Use of Facilities.

This 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 November 20,1998.

TRD-9817810
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 458–7236

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Subchapter E. Use of Departmental Facilities

25 TAC §1.71

The new section is proposed under the Administrative Procedure Act, §2001.004 which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures and the Health and Safety Code, §12.001 which provides the Texas Board of Health (board) with the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, and the commissioner of health.

The new section affects the Government Code, Chapter 2001; the Health and Safety Code, Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§1.71. Use of Departmental Facilities.

(a) The purpose of this section is to prescribe the department's policy regarding the use of department facilities by public health-related organizations and public employee organizations.

(b) The term "facilities" denotes all institutions or physical plants, or part of either, under the control and management of the Texas Board of Health. This term encompasses real and personal property and includes, but is not limited to, meeting rooms, auditoriums, cafeterias, parking lots, outdoor grounds, and bulletin boards, wherever located within the State of Texas.

(c) The term "organization" denotes a public health-related organization which is any nonprofit association, organization, or group which has as its primary purpose the promotion and protection of the public health or a public employee organization which is an organization or association of public employees acting as a representative of such employees to present grievances concerning wages, hours of work, or conditions of work or for any other lawful purpose.

(d) Organizations may have access to limited use of department facilities under the following conditions.

(1) Public employee organizations may have access for activities which are primarily for department employee-related purposes.

(2) Public health-related organizations may have access for activities which are primarily for public health purposes.

(3) The use may include organizations using facilities for the purpose of presenting or sponsoring educational or entertainment programs, provided that the programs are open to all department employees.

(4) Requests or applications for the limited use shall be made to the commissioner, or his designee, who may require applicants to provide such information as may be necessary for proper planning and scheduling of the requested use.

(5) The department may require reimbursement for any expense incurred by the department for utilities, janitorial services, repairs, or other expenditures necessitated by the limited use.

This 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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Susan K. Steeg
General Counsel
Texas Department of Health
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Subchapter F. Petition for the Adoption of a Rule

25 TAC §1.81

The Texas Department of Health (department) proposes an amendment to §1.81 concerning petitions for the adoption of a rule.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, requires each state agency to review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 1.81 has been reviewed and the department has determined that the reasons for adopting the section continue to exist.

The Administrative Procedure Act, §2001.021 requires each state agency to adopt rules relating to the form of a petition for adoption of rules and the procedures for submission, consideration, and disposition of the petition. The law also requires that a state agency shall deny the petition in writing or initiate rulemaking procedures not later than the 60th day after the date of submission of a petition. Section 1.81 describes the form of a petition which would be accepted by the commissioner of health. The amendments state that the commissioner may refuse to accept a petition which is not in the correct form, rather than requiring board action to deny an unacceptable petition. The amendments also provide that the commissioner shall submit an accepted petition to the board and that the board shall deny the petition or institute rulemaking procedures within 60 days after receipt of an accepted petition. Other minor changes were made for the purpose of clarification of the section.

The department published a Notice of Intention to Review this section as required by Rider 167 in the *Texas Register* (23 TexReg 9075) on September 4, 1998. No comments were received by the department on this section.

Susan Steeg, General Counsel, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the section as proposed.

Ms. Steeg has determined that for each year of the first five years the section is in effect, the public benefits anticipated as a result of enforcing or administering the section will be clarification of the process for consideration of a petition through acceptance of a complete petition by the commissioner, rather than the board, and clarification of the timeframe for board consideration of an accepted petition. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendments as proposed. There is no anticipated impact on local government.

Comments on the proposal may be submitted to Susan K. Steeg, General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7236. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under the Administrative Procedure Act, §2001.021 which requires state agencies to adopt rules relating to petitions for adoption of rules and the Health and Safety Code, §12.001 which provides the board with the authority to adopt rules for its procedures and for the performance of each duty imposed by law on the board, the department, and the commissioner of health.

The amendment affects the Government Code, Chapter 2001; the Health and Safety Code, Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§1.81. Petition for the Adoption of a Rule.

(a) Purpose. The [~~rule's~~] purpose of this section is to delineate the procedures of the Texas Board of Health (board) [~~Health's procedures~~] for the submission, consideration, and disposition of a petition to the board to adopt a rule.

(b) Submission of the petition.

(1) (No change.)

(2) The petition shall be in writing; [~~, shall~~] contain the petitioner's name, [~~and~~] address, and organization, if any; and [~~shall~~] describe the rule and the reason for it; however, if the [~~Texas~~] commissioner of health determines that further information is necessary to assist the board in reaching a decision, the commissioner may require that the petitioner resubmit the petition and that it contain:

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

(3) The commissioner may refuse to accept [~~board may deny~~] a petition which does not contain the information in paragraph (2) of this subsection or the information in paragraph (2) (A)-(D) of this subsection if the commissioner determines that the latter information is necessary.

(4) The petition shall be mailed or delivered to the [~~Texas~~] Commissioner of Health, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

(c) Consideration and disposition of the petition.

(1) Except as otherwise provided in subsection (d) of this section, the commissioner shall submit an accepted [~~the~~] petition to the board [~~Texas Board of Health~~] for its consideration and disposition.

(2) Within 60 days after receipt [~~the postmark date~~] of an accepted [~~the~~] petition, [~~the commissioner's office, or within 60 days after receipt by the commissioner's office of a resubmitted petition by the commissioner's office of a resubmitted petition in accordance with subsection (b)(2)(A)-(D) of this section,~~] the board shall deny the petition or institute rulemaking procedures [~~rule-making procedure~~] in accordance with the Administrative Procedure [~~and Texas Register~~] Act, Government Code, Chapter 2001, Subchapter B [~~§5~~]. The board may deny parts of the petition and/or institute rulemaking [~~rule-making~~] procedures on parts of the petition.

(3) (No change.)

(4) If the board initiates rulemaking [~~rule-making~~] procedures, the version of the rule which the board proposes may differ from the version proposed by the petitioner.

(d) Subsequent petitions to adopt the same or similar rule. All initial accepted petitions for the adoption of a rule shall be presented to and decided by the board in accordance with the provisions of subsections (b) and (c) of this section. The commissioner may refuse to forward to the board for consideration any subsequent petition for the adoption of the same or a similar rule submitted within six months after the date of the initial petition.

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

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TRD-9817815
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 458–7236

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Subchapter H. Public Health Promotion

25 TAC §1.101

The Texas Department of Health (department) proposes an amendment to §1.101, concerning a memorandum of understanding (MOU) between the department and other state human service agencies. The amendment changes a reference to the "Public Health Promotion Division" to the "Office of Communications" to reflect current department organization and nomenclature.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, requires each state agency to review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 1.101 has been reviewed and the department has determined that the reasons for adopting the section continue to exist.

The Human Resources Code, §22.013 requires that the Texas Department of Human Services, Texas Department of Health, Texas Department of Mental Health and Mental Retardation, and the Texas Rehabilitation Commission adopt a MOU that authorizes and requires the exchange and distribution among the agencies of public awareness information relating to services provided by or through the agencies.

The department published a notice of intention to review the section as required by Rider 167 in the *Texas Register* (23 TexReg 9076) on September 4, 1998. No comments were received by the department on this section.

Susan K. Steeg, General Counsel, has determined that for each year of the first five years the section is in effect, there will no fiscal implications to state or local government as a result of enforcing or administering the section as proposed.

Ms. Steeg has determined that for each year of the first five years the section is in effect, the public benefits anticipated as result of enforcing or administering the section will be clarification of the existence and availability of the MOU, and compliance with the law. There is no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed. There is no anticipated impact on local government.

Comments on the proposal may be submitted to Susan K. Steeg, General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7236. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register.*

The amendment is proposed under the Human Resources Code §22.013 which requires that the Texas Department of Human Services, Texas Department of Health, Texas Department of Mental Health and Mental Retardation, and the Texas Rehabilitation Commission, adopt a MOU that authorizes and requires the exchange and distribution among the agencies of public awareness information relating to services provided by or through the agencies, and Health and Safety Code §12.001 which provides the board with the authority to adopt rules for its procedures and the performance of each duty imposed by law on the board, the department, and the commissioner of health.

The amendment affects the Human Resources Code §22.013; the Health and Safety Code, Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§1.101. Memorandum of Understanding.

(a) The Texas Department of Health adopts by reference a memorandum of understanding entered into between the department, the Texas Department of Human Services, the Texas Rehabilitation Commission, and the Texas Department of Mental Health and Mental Retardation concerning the exchange and distribution of public awareness information.

(b) Copies of the memorandum of understanding are filed in the Office of Communications [~~Public Health Promotion Division~~], Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, and may be reviewed during regular business hours.

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

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458–7236

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Subchapter M. Payment of Franchise Texas by Corporations Contracting with the Department or Applying for a License from the Department

25 TAC §1.161

The Texas Department of Health (department) proposes an amendment to §1.161, concerning delinquent corporate franchise taxes.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, requires each state agency to review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 1.161 has been reviewed and the department has determined that the reasons for adopting the section continue to exist.

The Business Corporation Act, Article 2.45 states that a corporation that is delinquent in a franchise tax owed to the state may not be awarded a contract by a state agency and may not be granted a permit or license by any state agency. While the state law does not require the department to adopt rules, it is appropriate to have rules to clarify the requirements of the department for applicants and contractors and to provide consistency throughout department programs. The section incorporates the requirement of the General Services Commission that certain bids submitted by a corporation must contain the required certification. The amendments also incorporate the current legal requirement that a limited liability company, as well as any type of corporation, file the certification. Other minor changes were made for the purpose of the clarification of the section.

The department published a notice of intention to review the section as required by Rider 167 in the *Texas Register* (23 TexReg 9075) on September 4, 1998. No comments were received by the department on this section.

Susan K. Steeg, General Counsel, has determined that for each year of the first five years the section is in effect, there will no fiscal implications to state or local government as a result of enforcing or administering the section as proposed.

Ms. Steeg has determined that for each year of the first five years the section is in effect, the public benefits anticipated as result of enforcing or administering the section will be clarification of the process of certifying corporate franchise tax status. The effect on small business will be the same effect as on large business. Any business which is a limited liability company will now have to provide the required certification. Bidders subject to the General Services Commission rules are already required to provide the certification as part of the bid so the inclusion of that requirement in the department rule will not effect small businesses. There is no anticipated economic cost to persons who are required to comply with the amendments as proposed. There is no anticipated impact on local government.

Comments on the proposal may be submitted to Susan K. Steeg, General Counsel, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 458-7236. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under the Business Corporation Act, Article 2.45 which requires state agencies to not award contracts or grant permits or licenses to corporations that are delinquent in the payment of their franchise tax and the Health and Safety Code, §12.001 which provides the board with the authority to adopt rules for its procedures and the performance of each duty imposed by law on the board, the department, and the commissioner of health.

The amendment affects the Business Corporation Act, Article 2.45; the Health and Safety Code, Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§1.161. Delinquent Corporate Franchise Taxes.

(a) Each corporation contracting with the department or each corporate applicant for an original or renewal [~~a~~] license or permit issued by the department shall [~~must~~] certify:

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

(b) The department must have the certification on file before the department will enter into the contract or issue the license or permit. When required by the General Services Commission under 1 Texas Administrative Code, §113.5(a)(13) (relating to Bid Submission, Bid Opening, and Tabulation), a bid submitted by a corporation must contain the certification.

(c) (No change.)

(d) If the corporation makes a false statement as to corporate franchise tax status on any contract, the statement is grounds for cancellation of [~~the department canceling~~] the contract by the department at the sole option of the department.

(e) The term "corporation" includes a limited liability company.

(f) [~~(e)~~] This section covers any contract, permit, or license issued by the department. However, the Texas Board of Health may adopt rules covering delinquent franchise taxes for individual programs within the department. In such cases, the individual program section will prevail over 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.

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TRD-9817836
Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458–7236

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Chapter 13. Health Planning and Resource Development

Subchapter E. Advisory Committee

25 TAC §13.51

The Texas Department of Health (department) proposes an amendment to §13.51, concerning the Hospital Data Advisory Committee (committee). The committee provides assistance to the Texas Board of Health (board) and the department on hospital reporting requirements and on interpretation and evaluation of data received.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules to establish advisory committees. The rules must state the purpose and composition of the committee, describe the tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 1995, the board established a rule relating to the Hospital Data Advisory Committee. The rule states that the committee will automatically be abolished on May 1, 1999. The board has now reviewed and evaluated the committee and has determined that the committee should continue in existence until May 1, 2003.

This section amends provisions relating to the operation of the committee. Specifically, language is revised to reference the Government Code; to decrease membership from 19 to 12 members; to require that the presiding officer and the assistant presiding officer of the committee will be selected by the chairman of the board for a term of two years; to allow a temporary vacancy in an office to be filled by vote of the committee until appointment by the chairman of the board occurs; to clarify that the committee is prohibited from holding an executive session (closed meeting) for any reason; and to clarify that the committee and its members may not participate in legislative activity in the name of the board, the department, or the committee except with certain approval. These changes will clarify procedures for the committee and emphasize the advisory nature of the committee.

Ann Henry, Acting Bureau Chief, Bureau of State Health Data and Policy Analysis, has determined that for each year of the first five years the proposed section is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering this section.

Ms. Henry also has determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section will be better information and advice provided to the board and the department on the issues addressed by the advisory committee and clarification of the role and procedures of the committee. There will no effect on small businesses. There are no economic costs to persons who are required to comply with the section as proposed. There will be no effect on local employment.

Comments may be submitted to Ann Henry, Acting Bureau Chief, Bureau of State Health Data and Policy Analysis, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, 512/458-7261. Comments on the proposed section will be accepted for 30 days following publication in the *Texas Register*.

The amendment is proposed under the Health and Safety Code, §11.016, which allows the board to establish advisory committees; the Government Code, Chapter 2110, which sets standards for the evaluation of advisory committees by the agencies for which they function; and the Health and Safety Code, §12.001, which provides the board with authority to adopt rules for the performance of every duty imposed by law upon the board, the department, and the commissioner of health.

The amendment affects the Health and Safety Code, Chapter 11, and the Government Code, Chapter 2110.

§13.51. Hospital Data Advisory Committee.

(a) (No change.)

(b) Applicable law. The committee is subject to the Government Code, Chapter 2110 [~~Texas Civil Statutes, Article 6252-33~~], concerning state agency advisory committees.

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

(e) Review and duration. By May 1, 2003 [~~1999~~], the board will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.

(f) Composition.

(1) The committee shall be composed of 12 [~~19~~] members appointed by the board as follows:

(A) [~~(1)~~] four [~~five~~] members from the hospital industry;

[~~(2) one member from private business;~~]

(B) [~~(3)~~] two members from the insurance industry;

(C) [~~(4)~~] two [~~six~~] members from state agencies as follows:

[~~(A) Texas Department of Human Services;~~]

[~~(B) Employees Retirement System of Texas;~~]

(i) [~~(C)~~] Texas Department of Mental Health and Mental Retardation; and

(ii) [~~(D)~~] Texas Commission on Alcohol and Drug Abuse;

[~~(E) Texas Department of Insurance; and~~]

[~~(F)~~ other state agencies, as deemed appropriate]; and

(D) [~~(5)~~] four [~~two~~] members from consumer organizations[;]

[~~(6) one member from the Statewide Health Coordinating Council; and~~]

[~~(7) two ex-officio members from the Texas state legislature~~].

(2) Since the composition of the committee as it existed on March 1, 1999, is changed under this section, existing members shall continue to serve until the board appoints members under the new composition.

(g) Terms of office. The term of office of each member shall be six years.

(1) Members shall be appointed for staggered terms so that the terms of a substantially equivalent number of members will expire on December 31 of each even-numbered year [~~beginning in 1996~~].

(2) (No change.)

(h) Officers. The chairman of the board [~~committee~~] shall appoint [~~elect~~] a presiding officer and an assistant presiding officer to begin serving on May 1 of each odd-numbered year [~~at its first meeting after August 31st of each year~~].

(1) Each officer shall serve until April 30th of each odd-numbered year. Each officer may holdover until his or her replacement is appointed by the chairman of the board [~~the next regular election of officers~~].

(2) (No change.)

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

(4) If the office of assistant presiding officer becomes vacant, it [~~A vacancy which occurs in the offices of presiding officer or assistant presiding officer~~] may be filled temporarily by vote of the committee until a successor is appointed by the chairman of the board [~~at the next committee meeting~~].

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

(7) The presiding officer and assistant presiding officer serving on January 1, 1999, will continue to serve until the chairman of the board appoints their successors.

(i) Meetings. The committee shall meet only as necessary to conduct committee business.

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

(3) The committee is not a "governmental body" as defined in the Open Meetings Act. However, in order to promote public participation, each [~~Each~~] meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Texas Government Code, Chapter 551, with the exception that the provisions allowing executive sessions shall not apply.

(4)-(7) (No change.)

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

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

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

(k)-(m) (No change.)

(n) Statement by members.

(1) The board, the department, and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the board, department, or committee.

(2) The committee and its members may not participate in legislative activity in the name of the board, the department, or the committee except with approval through the department's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process.

(o) Reports to board. The committee shall file an annual written report with the board.

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

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

(p) Reimbursement for expenses. In accordance with the requirements set forth in the Government Code, Chapter 2110 [~~Texas Civil Statutes, Article 6252-33~~], a committee member may receive reimbursement for the member's expenses incurred for each day the member engages in official committee business if authorized by the General Appropriations Act or budget execution process.

(1)-(5) (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 November 20,1998.

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Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 458–7236

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Chapter 157. Emergency Medical Care

Subchapter F. Advisory Committee

25 TAC §157.101

The Texas Department of Health (department) proposes an amendment to §157.101, concerning the Emergency Health Care Advisory Committee (committee). The committee provides assistance to the Texas Board of Health (board) and the department on the need for emergency medical services (EMS) in the state including the specialized needs of pediatric patients,

and hospital administrative and operational considerations relating to EMS/trauma systems development and facility designation.

In 1993, the Texas Legislature passed Senate Bill 383 (now codified in the Government Code, Chapter 2110) which requires that each state agency adopt rules to establish advisory committees. The rules must state the purpose and composition of the committee, describe the tasks of the committee, describe the manner in which the committee will report to the agency, and establish a date on which the committee will be automatically abolished unless the governing body of the agency affirmatively votes to continue the committee's existence.

In 1995, the board established a rule relating to the Emergency Health Care Advisory Committee. The rule states that the committee will automatically be abolished on May 1, 1999. The board has now reviewed and evaluated the committee and has determined that the committee should continue in existence until May 1, 2003.

This section amends provisions relating to the operation of the committee. Specifically, language is revised to reference the Government Code; to increase the consumer members by one person so that one-third of the committee are consumers; to require that the presiding officer and the assistant presiding officer of the committee will be selected by the chairman of the board for a term of two years; to allow a temporary vacancy in an office to be filled by vote of the committee until appointment by the chairman of the board occurs; to clarify that the committee is prohibited from holding an executive session (closed meeting) for any reason; to clarify that the committee and its members may not participate in legislative activity in the name of the board, the department, or the committee except with certain approval; and to require the committee's annual report in May rather than January. These changes will clarify procedures for the committee and emphasize the advisory nature of the committee.

Gene Weatherall, Bureau Chief, Bureau of Emergency Management, has determined that for each year of the first five years the proposed section is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering this section.

Mr. Weatherall also has determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section will be better information and advice provided to the board and the department on the issues addressed by the advisory committee and clarification of the role and procedures of the committee. There will no effect on small businesses. There are no economic costs to persons who are required to comply with the section as proposed. There will be no effect on local employment.

Comments may be submitted to Gene Weatherall, Bureau Chief, Bureau of Emergency Management, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 834-6700. Comments on the proposed section will be accepted for 30 days following publication in the *Texas Register*.

The amendment is proposed under the Health and Safety Code, §11.016, which allows the board to establish advisory committees; the Government Code, Chapter 2110, which sets standards for the evaluation of advisory committees by the agencies for which they function; and the Health and Safety Code, §12.001, which provides the board with authority to adopt rules for the performance of every duty imposed by law upon the board, the department, and the commissioner of health.

The amendment affects the Health and Safety Code, Chapter 11, and the Government Code, Chapter 2110.

§157.101. Emergency Health Care Advisory Committee.

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

(1) (No change.)

(2) The [~~new~~] advisory committee is established [~~promulgated~~] under the provisions of the Health and Safety Code, §11.016, which states the Texas Board of Health (board) may appoint advisory committees.

(b) Applicable law. The committee is subject to the Government Code, Chapter 2110 [~~Texas Civil Statutes, Article 6252-33~~], concerning state agency advisory committees.

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

(e) Review and duration. By May 1, 2003 [~~1999~~], the board will initiate and complete a review of the committee to determine whether the committee should be continued, consolidated with another committee, or abolished. If the committee is not continued or consolidated, the committee shall be abolished on that date.

(f) Composition.

(1) The committee shall be composed of 15 [~~14~~] members appointed by the board as follows:

(A) [~~(1)~~] five [~~four~~] shall be consumer members; and

(B) [~~(2)~~] ten shall be non-consumer members as follows:

(i) [~~(A)~~] an emergency physician;

(ii) [~~(B)~~] a provider of prehospital emergency medical services;

(iii) [~~(C)~~] an emergency medical technician (EMT), emergency medical technician-intermediate (EMT-I) or emergency medical technician-paramedic (EMT-P);

(iv) [~~(D)~~] an emergency nurse;

(v) [~~(E)~~] a pediatrician;

(vi) [~~(F)~~] a trauma surgeon;

(vii) [~~(G)~~] a trauma nurse;

(viii) [~~(H)~~] a facility administrator;

(ix) [~~(I)~~] a fire department provider; and

(x) [~~(J)~~] an EMS medical director.

(2) Since the composition of the committee as it existed on March 1, 1999, is changed under this section, existing members shall continue to serve until the board appoints members under the new composition.

(g) Terms of office. The term of office of each member shall be six years.

(1) Members shall be appointed for staggered terms so that the terms of a substantially equivalent number of members will expire on December 31st of each even-numbered year.

(2) (No change.)

(h) Officers. The chairman of the board [committee] shall appoint [elect] a presiding officer and an assistant presiding officer to begin serving on May 1 of each odd-numbered year [at its first meeting after August 31st of every year].

(1) Each officer shall serve until April 30th of each odd-numbered year. Each officer may holdover until his or her replacement is appointed by the chairman of the board [the next regular election of officers].

(2) The presiding officer [shall]:

(A) shall preside at all committee meetings at which he or she is in attendance;

(B) shall call meetings in accordance with this section;

(C) shall appoint subcommittees of the committee as necessary;

(D) shall cause proper reports to be made to the board; and

(E) may serve as an ex-officio member of any subcommittee of the committee.

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

(4) If the office of assistant presiding officer becomes vacant, it [A vacancy which occurs in the offices of presiding officer or assistant presiding officer] may be filled temporarily by vote of the committee until a successor is appointed by the chairman of the board [at the next committee meeting].

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

(7) The presiding officer and assistant presiding officer serving on January 1, 1999, will continue to serve until the chairman of the board appoints their successors.

(i) Meetings. The committee shall meet at least twice annually and as necessary to conduct committee business.

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

(3) The committee is not a "governmental body" as defined in the Open Meeting Act. However, in order to promote public participation, each [Each] meeting of the committee shall be announced and conducted in accordance with the Open Meetings Act, Texas Government Code, Chapter 551, with the exception that the provisions allowing executive sessions shall not apply.

(4)-(7) (No change.)

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

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

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

(k)-(m) (No change.)

(n) Statement by members.

(1) The board, the department, and the committee shall not be bound in any way by any statement or action on the part of any committee member except when a statement or action is in pursuit of specific instructions from the board, department, or committee.

(2) The committee and its members may not participate in legislative activity in the name of the board, the department, or the committee except with approval through the department's legislative process. Committee members are not prohibited from representing themselves or other entities in the legislative process.

(o) Reports to the board. The committee shall file an annual written report with the board.

(1) The report shall list:

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

(E) the status of any rules which were recommended by the committee to the board; and

(F) anticipated activities of the committee for the next year[; and]

[(G) any amendments to this section requested by the committee].

(2) (No change.)

(3) The report shall cover the meetings and activities in the immediate preceding 12 months and shall be filed with the board each May [January]. It shall be signed by the presiding officer and appropriate department staff.

(p) Reimbursement for expenses. In accordance with the requirements set forth in the Government Code, Chapter 2110 [Texas Civil Statutes, Article 6252-33], a committee member may receive reimbursement for the member's expenses incurred for each day the member engages in official committee business if authorized by the General Appropriations Act or budget execution process.

(1)-(5) (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 November 20,1998.

TRD-9817808
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 458–7236

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Chapter 229. Food and Drug

Subchapter P. Licensing of Wholesale Distributors of Drugs Including Good Manufacturing Practices

25 TAC §§229.251–229.254

The Texas Department of Health (department) proposes amendments to §§229.251 - 229.254, concerning the licensing of wholesale distributors of drugs including good manufacturing practices. Specifically, the sections cover definitions; licensing

fees and procedures; minimum standards for licensure; and refusal, revocation, or suspension of a license.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, requires that each state agency review and consider for readoption each rule adopted by the agency pursuant to the Government Code, Chapter 2001 (Administrative Procedures Act). These sections have been reviewed and the department has determined that the reason for readopting the sections continues to exist.

In §229.251, all definitions are numbered in accordance with Texas Register format to comply with 1 Texas Administrative Code, §91.1, effective February 17, 1998. Section 229.252 will provide for a license, at no cost, for charitable organizations wholesaling over-the-counter (OTC) drugs and will conform §229.252(h) to the requirements of the Health and Safety Code, §431.2021, "Exemption From Licensing," which only allows for exemptions to licensing to those persons engaged in wholesale distribution of prescription drugs for use in humans. Section 229.253(a) will clarify existing requirements for all wholesale drug distributors and will provide for guidelines for wholesale drug distributors of OTC drugs and will establish standards for storage practices; records (i.e., receipt, distribution and disposition of returned, damaged, and outdated OTC drugs); and policies and procedures for rotation of stock and recalls. Section 229.254 will replace "the Administrative Procedure and Texas Register Act, Texas Civil Statutes, Article 6252-13a" with "Government Code, Chapter 2001," pursuant to legislation passed by the Texas 74th Legislature.

The department published a Notice of Intention to Review these sections as required by Rider 167 in the *Texas Register* on September 4, 1998, (23 TR 9078). No comments were received by the department on these sections.

Cynthia T. Culmo, R.Ph., Director, Drugs and Medical Devices Division, has determined that for each year of the first five years these sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the sections as proposed.

Ms. Culmo has determined that for each year of the first five years the sections are in effect, the public benefits anticipated as a result of enforcing or administering the sections will be to create state uniformity with national standards for OTC drugs and provide for consistent and effective minimum standards for the wholesale distribution of OTC drugs in Texas. As a result, there is no fiscal impact on small or large businesses. There is no anticipated economic cost to persons who are required to comply with the amendments as proposed, since the OTC drug wholesalers are currently complying with procedures and policies for storage practices, records and recalls. In addition, charitable organizations would be required to license, but would be exempt from paying the licensure fee. There is no anticipated impact on local government.

Comments on the proposal may be submitted to Angela K. Bensel, Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756, (512) 719-0237. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Health and Safety Code, §431.241, which provides the department with the authority to adopt necessary regulations pursuant to the enforcement of this chapter; and §12.001, which provides the Texas Board of Health with the authority to adopt rules for the performance of every duty imposed by law on the Texas Board of Health, the Texas Department of Health, and the Commissioner of Health.

The amendments affect the Health and Safety Code, Chapter 431, Texas Food, Drug and Cosmetic Act; the Health and Safety Code, Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§229.251. Definitions.

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

(1) Department - Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756.

(2) Manufacturer - A person who manufactures, prepares, propagates, compounds, processes, packages, repackages, or changes the container, wrapper, or labeling of any drug package.

(3) Place of business - Each location at which drugs are distributed at wholesale as defined in the Health and Safety Code, Chapter 431.

(4) Wholesale distribution - Distribution to a person other than a consumer or patient, including, but not limited to distribution to any person by a manufacturer, repacker, own label distributor, jobber, or wholesaler.

§229.252. Licensing Fee and Procedures.

(a) License fee.

(1) All wholesale distributors of drugs who are not manufacturers of drugs in Texas shall obtain a license annually with the Texas Department of Health (department). Except as provided for in paragraph (2) of this subsection, wholesale distributors of drugs who are not manufacturers of drugs in Texas shall pay a licensing fee for each place of business operated as follows:

(A) - (C) (No change.)

(D) $850 per wholesale distributor having gross annual drug sales greater than or equal to $20 million; [~~and~~]

(E) $750 per out-of-state wholesale distributor, unless an audited statement is provided which demonstrates gross annual drug sales of less than $20 million which would require a licensing fee of $500; and [~~.~~]

(F) $0.00 per wholesale distributor engaged in the distribution of an over-the-counter drug by a charitable organization, as described in the Internal Revenue Code of 1986, §501(c)(3), to a nonprofit affiliate of the organization to the extent otherwise permitted by law.

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

(b) - (g) (No change.)

(h) Exemption from licensing. Persons who engage [~~only~~] in prescription [~~the following types of~~] wholesale drug distribution for use in humans are exempt from the licensing requirements of this subchapter [~~undesignated head~~], to the extent that it does not violate provisions of the Texas Dangerous Drug Act or the Texas Controlled Substances Act, the Health and Safety Code. The exemptions are:

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

(i) (No change.)

§229.253. Minimum Standards for Licensure.

(a) Minimum standards. All manufacturers of drugs shall comply with these subsections in addition to the existing statutory standards contained in the Texas Health and Safety Code, Chapter 431. All wholesale distributors of drugs who are not manufacturers of drugs shall comply with the minimum standards specified in subsections (c) and (d) of this section in addition to the existing statutory standards contained in the Texas Health and Safety Code, Chapter 431. [~~All wholesale distributors of drugs not engaged in manufacturing, processing, packing, or holding of drugs shall comply with the minimum standards specified in subsection (c) of this section in addition to the existing statutory standards contained in the Texas Health and Safety Code, Chapter 431. All wholesale distributors of drugs engaged in manufacturing, processing, packing, or holding of drugs shall comply with subsections (b) and (c) of this section in addition to the existing statutory standards contained in the Texas Health and Safety Code, Chapter 431.~~] For the purpose of this section, the policies described in the United States Food and Drug Administration's Compliance Policy Guides as they apply to [~~human prescription~~] drugs shall be the policies of the Texas Department of Health (department).

(b) (No change.)

(c) Guidelines for licensing of wholesale prescription drug distributors.

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

(d) Guidelines for licensing of wholesale over-the-counter drug (OTC) distributors.

(1) Facilities. All facilities at which OTC drugs are stored, warehoused, handled, held, offered, marketed, or displayed shall:

(A) be of suitable size and construction to facilitate cleaning, maintenance, and proper operation;

(B) have storage areas designed to provide adequate lighting, ventilation, temperature, sanitation, humidity, space, equipment, and security conditions;

(C) have a quarantine area for storage of OTC drugs that are outdated, damaged, deteriorated, misbranded, or adulterated, or that are in immediate or sealed, secondary containers that have been opened;

(D) be maintained in a clean and orderly condition; and

(E) be free from infestation by insects, rodents, birds, or vermin of any kind.

(2) Storage.

(A) All OTC drugs shall be stored at appropriate temperatures and under appropriate conditions in accordance with requirements, if any, in the labeling of such drugs, or with requirements in the current edition of an official compendium, such as the United States Pharmacopeia/National Formulary (USP/NF).

(B) If no storage requirements are established for an OTC drug, the drug shall be held at room temperature, as defined in an official compendium, to help ensure that its identity, strength, quality, and purity are not adversely affected.

(C) Appropriate manual, electromechanical, or electronic temperature and humidity recording equipment, devices, and/or logs shall be utilized to document proper storage of OTC drugs. Temperature logs shall be kept at the licensed location for one year following the date of the last entry.

(3) Examination of materials.

(A) Upon receipt, each outside shipping container shall be visually examined for identity and to prevent the acceptance of contaminated OTC drugs or OTC drugs that are otherwise unfit for distribution. This examination shall be adequate to reveal container damage that would suggest possible contamination or other damage to the contents.

(B) Each outgoing shipment shall be carefully inspected for identity of the OTC drug products and to ensure that there is no delivery of OTC drugs that have been damaged in storage or held under improper conditions.

(4) Returned, damaged, and outdated OTC drugs.

(A) OTC drugs that are outdated, damaged, deteriorated, misbranded, or adulterated shall be quarantined and physically separated from other OTC drugs until they are destroyed or returned to their supplier.

(B) Any OTC drugs whose immediate or sealed outer or sealed secondary containers have been opened or used shall be identified as such, and shall be quarantined and physically separated from other OTC drugs until they are either destroyed or returned to their supplier.

(C) If the conditions under which an OTC drug has been returned casts doubt on the drug's safety, identity, strength, quality, or purity, then the drug shall be destroyed, or returned to the supplier, unless examination, testing, or other investigation proves that the drug meets appropriate standards of safety, identity, strength, quality, and purity.

(5) Recordkeeping.

(A) Wholesale drug distributors shall establish and maintain inventories and records of all transaction regarding the receipt and distribution or other disposition of OTC drugs. These records shall include the following information:

(i) the source of the drugs, including the name and principal address of the seller or transferor, and the address of the location from which the drugs were shipped;

(ii) the identity and quantity of the drugs received and distributed or disposed of; and

(iii) the dates of receipt and distribution of other disposition of the drugs.

(B) Records shall be made available for inspection and photocopying by an authorized agent with the Texas Department of the Health, for two years following disposition of the drugs.

(C) Records described in this section that are kept at the inspection site or that can be immediately retrieved by computer or other electronic means shall be readily available for authorized inspection during the retention period. Records kept at a central location apart from the inspection site and not electronically retrievable shall be made available for inspection within two working days of a request by an authorized agent.

(6) Written policies and procedures.

(A) Wholesale OTC drug distributors shall establish, maintain, and adhere to written policies and procedures, which shall be followed for the receipt, storage, inventory, and distribution of OTC drugs.

(B) Wholesale OTC drug distributors shall include in their written policies and procedures the following:

(i) a procedure whereby the oldest approved stock of an OTC drug product is distributed first;

(ii) a procedure to be followed for handling recalls and withdrawals of OTC drugs; and

(iii) a procedure to ensure that any outdated OTC drugs shall be segregated from other drugs and either returned to the manufacturer or destroyed. This procedure shall provide for written documentation of the disposition of outdated OTC drugs.

(e) [~~(d)~~] Buildings and facilities. All manufacturing, processing, packing or holding of drugs shall take place in buildings and facilities described in Title 21, Code of Federal Regulations, Part 211, Subpart C. No manufacturing, processing, packing, or holding of drugs shall be conducted in any personal residence.

(f) [~~(e)~~] Drug labeling.

(1) If a person, firm or corporation labels a drug, the label shall meet the requirements of the Texas Health and Safety Code, Chapter 431.

(2) The department adopts by reference and will enforce Title 21, Code of Federal Regulations, Part 201, §§201.1-201.317, titled "Labeling."

(3) Copies are indexed and filed in the office of the Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756 and are available for inspection during normal working hours.

(g) [~~(f)~~] Drugs general, drug advertising, specific requirements for special drugs, official names and established names, and labeling and packaging requirements for controlled substances.

(1) The department adopts by reference and will enforce Title 21, Code of Federal Regulations:

(A) Part 200, §§200.5 - 200.200, titled "General";

(B) Part 202, §202.1, titled "Prescription Drug Advertising";

(C) Part 250, §§250.10 - 250.250, titled "Special Requirements For Specific Human Drugs";

(D) Part 299, §§299.3 - 299.5, titled "Drugs; Official Names and Established Names"; and

(E) Part 1302, §§1302.01 - 1302.08, titled "Labeling and Packaging Requirements For Controlled Substances."

(2) Copies are indexed and filed in the office of the Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756 and are available for inspection during normal working hours.

(h) [~~(g)~~] Current good manufacturing practices in manufacturing, processing, packing, or holding of blood and blood components.

(1) The department adopts by reference and will enforce Title 21, Code of Federal Regulations, Part 606, §§606.3 - 606.170, titled "Current Good Manufacturing Practice For Blood and Blood Components."

(2) Copies are indexed and filed in the office of the Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756 and are available for inspection during normal working hours.

(i) [~~(h)~~] General biological products standards, standards for bacterial products, standards for viral vaccines, standards for human blood and blood products, standards for diagnostic substances for dermal test, standards for diagnostic substances for laboratory test, and standards for miscellaneous biological products.

(1) The department adopts by reference Title 21, Code of Federal Regulations:

(A) Part 600, §§600.3 - 600.15, titled "Biological Products: General";

(B) Part 610, §§610.1 - 610.65, titled "General Biological Products Standards";

(C) Part 620, §§620.1 - 620.48, titled "Additional Standards For Bacterial Products";

(D) Part 630, §§630.1 - 630.75, titled "Additional Standards For Viral Vaccines";

(E) Part 640, §§640.1 - 640.114, titled "Additional Standards for Human Blood and Blood Products";

(F) Part 650, §§650.1 - 650.15, titled "Additional Standards for Diagnostic Substances for Dermal Test";

(G) Part 660, §§660.1 - 660.105, titled "Additional Standards for Diagnostic Substances for Laboratory Test"; and

(H) Part 680, §§680.1 - 680.26, titled "Additional Standards for Miscellaneous Products."

(2) Copies are indexed and filed in the office of the Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756 and are available for inspection during normal working hours.

(j) [~~(i)~~] Labeling and standard requirements for the manufacturing or processing of animal biological products.

(1) The department adopts by reference and will enforce Title 9, Code of Federal Regulations, Part 113, §§113.1 - 113.455, titled "Standard Requirements."

(2) Copies are indexed and filed in the office of the Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756 and are available for inspection during normal working hours.

(k) [~~(j)~~] Cosmetic labeling for a person, firm, or corporation that labels a cosmetic.

(1) The department adopts by reference and will enforce Title 21, Code of Federal Regulations, Part 701, §§701.1 - 701.30, titled "Cosmetic Labeling."

(2) Copies are indexed and filed in the office of the Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756 and are available for inspection during normal working hours.

(l) [~~(k)~~] Cosmetics general and cosmetic product warning statement.

(1) The department adopts by reference and will enforce Title 21, Code of Federal Regulations, Part 700, §§700.3-700.25, titled "General"; and Part 740, §§740.1-740.18, titled "Cosmetic Product Warning Statements."

(2) Copies are indexed and filed in the office of the Drugs and Medical Devices Division, Texas Department of Health, 1100

West 49th Street, Austin, Texas 78756 and are available for inspection during normal working hours.

(m) [~~(l)~~] Current good manufacturing practices in manufacturing, processing, packing, or holding of medicated feeds and Type A medicated articles.

(1) The department adopts by reference and will enforce Title 21, Code of Federal Regulations:

(A) Part 225, §§225.1 - 225.202, titled "Current Good Manufacturing Practice For Medicated Feeds"; and

(B) Part 226, §§226.1 - 226.115, titled "Current Good Manufacturing Practices For Type A medicated articles."

(2) Copies are indexed and filed in the office of the Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756 and are available for inspection during normal working hours.

(n) [~~(m)~~] Over-the-Counter (OTC) for human use.

(1) The department adopts by reference and will enforce Title 21, Code of Federal Regulations:

(A) Part 300, titled "General";

(B) Part 310, titled "New Drugs";

(C) Part 312, titled "Investigational New Drug Application";

(D) Part 314, titled "Applications for FDA Approval to Market a New Drug or an Antibiotic Drug";

(E) Part 316, titled "Orphan Drugs";

(F) Part 320, titled "Bioavailability and Bioequivalence Requirements";

(G) Part 329, titled "Habit-forming Drugs";

(H) Part 330, titled "Over-the-Counter (OTC) Human Drugs Which are Generally Recognized as Safe and Effective and Not Misbranded";

(I) Part 331, titled "Antacid Products for Over-the-Counter (OTC) Human Use";

(J) Part 332, titled "Antiflatulent Products for Over-the-Counter (OTC) Human Use";

(K) Part 333, titled "Topical Antimicrobial Drug Products for Over-the-Counter (OTC) Human Use";

(L) Part 336, titled "Antiemetic Drug Products for Over-the-Counter (OTC) Human Use";

(M) Part 338, titled "Nighttime Sleep-aid Drug Products for Over-the-Counter (OTC) Human Use";

(N) Part 340, titled "Stimulant Drug Products for Over-the-Counter (OTC) Human Use";

(O) Part 341, titled "Cold, Cough, Allergy, Bronchodilator, and Anti-asthmatic Drug Products for Over-the-Counter (OTC) Human Use";

(P) Part 344, titled "Topical OTIC Drug Products for Over-the- Counter (OTC) Human Use";

(Q) Part 346, titled "Anorectal Drug Products for Over-the-Counter (OTC) Human Use";

(R) Part 348, titled "External Analgesic Drug Products for Over-the-Counter (OTC) Human Use";

(S) Part 349, titled "Ophthalmic Drug Products for Over-the-Counter (OTC) Human Use";

(T) Part 357, titled "Miscellaneous Internal Drug Products for Over-the-Counter (OTC) Human Use";

(U) Part 358, titled "Miscellaneous External Drug Products for Over-the-Counter (OTC) Human Use";

(V) Part 361, titled "Prescription Drugs for Human Use Generally Recognized as Safe and Effective and Not Misbranded: Drugs Used In Research"; and

(W) Part 369, titled "Interpretative Statements Re: Warnings on Drugs and Devices for Over-the-Counter Sales."

(2) A manufacturer, repacker, own label distributor, jobber, or wholesaler or any person distributing over-the-counter drugs shall not market, promote or advertise the drugs in a manner inconsistent with or broader than that permitted by the over-the-counter tentative final monographs or final monographs in Title 21, Code of Federal Regulations, Parts 300-369.

(3) Copies are indexed and filed in the office of the Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756 and are available for inspection during normal working hours.

(o) [~~(n)~~] Packaging, labeling, tests, and methods of assays for human antibiotic drugs.

(1) The department adopts by reference and will enforce Title 21, Code of Federal Regulations:

(A) Part 429, titled "Drugs Composed Wholly or Partly of Insulin";

(B) Part 430, titled "Antibiotic Drugs; General";

(C) Part 431, titled "Certification of Antibiotic Drugs";

(D) Part 432, titled "Packaging and Labeling of Antibiotic Drugs";

(E) Part 433, titled "Exemptions from Antibiotic Certification and Labeling Requirements";

(F) Part 436, titled "Tests and Methods of Assay of Antibiotic and Antibiotic-containing Drugs";

(G) Part 440, titled "Penicillin Antibiotic Drugs";

(H) Part 441, titled "Penem Antibiotic Drugs";

(I) Part 442, titled "Cepha Antibiotic Drugs";

(J) Part 444, titled "Oligosaccharide Antibiotic Drugs";

(K) Part 446, titled "Tetracycline Antibiotic Drugs";

(L) Part 448, titled "Peptide Antibiotic Drugs";

(M) Part 449, titled "Antifungal Antibiotic Drugs";

(N) Part 450, titled "Antitumor Antibiotic Drugs";

(O) Part 452, titled "Macrolide Antibiotic Drugs";

(P) Part 453, titled "Lincomycin Antibiotic Drugs";

(Q) Part 455, titled "Certain Other Antibiotic Drugs"; and

(R) Part 460, titled "Antibiotic Drugs Intended for Use in Laboratory Diagnosis of Disease."

(2) Copies are indexed and filed in the office of the Drugs and Medical Devices Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756 and are available for inspection during normal working hours.

§229.254. Refusal, Revocation, or Suspension of License.

(a) (No change.)

(b) Hearings. Any hearings for the refusal, revocation, or suspension of a license are governed by the department's formal hearing procedures in Chapter 1 of this title (relating to Texas Board of Health) and the Government Code, Chapter 2001 [~~the Administrative Procedure and Texas Register Act, Texas Civil Statutes, Article 6252-13a~~].

This 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 November 20,1998.

TRD-9817814
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 458–7236

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Chapter 265. General Sanitation

Subchapter J. Standards for Public Pools and Spas

25 TAC §§265.181–265.207

The Texas Department of Health (department) proposes new §§265.181 - 265.207, concerning standards for new and existing public swimming pools and spas.

The proposed new rules implement Minimum Standards of Sanitation and Health Protection Measures, Texas Health and Safety Code, Chapter 341, §341.064(a) and (g), which requires public swimming pools and spas to be maintained in a sanitary condition and construction and appliances of public swimming pools to be such as to reduce to a practical minimum the possibility of drowning or injury to bathers. The new sections will update the requirements concerning public swimming pools in the state and address general provisions; plans and permits; general and structural design; dimensional design; deck and deck equipment; circulation systems; filters; pumps and motors; return inlets and suction outlets; surface skimmer systems; electrical requirements; heaters; water supply; waste water disposal; disinfectant equipment; safety; dressing facilities for Class A and B public pools; fencing; operation and management; chemical operating parameters; and spa construction, operation and maintenance.

Mr. Elías Briseno, R. S. Director, General Sanitation Division, has determined that, for the first five years that the sections are in effect, there will be fiscal implications to state and local government as a result of enforcing or administering the sections as proposed. The effect on state government and the estimated impact on local government will be an increased cost per inspection of less than $40 due to the expanded, comprehensive provisions of the new sections. No additional full time equivalents or revenue is expected as a result of these new rules.

Mr. Briseno, has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the sections will be the maintenance of public swimming pools and spas in a sanitary condition and the construction of public swimming pools and spas to reduce to a practical minimum the possibility of drowning or injury to bathers. The anticipated economic cost to small businesses and persons who may be required to comply with the new sections as proposed is a one time cost ranging from $100 to $6,000 depending on the size of the spa or pool and an estimated yearly cost ranging from $0 to $1,000. There will be no impact on local employment.

Comments on the proposal may be sent to Elías Briseno, R.S., Director, General Sanitation Division, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3199, (512) 834-6635. Comments will be accepted for 30 days following publication of these rules in the *Texas Register*.

The new sections are proposed under the Health and Safety Code, §§341.002 and 341.064, which provide the Board of Health (board) with authority to adopt rules concerning public swimming pool and spa construction and safety; and Health and Safety Code, §12.001, which provides the board with authority to adopt rules to implement every duty imposed by law on the board, the department and the commissioner of health.

The new sections affect the Health and Safety Code, Chapter 341, and the Health and Safety Code, Chapter 12.

§265.181. General Provisions.

(a) Scope and purpose of rules. These rules address minimum standards for design and construction of pools and spas. These rules also establish minimum operating standards for pools and spas to assure proper filtration, chemical, and general maintenance of water and safety to users. These standards are based in part on the American National Standards Institute and the National Spa and Pool Institute "Standards for Public Swimming Pools" (ANSI/NSPI-1, 1991) and the American National Standards Institute and National Spa and Pool Institute "Standards for Public Spas" (ANSI/NSPI-2, 1992). These rules are in addition to any municipal or federal laws applicable to pools and spas. These rules implement Texas Health and Safety Code, Title 5, Subtitle A, Chapter 341.064(g) and are considered good public health engineering and safety practices.

(b) Application of rules.

(1) The terms "new pool" or "new spa" designate a pool or spa constructed on or after October 1, 1999. An "existing pool" or "existing spa" is a pool or spa constructed prior to October 1, 1999. A pool or spa is considered "constructed" on the date that a building permit for construction of the pool or spa is issued by a municipality or, if no building permit is required, the pool/spa operator/owner must produce adequate written documentation of the date that excavation or electrical service to the pool or spa begins, whichever is first.

(2) The following pools and spas are exempt from these rules:

(A) a pool or spa serving only one or two dwellings (a single or duplex residential pool), regardless of whether the pool/spa is permanently or temporarily installed in the ground, on the ground or above the ground;

(B) a pool or spa operated for therapeutic purposes such as medical treatment or physical therapy. The Texas Health and Safety Code, §341.064 applies to pools and spas used for therapeutic purposes; and

(C) Class E pools, except those discussed in §265.204(a) of this title (relating to Water Quality) apply to both new and existing Class E pools.

(3) Each section of the rules states the extent to which the rule applies to new or existing pools, spas, or facilities.

(4) The standards for pool or spa design and construction (as contrasted to operation) that apply to new pools or new spas constructed on or after October 1, 1999, are contained in these rules. The standards for pool or spas design and construction that apply to pools and spas existing prior to October 1, 1999 are those standards that were in existence at the time the pool or spa was constructed, including then applicable local, state and federal laws except as otherwise stated in these rules. Except for those items specifically stated in these rules which existing pools shall adhere to, existing pools and spas may also choose to follow the rules in these sections instead of the rules in existence at the time the pool or spa was constructed.

(5) The standards for pool or spa operation (as contrasted to design construction) that apply to new pools or spas are contained in these rules. The standards for pool or spa operation that apply to existing pools or spas are the provisions which specifically state that they are applicable to existing pools or spas.

(6) The standards for spa design, construction, and operation that apply to new and existing spas, are contained or referenced in §265.205 of this title (relating to Spa Construction, Operation, and Maintenance).

(7) The standards contained in these rules may be met notwithstanding minor variations in equipment, materials, or design if:

(A) the variation provides the quality, strength and durability equal to or greater than the standards contained in these rules; and

(B) the operation, maintenance, safety, and sanitation of the pool or spa is not adversely affected by the variation.

(8) Where a local regulatory authority has jurisdiction for the regulation of pools and spas, such authorities may, as statutorily allowed, adopt standards that vary from these standards; however, such standards shall be the same as, equivalent to, or more stringent than these standards and shall be in accordance with good public health engineering and safety practices.

(c) Subsequent codes and standards. Whenever these rules require compliance with a standard or code promulgated by a national organization or another governmental agency, a pool or spa owner's compliance with a more recent code or standard which is more strict on a particular subject than what is required by these rules shall be deemed as compliance with these rules on that subject.

§265.182. Definitions.

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

(1) Above ground/on ground pool or spa - A removable pool or spa of any shape that is located on the surrounding earth or a pool or spa package located in an excavation below the ground level which may be readily disassembled or stored and reassembled to its original integrity.

(2) Actual water level - The specific level of the water observed at any time. This level will vary with specific conditions such as rainfall or number of users (see definition number (43) "Design water level" and number (84) "Operating water level range").

(3) Algae - Microscopic plant-like organisms that contain chlorophyll and include green, blue-green or black brown, and yellow-green (mustard) algae.

(4) Algaecide - A natural or synthetic substance used for killing, destroying, or controlling algae.

(5) Alkalinity - The amount of bicarbonate, carbonate or hydroxide compounds present in water solution (see definition number (132) "Total alkalinity").

(6) ACI - American Concrete Institute, P. O. Box 9094, Farmington Hills, MI 48333, telephone (248) 848-3800.

(7) ANSI - American National Standards Institute, 11 West 42nd Street, New York, NY 10036, telephone (212) 642-4900.

(8) ANSI/NSPI-1, 1991 - American National Standards Institute and National Spa and Pool Institute "Standards for Public Swimming Pools" adopted in 1991.

(9) ANSI/NSPI-2, 1992 - American National Standards Institute and National Spa and Pool Institute "Standards for Public Spas" adopted in 1992.

(10) ARC - American Red Cross, 8111 Gatehouse Road, Falls Church, VA 22042, telephone (703) 206-7090.

(11) ASHRAE - American Society of Heating, Refrigeration and Air-Conditioning Engineers, Inc., 1791 Tullie Circle NE, Atlanta, GA 30329-2305, telephone (800) 527-4723.

(12) ASME - American Society of Mechanical Engineers, 346 East 47th Street, New York, NY 10017, telephone (212) 705-7800.

(13) ASTM - American Society of Testing Materials, 100 Barr Harbor Drive, West Conshohocken, PA 19428-2959, telephone (215) 299-5400.

(14) Available chlorine - Rating of chlorine containing products for total oxidizing power (see definition number (56) "Free available chlorine").

(15) AWWA standards - American Water Works Association, 6666 West Quincy Avenue, Denver, CO 80235, telephone (303) 794-7711.

(16) Backwash - The process of cleansing the filter medium and/or elements by the reverse flow of water through the filter.

(17) Bacteria - Single-celled microorganisms of various forms, some of which cause infections or disease.

(18) Beginner's areas - Water areas in pools which are three feet or less in water depth.

(19) Bonded - The permanent joining of metallic parts to form an electrically conductive path that will ensure electrical continuity and the capacity to conduct safely any current likely to be imposed (NEC definition, 1996).

(20) Breakpoint - The practice of adding a sufficient amount of chlorinating compound to water to destroy chlorine demand compounds and any combined chlorine which is present. Generally, the level of chlorine added is ten times the level of

combined chlorine in the water (see definition number (124) for "Superchlorination").

(21) Breakpoint chlorination - The addition of a sufficient amount of chlorine to water to destroy the chlorine demand compounds and any combined chlorine which is present (see definition number (124) "Superchlorination").

(22) Bromine - A chemical element (Br2) that exists as a liquid in its elemental form or as part of a chemical compound which is a biocidal agent used to disinfect pool or spa water.

(23) Catch pools - Bodies of water located at the termination of a manufactured water slide attraction provided for the specific purpose of terminating the slide action and providing a means for exit to a deck or walkway area.

(24) Chemical feeder - A mechanical device for applying chemicals to pool or spa water.

(25) Chloramine - A compound formed when chlorine combines with nitrogen or ammonia which when found in significant amounts in a pool or spa, may cause eye and skin irritation and may have an objectionable odor.

(26) Chlorinator - A device to apply or to deliver a chlorine disinfectant to water at a controlled rate.

(27) Chlorine - A chemical element (Cl2) that exists as a gas in its elemental form or as a part of chemical compound which is an oxidant. Chlorine is a biocidal agent used to disinfect pool or spa water.

(28) Chlorine demand compounds - Organic matter, chloramines and other such compounds that chlorine reacts with and which depletes chlorine.

(29) Chlorine Institute - Chlorine Institute, 2001 L Street North West, Suite 506, Washington, DC 20036-4919, telephone (202)775-2790.

(30) Circulation equipment - The mechanical components which are a part of a circulation system on a pool or spa. Circulation equipment may include but is not limited to, categories of pumps; hair and lint strainers; filters; valves; gauges; meters; heaters; surface skimmers; inlet/outlet fittings; and chemical feeding devices. The components have separate functions, but when connected to each other by piping, perform as a coordinated system for purposes of maintaining pool or spa water in a clear, sanitary, and desirable condition for use.

(31) Circulation system - An arrangement of mechanical equipment or components, connected by piping to a pool or spa in a closed circuit. The function of a circulation system is to direct water from the pool or spa, causing it to flow through the various system components for purposes of clarifying, heating, purifying, and returning the water back to the original body of water.

(32) Clarifier (also called Coagulant or Flocculent) - A chemical that coagulates and neutralizes suspended particles in water. There are two types of clarifiers: inorganic salts of aluminum or iron, and water-soluble organic polyelectrolyte polymers.

(33) Combined chlorine - The portion of the total chlorine existing in water in chemical combination with ammonia, nitrogen, and/or organic compounds, mostly comprised of chloramines. Combined chlorine plus free chlorine equals total chlorine. Combined chlorine is calculated from the results of measuring the free and total chlorine with a test kit.

(34) Construction date/date of construction - the date that a building permit for construction of the pool or spa is issued by a municipality or, if no building permit is required, written documentation of the date that excavation or electrical service to the pool or spa begins, whichever is first.

(35) Coping - The cap on the pool or spa wall that provides a finishing edge around the pool or spa. The coping can be formed, cast in place or pre-cast, or pre-fabricated from metal or plastic materials.

(36) CPSC - United States Consumer Product Safety Commission, Washington, D.C. 20207, telephone (301) 504-0400.

(37) Cross-connection - A physical connection between the potable water system and a non-potable source such as a pool or spa, or a physical connection between a pool or spa and the sanitary sewer or wastewater disposal system.

(38) Cyanuric acid -

(A) Any one of a number of chemical compounds also called stabilizers.

(B) A chemical that helps reduce the excess loss of chlorine in water due to the ultraviolet rays of the sun.

(39) Decks - Those areas immediately adjacent to or attached to a pool or spa that are specifically constructed or installed for sitting, standing, or walking.

(40) Deep areas - Water levels in pools which are five feet or deeper.

(41) Department - The Texas Department of Health, 1100 West 49th Street, Austin, TX 78756, telephone (512) 834-6635.

(42) Depth (pool or spa depth) - The vertical distance measured at three feet from the pool or spa wall from the bottom of the pool or spa to the design water level.

(43) Design water level - The design water level defined in one of the following ways:

(A) Skimmer system - The design water level shall be at the midpoint of the operating range of the skimmers.

(B) Overflow system - The design waterline shall be at the top of the overflow rim of the gutter system.

(44) Disinfectant - Energy or chemicals used to kill undesirable or pathogenic (disease-causing) organisms, and having a measurable residual at a level adequate to make the desired kill.

(45) Diving board - A recreational mechanism for entering a pool, consisting of semirigid board that derives its elasticity through the use of a fulcrum mounted below the board.

(46) Diving equipment, competition - Competitive diving boards and fulcrum-setting diving stands intended to provide adjustment for competitive diving.

(47) Dwelling or rental dwelling - One or more rooms rented to one or more persons where a Class C or Class D pool or spa is located.

(48) Effective filter area - Total surface area through which designed flow rate will be maintained during filtration.

(49) Effluent - The water that flows out of a filter, pump, or other device.

(50) Facility(ies) - The pool or spa, restrooms, dressing rooms, equipment rooms, deck, enclosure, and other appurtenances directly serving the pool or spa area.

(51) Feet of head - A basis for indicating the resistance in a hydraulic system, equivalent to the height of a column of water that would cause the same resistance (100 feet of head equals 43 pounds per square inch). The dynamic head is the sum of all resistances in a complete operating system.

(52) Filter - A device that removes undissolved particles from water by recirculating the water through a porous substance (a filter medium or element) such as a:

(A) medium filter - A filter that utilizes a medium, for example, sand, gravel or other medium that under normal use will not have to be replaced frequently.

(B) diatomaceous earth filter - A filter that utilizes a thin coating of diatomaceous earth over a porous fabric as its filter medium.

(C) cartridge filter - A filter that utilizes a porous element that acts as a filter medium in cartridge.

(D) vacuum filter - A filter that operates under a vacuum from the suction of a pump.

(53) Filter element - A device within a filter tank designed to entrap solids and conduct water to a manifold, collection header, pipe, or similar conduit and return it to the pool or spa. A filter element usually consists of a septum and septum support, or a cartridge.

(54) Filter medium - A finely graded material (for example, sand, diatomaceous earth, polyester fabric, anthracite) that removes filterable particles from the water.

(55) Floor - The interior bottom surface of a pool or spa.

(56) Free available chlorine - That portion of the total chlorine remaining in chlorinated water that is not combined with ammonia or nitrogen compounds and which will react chemically with undesirable or pathogenic organisms. Combined chlorine plus free chlorine equals total chlorine.

(57) Grab rail - Tubular rails used to enter or leave a pool or spa, usually made of stainless steel or chrome-plated brass (see definition number (58) "Handhold/handrail").

(58) Handhold/handrail - A device that is intended to be gripped by a user for the purpose of resting and/or steadying a person and that is typically located within or without the pool or spa or as part of a set of steps or deck-installed equipment.

(59) Hardness of water - The amount of calcium and magnesium dissolved in water measured by a chemical test kit and expressed as parts per million (ppm) of equivalent calcium carbonate.

(60) Heat exchanger - A device with coils, tubes or plates that absorbs heat from any fluid, liquid or air, and transfers that heat to another fluid without intermixing the fluids.

(61) Heat pump - A refrigeration compressor, usually electrically driven, that is operated in reverse. To obtain heat, the evaporator side (cooling coil) is exposed to warm water, air or ground. The evaporator coil absorbs the heat from this source and transfers it to the condenser coil where it discharges the heat to the pool or spa to be heated.

(62) Hot tub - A spa constructed of wood with sides and bottoms formed separately and joined together by pressure from surrounding hoops, bands, or rods; distinct from spa units formed of plastic, concrete, metal, or other materials.

(63) IESNA - Illuminating Engineering Society of North America, 140 Wall Street, Floor 17, New York, NY 10005-4001, telephone (212) 248-5000.

(64) Influent - The water entering a filter or other device.

(65) Interactive play attractions - Manufactured devices using sprayed, jetted, or other water sources contacting the users that do not incorporate standing or captured water as part of the user activity area.

(66) Jump board - A recreational mechanism for entering a pool that has a coil spring or comparable device located beneath the board which is activated by the force exerted in jumping on the board.

(67) Labeled - Equipment or material to which has been attached a label, symbol, or other identifying mark of an organization that is acceptable to the authority having jurisdiction and concerned with product evaluation that maintains periodic inspection of production of labeled equipment or materials and by whose labeling the manufacturer indicates compliance with appropriate standards or performance in a specified manner.

(68) Ladders -

(A) Deck ladder - A ladder ascending from ground level outside the pool or spa to the level of a deck.

(B) In-pool or in-spa ladder - A ladder located in a pool or spa to provide ingress and egress from the deck.

(69) Leisure rivers - Manufactured streams of near constant depth in which the water is moved by pumps or other means of propulsion to provide a river-like flow which transports users over a defined path which may include water features and play devices.

(70) Listed - Equipment or materials included in a list published by an organization acceptable to the authority having jurisdiction and concerned with product evaluation, that maintains periodic inspection of production of listed equipment or materials, and whose listing states either that the equipment or material meets appropriate designated standards or has been tested and found suitable for use in a specified manner.

(71) Local regulatory authority - The local governmental entity having legal authority over construction, operation, enforcement and maintenance of pools or spas.

(72) May - An advisory statement or a good practice which exceeds ordinary care and is not legally required (see definition number (103) "recommended").

(73) MSHA - Mine Safety Health Administration, 4015 Wilson Boulevard, Arlington, Va. 22203, telephone (703) 235-1452.

(74) National Recreation and Park Association - National Recreation and Park Association, 650 West Higgins Road, Hoffman Estates, IL 60195-3402, telephone (708) 843-7529.

(75) National Swimming Pool Foundation - National Swimming Pool Foundation, 10803 Gulfdale, Suite 300, San Antonio, Texas, 78216, telephone (512) 525-1227.

(76) New pool and/or spa construction - The activity of building or installing a pool and/or spa structure, and its component parts, where no such structure has previously existed or where previously existing pool or spa structures have been removed.

(77) NEC - National Electric Code, distributed by NFPA (see definition number (79) "NFPA").

(78) NEMA - National Electric Manufacturers Association, 2101 L Street, NW, Washington, D.C. 20037, telephone (202) 457-8400.

(79) NFPA - National Fire Protection Association, Batterymarch Park, Quincy, MA 02269, telephone (617) 770-0700 or (800) 344-3555.

(80) NSFI - NSF International, (National Sanitation Foundation International), 3475 Plymouth Road, P. O. Box 130140, Ann Arbor, MI 48113-0140, telephone (313) 769-8010.

(81) NSPF - National Swimming Pool Foundation, 10803 Gulfdale, Suite 300, San Antonio, TX 78216, telephone (210) 525-1227.

(82) NSPI - National Swimming Pool Institute, 2111 Eisenhower Avenue, Alexandria, VA 22314, telephone (703) 838-0083.

(83) Offset ledge - a horizontal shelf or ledge projecting toward the interior of a pool from the vertical wall that provides a safe footing for a pool user to stand on in deep areas of the pool.

(84) Operating water level range - The operating water level defined in one of the following ways:

(A) Skimmer system - Two inches above to two inches below the midpoint of the operating range of the device, or manufacturer's maximum stated operating range.

(B) Overflow (gutter) system - The manufacturer's maximum stated operating range above the design water level.

(85) Organic matter - Perspiration, urine, fecal matter, saliva, suntan oil, cosmetics, lotions, dead skin, and similar debris introduced to water by users and the environment.

(86) ORP - The oxidation reduction potential level produced by strong oxidizing (sanitizing) agents in a water solution. Oxidation level is measured in millivolts by an ORP meter.

(87) OSHA - United States Department of Labor, Occupational Safety and Health Administration, 200 Constitution Avenue, Washington, D.C. 20210, telephone (800)321-6742.

(88) Overflow system - Overflows, surface skimmers, and surface water collection systems of various design and manufacture for removal of pool or spa surface water.

(89) Owner/operator - Fee title holder of the property upon which the pool or spa is located, and/or an occupant of the property who is exercising management or control over the pool or spa.

(90) Parts per million (PPM) - A unit of measurement in chemical testing which indicates the parts by weight in relation to one million parts by weight of water. For the purposes of pool or spa water chemistry, ppm is considered to be essentially identical to the term milligrams per liter (mg/L).

(91) pH - A value expressing the relative acidic or basic tendencies of a substance, such as water, as indicated by the hydrogen ion concentration. The pH is expressed as a number on the scale of zero to 14, zero being most acidic, one to seven being acidic, seven being neutral, seven to 14 being basic and 14 being most basic.

(92) Plaster - A type of interior finish (a mixture of white cement and aggregate), which is white or lightly tinted which is applied to a concrete pool or spa.

(93) Plummet - A line perpendicular to the water surface and extending vertically to a point located at the front end of the diving board and at the center line directly in front of the diving board.

(94) Pool - Any man-made permanently installed or non-portable structure, basin, chamber, or tank containing an artificial body of water for swimming, diving, or recreational bathing and having a depth of at least 18 inches at any point, a surface area exceeding 250 square feet or a volume over 3250 gallons, other than a single or double family (duplex) residential pool, which is operated by an owner, lessee, operator, licensee or concessionaire, regardless of whether a fee is charged for use. The pool may be either publicly or privately owned. Pools may be diving or nondiving. If diving, they shall be further classified into types indicating the suitability for use with diving equipment. The term does not include a decorative fountain which is not used as a wading or swimming pool. References within the standard to various types of pools are defined by the following categories:

(A) Class A pool - Any pool intended for use, with or without a fee, for accredited competitive aquatic events such as Federation Internationale de Natation Amateur (FINA), United States Swimming, United States Diving, National Collegiate Athletic Association (NCAA), National Federation of State High School Associations (NFSHSA), events. A "Class A" pool may also be used for recreation.

(B) Class B pool - Any pool intended for public recreational use and open to the general public with or without a fee.

(C) Class C pool - Any pool operated for and in conjunction with lodgings such as hotels, motels, apartments, condominiums, mobile homes parks, property owners associations, etc. The use of such a pool would be open to occupants and their guests but not open to the general public. Also a pool which is open to membership and member guests but not to the general public.

(D) Class D pool - a splasher pool with a maximum water depth of 36 inches at any point or wading pool with a maximum depth of two feet at any point.

(E) Class E pool - A special purpose pool such as wave or surface action pools, catch pools, leisure rivers, interactive play attractions, vortex pools, and other such pools used primarily for aquatic attractions. Also see §265.181(b)(2)(C) of this title (relating to General Provisions) and §265.204(a) of this title (relating to Water Quality) which applies to Class E pools.

(F) Type VI pool - A pool suitable for the installation of diving equipment up to 2/3 meter above the water (see ANSI/NSPI-1, 1991).

(G) Type VII pool - A pool suitable for the installation of diving equipment up to 3/4 of a meter above the water (see ANSI/NSPI-1, 1991).

(H) Type VIII pool - A pool suitable for the installation of diving equipment up to one meter above the water (see ANSI/NSPI-1, 1991).

(I) Type IX pool - A pool suitable for the installation of diving equipment up to three meters over the water (see ANSI/NSPI-1, 1991).

(95) Pool or spa yard - An area that contains a pool or spa.

(96) Pool or spa yard enclosure - A fence, wall, or combination of fences, walls, gates, windows, or doors that completely surround a pool or spa.

(97) Potable water - Water which is bacteriologically safe and otherwise suitable for drinking and is regulated by the Texas Natural Resource Conservation Commission or another regulatory authority as a drinking water system.

(98) Precipitate - A solid material which is forced out of a solution by some chemical reaction and which settles out or remains as a haze in suspension (turbidity).

(99) Pressure differential - The difference in pressure between two parts of a hydraulic system, such as the influent and effluent of a filter.

(100) PSI - Pounds per square inch.

(101) Pump - A mechanical device, usually powered by an electric motor, which causes hydraulic flow and pressure for the purpose of filtration, heating, and circulation of pool and spa water.

(102) Rate of flow - The quantity of water flowing past a designated point within a specified time, such as the number of gallons flowing in one minute (gpm).

(103) Recommended - An advisory statement or a good practice which exceeds ordinary care and is not legally required (see definition number (72) "may").

(104) Regulatory authority - The federal, state, or local governmental entity having legal authority over construction operation, enforcement, and maintenance of pools or spas and associated facilities.

(105) Removable - Capable of being disassembled with the use of only simple tools such as a screwdriver, pliers, or wrench.

(106) Residential pool or spa - A pool or spa that is located on private property under the control of the property owner and intended for use by not more than three resident families and their guests.

(107) Return inlet or inlet - The aperture or fitting through which the water under positive pressure returns into a pool or spa.

(108) Ring buoy - A ring-shaped floating buoy capable of supporting a user.

(109) Rope and float line - A continuous line not less than 1/4 inch in diameter, which is supported by buoys and attached to opposite sides or ends of a pool to separate the deep and shallow ends or mark exercise or racing lanes.

(110) Scale - The precipitate that forms on surfaces in contact with water when the calcium hardness, pH, or total alkalinity levels are too high.

(111) Self-closing and self-latching device - A device that causes a gate to automatically fully close and latch without human or electrical power.

(112) Separation tank - A tank used in conjunction with a filter to facilitate the separation of filtrate material for disposal.

(113) Service animal - A guide dog, signal dog, or other animal trained to do work or perform tasks for the benefit of an individual with a disability, including but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, or providing minimal protection or rescue work, such as pulling a wheelchair, or fetching dropped items.

(114) Shall - Mandatory provisions of these regulations.

(115) Shallow areas - Pool water areas which are less than five feet deep.

(116) Shock treatment - The practice of adding significant amounts of an oxidizing chemical to water to destroy ammonia and nitrogenous and organic contaminants in water.

(117) Skimmer weir - Part of a skimmer which adjusts automatically to small changes in water level to assure a continuous flow of water to the skimmer.

(118) Slip-resistant - A surface that has been treated or constructed to significantly reduce the chance of a user slipping.

(119) Spa - A constructed permanent or portable structure that is two feet or more in depth and that has a surface area of 250 square feet or less or a volume of 3250 gallons or less which is intended to be used for bathing or other recreational uses and is not drained and refilled after each use. It may include, but is not limited to, hydrojet circulation, hot water, cold water, mineral baths, air induction bubbles, or any combination thereof. Industry terminology for a spa includes, but is not limited to, "hydrotherapy pool," "whirlpool," "hot spa," "hot tub," etc.

(120) Splasher pool - A Class D pool with a maximum water depth of 36 inches at any point.

(121) Stabilizer - A chemical that helps reduce the excess loss of chlorine in water due to the ultraviolet rays of the sun (see definition number (38) "Cyanuric acid").

(122) Steps, recessed steps, ladders, and recessed treads - Means of pool and spa ingress and egress that are intended to be used separately or used in conjunction with one another.

(A) Steps - A riser/tread or series of risers/treads extending down from the deck and terminating at the pool or spa floor. Included are recessed steps that have the risers located outside of user areas.

(B) Ladders - A series of vertically separated treads or rungs connected by vertical rail members or independently fastened to an adjacent vertical pool or spa wall (see definition number (68)"Ladders" for particular ladder types).

(C) Recessed Treads - A series of vertically spaced cavities in the pool or spa wall creating tread areas for stepholes.

(123) Suction outlet or outlet - The aperture or fitting through which the water under negative pressure is drawn from the pool or spa.

(124) Superchlorination - The practice of adding a sufficient amount of chlorinating compound to water to destroy chlorine demand compounds and any combined chlorine which is present. Generally, the level of chlorine added is ten times the level of combined chlorine in the water (see also definition number (21) "Breakpoint chlorination").

(125) Surface skimmer system/Through wall skimmer - A device installed in the wall of an inground pool or spa, or above ground/on ground pool or spa that permits the continuous removal of floating debris and surface water to the filters.

(126) Swimouts - A recessed area outside of the general perimeter of the pool designed to facilitate the entry and exit of swimmers from a pool.

(127) TDLR - Texas Department of Licensing and Regulation, Boiler Division, P. O. Box 12157, Austin, TX 78711, telephone (512) 463-2904.

(128) TDS - Total dissolved solids. A measure of the total amount of dissolved matter in water (for example, calcium, magnesium, carbonates, bicarbonates, metallic compounds).

(129) Ten/twenty rule - The ability of a lifeguard to identify a trauma or distress situation within ten seconds of its initiation and be physically at the victim's side and performing a rescue or other care as appropriate within 20 seconds after the initial identification of the victim.

(130) Test kit - A device for monitor a specific chemical level in pool or spa water.

(131) TNRCC - Texas Natural Resources Conservation Commission, P. O. Box 13087, Austin, TX 78711-3087, telephone (512) 239-1000.

(132) Total alkalinity - A measure of the ability or capacity of water to resist change in pH; also known as the buffering capacity of water. Measured with a test kit and expressed as ppm; consists mainly of carbonates, bicarbonates and hydroxides.

(133) Total chlorine - The sum of both the free available and combined chlorine.

(134) Toxic - A substance that has an adverse physiological effect on human beings or other living organisms.

(135) Turbidity - Cloudy condition of water due to the presence of extremely fine particulate materials in suspension that interferes with the passage of light.

(136) Turnover rate - The period of time (usually in hours) required to circulate a volume of water equal to the pool or spa capacity.

(137) UFC - Uniform Fire Code, published by the International Fire Code Institute, 5360 Workman Mill Road, Whittier, CA 90601-2298, telephone (562) 699-0124.

(138) Underwater light - A fixture designed to illuminate a pool or spa from beneath the water surface. An underwater light includes either of the following:

(A) wet niche light - a watertight and water-cooled light unit placed in a submerged, wet niche in the pool or spa wall and accessible only from the pool or spa; or

(B) dry niche light - a light unit placed behind a watertight window in the pool or spa wall.

(139) UL - Underwriters Laboratory, 333 Pfingsten Road, Northbrook, IL 60062-2096, telephone (708) 272-8800.

(140) User - Any person using a pool or spa and adjoining deck area for the purpose of water sports, recreation therapy or related activities.

(141) User load - The number of persons in the pool or spa area at any given moment, or during any stated period of time.

(142) Vacuum - The reduction of atmospheric pressure within a pipe, tank, pump, or other vessel. Vacuum is measured in inches of mercury. Each inch of mercury is equivalent to 1.13 feet of head. The typical maximum vacuum is 30 inches of mercury, or 33.9 feet of head.

(143) Valve - Any device in a pipe that will partially or totally obstruct the flow of water (as in a ball, gate or globe valve) or permit flow in one direction only (as in a check or foot valve).

(A) Bleeder valve - A device that allows air to be vented from a closed system.

(B) Multi-port valve - A device that allows the multi-directional control of the passage or flow of water through a system.

(C) Push-pull valve - A device that allows the dual directional control or flow of water through a system.

(144) Velocity - The speed at which a liquid flows between two specified points, expressed in feet per second.

(145) Vortex pool - Circular pools equipped with a method of transporting water in the pool for the purpose of propelling riders at speed dictated by velocity of the moving stream

(146) Wading pool - A Class D pool that has a maximum depth of two feet at any point.

(147) Walls - The interior pool or spa wall surfaces consisting of surfaces from plumb to a slope of 11 degrees from plumb.

(148) Waste water disposal system - A plumbing system used to dispose of backwash or other water from a pool or spa or from dressing rooms and other facilities associated with a pool or spa.

(149) Water action pools - A pool designed to simulate breaking or cyclic waves for the purpose of general play or surfing

(150) Y.M.C.A. of U.S.A. - Y.M.C.A. of U.S.A. (Y.M.C.A.), 101 North Wacker, Chicago, IL 60606, telephone (800) 872-9622.

(151) Zero depth pool - A pool in which the pool floor intersects the water surface along at least one side of the pool.

§265.183. Plans, Permits and Instructions.

(a) Plans and permits for new pools and spas. The department reviews plans for new pools or spas only on a case by case basis in order to ensure compliance regarding enforcement issues. The department recommends that a registered professional engineer or registered architect be consulted to assure that the pool or spa is designed and built in compliance with these rules and applicable federal, state, and/or local regulatory requirements. Regardless of whether a regulatory authority requires plans or permits, pools and spas shall be designed, constructed, and operated in compliance with these standards.

(b) Instructions for new pools and spas. Upon completion of construction of any pool or spa, the builder and/or the designer shall provide the manager and his operators complete written and oral operational instructions for the pool or spa. Written instructions shall include items such as procedures for filtration, backwash, cleaning, operation of all chemical feed devices and general maintenance of pool or spa. In addition, the following is required:

(1) valves shall be labeled;

(2) color-coding of exposed piping, (see §265.187(c) of this title (relating to Circulation Systems (Exposed piping color-coding for new and existing pools and spas)); and

(3) clean filter pressures, normal operating pressures and differentials that indicate the need for filter cleaning shall be indicated.

§265.184. General and Structural Design.

(a) Non-toxic and sound materials for new pools and spas. New pools and spas and all appurtenances shall be constructed of materials which are considered to be nontoxic to humans and the environment, are impervious and enduring, and will withstand design stresses; and will provide a water-tight structure with a smooth and easily cleanable surface without cracks or joints, excluding structural joints.

(b) Accepted practice for new pools and spas. The structural design and materials used for new pools or spas shall be in accordance with generally accepted industry engineering practices and methods prevailing at the time of original construction. It is recommended that new pools and spas be constructed to meet the NSPI, June 1996, Workmanship Standards for Swimming Pools and Spas.

(c) NSFI Standard-50 for new pools and spas. Where equipment for a new pool or spa such as pumps, filters, skimmers, chemical feeders, and other equipment, falls within the scope of ANSI and NSFI Standard-50-1996 (ANSI/NSFI-50-1996), the equipment shall meet the standard as confirmed by a testing laboratory. The testing laboratory for determining compliance with these standards shall be properly equipped and qualified for experimental testing, inspections of run goods at factories, and service/value determination through field inspections. It shall operate as a third-party testing/inspection body. Conformity with standards noted above shall be evidenced by the listing or labeling of such equipment by such a laboratory.

(d) NSFI Standard-50 for existing pools and spas. When equipment is replaced on existing pools and spas such equipment that falls within the scope of ANSI and NSFI Standard-50-1996 (ANSI/NSFI-50-1996), such equipment shall meet the standard as confirmed by a testing laboratory. The testing laboratory for determining compliance with these standards shall be properly equipped and qualified for experimental testing, inspections of run goods at factories, and service/value determination through field inspections. It shall operate as a third-party testing/inspection body. Conformity with standards noted above shall be evidenced by the listing or labeling of such equipment by such a laboratory.

(e) Prohibition of earth material for new and existing pools and spas. Earth shall not be permitted as an interior finish in a new or existing pool or spa. Clean sand or similar material, if used in a beach pool environment shall only be used over an impervious surface and designed to perform in such an environment, and controlled so as not to adversely affect the proper filtration, treatment system, maintenance, safety, sanitation and operation of the overall pool or spa. If sand or similar material is used, positive upflow circulation through the sand shall be provided as necessary to assure that sanitary conditions are maintained at all times.

(f) Interior color for new pools and spas. The colors, patterns, or finishes of a new pool or spa interior shall not obscure the existence or presence of objects or surfaces within the pool or spa. All new pool and spa interior surfaces shall be white or lightly tinted except for:

(1) water lines that are tiled;

(2) racing lane markings (painted or tile maximum 12 inches wide);

(3) turn targets (painted or tiled); and

(4) safety markers.

(g) Materials to withstand freezing temperatures for new pools and spas. In climates subject to freezing temperatures, a new pool or spa shell and appurtenances, piping, filter system, pump and motor, and other components shall be designed and constructed to facilitate protection from damage due to freezing.

(h) Hydrostatic relief valve for new pools and spas. A hydrostatic relief valve or a more extensive hydrostatic system shall be installed if necessary to prevent ground water pressure from displacing or otherwise damaging a new pool or spa.

(i) Interior surface footing for new pools and spas. The surfaces within a new pool or spa intended to provide footing for users shall have a slip-resistant surface to help reduce the chance for a fall. The roughness or irregularity of such surfaces shall not cause injury to the feet during normal use.

§265.185. Dimensional Design.

(a) General shape for new pools and spas. This standard is not intended to regulate the perimeter shape of new pools or spas. It is the designer's responsibility to take into account the effect a given shape will have on the health and safety of the occupants.

(b) Dimensional variation for new pools and spas. Dimensions for new pools and spas may vary in limited areas where access for persons with disabilities has been provided, as long as general safety of all users is maintained. The design shall take into account requirements of the American Disability Act and any other applicable local, state and federal laws relating to such access.

(c) Entanglement or entrapment avoidance for new pools and spas. There shall be no protrusions, extensions, means of entanglement, or other obstructions in a new pool or spa which will cause the entrapment or injury of the user. For specific requirements regarding entrapment issues, see the CPSC, Handbook for Public Playground Safety, Publication Number 325-1997, or the ASTM, Standard Consumer Safety Performance Specification for Playground Equipment for Public Use, F1487-1995.

(d) Construction tolerances for new pools and spas. For new pools and spas, construction tolerances allowed on all dimensional designs for overall length, width, and depth in the deep end may vary plus or minus three inches. All other dimensions may vary plus or minus two inches, unless otherwise specified (such as in a Class A pool). The design water level shall have a maximum construction tolerance at the time of completion of the work of plus or minus 1/4 inch for new pools or spas with adjustable weir surface skimming systems, and of plus or minus 1/8 inch for new pools or spas with non-adjustable surface skimming systems. Step treads and risers may vary plus or minus 1/2 inch.

(e) Maximum user loading for new and existing pools and spas. The maximum number of users to be allowed in a new or existing pool or spa at one time will depend on a number of factors, such as the type of pool or spa; indoor or outdoor location; surface area; operating characteristics of the water; purification system; quality and clarity of the pool or spa water, etc., the most significant factors being the pool or spa area and the sanitary and physical condition of the pool or spa water. Based on these factors, pool or spa owners of a new or existing pool or spa shall reduce the user load if existing conditions indicate the need. The user load shall be based on the following.

(1) Maximum load limit for new pools shall be in accordance with the following table:
Figure: 25 TAC, §265.185(e)(1).

(2) In both new and existing spas, the maximum user load shall not exceed one person per nine square feet of surface area.

(f) Interior walls for new pools and spas. New Class B and C pools and spas shall have walls not greater than 11 degrees from plumb. Maximum allowable wall slope:
Figure: 25 TAC, §265.185(f).

(g) Walls joining floors for new pools. Walls for new Class B and C pools shall be joined to the floor with a radius tangent to the wall at a depth not less than four feet six inches in water depths eight feet and greater and not less than two feet six inches in water depths of three feet. The tangent radius point at the wall shall progressively move between these points as the water depth progressively changes. Wall to floor radiuses shall not encroach on the minimum specified floor width, prescribed in §265.186(c)(7) of this title (relating to Deck Entry/Exit, and Diving Facilities, and Other Deck Equipment (Diving Facilities)). Class A pools, where racing lanes terminate, shall have walls that are not greater than one degree from vertical.

(h) Floor slopes for new pools. Floor slopes for new pools shall, as a minimum meet the following requirements:

(1) all slopes shall be uniform and shall drain;

(2) the slope of the floor from the shallow end wall toward the deep end shall not exceed one foot in ten feet to the point of the first slope change which shall not occur in water depth less than five feet;

(3) the point of the first slope change shall be defined as the point at which the floor slope exceeds one foot in ten;

(4) the slope of the floor from the point of the first slope change to the deep end shall not exceed one foot in three feet; and

(5) the slope of the floor may vary in limited areas where access for persons with disabilities has been provided.

(i) Visual separation for new pools. Any area of a new pool that is less than three feet in depth shall be visually set apart from deeper areas of the pool by a minimum four inch wide tile band, painted line, or similar means of contrasting color across the floor at this point, see also §265.199(b)(2) and (3) of this title (relating to Specific Safety Features ((Float lines and floor markings for new pools)).

(j) Zero depth design for new pools. Zero depth designs for new pools shall be allowed where the bottom of the pool in the beginner's area is designed and constructed to meet the pool deck surface at a slope not to exceed one in 12 to a water depth of 1-1/2 feet. In such pools where the water depth is less than 1-1/2 feet, floor inlets shall be provided and spaced uniformly with at least one inlet per 200 square feet or portion thereof.

(k) Offset ledges for new pools. When provided in a new pool, offset ledges shall:

(1) fall within 11 degrees from plumb starting at the junction of the pool wall and the design water level;

(2) shall have a slip-resistant surface; and

(3) shall have a maximum width of eight inches and shall be in accordance with the following drawing of Offset Ledges:
Figure: 25 TAC, §265.185(k)(3).

(l) Underwater seat benches for new pools and spas. Underwater seat benches for new pools and spas shall:

(1) have a maximum seating width of 24 inches projecting from the wall at a depth not to exceed 24 inches below the design water level;

(2) be located fully outside of the required minimum diving water envelope if the pool is intended for use with diving equipment;

(3) be visually set apart and shall be provided with a solid or broken stripe two inches wide on the top surface along the front leading edge of the bench. The stripe shall be plainly visible to persons on the pool deck. The stripe shall be a contrasting color to the background on which it is applied, and the color shall be permanent in nature;

(4) have a slip-resistant surface; and

(5) shall not be used as the required entry/exit access unless they are in conjunction with pool stairs.

(m) Special requirements for new Class D wading pool.

(1) New Class D wading pools at a facility having Class A, B, or C pools shall be separate and physically set apart from beginner or shallow water areas by at least 15 feet of deck or a pool yard enclosure meeting the requirements of §265.200 of this title (relating to Pool Yard Enclosures). If a pool yard enclosure is provided, clear visibility through the barrier shall be maintained.

(2) Where a wading pool at a Class A, B, or C pool is within 35 feet of any deep water area, a pool yard enclosure meeting the requirements of §265.200 of this title shall be provided to physically separate the wading pool from the deep water area. Clear visibility through the barrier shall also be maintained.

(3) The maximum water depth shall be no greater than 24 inches. At the perimeter of the pool the vertical distance from the deck or walk to the bottom of the pool or to perimeter seating bench underwater shall not be greater than 18 inches. The vertical distance from the bottom of the pool to the deck or walk may be reduced and brought to zero at the most shallow point. The slope of zero level deck entries shall not exceed one foot in 12 feet.

(4) Floors of wading pools shall be uniform, sloped to drain with a maximum slope of one foot in 12 feet, and shall be slip-resistant.

§265.186. Deck Entry/Exit, and Diving Facilities, and Other Deck Equipment.

(a) Decks for New Pools and Spas.

(1) Deck(s) shall be designed and installed in accordance with the engineering methods required by applicable local regulatory authority. This includes the design and quality of subbase, concrete mix, reinforcing, joints, etc.

(2) If a concrete deck is selected, in the absence of specific local engineering practices, the work shall be performed in accordance with ACI Standard 302.1R-1998, "Guide for Concrete Floor and Slab Construction."

(3) Decks, ramps, coping, steps, markings, brand insignias and similar surfaces shall be slip-resistant and easily cleanable.

(4) Soils supporting decks shall have adequate load-bearing capacities.

(5) The minimum continuous, unobstructed, usable deck width, which can include flush coping, shall conform with subparagraphs (A)-(F) of this paragraph, except that at a Class B, C, or D pool, as much as 35% of the deck in subparagraphs (A)-(D) of this paragraph may be replaced with other structures; however, in no case shall other structures restrict emergency access or create above deck structures that may be used as diving platforms or create other safety or sanitary hazards.

(A) Class A pool deck widths shall meet standards of the appropriate sanctioning body which regulates the type of competitions to be held.

(B) Class B pool deck widths shall be six feet minimum.

(C) Class C pool deck widths shall be four feet minimum.

(D) Class D pool deck widths shall be four feet minimum.

(E) Spas shall have a four foot minimum, continuous, unobstructed deck, which may include the coping, which shall be provided around at least 50% or more of the spa.

(F) A minimum of four feet of deck width shall be provided on the sides and rear of any diving equipment. A deck clearance of 36 inches shall be provided around all other deck equipment.

(6) The minimum slope of the deck(s) shall be 1/8 inch per foot for textured, hand-finished concrete decks and 1/4 inch per foot for exposed aggregate concrete decks including decks covered with an epoxy finish and other specialty surfaces installed according to the manufacturer's instructions and good sanitation practices. Wood decks or indoor/outdoor carpeting shall not be located within the distance specified in paragraph (5) of this subsection unless approved by local regulatory authority.

(7) The maximum slope of all decks, other than wood decks, shall be 1/2 inch per foot, except for ramps. The maximum slope for wood decks shall be 1/8 inch per foot. Gaps shall be required between deck boards consistent with good engineering and safety practices with respect to the type of wood used.

(8) The maximum gaps between pool or spa decks and/or walkways including joint material, shall be 3/16 inch of horizontal clearance with a maximum difference in vertical elevation of 1/4 inch.

(9) Construction joints where pool or spa coping meets concrete deck(s) shall be watertight.

(10) Construction joints where pool or spa coping meets concrete deck shall be installed to protect the coping and its mortar bed from damage as a result of movement of adjoining deck(s).

(11) Control joints in deck(s) shall be provided to minimize the potential for cracks due to a change in elevations, separation of surfaces or movement of the slab.

(12) The areas where concrete deck(s) join other concrete work shall be protected by expansion joints to protect the pool and spa adequately from the pressures of relative movements.

(13) The edge of deck(s) shall be rounded, tapered or otherwise relieved to eliminate sharp corners.

(14) Deck(s) shall be sloped to effectively drain to perimeter areas or to deck drains. Drainage shall remove pool and spa splash water, deck cleaning water, and rain water without leaving standing water deeper than 1/8 inch. Water from deck drainage shall not be mixed with pool or spa water.

(15) Site drainage shall direct all perimeter deck drainage, general site and roof drainage away from the pool area. Yard drains shall be installed, as needed, to prevent the accumulation or puddling of site water in the general area of the deck(s) and related improvements.

(16) Valves installed in or under any deck(s) shall provide a minimum ten inches diameter access cover and valve pit to facilitate operation, service, and maintenance. Access covers shall be provided for valve pits for new and existing pools and spas.

(17) An adequate number of hose bibs and adequate hose shall be provided for washing down all areas of the deck. Cross-connection control device(s) as approved by the TNRCC or the department or state or local regulatory authority shall be provided. When not in use, hoses shall be stored in such a manner to prevent a hazard from tripping.

(b) Entries and exits for new pools. New pools shall have a minimum of two entry/exits, one serving the shallow end and one serving the deep end. Entry/exits may consist of ladders, stairs, or recessed treads or combination thereof and shall conform to the following:

(1) areas where the vertical distance from the bottom of the pool to the deck or walk is 18 inches or less at the pool wall may be considered as an entry/exit;

(2) for pool areas over 30 feet in width, both sides of the deep portions shall have entries/exits provided;

(3) a means of entry/exit for the shallow end shall be located between the shallow end wall and the cross section at Point C, while a means of entry/exit for the deep end shall be between the deep end wall and the cross section at Point B, refer to pool dimensions at subsection (c)(7) of this section, or if not a diving pool, they shall be so located as to reasonably serve the respective areas;

(4) a means of entry/exit shall be provided at a minimum of every 75 linear feet of pool wall or fraction thereof;

(5) stairs, ladders, and recessed treads shall be located so as not to interfere with racing lanes if applicable;

(6) stairs, ladders, and recessed treads shall have slip-resistant surfaces; and

(7) design and construction of pool stairs shall comply with the following requirements:

(A) steps shall have a minimum unobstructed horizontal depth of 12 inches and a minimum width of 20 inches;

(B) risers for steps shall have a maximum uniform height of ten inches, with the bottom riser height allowed to vary plus or minus two inches from the uniform riser height;

(C) underwater steps shall be provided with a horizontal solid or broken stripe two inches wide on the top surface along the front leading edge of each step. This stripe shall be plainly visible to persons on the pool deck. The stripe shall be a contrasting color to the background on which it is applied, and the color shall be permanent in nature and shall be a slip-resistant surface; and

(D) each set of stairs shall be provided with at least one handrail to serve all treads and risers. Handrails shall comply with the following requirements:

(i) handrails, if removable, shall be installed in such a way that they cannot be removed without the use of tools;

(ii) the leading edge of handrails for stairs shall be no more than plus or minus eight inches horizontally from the vertical plane of the bottom riser or extend into the pool to a water depth of 36 inches as measured from the horizontal stair surface to the design water level; and

(iii) the outside diameter of handrails shall range from 1-1/4 inches to 2 inches.

(8) the design and construction of pool ladder(s) shall comply with the following requirements:

(A) pool ladders shall be made entirely of corrosion-resistant materials;

(B) two handholds or two handrails shall be provided, one on each side of the ladder;

(C) below the water level, there shall be a clearance of not more than 3-1/2 inches between ladder handrails or ladder tread edge, measured from the pool wall side of the tread, and the pool wall. See §265.185(c) of this title (relating to Dimensional Design (Entanglement or entrapment avoidance for pools and spas));

(D) the clear distance between ladder handrails shall be a minimum of 17 inches and a maximum of 24 inches;

(E) there shall be a uniform height between ladder treads with a seven inch minimum distance and a 12 inch maximum distance; and

(F) ladder treads shall have a minimum horizontal depth of 1-1/2 inches.

(9) the design and construction of recessed treads in the pool wall shall comply with the following requirements:

(A) the recessed treads shall have a uniform vertical spacing of 12 inches maximum and seven inches minimum;

(B) the vertical distance between the pool coping edge, deck, or step surface and the uppermost recessed tread shall be a maximum of 12 inches;

(C) the recessed treads shall have a minimum depth of 4-1/2 inches and a minimum width of 12 inches;

(D) the recessed treads shall drain into the pool but not be sloped more than 1/2 inch per foot, to prevent the accumulation of dirt and debris; and

(E) each set of recessed treads shall be provided with a set of handrails/grabrails/handholds one on each side of the ladder to serve all treads and risers.

(10) the design and construction of swimouts in the pool wall shall comply with the following:

(A) swimouts shall be completely outside the perimeter shape of the pool;

(B) when used as an entry/exit access, swimouts shall be provided with a step(s) to meet the pool stair requirements as stated in subsection (b)(7) of this section;

(C) when steps are used in swimouts, they shall be visually set apart with a horizontal solid or broken stripe two inches wide on the top surface along the leading edge of horizontal surfaces of each step. The stripe shall be plainly visible to persons on the pool deck. The stripe shall be a contrasting color to the background on which it is applied, and the color shall be permanent;

(D) are allowed in the deep or shallow areas of the pool;

(E) the horizontal surface shall be a maximum of 20 inches below the design water level unless stairs are provided in the swimout; and

(F) pools that do not utilize a perimeter overflow system shall provide a wall return inlet or outlet in the swimout to maintain sufficient circulation.

(c) Diving facilities.

(1) New Class A pools intended for accredited competitive aquatic sports, shall be designed and constructed to provide the dimensions specified by United States Swimming or United States Diving, National Federation of State High School Associations (NFHS), or National Collegiate Athletic Association or the appropriate sanctioning body or the equivalent.

(2) New pools with diving facilities in excess of three meters in height or pools designed for platform diving, shall comply with the pool dimension design requirements of one of the organizations listed in paragraph (1) of this subsection.

(3) New diving areas intended for Class B and C pools shall conform to the minimum water depths, areas, slopes, and other dimensions shown in subsection (c)(7), of this section. This section does not apply to platform or deck diving. Competitive diving equipment shall not be installed on new or existing Class B and C pools. Diving equipment on new Class B and C pools shall have a fixed fulcrum unless the design and construction meets the standards for a Class A pool as stated in paragraph (1) of this subsection.

(4) At new pools, there shall be a completely unobstructed clear vertical distance of 16 feet above any diving board measured from the center of the front end of the board. This area shall extend horizontally at least 12 feet behind, 12 feet to each side and 16 feet ahead of Point A, as described in subsection (c)(7) of this section.

(5) The tip of the diving board at a new pool shall be located at directly above Point A, as described in subsection (c)(7) of this section, which is the reference point of all other dimensions. If the board is given more or less overhang, other dimensions shall move further inward or outward by the same amount respectively.

(6) When other types of equipment or devices are provided for water entry at new and existing pools and spas, the location size and depths of the required water envelope shall be clearly specified by the manufacturer/provider/installer of the equipment or device and installed according to those specifications. At new pools, a label shall be permanently affixed to the equipment or device and shall include the applicable items found in subsection (c)(10) of this section.

(7) At new pools, minimum dimensions for diving areas of Class B and C pools are contained in the following table:
Figure: 25 TAC, §265.186(c)(7).

(8) At new pools, supports, platforms, stairs, and ladders for diving equipment shall be designed to carry the anticipated loads. At new pools, stairs and ladders shall be of corrosion-resistant material, easily cleanable and with slip-resistant tread.

(9) Diving equipment for new and existing pools shall be installed according to manufacturer's instructions and specifications supplied with each unit.

(10) On new pools, a label shall be permanently affixed to the diving equipment or jump board and shall include the following:

(A) manufacturer's name and address;

(B) board equipment length;

(C) identification as to diving or jump board;

(D) fixed fulcrum setting;

(E) reference to the applicable article(s) in the American National Standards Institute/National Swimming Pool Institute-2 (ANSI/NSPI-2, 1992) Standards for Public Swimming Pools;

(F) weight limitations as specified by the board manufacturer, if available; and

(G) date of installation.

(11) At new and existing pools, manufactured diving equipment shall be installed according to pool types (refer to §265.182(91)(F)-(I) of this title (relating to Definitions)) that are equal to or larger than the pool type designated by the manufacturer.

(12) New diving stands higher than 21 inches measured from the deck to the top butt end of the board shall have stairs or a ladder and handrails. Step treads shall be self-draining.

(13) On new pools, platforms and diving equipment of one-half to one meter in height shall be protected with guard rail(s) which shall be at least 30 inches above the diving board and extend from the butt end of the equipment to the edge of the pool wall. All platforms or diving equipment higher than one meter shall have dual guard rails which are approximately 18 inches and 36 inches above the diving board. A means shall be provided on platforms or diving equipment higher than one meter to prevent slips or falls through the equipment on to the deck surface.

(14) On new pools, diving equipment shall have slip-resistant tread surfaces.

(15) On new pools, diving equipment shall be permanently anchored to the pool deck.

(16) At new pools, the top of the diving board from the deck end to the tip shall be level or have an upward slope of 5/8 inch per foot maximum, provided elevation difference shall not exceed six inches from the deck end to the tip of the board.

(17) At new pools, the maximum construction tolerances for the installation of diving equipment shall be plus or minus two inches to allow for construction variances only on Class B and C pools.

(d) Starting blocks in new and existing pools.

(1) Starting blocks shall be installed and used to meet the standards, depth specifications and other requirements of the national competitive pool organization having jurisdiction over the competition.

(2) Starting blocks shall only be used during official competition or when there is direct supervision by the team coach or another qualified instructor.

(3) When not directly supervised, the starting block shall be removed or secured from use to prevent inadvertent use by an untrained user or by the general public.

(e) Play equipment for new and existing pools. Playground equipment in new pool or on new and existing pool deck, which is not covered by the Amusement Ride and Safety Inspection and Insurance Act (see subsection (g) of this section), shall be designed and installed according to the CPSC Handbook for Public Playground Safety, Publication Number 325-1997, or the ASTM Standard Consumer Safety Performance Specification for Playground Equipment for Public Use, F1487-1995. It is recommended that playground equipment for existing pools meet CPSC Guidelines or ASTM standards in existence at the time they were installed.

(f) Slides for new and existing pools to comply with CPSC standards. Slides at new and existing pools that are of the specific configuration and type, as stated in the CPSC Standard for Swimming Pool Slides as published in the Code of Federal Regulations, 16 CFR Chapter II, Part 1207, §5.8, shall comply with those standards.

(g) Exclusion of certain facilities at new and existing pools. These subsections are not meant to cover amusement rides as defined under Texas Department of Insurance, Insurance Code, Chapter 21-General Provisions, Subchapter E - Miscellaneous Provisions, Article 0021.0060 relating to the Amusement Ride Safety Inspection and Insurance Act which regulates large slides and other such types of amusement devices used at new and existing pool facilities.

§265.187. Circulation Systems.

(a) Suction outlet covers for new and existing pools and spas. The circulation system of a new or existing pool or spa shall not be operated if the main drain grate, or anti-vortex suction outlet, or any suction outlet cover is missing, broken or loose. In such a case the pool or spa shall be closed immediately and remain closed until a proper repair or replacement has been accomplished.

(b) General circulation requirements for new pools and spas. A circulation system consisting of pumps, piping, return inlets and suction outlets, filters, and other necessary equipment shall provide complete and uniform circulation of water and be designed to accommodate 100% of the turnover flow rate and maintain the distribution of disinfectant residual through all parts of the pool or spa.

(1) The system shall be designed to give the proper turnover rate based on the manufacturer's specified maximum pressure flow of the filter in clean media condition. The equipment shall be of adequate size to turn over the entire pool or spa water capacity at the following minimum rate: (also refer to §265.203(c) of this title (relating to Operation and Management (Water clarity standards for new and existing pools and spas));

(A) a turnover rate of six hours is specified for pools with average depths of four feet or greater;

(B) turnover rates in pools with shallower average depths shall be calculated based upon the formula: average depth times 1-1/2 shall be the required turnover rate; for example, a pool with an average depth of three feet will require a 4-1/2 hour turnover rate; or

(C) a spa recirculation system shall turn over the entire spa water capacity at a minimum of once every 30 minutes based on the manufacturer's recommended rate of the filter, with a clean filter.

(2) Circulation system components which require replacement or servicing shall be accessible for inspection, repair, or replacement, and shall be installed in accordance with the manufacturer's specifications.

(3) Pool and spa equipment and related plumbing shall be supported to prevent damage from misalignment, settlement, etc. The equipment shall be mounted to minimize the potential for the accumulation of debris and moisture, following manufacturer's specifications.

(4) The water velocity in the pool and spa piping shall not exceed ten feet per second for discharge piping (except for copper pipe where the velocity shall not exceed eight feet per second), and six feet per second for suction piping, and 1-1/2 feet per second flow rate through suction grates. Pool and spa piping shall be sized to permit the rated flows for filtering and cleaning without exceeding the maximum head of the pump.

(5) Circulation system piping, other than that integrally included in the manufacture of the pool or spa, shall be subject to an induced static hydraulic pressure test for six hours at a pressure 50% greater than the maximum design operating pressure of the system or 25 pounds per square inch whichever is greater. This test shall be performed before the deck is poured, and the pressure shall be maintained throughout the deck pour.

(6) The circulation system piping and fittings shall be nontoxic, and shall be of material(s) able to withstand operating pressures and operating conditions. Polyvinyl chloride pipe shall bear the NSFI seal for potable water and be schedule 40 or stronger.

(7) Pool or spa piping subject to damage by freezing shall have a uniform slope in one direction and equipped with valves for adequate drainage or shall be capable of evacuating water to prevent freezing and possible damage. Pool or spa piping shall be adequately supported and designed to prevent entrapment of air, water or dirt. Provision shall be made for expansion or contraction of pipes.

(8) Equipment shall be designed and fabricated to drain the pool or spa water from the equipment, by removal of drain plugs and manipulating valves, or by other methods.

(9) All pools and spas shall be equipped with the following:

(A) a pump suction (vacuum) gauge installed as close to the suction side of the pump as possible without sacrificing accuracy;

(B) a filter inlet pressure gauge installed on the piping ahead of the filter in the area of greatest pressure;

(C) a filter outlet gauge; and

(D) a rate of flow meter located to accurately (plus or minus 10%) indicate the rate of flow through the filter (during filtering as well as backwashing) in gallons per minute.

(c) Exposed piping color-coding for new and existing pools and spas. Exposed piping in new pools and spas shall be color-coded according to the following color scheme. It is recommended that piping on existing pools and spas also be color-coded. If any two colors do not have sufficient contrast to easily distinguish between them, a six-inch band of contrasting color shall be painted on one or more of the pipes at approximately 30-inch intervals. The name of the liquid or gas and arrows indicating direction of flow, should be painted or otherwise permanently indicated on the pipe.
Figure: 25 TAC, §265.187(c).

§265.188. Filters.

(a) Filters for new pools and spas. Filters for new pools and spas shall meet ANSI/NSFI Standard-50-1996.

(b) Replaced filters for existing pools and spas. When equipment is replaced on existing pools and spas, that equipment falling within the scope of ANSI/NSFI Standard-50-1996 shall meet this standard.

(c) Filter design and operation for new pools and spas. Filters for new pools and spas shall be designed so that after cleaning according to the manufacturer's instructions the system provides the water clarity noted in §265.203(c) of this title (relating to Operation and Management) (Water clarity standards for new and existing pools and spas).

(d) Filter accessibility for new pools and spas. Filters for new pools and spas shall be installed so that filtration surfaces are accessible for inspection and service as per manufacturer's specifications.

(e) Filter and separation tank pressure release for new pools and spas. Any filter or separation tank for a new pool or spa shall have both manual and automatic means of air release which provide a slow and safe release of pressure as a part of its design.

(f) Filter and separation tank instructions for new pools and spas. Pressure filters and any separation tank for new pools and spas shall have operation and maintenance instructions permanently installed on the filter or separation tank and shall include a precautionary statement warning not to start up the system after maintenance without first opening the air release and properly reassembling the filter and separation tank. The statement shall be readily visible from the area of the air release and the start-up controls.

(g) Observable waste discharge for new pools and spas. Pressure filters for new pools and spas shall be provided with a readily observable free fall or sight glass installed on the waste discharge line in order that the filter washing progress may be observed. Where sight glasses are used, they shall be readily removable for cleaning.

(h) Backwashing for new pools and spas. Filters for new pools and spas shall be backwashed and maintained according to manufacturer's instructions.

§265.189. Pumps and Motors.

(a) Safe pump operation for new and existing pools and spas. A pump for a new or existing pool or spa shall not be operated if the main drain grate, anti-vortex suction outlet, or any suction outlet cover is missing, broken or loose. The pool or spa shall be closed immediately and remain closed until a proper repair or replacement has been accomplished.

(b) Safe pump design and operation for new pools and spas. The design, construction and installation of the pump(s) and component parts for new pools and spas shall provide safe operation as per manufacturer's specifications. Pumps for new pools and spas shall comply with UL and/or NEMA requirements.

(c) Priming device cross-connection control for new and existing pools and spas. Any priming device for a new or existing pool or spa pump receiving piped water from a potable water supply shall be isolated from the potable supply by means of a cross-connection control device as approved by the TNRCC or the department or state or local regulatory authority.

(d) Pump and motor provided for circulation for new and existing pools and spas. A pump and motor shall be provided for circulation of new and existing pool and spa water. Performance of all pumps for new pools and spas shall meet the filter design range of flow required for filtering as stated in §265.187(b)(1) of this title (relating to Circulation Systems) and cleaning the filters (if applicable) against the total dynamic head developed by the complete system and to meet the clarity noted in §265.203(c) of this title (relating to Operation and Management (Water clarity for new and existing pools and spas)).

(e) Cleanable strainer for new pools and spas. With all pressure filter systems for new pools and spas, a cleanable strainer or screen shall be provided upstream of the circulation pump(s) to remove solids, such as debris, hair, and lint, and shall be readily accessible and cleaned routinely.

(f) Pumps and motors accessible for new pools and spas. Pump(s) and motor(s) for new pools and spas shall be accessible for inspection and service as per manufacturer's specifications.

(g) Durable pump seal for new pools and spas. Where mechanical pump seal for new pools and spas are provided, components of the seal shall be corrosion-resisting and capable of operating under conditions normally encountered in pool or spa operation.

(h) Pump valves for new pools and spas. When the pump for a new pool and spa is below the design water level, valves shall be installed on suction and discharge lines, to enable maintenance and removal of the pump without draining the pool or spa.

(i) Motors for new pools and spas.

(1) Motors shall have as a minimum an open, drip-proof enclosure as defined by the National Electrical Manufacturers Association (NEMA) Standard NEMA, MG1-1993, and be constructed electrically and mechanically to perform satisfactorily and safely under the conditions of load and environment normally encountered in pool or spa installations. Motors for new pools and spas shall comply with UL requirements.

(2) Motors shall be capable of operating the pump under full load with a voltage variation of plus or minus 10% from the nameplate rating. If the maximum service factor of the motor is exceeded (at full voltage), the manufacturer shall indicate this on the pump curve.

(3) Motors shall have thermal or current overload protection, either built in or in the line starter, to provide locked rotor and running protection.

§265.190. Suction Outlets and Return Inlets.

(a) Closure of new and existing pools and spas if suction outlet not functional. On a new or existing pool or spa, if the main drain grate, anti-vortex suction outlet, or any suction outlet cover or grate is missing, broken or loose, the pool or spa shall be closed immediately and remain closed until a proper repair or replacement has been accomplished.

(b) Suction outlets for new pools and spas. Suction outlets for new pools and spas shall be designed to protect against entrapment and not constitute a hazard to the user. Any suction outlet system, for a pool or spa circulation or filtration system, booster system, automatic cleaning system, solar system, etc., shall be designed to protect against a suction entrapment, evisceration or hair entrapment/entanglement hazard and shall comply with the following.

(1) Suction outlets (other than skimmers) shall be provided with anti-vortex covers or grates that have been tested by a nationally recognized testing laboratory and comply with ASME/ANSI A 112.19.8M R96, "Suction Fittings for Use in Swimming Pools, Wading Pools, Spas, Hot Tubs, and Whirlpool Bathtub Appliances." The installation of the anti-vortex or grate shall be according to manufacturer's specifications.

(2) A minimum of two hydraulically balanced suction outlets (suction fittings), with anti-vortex covers, or grates, per pool or spa pump suction line shall be provided. Multiple sets of pump suctions shall be permitted into two or more suction outlets as long as they are hydraulically balanced and meet the requirement of paragraph (1) of this subsection. The distance between the suction fittings shall be three feet to five feet for suction outlets less than 12 inches by 12 inches (144 square inches). All suction outlets larger than 12 inches by 12 inches (144 square inches) on any pool shall have a minimum of two hydraulically balanced suction outlets (main drains) with a separation distance of three feet or more in the lowest point of the pool floor. The spacing of the suction outlets (main drains) shall not be greater than 20 feet on centers nor more than 15 feet from each side wall. No means of isolating suction outlets is permitted that could allow one suction outlet to serve as the sole source of water to a pump. A single pipe to a pump suction inlet that serves two or more suction outlets may be valved off to shut off the flow to the pump.

(3) Water velocity through suction outlet grates shall not exceed 1-1/2 feet per second. Suction outlets with velocities exceeding 1-1/2 feet per second are permitted provided each suction outlet has a cover that has been tested and approved for such velocities by a nationally recognized testing laboratory and complies with ANSI/ASME A112.19.8M R96, "Suction Fittings for Use in Swimming Pools, Wading Pools, Spas, Hot Tubs, and Whirlpool Bathtub Appliances." The maximum velocity in the pump suction hydraulic system shall not exceed six feet per second when 100% of the pump flow comes from the main drain system and any suction fitting in the system is completely blocked. The flow through the open area of the remaining suction grate outlet or outlets shall not exceed 1-1/2 feet per second or shall meet ASME/ANSI A112.19.8M R96, "Suction Fittings for Use in Swimming Pools, Spas, Hot Tubs, Wading Pools and Whirlpool Bathtub Appliances."

(4) Color-coding of piping of exposed piping, see §265.187(c) (relating to Circulation Systems (Exposed piping color-coding for new and existing pools and spas));

(c) Upgrading suction outlet system on existing pools and spas. Existing pools shall upgrade the suction outlet system serving the pool or spa facility so as not to constitute a hazard to the user as follows.

(1) In accordance with the time frame indicated in subsection (c)(2) of this section existing pools shall:

(A) renovate suction outlets system to comply with subsection (b) of this section; or

(B) protect against suction entrapment, evisceration and hair entrapment by other means. The CPSC "Guideline for Addressing Potential Entrapment Hazards Associated with Pools and Spas," Publication Number 363-009801, may be consulted; however, the overriding factor must be to prevent suction entrapment, evisceration and hair entrapment and the need to reduce, to a practical minimum, the possibility of drowning, or of injury to the pool user. Such means shall provide the equivalent or better level of protection as those stated in subsection (b) of this section.

(2) Required inspections and suction system upgrade plan and follow-up inspection shall be accomplished for existing pools as follows.

(A) By October 1, 2002, all pools and spas in existence prior to October 1, 1999, with outlets in water five feet or less, shall be inspected and a written notarized plan to upgrade the suction system shall be developed that will include details regarding any corrective measures necessary to comply with paragraph (1) of this subsection. By October 1, 2003, all pools and spas in existence prior to October 1, 1999, with outlets in water deeper than five feet, shall be inspected and a written notarized plan to upgrade the suction system shall be developed that will include details regarding any corrective measures necessary to comply with paragraph (1) of this subsection.

(B) By October 1, 2003, all pools and spas with outlets in water five feet or less shall be renovated as necessary to comply with the detailed plan for suction system improvements developed as a result of paragraph (2)(A) of this subsection. By October 1, 2004, all pools and spas with outlets in water deeper than five feet shall be renovated as necessary to comply with the detailed plan for suction

system improvements developed as a result of paragraph (2)(A) of this subsection.

(3) An inspection and notarized written suction system plan detailing improvements necessary to the suction system shall be accomplished by a person with the following qualifications:

(A) a person certified by NSPI as a "Certified Service Technician" or as a "Certified Building Professional" or the equivalent;

(B) a professional engineer registered in the state of Texas;

(C) a professional architect registered in the state of Texas;

(D) a registered sanitarian or code enforcement officer in the state of Texas, who has one of the following certifications or the equivalent:

(i) the NPRA, "Certified Aquatic Facility Operator" (A.F.O.);

(ii) the NSPF, "Certified Pool-Spa Operator" (C.P.O.);

(iii) Y.M.C.A., "Pool Operator on Location" (P.O.O.L.);

(iv) the NSPI, "Service Technician I" or "Service Technician II" or "Certified Service Technician"; or

(v) completion of a six hour course encompassing the concepts and information in the CPSC "Guideline for Addressing Potential Entrapment Hazards Associated with Pools and Spas", Publication Number 363-009801, and other related issues.

(4) After upgrading of the suction system and prior to opening the pool for use, a follow-up inspection with accompanying notarized written statement attesting to the fact that improvements have been made to meet the requirements indicated in paragraph (1) of this subsection, shall be accomplished as follows:

(A) by a person with the following qualifications:

(i) those qualifications as stated in paragraph (3) of this subsection; or

(ii) a person who has completed a six hour course encompassing the concepts and information in the CPSC "Guideline for Addressing Potential Entrapment Hazards Associated with Pools and Spas", Publication Number 363-009801, and other related issues; and has one of the following certifications or equivalent:

(I) the NPRA, "Certified Aquatic Facility Operator" (A.F.O.);

(II) the NSPF, "Certified Pool-Spa Operator" (C.P.O.);

(III) Y.M.C.A., "Pool Operator on Location" (P.O.O.L.); or

(IV) the NSPI, "Service Technician I"; and

(B) a copy of the notarized written detailed plan required in paragraph (2) of this subsection, and the statement attesting to the fact that improvements have been constructed as required in paragraph (1) of this subsection, shall be kept on file by the owner, and the person who conducted the follow-up inspection, and made available for review at a reasonable time upon the request by the department or other local regulatory authority.

(d) On a new or existing pool or spa, all suction outlet covers, grates, anti-vortex suction outlets, etc., shall be secured in such a way that they can be removed only with the use of a tool.

(e) Vacuum outlets for new pools and spas. Vacuum outlets for new pools and spas shall be provided with covers which automatically close and automatically latch and can only be opened with the use of a tool. Such covers shall be securely closed and latched when the pool is open for use. Where a vacuum outlet is internally located in a skimmer which is provided with a cover, a separate cover for the vacuum outlet is not required. If vacuum cleaner fittings are provided, they shall be located in an accessible position(s) at least 12 inches and no greater than 18 inches below the design water level or as an attachment to the skimmer(s).

(f) Vacuum outlets for existing pools and spas. Vacuum outlets for existing pools and spas shall be provided with covers which can only be opened with the use of a tool, or which meet the requirements of subsection (e) of this section. Such covers shall be securely closed when the pool is open for use. Where a vacuum outlet in an existing pool or spa is internally located in a skimmer which is provided with a cover, a separate cover for the vacuum outlet is not required.

(g) Automatic cleaners not operated while a new or existing pool or spa is in use. In a new or existing pool or spa an automatic bottom or side cleaner that could provide a means of entanglement or entrapment shall not be operated while the facility is open for use.

(h) Return inlets in new pools and spas. Return inlets in new pools and spas shall comply with the following.

(1) Return inlet(s) from the circulation system shall be designed to not constitute a hazard to the user.

(2) A pool or spa shall have a minimum of two return inlets regardless of pool or spa size. The number of return inlets shall be based on at least one return inlet per 300 square feet of pool or spa surface area or fraction thereof with a minimum of two inlets for the first 300 square feet.

(3) Inlets from the recirculation system shall not project more than one inch beyond the pool or spa wall surface and shall be submerged at least 12 inches below the design water level. Inlets in the pool or spa bottom shall be flush with the floor. Bottom inlets will be considered to have an area of influence within a radius of 15 feet.

§265.191. Surface Skimming and Perimeter Overflow (Gutter) Systems.

(a) Safe surface skimming and perimeter overflow system for new pools and spas. A surface overflow device in a new pool or spa shall be designed and installed so as not to constitute a hazard to the user. Skimmer and perimeter overflow systems shall be designed to prevent entrance or entrapment of a limb, body or hair.

(b) Surface skimming and perimeter overflow system provided for new pools and spas. A surface skimming or perimeter overflow (gutter) system shall be provided and shall be designed and constructed to skim the surface of a new pool or spa when the water level is maintained within the operating water level range of the system's rim or weir device. The operating water level for a perimeter overflow system shall be slightly over the overflow (gutter) lip or, in the case of surface skimmers, within the vertical operating range of the skimmers.

(c) Surface skimmer systems for new pools and spas. Surface skimmer systems for new pools and spas shall comply with the following:

(1) the return inlet(s) shall be located so as to help bring floating particles within range of the skimmers;

(2) when surface skimmers are used, they shall be located to maintain effective skimming action throughout the pool or spa;

(3) where surface skimmers are used in a pool as the sole overflow system, at least one surface skimmer shall be provided for each 500 square feet or fraction thereof of the water surface area (recessed areas such as stairs, and swimouts shall not be considered in the calculation);

(4) where surface skimmers are used on a spa, one surface skimmer shall be provided for each 150 square feet, or fraction thereof;

(5) the circulation system shall be designed to handle 80% of pool or spa flow through surface skimmers;

(6) flow rate shall be no less than three gallons per minute per skimmer per weir inch; and

(7) skimmer covers located on a walking surface shall be securely seated, slip- resistant, of sufficient strength to withstand normal deck use, and not constitute a tripping hazard.

(d) Perimeter overflow (gutter) surface skimming systems for new pools and spas. Perimeter overflow (gutter) surface skimming systems for new pools and spas shall comply with the following:

(1) when a perimeter overflow (gutter) surface skimming system is used as the sole surface skimmer system, this system shall extend around a minimum of 50% of the perimeter of the pool or spa;

(2) when perimeter overflow (gutter) surface skimming system is used, it shall be connected to the circulation system with a system surge capacity not less than one gallon for each square foot of pool surface;

(3) when perimeter overflow (gutter) surface skimming system is used in a spa it shall be connected to the circulation system with a system surge capacity not less than two gallons for each square foot of spa surface; and

(4) the hydraulic capacity of a perimeter overflow (gutter) surface skimming system shall be capable of handling 100% of the circulation flow.

§265.192. Electrical Requirements.

(a) National Electrical Code (NEC) for new pools and spas. All installations of electrical equipment at new pools and spas, restrooms, equipment rooms and other facilities serving pools or spas shall comply with the applicable provisions set forth in the 1999 edition of the NEC or local electric code.

(b) National Electrical Code (NEC) for existing pools and spas. Existing pools or spas restrooms, equipment rooms and other facilities shall meet the NEC that was in effect on the date of construction of the pool or spa or the 1999 edition of the NEC or local electric code.

(c) Electrical equipment for new pools and spas. Electrical equipment for new pools and spas shall be the types of electrical equipment and their ratings for which suitable electrical safety standards have been established and which have been listed by a qualified electrical testing laboratory. The standards to be adopted as criteria for the safety of such equipment shall be those designated and recognized as safety standards, are publicly available, and have a broad level of public acceptance selected from among the following:

(1) American National Standards Institute (ANSI);

(2) standards of a qualified technical society, trade association, agency, or other organization or national scope and recognition;

(3) federal, state or local governmental safety standards; and

(4) the standards shall be consonant with the installation and equipment requirements of the NEC. The testing laboratory for determining compliance with these standards shall be properly equipped and qualified for experimental testing, inspections of run goods at factories, and service/value determination through field inspections. It shall operate as a third-party testing/inspection body. Conformity with standards noted above shall be evidenced by the listing or labeling of such equipment by such a laboratory.

(d) Proper installation in new and existing pools and spas. All electrical components for new and existing pools and spas shall be installed to meet manufacturer's specifications and applicable federal, state or local codes and be in compliance with UL-1241 regarding Junction Boxes for Swimming Pool Fixtures and UL-1081 regarding Swimming Pool Pumps, Filters and Chlorinators.

(e) Ground fault interrupters in new and existing pools and spas. For new and existing pools or spas, electrical equipment such as duplex plugs and lighting serving pool or spa facilities shall be protected with ground fault interrupter circuits shall comply with NEC-1999.

(f) Bonding and grounding in new pools and spas. To reduce electrical shock, electrical equipment serving a new pool or spa shall be grounded and bonded as per ANSI/UL 1563-1995 "Standard for Electric Hot Tubs, Spas and Associated Equipment" and NEC-1999. Pool and spa pumps shall be internally and externally grounded.

(g) Overhead wires above new and existing pools and spas. For new and existing pools or spas, no overhead electrical wiring shall pass within 20 feet of the pool or spa enclosure.

(h) Electrical disconnecting means for new pools and spas. Electrical disconnecting means for new pools and spas shall be accessible, located within sight from the pool or spa, and be located at a distance from the inside wall of the pool or spa as required by NEC-1999, Chapter 6, Article 680-12 - Disconnecting Means.

(i) Location of other electrical equipment for new pools and spas. Electrical switches, outlets, deck lights and other such electrical equipment shall be located at a distance from the inside wall of a new pool or spa unless separated from the pool or spa by a solid fence, wall or other permanent barrier as required by NEC-1999, Chapter 6, Article 680 - Swimming Pools, Fountains, and Similar Installations.

§265.193. Heaters.

(a) Certification of heaters or boilers for new and existing pools and spas. If required by TDLR, both new and existing pool and spa heaters or boilers shall have a current certificate of operations from the TDLR. In addition, all pool and spa heater installation and energy sources for new pools and spas shall be designed, constructed and operated to comply with applicable local, state, or federal codes or standards as well as the manufacturer's specifications.

(b) Installation and testing for new pools and spas. This subsection pertains to appliances using either fossil fuels such as natural gas, liquid petroleum gas, and No. 2 fuel oil, or electric heating equipment for heating pool water for new pools and spas and shall comply with the following.

(1) Heaters shall comply with ANSI Z21.56-1994, Standards for Gas-Fired Heaters, or for electrical heaters UL 1261-1992, or UL 559-1985 for heat pumps.

(2) Heaters shall be installed on a surface with sufficient structural strength to support the heater when it is full of water and operating. The heater shall be level and stationary after plumbing, gas and/or electrical connections are completed.

(3) Heaters requiring a non-combustible surface per the manufacturer, shall be placed on a concrete or other accepted surface in accordance with ANSI Z21.56-1994-Gas-Fired Heaters.

(4) Heaters shall be installed and maintained with the minimum clearances to combustibles for which the heater has been tested as specified by the manufacturer.

(5) Heaters shall have adequate ventilation in order to ensure proper operation.

(6) Heaters shall be grounded and bonded to reduce electrical shock hazard.

(7) Heaters with electronic ignition shall be wired in series with the circulation pump to ensure they will not turn on when the pump is off.

(8) Water flow through heaters, bypass plumbing installed, cross-connection protection, and heat sinks shall be installed in accordance with the manufacturer's and TNRCC specifications or the department, or state or local regulatory authority.

(c) Temperature and thermometer for new and existing spas. The maximum temperature of the water in a new or existing spa shall not exceed 104 degrees Fahrenheit (40 degrees Centigrade). At a new or existing spa, an unbreakable thermometer (plus or minus one degree Fahrenheit tolerance) that is designed for use in a spa environment shall be available for patrons and staff to monitor spa temperature. The control for the spa temperature shall not be accessible to the spa user. It is recommended that the operating temperature in the spa be limited to not more than 102 degrees Fahrenheit.

(d) Heating energy source for new pools and spas. The heating energy source for new pools and spas shall comply with the following.

(1) Pool and spa heater energy sources shall be designed, constructed and operated to comply with applicable local, state, or federal codes or standards as well as the manufacturer's specifications.

(2) The natural gas energy supply piping shall comply with manufacturer's specifications and ANSI Z223.1-1996-National Fuel Gas Code.

(3) Gas lines shall have a gas cock, properly sized and readily accessible outside the jacket, to stop the flow of natural gas at the heater for service or emergency shutdown.

(4) Where liquid petroleum gas appliances are used, they shall be installed in accordance with ANSI/NFPA 58-1998-Storage and Handling of Liquefied Petroleum Gases.

(5) The storage tank, supply piping and regulator shall be adequately sized to ensure operating fuel pressures as specified by the appliance manufacturer.

(6) Propane appliances located in a pit or enclosed area shall be installed in accordance with ANSI/NFPA 58-1995 standards.

§265.194. Pool and Spa Water Supply.

(a) Initial fill water for new and existing pools and spas. The water supply used to fill a new or existing pool or spa shall be from a potable water system which meets applicable standards of TNRCC or meets the approval of the department or local regulatory authority.

(b) Make-up water source for new and existing pools and spas. In a new or existing pool or spa, make-up water to maintain the pool or spa water level and water used as vehicle for disinfectants or other pool or spa chemicals, for pump priming or for other such additions to the pool or spa shall be from a potable water system and shall meet applicable standards of TNRCC or the department or local regulatory authority.

(c) No direct mechanical connection for new and existing pools and spas. In a new or existing pool or spa, no direct mechanical connection shall be made between the pool or spa, chlorinating equipment, or the system of piping for the pool or spa and the sanitary sewer system, septic system or other wastewater disposal system.

(d) Fill spout for new pools and spas. An over-the-rim spout, if used in a new pool or spa, shall be located under a diving board, adjacent to a ladder, or otherwise properly shielded so as not to create a trip or other hazard. Its open end shall have a secured soft pliable end (for example, a short section of a rubber hose) to prevent injury to patrons and shall not protrude more than two inches beyond the edge of the pool or spa. The end of the soft pliable outlet shall be separated from the maximum possible pool or spa water level by an airgap at least two times the diameter of the pipe.

(e) Fill spout for existing pools and spas. An over-the-rim spout, if used in an existing pool or spa shall have a secure soft pliable end (for example, a short section of rubber hose) to prevent injury to patrons and shall not protrude more than two inches beyond the edge of the pool or spa. The end of the soft pliable outlet shall be separated from the maximum possible pool or spa water level by an airgap at least two times the diameter of the pipe.

§265.195. Facility Drinking Water Supply.

(a) Potable water source for new and existing pools and spa facilities. The water supply serving a new or existing pool or spa facility, such as drinking water fountains, plumbing fixtures, lavatories and showers shall be a potable water system and shall meet applicable standards of TNRCC.

(b) No cross-connections at new and existing pools and spas. At a new or existing pool or spa, no direct mechanical connection shall be made between the potable water supply and the pool or spa, chlorinating equipment, or the system of piping for the pool or spa, unless it is protected against cross-connection in a manner in compliance with 30 Texas Administrative Code, TNRCC, Chapter 290, Water Hygiene, Subchapter D, Rules and Regulations for Public Water Systems, §290.44(h) (relating to Water Distribution) concerning back siphonage or other regulatory authority.

(c) Drinking water fountain for new pools and spas. At least one drinking fountain shall be provided and available to users at a new pool or spa.

(d) Location of waterlines for new pools and spas. Location of water lines at a new pool or spa facility shall be in compliance with 30 TAC, Chapter 290, Water Hygiene, Subchapter D, Rules and Regulations for Public Water Systems, §290.44(e) (relating to Water Distribution), TNRCC, concerning location of waterlines or other regulatory authorities.

§265.196. Waste Water Disposal.

(a) Filter backwash disposal for new and existing pools and spas. Filter backwash water and pool or spa drainage water from

new and existing pools and spas shall be discharged or disposed of in accordance with the requirements of TNRCC or local regulatory authority.

(b) No direct physical connection between a sewer and a new and existing pools or spas. There shall be no direct physical connection between a wastewater disposal system and a drain or recirculation system of a new or existing pool or spa. Backwash water or pool and spa draining water, shall be discharged through an air gap formed by positioning the discharge pipe opening at least two pipe diameters above the overflow level of any confining barriers which could cause flooding and submergence of the discharge opening, in the event that the disposal system should fail or by other means in accordance with TNRCC or other regulatory authority. Splash screening barriers are permitted as long as they do not destroy air gap effectiveness.

(c) Location of on-site sewage facility wastewater disposal lines for new and existing pools and spas. The location of on-site sewage facility wastewater disposal lines at a new or existing pool or spa shall be in compliance with 30 TAC, Chapter 285, On-site Sewage Facilities, Subchapter D, Planning, Construction and Installation Standards for OSSF's, §285.31 (relating to Setback and Separation Requirements) or other local regulatory requirements.

(d) Location of other wastewater disposal facilities or lines for new and existing pools and spas. The location of other wastewater disposal facilities or lines at a new and existing pool or spa shall meet applicable standards of the TNRCC or local regulatory authority.

§265.197. Disinfectant Equipment and Chemical Feeders.

(a) Disinfectant equipment replacement for existing pools. When equipment is replaced on existing pools and spas and the equipment falls within the scope of ANSI and NSFI Standard-50-1996 (ANSI/NSFI-50-1996), the equipment shall meet this standard.

(b) Disinfectant equipment and practices at new pools and spas. Disinfectant equipment and practices at new pools and spas shall comply with the following.

(1) Disinfectant equipment and installation shall comply with ANSI/NSFI-50-1996, "Circulation System Components and Related Materials for Swimming Pools, Spas/Hot Tubs."

(2) Disinfectant feed systems shall have the capacity to maintain up to 5 part per million chlorine or approved equivalent for outdoor pools and up to 3 parts per million chlorine or approved equivalent for indoor pools, under all conditions of intended use. The disinfectant feed system at a new outdoor spa shall have the capacity to maintain up to 8 parts per million chlorine or approved equivalent and up to 5 parts per million chlorine or approved equivalent in a new indoor spa.

(c) Disinfectant equipment and practices at new and existing pools and spas. Disinfectant equipment and practices at new pools and spas shall comply with the following.

(1) A chlorine or bromine residual or other method of disinfectant approved by the Department shall be maintained in the pool or spa water to meet the requirements of §265.204(a) of this title (relating to Water Quality (Required water quality for new and existing pools and spas)). Disinfection equipment shall be selected and installed so that continuous and effective disinfection can be secured under all conditions. The use of elemental gas chlorine shall be in compliance with §265.198 of this title (relating to Gas Chlorination).

(2) The pool or spa water shall be continuously disinfected by a disinfecting agent whose residual can be easily measured by simple and accurate field tests.

(3) Personnel responsible for the operation of the disinfection agent and other potentially hazardous chemicals shall be properly trained as required in §§295.1-295.8 and §295.10 of this title (relating to Hazard Communication). Protective equipment and clothing, including rubber gloves and goggles, and any other protective gear and safety information shall be provided as required in §§295.1-295.8 and §295.10 of this title.

(4) Disinfection or other chemicals and feed equipment shall be stored in such a manner that pool and spa users shall not have access to such facilities and/or chemicals. Dry chemicals shall be stored off the floor in a dry, above ground level room and protected against flooding or wetting from floors, walls, and ceiling.

(5) All chemical bulk and day tanks shall be clearly labeled to indicate the tank's contents.

(6) Solution containers shall be provided with a cover to prevent the entrance of dust, insects, and other contaminants.

(7) It is recommended that day tanks be provided to minimize the possibility of severely overfeeding liquid chemicals.

(8) Chlorine compounds shall not be stored in the same area as petroleum products as required in §§295.1-295.8 and §295.10 of this title (relating to Hazardous Communication).

(9) If needed in order to maintain proper chemical levels, chlorine, pH or other chemical control equipment which automatically adjusts chemical feed based on demand, shall be provided in order to meet §265.204(a) of this title (relating to Water Quality (Required water quality for new and existing pools and spa)).

(10) If ancillary non-chlorine or non-bromine disinfectants are used, they shall be used in addition to chlorine or bromine or other approved equivalent, see §265.204(a) of this title (relating to Water Quality (Required water quality for new and existing pools and spa)).

(11) Disinfectant agents for pools and spa shall be registered for use by the United States Environmental Protection Agency (EPA).

(12) Supplemental hand feeding of disinfectant or other chemicals directly into the pool or spa shall not occur when the pool or spa is occupied by users.

(13) Pool and spa skimmer baskets shall not be used as chemical feeders.

(d) Chemical feeders at new and existing pools and spas. Chemical feeders at new and existing pools and spas shall:

(1) be installed, maintained and operated in accordance with the manufacturer's specifications;

(2) be installed so that the gas or solution is introduced downstream from the filter and heater and, if possible, at a point lower than the heater outlet fitting or according to manufacturer's instructions;

(3) incorporate failure-proof features so that the chemical cannot feed into the pool or spa, the pool or spa piping system, water supply system, or the pool and spa enclosure if equipment or power fails. Chemical feed pumps shall be wired so they cannot operate unless there is adequate return flow to properly disburse the chemical throughout the pool or spa as designed;

(4) be regulated to ensure constant feed with varying supply or back pressure;

(5) be designed to prevent siphoning from the recirculation system to the solution container and to prevent the siphoning of the chemical solution into the pool or spa;

(6) have a graduated and clearly marked dosage adjustment to provide flows from full capacity to 10% of such capacity. The device shall be capable of continuous delivery within 10% of the dosage at any setting; and

(7) be provided with make-up water supply lines to chemical feeder solution containers that have an air gap or other acceptable cross-connection control.

§265.198. Gas Chlorination.

This section applies to existing Class A, B, C or D pools and existing spas using gas chlorination, and new Class A or B pools using gas chlorination. Gas chlorination equipment shall not be installed on new Class C or Class D pools, or on new spas.

(1) Trained personnel. Trained personnel shall be provided to meet §265.197(c)(3) of this title (relating to Disinfectant Equipment and Chemical Feeders (Disinfectant equipment and practices at new and existing pools and spas)).

(2) Two trained persons. Two persons trained in the performance of routine chlorination operation and emergency procedures shall be readily available during normal operating hours. Pool personnel shall be informed about leak control procedures. It is recommended that a Chlorine Institute Emergency Kit A be provided and stored at an approved location where it is readily accessible per the emergency response plan. Only trained designated personnel shall operate the chlorinator and change chlorine cylinders.

(3) Safe equipment location. Chlorination equipment shall be located so that failure or malfunction will have minimum effect on evacuation of pool patrons in an emergency.

(4) Chlorinator. Gas chlorinators shall be the type where the regulator attaches to the cylinder, with the injector located at the point of injection, with a vacuum line taking suction at the regulator and delivering the gas to the vacuum injector. They shall be designed to prevent the suction of water into the chlorination system if the booster pump fails to operate.

(5) Booster pump. A booster pump water supply for the gas chlorinator injector shall be capable of producing the flow rate and pressure required by the manufacturer's specifications for proper operation of the equipment.

(A) Elemental chlorine feeders (chlorinators) shall be activated by a booster pump using recirculated water supplied via the recirculation system.

(B) A booster pump shall be interlocked to the filter pump to prevent feeding of chlorine when the recirculation pump is not running.

(6) Housing. The chlorinator, cylinders of chlorine, and associated equipment shall be housed in a separate corrosion-resistant room reasonably gas-tight having a floor area adequate to the purpose. The following shall apply to housing structures:

(A) all enclosures shall be located at or above ground level;

(B) the enclosure shall be provided with: ducts from the bottom of the enclosure to the atmosphere in an unrestricted area, a motor-driven louvered exhaust fan capable of producing at least one air change per minute, near the top of the enclosure for admitting fresh air or negative pressure ventilation may be provided as long as the facilities also have gas containment and treatment as prescribed by the Uniform Fire Code (UFC);

(C) a warning sign shall be posted on the exterior side of the doors which states in four inch letters, "DANGER CHLORINE";

(D) the doors to the chlorine room shall open away from the pool and open outward and have panic hardware;

(E) electrical switches for the control of artificial lighting and ventilation shall be on the outside of the enclosure adjacent to the door. Adequate lighting shall be provided;

(F) at least one door shall have a viewport to permit the operators to look into the room before entering; and

(G) the door shall be kept locked when the chlorine room is not being serviced.

(7) General gas chlorine safety features. The following gas chlorination safety features shall be required.

(A) Two full-face self-contained breathing apparatus (SCBA) or supplied air respirator that meets Occupational Safety and Health Administration (OSHA) or Mine Safety Health Administration (MSHA) standards shall be provided for protection against chlorine in the event of a leak. This equipment shall have sufficient capacity for the purpose intended. SCBA equipment shall be readily accessible at a location acceptable to the Local Emergency Planning Committee and/or the local fire chief. Entry into the chlorine room shall not be permitted without necessary safety equipment (i.e. SCBA for leaks, or escape type half-face or mouthpiece cartridge-type respirator or SCBA when conducting general maintenance, changing cylinders, etc.) and two trained personnel at the site. In addition a written respirator program shall be provided and employees shall be trained in the use and maintenance of such equipment to ensure operability and safety. Occupational Safety and Health Administration (OSHA) regulations 29 CFR 1910, require training and maintenance programs for respirators. All applicable local, state or federal requirements concerning the proper handling of chlorine shall be followed.

(B) Containers may be stored indoors or outdoors. Full and empty cylinders shall be segregated and appropriately tagged. Cylinders, empty or full shall always be stored in an upright position and properly secured. Cylinders shall be chained to a wall or scale support. Storage conditions shall:

(i) minimize external corrosion;

(ii) be clean and free of trash;

(iii) not be near elevator shafts or intake vents; and

(iv) be away from elevated temperatures or heat sources.

(C) Chlorine cylinders shall be handled with care. Valve protection caps and valve outlet caps shall be in place at all times except when the cylinder is connected for use. Cylinders shall not be dropped and shall be protected from falling objects. Cylinder shall be used on a first-in, first-out basis. New, approved washers shall be used each time a cylinder is connected.

(D) As soon as a container is empty, the valve shall be closed and the lines disconnected. The outlet cap shall be applied promptly and the valve protection hood attached. The open end of the disconnected line shall be plugged or capped promptly to keep atmospheric moisture out of the system. A chlorine valve shut off

wrench shall be kept on the cylinder valve stem of the cylinder that is in use.

(E) Contents of a chlorine cylinder can be determined only by weight; therefore, facilities shall include a scale suitable for weighing the cylinders. Changing cylinder(s) shall be accomplished only after weighing proves contents of cylinder to be exhausted. Care shall be taken to prevent water suck-back into the cylinder by closing the cylinder valve.

(F) The telephone number of the chlorine supplier shall be posted. In the event of a chlorine leak, the fire department or an agency trained in the handling of chlorine spills shall be immediately contacted. The telephone numbers of the fire department or above agency shall be posted on the outside of the chlorine room door.

(G) It is recommended that information regarding safety issues be posted in or near the chlorine enclosure and in the pool office near the telephone. Such charts are available from many suppliers and from the Chlorine Institute. In addition, the Chlorine Institute publishes a document called "Chlorine Safety At Nonresidential Swimming Pools", Edition 1, 1988, pamphlet 82.

(H) It is recommended that an automatic chlorine leak detector be installed in the chlorine room with an audible alarm installed at the pool site and at the remote site where emergency response personnel are located.

(I) The chlorinator and all line and tank fittings shall be checked for leaks at regular intervals and after every tank exchange. A small bottle of fresh ammonia solution (or approved equal) for testing for chlorine leakage shall be provided and accessible outside the chlorinator room when chlorine gas is used.

(J) Tanks and cylinders shall be secured as necessary to prevent spills.

§265.199. Specific Safety Features.

(a) Handholds for new pools and spas. A new pool or spa shall be provided with a handhold around its perimeter in areas where depths exceed 42 inches. Handholds shall be provided no farther apart than three feet to include, but not limited to, one or a combination of the following items:

(1) handholds such as coping, rope, railing, ledge, or deck along the immediate top edge of the pool which provides a slip-resistant surface shall be at least four inches minimum horizontal width and located at or not more than nine inches above the design water level. The coping, decking or other material shall have rounded, slip-resistant edges, and shall not exceed three and one-half inches in thickness. The overhang of the coping, decking or other material shall not exceed two inches nor be less than one inch; and

(2) ladders, stairs, or seat ledges, in accordance with §265.186(b) of this title (relating to Deck Entry/Exit, and Diving Facilities, and Other Deck Equipment (Entries and exits for new pools)).

(b) Float lines and floor markings for new pools. Float lines with floats and floor markings for a new pool shall comply with the following.

(1) For Class A and B pools, a rope and float line shall be provided between one foot and two feet on the shallow side of the five foot depth along and parallel to this depth from one side of the pool to the other side. The floats shall be spaced at not greater than seven foot intervals. The floats shall be secured so they will not slide or bunch up. The tightly stretched float line shall be of sufficient size and strength to offer a good handhold and support loads normally imposed by users.

(2) For Class A and B pools, the transition point of the pool from the shallow area to the deep area (five foot deep) shall be visually set apart with a four inch minimum width row of floor tile, a painted line, or similar means using a color contrasting with the bottom.

(3) For Class C pools, the transition point of the pool from the shallow to the deep area shall be visually separated with one of the following:

(A) preferably a visible rope and floats spaced at not greater than seven foot intervals; or

(B) a four inch minimum width row of floor tile, painted line, or similar means using a color contrasting with the bottom.

(4) Where lap lanes are provided, the lanes shall be separated from other areas of the pool (i.e., shallow, beginning, diving) areas with the use of rope and float line.

(5) Rope and float line shall be securely fastened to wall anchors of corrosion-resisting materials and of the type which shall be recessed or have no projection that will constitute a hazard when the line is removed.

(c) Depth markers for new pools. New pools shall comply with the following depth marker requirements.

(1) Vertical sidewall depth marker numbers and units of measurement shall be four inches in height. These vertical sidewall depth marker number and units of measurement shall be plainly and conspicuously posted above the actual water level on the vertical pool wall and be positioned to be read by a user while in the pool. If a vertical sidewall depth marker number and units of measurement cannot be placed on the vertical wall with the entire marker above the actual water level (e.g. zero depth pool edge or other coping types which do not allow sufficient space for the four inch depth markers) other methods may be used to mark the depth and unit of measurement, such as eight inches in height markings placed above the pool deck level and on a wall, fence, or sign no further than 12 feet from the pool or by some other means to display the depth to a patron in the pool. If it is not possible to display the vertical depth marker numbers and units of measurement by a method described above, or an equivalent method, then such display will not be required.

(2) Vertical sidewall depth markers and deck depth markers shall indicate the pool depth from the design water level to the floor of the pool with a vertical measurement taken three feet from the pool wall.

(3) Depth markers and units of measurement on deck and vertical sidewall shall be of contrasting color to the background on which they are applied, and the color shall be of a permanent nature.

(4) On pool decks, depth marker number and units of measurement shall be within 24 inches of the water edge and positioned to be read while standing on the deck facing the water. These deck depth marker numbers and units of measurement shall be four inches in height.

(5) Units of measurement shall either spell out "feet" or "inches" or abbreviate "Ft.", "In." or feet and fractions of a foot. In addition to feet and inches the depth of water may also be displayed in meters. Units of measurement for meter depth markers may be spelled out "meters" or abbreviated "M".

(6) Vertical sidewall depth markers and deck depth markings and units of measurement shall be arranged uniformly around the pool.

(7) Vertical sidewall depth markers and deck depth markings and units of measurement shall be installed at the maximum and minimum water depths and at all points of bottom slope change.

(8) Vertical sidewall depth markers and deck depth markers and units of measurement on irregularly shaped pools shall designate depths at all major deviations in shape as well as conform to all other requirements of this subsection.

(9) Vertical sidewall depth markers and deck depth markers and units of measurement shall be installed at intermediate increments of water depth not to exceed two feet, nor spaced at distances greater than 25 foot intervals, and with a minimum of at least one marker per pool side.

(10) Depth marker number and units of measurement on the deck shall be slip-resistant.

(d) Deck "NO DIVING" wording and international symbol warning signs for new and existing pools. This subsection applies to new and existing pools. The warning words "NO DIVING" and the international symbol for no diving shall be clearly marked on the pool deck with an acceptable contrasting color and letters at least four inches in height. The warning shall be placed at least every 25 feet or fraction thereof, around the pool where the water depth is six feet or less. At least two warnings including the "NO DIVING" and international symbol for no diving, one at the extreme ends of the minimum depth and one at the extreme ends of the maximum depth at six feet, shall be provided on each side of the pool or on each of the longer dimensional sides of the pool. These warning signs shall be slip-resistant. The warning "NO DIVING" and international symbol on the deck shall be within 24 inches of the water edge and positioned to be read while standing on the deck facing the water.

(e) Signs for new and existing pools. New and existing pools shall comply with the following sign requirements.

(1) Signs shall be securely mounted as applicable and readily visible to the pool user from inside the pool enclosure.

(2) For Class C and D pools where no lifeguard is provided, a sign shall be placed in plain view and shall state "NO DIVING" along with an international warning symbol for no diving. The letters "NO DIVING" and the symbol shall be at least four inches high.

(3) For pools where no lifeguard service is required, a warning sign shall be placed in plain view and shall state "WARNING-NO LIFEGUARD ON DUTY" with clearly legible letters at least four inches high. In addition, the sign shall also state in letters at least two inches high "CHILDREN SHOULD NOT USE POOL WITHOUT ADULT SUPERVISION". The additional signage required in this subsection may be included on the sign described in paragraph (2) of this subsection. The language on the sign may impose stricter adult supervision requirements for children using the pool.

(4) When a required telephone is not readily visible from a new or existing pool or spa, directions shall be posted regarding its location as stated in subsection (h)(4) of this section.

(5) In addition to English, in areas of Texas where a majority of citizens are non-English speaking, it is also recommended that signs, and other written warnings required by these standards, be posted in the predominant language.

(f) Lifeguard personnel standards and lifeguard equipment at new and existing pools. New and existing pools shall comply with the following lifeguard requirements.

(1) Lifeguards and second responders shall be provided at new and existing Class A and B pools and at Class C pools with diving boards. Lifeguards and second responders are recommended at all Class C pools that reach 75% of the user load as defined in §265.185(e) of this title (relating to Dimensional Design (Maximum user loading for new and existing pools and spas)). At pools where lifeguards are not provided, refer to subsection (e)(3) of this section relating to signs.

(2) When a lifeguard is provided at a pool, the following shall apply:

(A) At all times the pool is in use, at least one lifeguard (and more as necessary) shall be positioned and actively performing pool user surveillance and be able to meet the 10/20 rule for all areas of the pool in use. No user shall be permitted in a pool area unless a lifeguard(s) is/are present.

(B) The lifeguard(s) shall hold a current and have available on request the American Red Cross (ARC) "Lifeguard Training" certificate or the equivalent certification from an aquatic safety organization, which also includes training in (ARC) "Adult, Infant, and Child CPR" and "Community First Aid" or their equivalent. Management at each facility will maintain a current file on each staff's current certification including expiration dates.

(C) An additional lifeguard, or second responder who is monitoring and readily available at the pool, who has a minimum training in (ARC) "Adult, Infant, and Child CPR" and "Community First Aid" certificate or equivalent certificate, shall also be in the pool area when the pool is in use.

(D) Lifeguard(s) conducting surveillance of pool users shall not be subject to duties that would distract their attention from proper observation of the patrons, or that would prevent immediate assistance to persons in distress in the water.

(E) Pool facilities shall provide alertness/response drills and other training including documentation of the following:

(i) a pre-season training program;

(ii) a continual "in-service" training programs for all lifeguards, and other aquatic personnel at a minimum or one hour per week; and

(iii) performance "audits" based on the 10/20 rule as recommended by the ARC or YMCA or equivalent aquatic safety organization certification.

(F) Owners shall maintain an emergency action plan similar to the one outlined by the ARC or YMCA or equivalent aquatic safety organization. All lifeguards and second responders shall receive training in the application of effective pool emergency procedures. Such training will be reviewed as necessary and kept current. Each lifeguard's ability to meet the 10/20 rule shall be evaluated and documented. Each lifeguard shall be given an assigned surveillance area commensurate to ability.

(G) Owners shall allow lifeguards to have sufficient break time from guarding activities as recommended by the ARC or YMCA or equivalent aquatic safety organization. It is recommended that a lifeguard not guard for more than one hour without a break of at least ten minutes. It is recommended that when multiple guards are on duty they rotate stations every 30 minutes.

(H) When on duty, lifeguards shall not be in the water except in the line of duty.

(g) Lifeguard chairs and lifeguard equipment. New and existing pools shall comply with the following sign requirements, as applicable.

(1) A new pool that has a diving board(s) shall have at least one elevated lifeguard chair, located to provide a clear unobstructed view of the pool bottom in the diving area.

(A) The seat of the lifeguard chair in the diving water area shall be located at an elevation at least four feet above the pool deck. The lifeguard chair may be the portable type so that its location can be optimized to prevent glare and provide proper supervision.

(B) Where a pool width is 45 feet or more, an additional elevated chair or station shall be provided and shall be located in the diving area on the opposite side of the pool.

(C) Such lifeguard platforms or chairs shall be placed in locations to reduce sun glare on the water, and in positions which allow complete visual coverage of the pool and the pool bottom within a field of view no greater than 90 degrees on either side of a line of sight extending straight out from the platform or chair.

(2) At new and existing pools. At new and existing pools, lifeguard(s) shall have standard rescue tube(s) or buoy(s) and attached rope/strap in sufficient numbers, and other equipment as necessary for use by the lifeguard(s), immediately accessible at all times as recommended by the ARC or YMCA or equivalent organization. At new and existing pools, lifeguard(s) and second responder shall be dressed in swimming attire so that they are readily identifiable as members of the staff.

(h) Pool safety equipment for new and existing pools. New and existing pools shall comply with the following standards.

(1) Lifesaving equipment at new and existing Class C pools. At a new and existing Class C pool, at least one of each of the following items of lifesaving equipment shall be mounted in a conspicuous place or places around the pool deck within 20 feet of the pool, and kept in good repair and ready condition. One unit shall be presumed to be adequate for 2,000 square feet of water surface area. At Class C pools where lifeguards are not provided, one additional unit shall be provided for each additional 2,000 square feet of water surface area or major fraction thereof as follows:

(A) a light, strong, non-telescopic reaching pole not less than 12 feet long, including a body hook or shepherd's crook type of pole, having blunted ends. This pole shall be constructed of fiberglass or some other electrically non-conducting material; and

(B) 1/4 inch to 3/8 inch diameter throwing rope a length of two-thirds the maximum width of the pool to which has been firmly attached a United States Coast Guard approved ring buoy with an outside diameter of 15 to 24 inches.

(2) Backboards at new and existing pools. New and existing Class A and B pools and Class C pools which have diving board(s) and/or slide(s), shall have one or more backboards with a minimum of three tie down straps and head immobilizer for back and neck injuries.

(3) First aid kits at new and existing pools. New and existing Class A and B pools and other pools with lifeguards shall be equipped with a first-aid kit meeting OSHA requirements. First aid kits shall be housed in a durable weather resistant container and kept filled and ready for use (including disease transmission barriers and cleansing kits that meet OSHA standards). First aid kits shall be designed to treat at least 15 persons. At Class C pools, first aid kits are recommended but not required.

(i) Telephones at new and existing pools and spas. New and existing pools and spas shall have a telephone or other electronic means capable of immediately summoning emergency service readily accessible within 150 feet unimpeded distance (an unlocked door or gate shall not be considered an impediment) of the pool or spa. A sign in plain view of the pool or spa shall state in letters at least one inch high: "In case of emergency, call 911 (or other appropriate emergency number or action)." If the location of the telephone or other electronic means is not readily visible from the pool or spa, the sign shall include a concise description of the location of the telephone or other electronic means. If other electronic means are provided, clear instructions regarding their use shall be provided.

(j) Lighting for new pools and spas. Lighting as described in this subsection shall be provided if a new pool or spa is open for use after sunset and before sunrise or during periods of low illumination. It is recommended that pool or spa lighting systems be designed by lighting professionals whose practice includes pool and spa lighting.

(1) Underwater lighting of not less than 0.5 watts (incandescent equivalent) per square foot of pool water surface area shall be provided. Such lights shall be spaced to provide illumination so that all portions of the pool or spa, including the bottom, may be readily seen without glare. Additionally, underwater lighting system design shall be consistent with IESNA RP-6, 1988.

(2) Overhead lighting shall comply with IESNA RP-6, 1988, standards.

(k) Indoor ventilation for new pools and spas. A new pool or spas that is constructed indoors shall be constructed to meet ASHRAE 62-1989 "Ventilation for Acceptable Indoor Air Quality" standards.

§265.200. Pool Yard Enclosures.

(a) Enclosures for new Class A and B pools. New Class A and B pools shall be enclosed by a chain link fence or equal non-scalable barrier a minimum seven foot vertical height fabric height with three strands of wire mounted at the top of the fence on a 45 degree arm projecting outward or one of the following: portion of a building, wall or other enclosure providing equivalent access control. All openings in the barrier shall be equipped with gate(s) or door(s) which are directly supervised by staff or locked to prevent unauthorized entry. Such a fence shall also be provided at all pools both existing and new that are located at a residential camp for a Youth Camp licensed under Health and Safety Code, Chapter 141.

(b) Enclosures for new and existing pools and spas subject to Health and Safety Code, Chapter 757. A new or existing pool subject to Health and Safety Code, Chapter 757, shall be provided with a pool yard enclosure as required in that code.

(c) Enclosures for other new and existing pools and spas. A new Class C and D pool and spa, or an existing Class C and D pool and spa which does not have an enclosure, and which is not located at a complex subject to Health and Safety Code, Chapter 757, and is not covered by existing local regulations for pool or spa yard enclosures, shall construct an enclosure in compliance with this subsection. Such enclosure shall also be provided at new and existing pools that are located at a day camp for a Youth Camp licensed under Health and Safety Code, Chapter 141. It is recommended that enclosures on existing pools and spas not subject to Health and Safety Code, Chapter 757, and not regulated by existing local requirements, be upgraded to the standards of this section. For spas, also see ANSI/NSPI-2, 1992 for additional enclosure methods.

(1) The pool or spa yard enclosure shall consist of one or a combination of the following: a fence, portion of a building, wall or other durable enclosure. Doors, openable windows, or gates of living quarters or associated private premises shall not be permitted as part of the pool enclosure. The enclosure, doors and gates shall meet the following specifications:

(A) a minimum effective perpendicular height of at least 48 inches as measured from the deck surface on the outside of the fence;

(B) be designed and constructed so that it cannot be readily climbed by small children. If the enclosure is constructed with horizontal and vertical members and the distance between the tops of the horizontal members is at least 45 inches, the openings shall not allow the passage of a four inch diameter sphere;

(C) openings under the pool or spa enclosure may not allow a sphere four inches in diameter to pass under the pool enclosure;

(D) planters or other structures that may allow children to climb the fence shall not be permitted to encroach within 36 inches measured horizontally from the outside of the fence; and

(E) chain link may not be used.

(2) Gates and doors for the pool or spa yard enclosure shall:

(A) be equipped with self-closing and self-latching devices. The self-closing device shall be designed to keep the gate or door securely closed and the self-latching device shall latch when the gate is allowed to close from anywhere in its range of operation, from its fully open position to a position where the gate is open six inches from the fully closed position;

(B) open outward away from the pool or spa except where otherwise prohibited by local code;

(C) have hand activated door or gate opening hardware located at least 3-1/2 feet above the deck or walkway;

(D) be capable of being locked; and

(E) be locked when a Class A or B pool or spa is not opened for use, and be locked when a Class C pool or spa located at a Class C facility, needs to be closed as a result of a hazard or condition that warrants the closure and locking of the pool.

(3) The enclosure shall be designed and constructed so that all persons will be required to pass through common pool enclosure gates or doors in order to gain access to the pool area. All gates and doors exiting the pool or spa area shall open into a public area or walkway accessible by all patrons of the pool or spa.

§265.201. Dressing and Sanitary Facilities.

(a) Fixture design at new facilities. Fixtures at new facilities shall be designed so that they are readily cleanable. Frequent cleaning and disinfecting shall not cause damage.

(b) Fixture installation at new and existing facilities. In new and existing facilities, fixtures shall be installed in accordance with local plumbing codes and shall be properly protected by cross-connection control device(s) as approved by the TNRCC or local regulatory authority.

(c) Proper cleaning at new and existing facilities. New and existing facilities shall be cleaned as necessary to maintain sanitary conditions at all times.

(d) Adequate ventilation at new facilities. Adequate ventilation shall be provided in new facilities to prevent objectionable odors in accordance with §265.199(j) of this title (relating to Specific Safety Features (Indoor ventilation for new pools and spas)).

(e) Dressing and sanitary facilities at new Class A or B facilities. Adequate dressing and sanitary facilities shall be provided at Class A, B, and D pools and spas located at Class A or B facilities, unless these facilities are provided in connection with the general development for other purposes and are of adequate capacity and number and in close proximity to the pool and spa.

(1) Separate dressing and sanitary facilities shall be provided for each gender. The rooms shall be well-lighted, drained, ventilated, and of good construction, using impervious materials. They shall be developed and planned so that good sanitation will be maintained throughout the building at all times. Dressing rooms in appropriate number, that can accommodate a family are allowed.

(2) Partitions between portions of the dressing room area, screen partitions, shower, toilet, and dressing room booths shall be of durable material not subject to damage by water and shall be designed so that a waterway is provided between partitions and floor to permit thorough cleaning of the walls and floor areas with hoses and brooms.

(3) At least one shower and dressing booth for each gender shall be provided for seclusion. This condition may be subject to variation for schools and other institutional use where a pool or spa may be open to one gender at a time.

(4) It is recommended that floors of the dressing facility have minimal joint and grout lines. Floors shall have a slip-resistant surface and shall be sufficiently smooth to ensure ease in cleaning. Floor drains shall be provided, and floors shall be sloped 1/4 inch per foot toward the drains to ensure positive drainage.

(5) An adequate number of hose bibs and hose of adequate length shall be provided for flushing down all areas of the dressing facility interior. Adequate cross-connection control devices as approved by the TNRCC or local regulatory authority shall be provided. When not in use hoses shall be stored in such a manner to prevent a trip hazard.

(f) Lavatories, showers, and toilets at new pools and spas. Except as provided in subsection (g) of this section, the following requirements apply to lavatories, showers and toilets in facilities serving new Class A, B, C, or D pools and spas located at Class A, B, or C facilities:

(1) the required fixture schedule is contained in the following table:
Figure: 25 TAC, §265.201(f)(1);

(2) fixture schedules should be increased for swimming pools at schools or similar locations where load may reach peaks due to schedule of use; and

(3) shower(s) and lavatory(s) water temperature shall be controlled by anti-scald devices. The water heater and thermostatically-controlled mixing valves shall be inaccessible to users and shall be capable of providing two gallons per minute of water, not to exceed 110 degrees Fahrenheit with a minimum of 90 degrees Fahrenheit water to each shower head. A shower can be located on the deck of the pool if proper waste water disposal is provided. The shower need not be enclosed.

(g) Sanitary facilities serving new pools or spas in apartments or condominiums. New Class C and D pools and spas located in

an apartment or condominium complex are not required to have the following facilities:

(1) dressing rooms;

(2) toilets;

(3) urinals unless the facility has toilets for persons using the pool or spa;

(4) hand drying towels unless the facility has a lavatory in an enclosed room;

(5) baby changing table unless the facility has a dressing room or toilets; and

(6) a lavatory if a faucet is installed at lavatory height and in compliance with subsection (f)(3) of this section and proper waste water disposal is provided.

(h) Additional requirements for facilities at new and existing pools and spas. New and existing facilities serving a pool or spa shall comply with the following;

(1) soap dispensers with liquid or powdered soap shall be provided at each lavatory. The dispenser shall be of all metal or plastic type with no glass permitted in these units;

(2) if mirrors are provided, they shall be shatter resistant;

(3) toilet paper holders and toilet paper shall be provided at each toilet;

(4) covered waste receptacles shall be provided in toilet or dressing room areas; and

(5) single use hand drying towels or hand drying devices shall be provided near the lavatory.

§265.202. Food, Beverages, and Containers.

(a) Food and beverages while in the water at new and existing pools and spas. At new and existing pools and spas, no person may eat, drink, or smoke while in the pool or spa.

(b) Non-breakable containers at new and existing pools and spas. At new and existing pools and spas, food and beverage(s) shall be served only in non-breakable containers. Glass containers shall not be allowed on a deck or in a pool or spa.

(c) Trash containers at new and existing pools and spas. At new and existing pools and spas, trash containers shall be provided where food and/or beverage(s) are allowed.

§265.203. Operation and Management.

(a) Required operator certification for new and existing pools and spas. New and existing Class A, B, and D pools and spas, located at Class A and B facilities shall be maintained under the supervision and direction of a properly trained and certified operator who would be responsible for the sanitation, safety, and proper maintenance of the pool or spa, and all physical and mechanical equipment and records. Training and certification can be obtained by completion of one of the following courses or their equivalent:

(1) the NPRA, "Certified Aquatic Facility Operator" (A.F.O.);

(2) the NSPF, "Certified Pool-Spa Operator" (C.P.O.); or

(3) Y.M.C.A., "Pool Operator on Location" (P.O.O.L.).

(b) Recommended operator training for new and existing pools and spas. It is recommended that new and existing Class C and D pools and spas located at Class C facilities be cared for by a trained pool and spa operator. It is recommended that training include at least six classroom or study hours.

(c) Water clarity standards for new and existing pools and spas. Areas of a new or existing pool or a spa shall be opened for use only if the pool or spa bottom and/or main drain are clearly visible. Possible visual occlusion by sediment or other matter shall be checked before opening a pool and while pool is in use. To check the pool or spa when pool or spa is in use, bathers shall exit the pool or spa, and the pool or spa water shall be allowed to calm and clarity shall be observed between one to five minutes after bathers have exited the pool. Areas of the pool or spa shall be opened for use only if the bottom and/or main drain are clearly visible. Monitoring of clarity shall be accomplished as necessary to assure clarity. Sediment or other matter that may cause visual occlusion shall be vacuumed, filtered or otherwise removed as needed prior to pool use.

(d) Equipment for water clarity for new and existing pools and spas. When a new or existing pool or spa is open for use, filtration, circulation systems, chemical/disinfectant feeders, slurry feeders, heaters, etc., that are dependent upon circulation pump flow shall be operating, plus any additional time necessary to ensure continuous water clarity and chemical distribution. The pool and spa shall be operated to maintain the circulation rates as stated in §265.187(b)(1) of this title (relating to Circulation Systems (Circulation Systems for New Pools and Spas)) concerning circulation turnover rates. Circulation pumps shall not be throttled to reduce circulation below the design flow rate.

(e) Off season water clarity for new and existing pools and spas. When a new or existing pool or spa is not in use for an extended period of time (such as off season), clarity shall be maintained and algae growth shall be prevented; however, other water quality parameters as defined in §265.204(a) of this title (relating to Water Quality (Required water quality for new and existing pools and spas)) do not need to be maintained. Other methods may be used to maintain pools and spas during extended periods of non-use if approved by local authorities.

(f) Off season safety for new and existing pools and spas. When a new or existing facility is not in use after seasonal operation, while under construction or renovation, or for any other reason, the facility shall not be allowed to give off objectionable odors; become a breeding site for insects; or create any other nuisance situation or safety hazard.

(g) Domestic animals prohibited at new and existing pools and spas. Domestic animals and other pets shall not be allowed within a new or existing pool or spa enclosure area, except that service animals shall be allowed on the deck and within the pool enclosure but not in the pool.

(h) Water level at new and existing pools and spas. Actual water level in a new or existing pool or spa shall be maintained within the operating water level range of the system's rim or weir device.

(i) Protection from chemicals for new and existing pools and spas. Personnel in charge of maintaining a new or existing pool or a spa shall be properly trained in accordance with §265.197(c)(3) of this title (relating to Disinfectant Equipment and Chemical Feeders (Disinfectant equipment and practices at new and existing pools and spas)).

(j) Maximum load limits for new pools. The maximum load limits for a new pool shall be calculated and posted. Load limits are indicated in §265.185(e)(1) of this title (relating to Dimensional Design (Maximum user loading for new and existing pools and spas)).

(k) Use of life jackets for new and existing pools and spas. No person shall prohibit the use of a life jacket in a new or existing pool by an individual who, as evidenced by a statement signed by a licensed physician, suffers from a physical disability or condition which requires the use of a life jacket.

(l) Proper use of chemicals at new and existing pools and spas. Use of all chemicals at new and existing pools and spas shall be according to manufacturer's directions.

(m) Use of registered products at new and existing pools and spas. In new and existing pools and spas, only chemicals registered and labeled for use in pools and spas by US EPA shall be used.

§265.204. Water Quality.

(a) Required water quality for new and existing pools and spas. Water quality for a new or existing pool or a spa shall meet the following criteria when the pool or spa is open for use. The water quality parameters in the following table apply to both pools and spas unless otherwise indicated.
Figure: 25 TAC, §265.204(a).

(b) Recommended water quality for new and existing pools and spas. The water quality parameters in the following table are recommended for new and existing pools and spas.
Figure: 25 TAC, §265.204(b).

(c) Water quality testing at new and existing pools and spas. A reliable means of testing for pH, free and total chlorine or total bromine residuals, cyanuric acid (if used), total alkalinity, and calcium hardness shall be maintained for new pools and spas. The test method shall be capable of measuring chemical ranges as detailed in subsections (a) and (b) of this section.

(1) The method used in determining the free available chlorine residual shall be such that chloramines or other chlorine compounds that may be present do not effect the determination.

(2) The test reagents shall be properly stored and changed at frequencies recommended by the manufacturer to assure accuracy of the tests.

(d) Testing frequency for new and existing pools and spas.

(1) When a Class A, B, or D pool or spa located at a Class A or B facility is open for use, a test for disinfectant level and pH shall be conducted at least every two hours to assure compliance with subsection (a) of this section relating to required water quality parameters. In lieu of the above testing frequency, if a system is used to automatically control disinfectant and pH, testing for disinfectant level and pH shall be made at least once per day. If necessary, tests shall be conducted more frequently to assure proper disinfectant level and pH.

(2) When a Class C or D pool or a spa located at a Class C facility is open for use, it is recommended that tests for disinfectant level, and pH be made two or more times per day to assure compliance with subsection (a) of this section relating to water quality parameters. In lieu of this testing frequency, if an automatic system is used to control disinfection and pH, it is recommended that testing for disinfection level and pH be made at least once per day. To assure proper disinfectant levels and pH, tests shall be conducted more frequently if necessary. If inspections by regulatory authorities indicate non-compliance with subsection (a) of this section relating to water quality parameters, then the department or local regulatory authority may require that these tests be conducted at an appropriate frequency and may require recording in accordance with subsection (f) of this section.

(e) Other required tests for new and existing pools and spas. Test(s) for total chlorine, cyanuric acid, alkalinity and calcium hardness at new and existing pools and spas shall be conducted as necessary to assure proper chemical control.

(f) Operational records for new and existing pools and spas. When tests are required, under this section, operational records of the tests shall be kept for two years and be made available during a governmental inspection.

§265.205. Spa Construction, Operation, and Maintenance.

(a) Construction standards for spas built between January 1, 1992 and prior to October 1, 1999. In order to comply with Health and Safety Code, Chapter 341.604, which requires that pools and spas constructed after September 1945, "conform to good public health engineering practices," spas built from January 1, 1992, and prior to October 1, 1999 shall meet ANSI/NSPI-2-1992 Standards for Public Spas or equivalent standards that conform to good public health engineering practices.

(b) Construction standards for spas built on or after October 1, 1999. Except as specifically stated in this and referenced sections, spas built on or after October 1, 1999, shall be constructed to meet ANSI/NSPI-2-1992 Standards for Public Spas.

(c) NSFI Standard-50 for new spas. On or after October 1, 1999, spa equipment such as pumps, filters, skimmers, chemical feeders, and other equipment falls within the scope of ANSI and NSFI Standard-50-1996 (ANSI/NSFI-50-1996), equipment shall comply with such ANSI/NSFI standard.

(d) NSFI Standard-50 for replaced equipment at existing spas. When equipment is replaced on existing spas such equipment that falls within the scope of ANSI and NSFI Standard-50-1996 (ANSI/NSFI-50-1996), shall meet this standard.

(e) Other standards for new spas except as otherwise noted. The following standards apply to new spas as specifically stated therein.

(1) Section 265.181 of this title (relating to General Provisions).

(2) Section 265.182 of this title (relating to Definitions).

(3) Section 265.183 of this title (relating to Plans, Permits and Instructions).

(4) Section 265.184 of this title (relating to General and Structural Designs).

(5) Section 265.185(a)-(f) of this title (relating to Dimensional Design), and as follows:

(A) the maximum water depth shall be four feet from the design waterline except when approved by the local regulatory authority; and

(B) multi-level seating may be provided, but the maximum water depth of any seat or sitting bench shall be 24 inches measured from the design waterline;

(6) Section 265.186(a)(1)-(17) of this title (relating to Deck Entry/Exit, and Diving Equipment and Other Deck Equipment), also see ANSI/NSPI-2, 1992.

(7) Section 265.187 of this title (relating to Circulation Systems).

(8) Section 265.188 of this title (relating to Filters).

(9) Section 265.189 of this title (relating to Pumps and Motors).

(10) Section 265.190 of this title (relating to Suction Outlets and Return Inlets).

(11) Section 265.191 of this title (relating to Surface Skimming and Perimeter Overflow (Gutter) Systems).

(12) Section 265.192 of this title (relating to Electrical Requirements).

(13) Section 265.193 of this title (relating to Heaters).

(14) Section 265.194 of this title (relating to Pool and Spa Water Supply).

(15) Section 265.195 of this title (relating to Facility Drinking Water Supply).

(16) Section 265.196 of this title (relating to Waste Water Disposal).

(17) Section 265.197 of this title (relating to Disinfectant Equipment and Chemical Feeders).

(18) Section 265.198 of this title (relating to Gas Chlorination).

(19) Section 265.199 of this title (relating to Specific Safety Features).

(20) Section 265.200 of this title (relating to Pool Yard Enclosures).

(21) Section 265.201 of this title (relating to Dressing and Sanitary Facilities).

(22) Section 265.202 of this title (relating to Food, Beverages, and Containers).

(23) Section 265.203 of this title (relating to Operation and Management).

(24) Section 265.204 of this title (relating to Water Quality).

(25) Air blowers and other devices and systems which induce or allow air to enter the spa either by means of a power pump or passive design and shall comply with the following:

(A) the air blower systems shall prevent water backflow that could cause electrical shock hazards in accordance with ANSI/UL 1563-1995;

(B) air intake sources shall not induce water external to the spa unit, dirt or contaminants, into the spa;

(C) the air induction system shall be properly sized in accordance with the manufacturer's sizing specification;

(D) when installing an air blower within an enclosure or indoors, adequate ventilation is required. The air induction system shall be installed in accordance with the manufacturer's recommendations;

(E) the air blowers shall be installed in accordance with the NEC and any federal, state or local codes;

(F) the air blower shall be accessible for inspection and service;

(G) integral air passages shall be pressure tested at time of manufacture to provide structural integrity to a value of one and one-half times the intended working pressure; and,

(H) if an air blower or other means of introducing air is provided, a manually-operated timer switch located as to require the exiting of the spa to reset shall be provided. Such a timer shall operate the spa blower and circulation pump and shall automatically shut the blower and circulation pump off in 15 minutes or when manually switched to the off position.

(f) Standards for new and existing spas. New and existing spas shall comply with the following.

(1) First aid kits. Spas at Class A and B pools facilities with lifeguards shall be equipped with a first-aid kit meeting OSHA requirements. First aid kits shall be housed in a durable weather resistant container and kept filled and ready for use (including disease transmission barriers and cleansing kits that meet OSHA standards). First aid kits shall be designed to treat at least 15 persons. At spas located at Class C pools, first aid kits are recommended but not required.

(2) Telephone. A means of summoning help in an emergency and a sign shall be provided in accordance with §265.199(i) of this title (relating to Specific Safety Features).

(3) Spas shall be provided with an enclosure as follows:

(A) a new or existing spa at a complex subject to Health and Safety Code, Chapter 757, shall be provided with a pool yard enclosure as required in that code; and

(B) all other new and existing spas shall be provided with an enclosure under §265.200 of this title (relating to Pool Yard Enclosures); or in accordance with ANSI/NSPI-2, 1992.

(4) Deck depth markers shall comply with the following.

(A) Spas shall have permanent deck depth markers with numbers and units of measurement a minimum of four inches high plainly and conspicuously visible from all obvious points of entry.

(B) There shall be a minimum of two deck depth markers per spa, regardless of spa size or shape.

(C) Deck depth markers shall be spaced at no more than 25 foot intervals and shall be uniformly located around the perimeter of the spa.

(D) Deck depth markers and units of measurement shall be within 24 inches of the water edge and positioned to be read while standing on the deck facing the water.

(E) Deck depth markers shall be positioned to be read while standing on the deck facing the water.

(F) Deck depth markers in or on the deck surfaces shall be slip-resistant.

(G) Units of measurement shall either spell out "feet" or "inches" or abbreviate "Ft.", "In." or feet and fractions of a foot. In addition to feet and inches the depth of water may also be displayed in meters. Units of measurement for meter depth markers may be spelled out "meters" or abbreviated "M".

(H) Deck depth markers shall indicate the spa depth from the design water level to the floor of the spa with a vertical measurement taken three feet from the spa wall.

(5) Water Clarity. At a new or existing spa water clarity shall meet the requirements of §265.203(c) of this title (relating to Operation and Management (Operation and Management Except as Otherwise Noted)) concerning clarity.

(6) Temperature and thermometers. At a new and existing spa, the maximum temperature of the water in the spa shall not exceed 104 degrees Fahrenheit (40 degrees Centigrade). At a new or existing spa, an unbreakable thermometer (plus or minus one degree Fahrenheit tolerance) that is designed for use in a spa environment shall be available for patrons and staff to monitor spa temperature. The control for the spa temperature shall not be accessible to the spa user. It is recommended that the operating temperature in the spa be maintained at or below 102 degrees Fahrenheit.

(7) Maximum load limits. Maximum load limits for new and existing spas are set forth at §265.185(e)(2) of this title.

(8) Clock. It is recommended that a functioning clock be visible to the spa user.

(9) Signs. Signs shall be securely mounted and readily visible to the spa user from inside the spa enclosure. Signage shall state the following:

(A) the location of the nearest telephone or emergency summoning device.

(B) "Do not use the spa, if the water temperature is above 104 degrees Fahrenheit (40 degrees Centigrade)" in letters at least one inch high;

(C) "WARNING-NO LIFEGUARD ON DUTY" with clearly legible letters at least four inches high if no lifeguard is required; and

(D) "CHILDREN SHOULD NOT USE SPA WITHOUT ADULT SUPERVISION" with clearly legible letters at least two inches high if no lifeguard is required. The language on the signs may impose stricter adult supervision requirements for children using the spa.

(g) Recommendation of additional safety signage at new and existing spas. For new and existing spas, it is recommended that signage be located in plain view, stating the following.

(1) Do not exceed maximum number of users. The maximum number of users for this spa is "stated number of users follows here."

(2) If you are pregnant, do not use the spa without medical consultation. Do not allow small children to use the spa. Hot water exposure limitations vary from person to person.

(3) If you suffer from heat disease, diabetes, high or low blood pressure or other health problems, do not enter the spa without prior medical consultation and permission from their doctor. Overexposure to hot water may cause nausea, dizziness, and fainting.

(4) Do not use the spa while under the influence of alcohol, narcotics, or other drugs that cause sleepiness, drowsiness, or raise/lower blood pressure.

(5) Do not allow use of the spa by unsupervised children.

(6) Check the spa temperature before entering the spa. Do not use the spa if the temperature is above 104 degrees Fahrenheit (40 degrees Centigrade). Lower water temperatures are recommended for extended use (exceeding 10-15 minutes) and for young children.

(7) Enter and exit slowly.

(8) Keep all breakable objects out of the spa area.

(9) Do not place electrical appliances (telephone, radio, tv, etc.) within five feet of the spa.

(10) Do not operate the spa during severe weather conditions; e.g. electrical storms, or tornadoes.

(11) Do not use of or operate a spa if the suction outlet cover is missing, broken or loose.

(h) Recommendation of signage in foreign language at new and existing spas. In areas of Texas where a majority of citizens are non-English speaking, it is recommended that signs be posted in the predominant language, in addition to required English signage.

§265.206. Compliance: Inspections and Investigations.

(a) The department or local regulatory authority shall maintain the right to inspect or investigate the operation and management of a public pool or spa or associated facilities.

(b) Advance notice of inspections or investigations by the department or local regulatory authority is not required.

(c) A department or local regulatory representative, upon presenting the department identification (ID) card, shall have the right to enter at all reasonable times any area or environment, including but not limited to the pool or spa facility, building, storage, equipment room, or office area to inspect and investigate for compliance with these sections, to review records, to question any person, or to locate, to identify, and to assess the condition of pool or spa facility.

(d) A department or local regulatory representative in pursuance of his/her official duties is not required to notify or seek permission to conduct inspections or investigations. It is a violation of this chapter for a person to interfere with, deny, or delay an inspection or investigation conducted by a department or local regulatory representative.

(e) Authority and responsibility for the qualifications, health status, and personal protection of department or local regulatory representatives resides with the department or local regulatory authority by law. A department or local regulatory representative shall not be impeded or refused entry in the course of his official duties by reason of any regulatory or contractual specification.

§265.207. Enforcement.

(a) If inspections by the department or the local regulatory authority determine that the operation or maintenance of the pool, spa, or facility constitutes a serious health or safety hazard for the user, the regulatory agency shall request voluntary immediate closure, seek injunctive relief in district court, or use any other enforcement methods available to it.

(b) Upon presentation of evidence that the deficiencies which caused the suspension of operation have been corrected, operation can be resumed if explicitly authorized by the regulatory authority in writing. Such evidence may be in the form of a reinspection by the regulatory authority, or by other evidence acceptable to the regulatory authority.

(c) Enforcement of these standards is pursuant but not limited to the Texas Health and Safety Code, Title 5, Subtitle A, Chapter 341, Minimum Standards of Sanitation and Health Protection, Subchapters E and F.

This 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 November 20,1998.

TRD-9817842

Susan K. Steeg

General Counsel
Texas Department of Health
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 458–7236

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Chapter 289. Radiation Control

Subchapter A. Control of Radiation

25 TAC §289.5

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

The Texas Department of Health (department) proposes the repeal of existing §289.5, concerning the Texas-Atomic Energy Commission regulatory transfer agreement. The section proposed for repeal adopts by reference the document titled "Texas-AEC Regulatory Transfer Agreement."

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 289.5 has been reviewed and the department has determined that the reasons for adopting the section no longer exist.

The document this section adopted by reference is an agreement between the State of Texas and the United States Nuclear Regulatory Commission. The Texas Radiation Control Act does not require that it be adopted as rule. Repeal of this section does not impact the agreement.

The department published a Notice of Intention to Review for §289.5 as required by Rider 167 in the *Texas Register* (23 TexReg 9079) on September 4, 1998. No comments were received by the department on this section.

Mrs. Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the section is repealed, there will be no fiscal implications for state or local government as a result of the repeal as proposed.

Mrs. McBurney also has determined that for each year of the first five years the section is repealed, the public benefit anticipated as a result of repealing the section will be to eliminate an unnecessary rule. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as repealed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, (512)834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The repeal is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeal affects Health and Safety Code, Chapter 401; Health and Safety Code, Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§289.5. Texas-AEC Regulatory Transfer Agreement.

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

Filed with the Office of the Secretary of State, on November 20,1998.

TRD-9817820
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 458–7236

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Subchapter B. Memoranda of Understanding

25 TAC §289.81

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

The Texas Department of Health (department) proposes the repeal of existing §289.81, concerning the memorandum of understanding (MOU) on in situ uranium mining between the Texas Department of Health and the Texas Department of Water Resources.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 289.81 has been reviewed and the department has determined that the reasons for adopting the section no longer exist.

The appropriate provisions of this MOU have been updated and incorporated in an MOU between the department and the Texas Natural Resource Conservation Commission regarding radiation control functions.

The department published a Notice of Intention to Review for §289.81 as required by Rider 167 in the *Texas Register* (23 TexReg 9079) on September 4, 1998. No comments were received by the department on this section.

Mrs. Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the section is repealed, there will be no fiscal implications for state or local government as a result of the repeal as proposed.

Mrs. McBurney also has determined that for each year of the first five years the proposed section is repealed, the public benefit anticipated as a result of repealing the section will be to eliminate an unnecessary rule. There will be no effect on

small businesses. There are no anticipated economic costs to persons who are required to comply with the section as repealed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, (512)834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The repeal is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeal affects Health and Safety Code, Chapter 401; Health and Safety Code, Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§289.81. Memorandum of Understanding on In Situ Uranium Mining between the Texas Department of Health and the Texas Department of Water Resources.

This 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 November 20,1998.

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Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 458–7236

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Subchapter C. Texas Regulations for Control of Radiation

The Texas Department of Health (department) proposes the repeal of existing §289.112 and new §289.205, concerning hearing and enforcement procedures. The section proposed for repeal adopts by reference Part 13, titled "Hearing and Enforcement Procedures" of the *Texas Regulations for Control of Radiation* (TRCR). The proposed new section incorporates language from TRCR Part 13 that has been rewritten into *Texas Register* format and includes the addition and revision of several subsections of the section. The repeal and new section are part of the renumbering phase in the process of rewriting the department's radiation rules in *Texas Register* format. The new section reflects the renumbering.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 289.112 has been reviewed and the department has determined that the reasons for adopting the section continue to exist in that a rule on this subject is needed; however the rule needs revision as described in this preamble.

The new section includes new language describing the process for hearings on denials of applications. Clarifying language is added concerning modifications, revocations or suspensions of licenses; certificates of registration, accreditation of mammography facilities; and industrial radiographer certification. The language for issuing, renewing, and amending licenses to process materials resulting in byproduct material or dispose of byproduct material and to process radioactive waste is revised to clarify noticing and hearing requirements. New language on severity levels for mammography violations is included to reflect current requirements, while examples of severity levels of violations are deleted.

The department published a Notice of Intention to Review for §289.112 as required by Rider 167 in the *Texas Register* (23 TexReg 10504) on October 9, 1998. No comments were received by the department on this section.

Mrs. Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the sections as proposed.

Mrs. McBurney also has determined that for each year of the first five years the proposed sections are in effect, the public benefit anticipated as a result of enforcing the sections will be to ensure that sufficient notice of certain licensing actions is provided and to ensure continued adequate protection of the public health and safety by having adequate hearing and enforcement procedures for licensees and registrants. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, (512)834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public meeting to accept oral comments will be held at 2:00 p.m., Wednesday, December 16, 1998, in Conference Room N218, Texas Department of Health, Bureau of Radiation Control, located at the Exchange Building, 8407 Wall Street, Austin, Texas.

25 TAC §289.112

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

The repeal is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with authority to adopt rules for its procedures and for the performance of every duty imposed by law on the board, the department and the commissioner of health.

The repeal affects Health and Safety Code, Chapter 401; Health and Safety Code, Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§289.112. Hearing and Enforcement Procedures.

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

Filed with the Office of the Secretary of State, on November 20,1998.

TRD-9817821
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 458–7236

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Subchapter D. General

25 TAC §289.205

The new section is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with authority to adopt rules for its procedures and for the performance of every duty imposed by law on the board, the department and the commissioner of health.

The new section affects Health and Safety Code, Chapter 401; Health and Safety Code, Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§289.205. Hearing and Enforcement Procedures.

(a) Purpose. This section governs the following in accordance with the Texas Radiation Control Act (Act), the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001, and the Formal Hearing Procedures, Chapter 1, §§1.21-1.34 of this title (relating to the Texas Board of Health):

(1) proceedings for the granting, denying, renewing, transferring, amending, suspending, revoking, or annulling of a:

(A) license or certificate of registration;

(B) accreditation of a mammography facility; or

(C) industrial radiographer certification;

(2) determining compliance with or granting of exemptions from agency rule, order, or condition of license or certificate of registration;

(3) assessing administrative penalties; and

(4) determining propriety of other agency orders.

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

(1) Administrative penalty - A monetary penalty assessed by the agency in accordance with the Act, §401.384, to emphasize the need for lasting remedial action and to deter future violations.

(2) Applicant - A person seeking a license, certificate of registration, accreditation of mammography facility, or industrial radiographer certification, issued under the provisions of the Act and the requirements in this chapter.

(3) Board - The Texas Board of Health.

(4) Certified industrial radiographer - An individual who meets the definition of radiographer as stated in §289.255(c) of this title (relating to Radiation Safety Requirements and Licensing and Registration Procedures for Industrial Radiography).

(5) Commissioner - The Texas commissioner of health.

(6) Contested case - A proceeding in which the agency determines the legal rights, duties, or privileges of a party after an opportunity for adjudicative hearing.

(7) Director - The director of the radiation control program under the agency's jurisdiction.

(8) Enforcement conference - A meeting held by the agency with management of a licensee, registrant, or a certified industrial radiographer to discuss the following:

(A) safety, safeguards, or environmental problems;

(B) compliance with regulatory, license condition, or registration condition requirements;

(C) proposed corrective measures including, but not limited to, schedules for implementation; and

(D) enforcement options available to the agency.

(9) Hearing - A proceeding to examine an application or other matter before the agency in order to adjudicate rights, duties, or privileges.

(10) Hearing examiner - An attorney selected by the agency to conduct hearings.

(11) Interested person - A person who participates in a hearing concerning a contested case but who is not admitted as a party by the hearing examiner.

(12) Major amendment - An amendment to a license issued in accordance with the requirements of §289.260 of this title (relating to Licensing of Uranium Recovery and Byproduct Material Disposal Facilities) that:

(A) reflects a transfer of ownership of the licensed facility;

(B) authorizes enlargement of the licensed area beyond the boundaries of the existing license;

(C) authorizes a change of the method specified in the license for disposal of byproduct material as defined in the Act, §401.003(3)(B); or

(D) grants an exemption from any provision of §289.260 of this title.

(13) Notice of violation - A written statement of one or more alleged infringements of a legally binding requirement. The notice normally requires the licensee, registrant, certified mammography system, or certified industrial radiographer to provide a written statement describing the following:

(A) corrective steps taken by the licensee, registrant, certified mammography system, or certified industrial radiographer, and the results achieved;

(B) corrective steps to be taken to prevent recurrence; and

(C) the projected date for achieving full compliance. The agency may require responses to notices of violation to be under oath.

(14) Order - A specific directive contained in a legal document issued by the agency.

(15) Party - A person designated as such by the hearing examiner. A party may consist of the following:

(A) the agency;

(B) an applicant, licensee, registrant, accredited mammography facility, or certified industrial radiographer; and

(C) any person affected.

(16) Person affected - A person who demonstrates suffering or who will suffer actual injury or economic damage and, if the person is not a local government:

(A) is a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located; or

(B) is doing business or has a legal interest in land in the county or adjacent county.

(17) Preliminary report - A document prepared by the agency containing the following:

(A) a statement of facts on which the agency bases the conclusion that a violation has occurred;

(B) recommendations that an administrative penalty be imposed on the person charged;

(C) recommendations for the amount of that proposed penalty; and

(D) a statement that the person charged has a right to a hearing on the occurrence of the violation, the amount of the penalty, or both.

(18) Radiation and Perpetual Care Fund - A fund established in the state treasury for the purposes described in the Act, §401.305.

(19) Requestor - A person claiming party status as a person affected.

(20) Severity level - A classification of violations based on relative seriousness of each violation and the significance of the effect of the violation on the occupational or public health or safety or the environment.

(21) Violation - An infringement of any rule, license or registration condition, order of the agency, or any provision of the Act.

(c) Procedures for licensing actions under the Act, §401.054.

(1) Except as provided in subsections (d)-(f) of this section, when the agency grants, renews, denies, transfers, or amends any specific license for the possession of radioactive materials, or grants exemptions from rules, orders, or licenses in accordance with the Act, the agency shall, no later than 30 days following the end of the month in which the action was taken, submit notice of the action for publication in the *Texas Register*. The action taken will remain in full force and effect unless and until modified by subsequent action of the agency.

(2) Any person who considers himself/herself a person affected by an agency action described in paragraph (1) of this subsection, (requestor) or any applicant/licensee may request a hearing by writing the director within 30 days after the notice is published in the *Texas Register*.

(A) The request for a hearing must contain the following:

(i) name and address of the person/applicant/licensee who considers himself/herself affected by agency action;

(ii) identification of the subject license;

(iii) reasons why the person/applicant/licensee considers himself/herself affected; and

(iv) relief sought.

(B) If the applicant/licensee or person affected is represented by an attorney, state the name and address of the attorney.

(C) Failure to submit a written request for a hearing within 30 days could result in denial of party status and render the agency action final.

(3) Either the applicant/licensee or the agency may contest the standing of a requestor as a person affected by motion filed with the hearing examiner no later than ten days prior to the hearing. The requestor has the burden of proof in a hearing to determine whether the requestor is a person affected.

(4) The hearing examiner may designate parties at the commencement of the hearing on the merits.

(5) A hearing may be scheduled by the agency regardless of whether a request for a hearing has been received.

(d) Special procedures for issuing, renewing, or amending byproduct material licenses in accordance with §289.260 of this title.

(1) When the agency determines that the issuance or renewal, in accordance with §289.260 of this title, of a license to process materials resulting in byproduct material or to dispose of byproduct materials as defined in the Act, §401.003(B), will have a significant impact on the human environment, the agency shall prepare or secure a written analysis of the impact and make it available to the public for written comment at least 30 days before a public hearing, if any, on the issuance or renewal of the license.

(2) At least 30 days prior to the issuance of a new license, renewal, or major amendment, a notice of such action will be published in the following:

(A) *Texas Register*; and

(B) a newspaper published in each county in which the proposed facility is located or, in which the proposed facility will be located. The applicant/licensee shall do the following:

(i) pay for the publication of the newspaper notice(s); and

(ii) file proof of publication required in this subparagraph with the agency within 30 days of publication. An affidavit by the publisher accompanied by a printed copy of the notice as published shall be conclusive evidence of publication.

(3) The notice referenced in paragraph (2) of this subsection shall contain at least the following:

(A) a statement identifying the location of the proposed facility and a summary of the proposed actions;

(B) a statement regarding the availability of an environmental analysis for the proposed facility; and

(C) the offer of an opportunity for a hearing to any person affected.

(4) When a hearing is requested in writing within 30 days after publication of the notice described in paragraph (2) of this subsection, the procedures described in subsection (c)(3) and (4) of this section and Formal Hearing Procedures, Chapter 1, §§1.21-1.34 of this title apply. Failure to submit a written request for a hearing in the form specified by subsection (c)(2) of this section within 30 days may result in no hearing being held and the proposed agency action being taken.

(5) A hearing may be scheduled by the agency regardless of whether a request for a hearing has been received.

(e) Special procedures for issuing or renewing licenses to process or store radioactive waste from other persons in accordance with §289.254 of this title (relating to Licensing of Radioactive Waste Processing and Storage Facilities).

(1) At least 30 days prior to issuance or renewal of a license to process or store radioactive waste from other persons, in accordance with §289.254 of this title, a notice of such action will be published in the following:

(A) *Texas Register*; and

(B) a newspaper published in each county in which the proposed facility is located or, in which the proposed facility will be located. The applicant/licensee shall do the following:

(i) pay for the publication of the newspaper notice(s); and

(ii) file proof of publication of the notice required in paragraph (1)(B) of this subsection with the agency within 30 days of publication. An affidavit by the publisher accompanied by a printed copy of the notice as published shall be conclusive evidence of publication.

(2) The notice specified in paragraph (1) of this subsection shall contain at least the following:

(A) the agency's intent to issue or renew a license in accordance with §289.254 of this title;

(B) location of the proposed facility;

(C) in the case of a Category III storage or processing facility, the availability of an environmental analysis for each proposed activity the agency determines has a significant impact on the human environment; and

(D) opportunity for a person affected to request a hearing.

(3) A hearing will be held only when requested, unless scheduled by the agency on its own motion. When a hearing is requested in writing by a date certain as stated in the notice described in paragraph (1) of this subsection, the procedures described in subsection (c)(3) and (4) of this section and the Formal Hearing Procedures, Chapter 1, §§1.21-1.34 of this title apply. Failure to submit a written request for a hearing in the form prescribed in subsection (c)(2) of this section on or before the stated date could result in denial of party status and in issuance or renewal of the license by the commissioner.

(A) Notice of the hearing shall be published in the following:

(i) *Texas Register*; and

(ii) a newspaper published in each county in which the proposed facility is located or, in which the proposed facility will be located.

(B) Notice of the hearing shall contain the subject, time, date, and location of the hearing.

(C) The applicant/licensee shall pay for the publication of the newspaper notice(s).

(D) The applicant/licensee shall file proof of publication of the notice required in subparagraph (A)(ii) of this paragraph with the agency at least ten days before the hearing. An affidavit by the publisher accompanied by a printed copy of the notice as published shall be conclusive evidence of publication.

(E) If no newspaper is published in the county or counties in which the proposed facility is to be located, a written copy of the notice of hearing shall be posted at the courthouse door and five other public places in the immediate locality to be affected for at least 30 days prior to the beginning of the hearing.

(F) The return of the sheriff or constable, or the affidavit of any credible person made on a written copy of the notice so posted showing the fact of the posting and filed with the agency at least ten days prior to the hearing date shall be conclusive evidence of posting.

(G) The applicant/licensee shall give written notice of the hearing by certified mail, return receipt requested, to persons shown on the current county tax records as owning property adjacent to the proposed site. The written notice shall contain the same information described in subparagraph (B) of this paragraph.

(i) The applicant/licensee shall furnish the agency with a list of names and addresses of the adjacent property owners no later than ten days before the hearing.

(ii) The list of names and addresses will be deemed accurate and valid if obtained from the current county tax records of the county where the adjacent property is located as of the mailing date of the notice of hearing. The information shall be certified by an appropriate county official.

(iii) The applicant/licensee shall certify to the mailing of the notice of hearing by certified mail, and proof of mailing to the proper address or the receipt shall be accepted at the hearing as conclusive evidence of the fact of the mailing.

(H) Failure to comply with the provisions of subparagraphs (A)(ii), (E), and (G) of this paragraph may result in denial of the license.

(f) Special procedures for amending waste licenses in accordance with §289.254 of this title.

(1) If the agency amends a license to process or store radioactive waste, in accordance with §289.254 of this title, the amendment will take effect immediately.

(2) Notice of amendment shall be published one time in the following:

(A) *Texas Register*;

(B) a newspaper of general circulation in the county or counties in which the licensed activity is located. The licensee shall file with the agency, within 30 days of publication, proof of publication of the notice.

(3) The licensee shall pay for publication of the newspaper notice(s).

(4) An affidavit from the publisher accompanied by a printed copy of the notice as published shall be conclusive evidence of publication.

(5) The notice shall contain the following:

(A) identity of the licensee and the license amended;

(B) a concise statement of the substance of the amendment; and

(C) opportunity for a person affected to request a hearing.

(6) The agency shall notify any person who has submitted an advance, written request to be notified of any proposed amendment to the license. Proof of mailing to the proper address shall be conclusive evidence of the agency's compliance.

(7) A person who considers himself/herself a person affected may request the agency to hold a hearing by writing the director, in the manner provided by subsection (c)(2) of this section, no later than 30 days after the notice is published. Failure to submit a written request for a hearing within 30 days could result in denial of party status and render the agency action final.

(8) Upon receipt of a request for hearing, the agency or the licensee may follow the procedures set out in subsection (c)(3) and (4) of this section to contest standing.

(9) Notice of a hearing on the merits shall be given in accordance with appropriate provisions of subsection (e)(3) of this section.

(g) Revocation of license, certificate of registration, accreditation of mammography facilities, or industrial radiographer certification for fraud, misrepresentation, or mistake.

(1) A license, certificate of registration, accreditation of mammography facility, or industrial radiographer certification may be revoked on the grounds of fraud, misrepresentation, or mistake.

(2) Before the agency revokes a license, certificate of registration, accreditation of mammography facility, or industrial radiographer certification, the agency shall give notice by personal service or by certified mail, addressed to the last known address, of the facts or conduct alleged to warrant the revocation by complaint, and order the licensee/registrant/accredited mammography facility/certified industrial radiographer to show cause why the license, certificate of registration, mammography facility accreditation, or industrial radiographer certification should not be revoked. The licensee, registrant, accredited mammography facility, or certified industrial radiographer shall be given an opportunity to request a hearing on the matter no later than 30 days after receipt of the notice.

(h) Denial of an application for a license, certificate of registration, accreditation of a mammography facility, or industrial radiographer certification.

(1) When the agency contemplates denial of an application for a license, certificate of registration, accreditation of a mammography facility, or industrial radiographer certification, the licensee, registrant, mammography facility seeking accreditation, or certified industrial radiographer shall be afforded the opportunity for a hearing. Notice of the denial shall be delivered by personal service or certified mail, addressed to the last known address, to the licensee, registrant, mammography facility seeking accreditation, or certified industrial radiographer.

(2) Any applicant, licensee, registrant, mammography facility seeking accreditation, or certified industrial radiographer against whom the agency contemplates an action described in paragraph (1) of this subsection may request a hearing by writing the director within 30 days of service or date of mailing.

(A) The written request for a hearing must contain the following:

(i) statement requesting a hearing; and

(ii) name and address of the applicant, licensee, registrant, mammography facility seeking accreditation, or certified industrial radiographer;

(B) Failure to submit a written request for a hearing within 30 days will render the agency action final.

(i) Compliance procedures for licensees, registrants, accredited mammography facilities, and certified industrial radiographers.

(1) A licensee, registrant, or certified industrial radiographer who commits a violation(s) will be issued a notice of violation.

(2) The terms and conditions of all licenses, certificates of registration, and accreditation of mammography facilities shall be subject to amendment or modification. A license, certificate of registration, accreditation of a mammography facility, or industrial radiographer certification may be modified, suspended, or revoked by reason of amendments to the Act, or for violation of the Act, the requirements of this chapter, a condition of the license, certificate of registration, accreditation of a mammography facility, or an order of the agency.

(3) Any license, certificate of registration, accreditation of a mammography facility, or industrial radiographer certification may be modified, suspended, or revoked in whole or in part, for any of the following:

(A) any material false statement in the application or any statement of fact required in accordance with provisions of the Act;

(B) conditions revealed by such application or statement of fact or any report, record, or inspection, or other means that would warrant the agency to refuse to grant a license, certificate of registration, accreditation of a mammography facility, or industrial radiographer certification on an original application; or

(C) violation of, or failure to observe applicable terms and conditions of the Act, this chapter, or of the license, certificate of registration, accreditation of a mammography facility, or industrial radiographer certification or order of the agency.

(4) If another state or federal entity takes an action such as modification, revocation, or suspension of the license, certificate of registration, or industrial radiographer certification, the agency may take a similar action against the licensee, registrant, or certified industrial radiographer.

(5) When the agency determines that the action provided for in paragraph (8) of this subsection or subsection (j) of this section is not to be taken immediately, the agency may offer the licensee, registrant, or certified industrial radiographer an opportunity to attend an enforcement conference to discuss the following with the agency:

(A) methods and schedules for correcting the violation(s); or

(B) methods and schedules for showing compliance with applicable provisions of the Act, the rules, license or registration conditions, or any orders of the agency.

(6) Notice of any enforcement conference shall be delivered by personal service, or certified mail, addressed to the last known address. An enforcement conference is not a prerequisite for the action to be taken under paragraph (8) of this subsection or subsection (j) of this section.

(7) Except in cases in which the public health, interest, or safety requires otherwise, no license, certificate of registration, accreditation of mammography facility, or industrial radiographer certification shall be modified, suspended, or revoked unless, prior to the institution of proceedings therefore, facts or conduct that may warrant such action shall have been called to the attention of the licensee, registrant, accredited mammography facility, or certified industrial radiographer in writing, and the licensee, registrant, accredited mammography facility, or certified industrial radiographer shall have been accorded an opportunity to demonstrate compliance with all lawful requirements.

(8) When the agency contemplates modification, suspension, or revocation of the license, certificate of registration, mammography facility accreditation, or industrial radiographer certification, the licensee, registrant, accredited mammography facility, or certified industrial radiographer shall be afforded the opportunity for a hearing. Notice of the contemplated action, along with a complaint, shall be given to the licensee, registrant, accredited mammography facility, or certified industrial radiographer by personal service or certified mail, addressed to the last known address.

(9) Any applicant, licensee, registrant, accredited mammography facility, or certified industrial radiographer against whom the agency contemplates an action described in paragraph (8) of this subsection may request a hearing by writing the director within 30 days of service or date of mailing.

(A) The written request for a hearing must contain the following:

(i) statement requesting a hearing;

(ii) name, address, and identification number of the licensee, registrant, accredited mammography facility, or certified industrial radiographer against whom the action is being taken.

(B) Failure to submit a written request for a hearing within 30 days will render the agency action final.

(j) Assessment of Administrative Penalties.

(1) When the agency determines that monetary penalties are appropriate, proposals for assessment of and hearings on administrative penalties shall be made in accordance with the Act, §401.384, and applicable sections of the Formal Hearing Procedures, Chapter 1, §§1.21-1.34 of this title.

(2) Assessment of administrative penalties shall be based on the following criteria:

(A) the seriousness of the violation(s);

(B) previous compliance history;

(C) the amount necessary to deter future violations;

(D) efforts to correct the violation; and

(E) any other mitigating or enhancing factors.

(3) Application of administrative penalties. The agency may impose differing levels of penalties for different severity level violations and different classes of users as follows.

(A) Administrative penalties may be imposed for severity level I and II violations. Administrative penalties will be considered for severity level III, IV, and V violations when they are combined with those of higher severity level(s) or for repeated violations that could have been prevented by corrective action and for which the licensee, registrant, or certified industrial radiographer did not take effective corrective action.

(B) The following Tables IA and IB show the base administrative penalties.
Figure: 25 TAC §289.205(j)(3)(B)

(C) Adjustments to the severity levels and percentages in Table IB may be made for the presence or absence of the following factors:

(i) prompt identification and reporting;

(ii) corrective action to prevent recurrence;

(iii) compliance history;

(iv) prior notice of similar event;

(v) multiple occurrences; and

(vi) negligence that resulted in or increased adverse effects.

(D) The penalty may be in an amount not to exceed $10,000 a day for a person who violates the Act or a rule, order, license or registration issued under the Act. Each day a violation continues may be considered a separate violation for purposes of penalty assessment.

(4) The Office of General Counsel may conduct settlement negotiations.

(k) Severity levels of violations for licensees, registrants, or certified industrial radiographers.

(1) Violations for licensees, registrants, or certified industrial radiographers shall be categorized by one of the following severity levels.

(A) Severity level I are violations that are most significant and may have a significant negative impact on occupational and/or public health and safety or on the environment.

(B) Severity level II are violations that are very significant and may have a negative impact on occupational and/or public health and safety or on the environment.

(C) Severity level III are violations that are significant and which, if not corrected, could threaten occupational and/or public health and safety or the environment.

(D) Severity level IV are violations that are of more than minor significance, but if left uncorrected, could lead to more serious circumstances.

(E) Severity level V are violations that are of minor safety or environmental significance.

(2) Additional violations for mammography registrants. Violations for mammography registrants shall be categorized by one of the following severity levels.

(A) Severity level I violations indicate a serious noncompliance that may adversely affect image quality or that may compromise the quality of mammography services.

(B) Severity level II violations indicate key quality system requirements are being met, but there is a failure to meet

one or more quality standards that may lead to a compromise of the quality of mammography services.

(C) Severity level III violations indicate that the quality system requirements are being met, but minor corrective actions are required for compliance with the quality standards.

(D) Severity level IV violations indicate that the quality system requirements and standards are being met, but minor corrective actions are required for compliance.

(3) Criteria to elevate or reduce severity levels.

(A) Violations may be elevated to a higher severity level for the following reasons:

(i) more than one violation resulted from the same underlying cause;

(ii) a violation contributed to or was the consequence of the underlying cause, such as a management breakdown or breakdown in the control of licensed or registered activities;

(iii) a violation occurred multiple times between inspections;

(iv) a violation was willful. This means the violation was the result of careless regard for requirements, deception, or other indications of willfulness by the licensee/registrant or employees of the licensee/registrant, or certified industrial radiographer; or

(v) compliance history.

(B) Violations may be reduced to a lower level for the following reasons:

(i) the licensee/registrant identified and corrected the violation prior to the agency inspection; or

(ii) the licensee/registrant's actions corrected the violation and prevented recurrence.

(4) Examples of severity levels. Examples of severity levels are available upon request to the agency.

(l) Impoundment of sources of radiation.

(1) In the event of an emergency, the agency shall have the authority to impound or order the impounding of sources of radiation possessed by any person not equipped to observe or failing to observe the provisions of the Act, or any rules, license or registration conditions, or orders issued by the agency. The agency shall submit notice of the action to be published in the *Texas Register* no later than 30 days following the end of the month in which the action was taken.

(2) At the agency's discretion, the impounded sources of radiation may be disposed of by:

(A) returning the source of radiation to a properly licensed or registered owner, upon proof of ownership, who did not cause the emergency;

(B) releasing the source of radiation as evidence to police or courts;

(C) returning the source of registration to a licensee or registrant after the emergency is over and settlement of any compliance action; or

(D) sale, destruction or other disposition within the agency's discretion.

(3) If agency action is necessary to protect the public health and safety, no prior notice need be given the owner or possessor. If agency action is not necessary to protect the public health and safety, the agency will give written notice to the owner and/or the possessor of the impounded source of radiation of the intention to dispose of the source of radiation. Notice shall be the same as provided in subsection (i)(6) of this section. The owner or possessor shall have 30 days from the date of personal service or mailing to request a hearing under the Formal Hearing Procedures, Chapter 1, §§1.21-1.34 of this title, and in accordance with subsection (i)(7) of this section, concerning the intention of the agency. If no hearing is requested within that period of time, the agency may take the contemplated action, and such action is final.

(4) Upon agency disposition of a source of radiation, the agency may notify the owner and/or possessor of any expense the agency may have incurred during the impoundment and/or disposition and request reimbursement. If the amount is not paid within 60 days from the date of notice, the agency may request the Attorney General to file suit against the owner/possessor for the amount requested. If the owner/possessor desires to contest the amount of such charge, the owner/possessor may request a hearing under the Formal Hearing Procedures, Chapter 1, §§1.21-1.34 of this title and in accordance with subsection (i)(7) of this section.

(5) If the agency determines from the facts available to the agency that an impounded source of radiation is abandoned, with no reasonable evidence showing its owner or possessor, the agency may make such disposition of the source of radiation as it sees fit.

(m) Emergency orders for licenses, certificates of registration, or certified industrial radiographers.

(1) When an emergency exists requiring immediate action to protect the public health or safety or the environment, the agency may, without notice or hearing, issue an order citing the existence of such emergency and require that certain actions be taken as it shall direct to meet the emergency. The agency shall, no later than 30 days following the end of the month in which the action was taken, submit notice of the action for publication in the *Texas Register*. The action taken will remain in full force and effect unless and until modified by subsequent action of the agency. These emergency orders shall apply to licenses, certificates of registration, or certified industrial radiographers.

(2) In addition to the requirements of paragraph (1) of this subsection, the agency shall issue an order directing any action and corrective measure needed to remedy or neutralize the following emergency situations:

(A) when the agency determines that byproduct material as defined in the Act, §401.003(3)(B), or the operation generating the byproduct material, or that radioactive waste threatens the public health or safety or the environment; and

(B) if the licensee managing the byproduct material, or the operation generating the byproduct material or the radioactive waste, is unable to correct or neutralize the threat.

(3) An emergency order takes effect immediately upon service.

(4) Any person receiving an emergency order shall comply immediately.

(5) The agency shall use any security provided by a licensee under the Act to pay toward the costs of such actions and corrective measures taken. If the cost of actions and corrective measures require more funds than the security has provided, the

agency shall request the Attorney General to seek reimbursement from the licensee or person causing the threat.

(A) The agency may send a copy of its order specified in this subsection to the Comptroller of Public Accounts together with necessary documents authorizing the Comptroller of Public Accounts to enforce security supplied by the licensee, convert the necessary amount of security into cash, and disburse from this security in the fund the amount necessary to pay costs of the agency actions and corrective measures. The agency shall direct the comptroller as to the amounts and recipients of the funds.

(B) The agency may request the Attorney General to file suit for reimbursement if the agency uses security from the Radiation and Perpetual Care Fund to pay for actions or corrective measures to remedy spills or contamination by radioactive material resulting from a violation of the Act or a rule, license, or order of the agency.

(6) The licensee, registrant, or certified industrial radiographer shall be afforded the opportunity for a hearing on an emergency order. Notice of the action, along with a complaint, shall be given to the licensee, registrant, or certified industrial radiographer by personal service or certified mail, return receipt requested. A hearing shall be held on an emergency order if the person receiving the order makes a written application to the agency for a hearing within 30 days of the order date.

(A) The hearing shall be held not less than 10 days nor more than 20 days after receipt of the written application for hearing.

(B) At the conclusion of the hearing and after the proposal for decision is made as provided in the Texas Administrative Procedure Act, Texas Government Code, Chapter 2001, the commissioner shall take one of the following actions:

(i) determine that no further action is warranted;

(ii) amend the license or certificate of registration;

(iii) revoke or suspend the license, certificate of registration, or industrial radiographer certification;

(iv) rescind the emergency order; or

(v) issue such other order as is appropriate.

(C) The application and hearing shall not delay compliance with the emergency order.

(n) Miscellaneous provisions.

(1) Computation of time. A time period established by the requirements of this chapter shall begin on the first day after the event that invokes the time period. When the last day of the period falls on a Saturday, Sunday, or state or federal holiday, the period shall end on the next day that is not a Saturday, Sunday, or state or federal holiday. The time period shall expire at 5:00 p.m. of the last day of the computed period.

(2) Interested person.

(A) An interested person may:

(i) make sworn or unsworn statements;

(ii) attend a hearing and may present evidence after the presentation of evidence by the parties; or

(iii) be represented by an attorney.

(B) An interested person may not:

(i) cross-examine the witnesses of the parties;

(ii) object to evidence presented by the parties; or

(iii) appeal a decision rendered by the agency.

(C) An interested person is not responsible for sharing the costs of the transcription of the hearing, but may purchase a transcript.

(D) The parties may cross-examine witnesses presented by an interested person.

(E) At the discretion of the hearing examiner an interested person may make an unsworn statement. Such statement shall not be made a part of the record.

(3) Place of the hearing. Hearings will be held at the agency offices in Austin unless the hearing examiner specifies another location.

(4) Prepared testimony. The following shall apply to written testimony of a witness:

(A) the testimony of a witness may be reduced to writing and offered into evidence as an exhibit, provided:

(i) the witness is present and has been sworn;

(ii) the witness identifies and adopts the written testimony as his/her own; and

(iii) all parties receive a copy of the testimony at least ten days before its submission at the hearing.

(B) written testimony shall be subject to objection and may be stricken by the hearing examiner. The witness shall be subject to cross-examination.

(5) Prior testimony. Testimony and evidence presented in the hearing to determine standing have the same weight at the hearing on the merits if a tape recording or written transcript of the standing hearing is available.

(6) Non-party witness and mileage fees.

(A) A witness or deponent who is not a party (or an employee, agent, or representative of a party) and who is subpoenaed or otherwise compelled to attend an agency hearing or a proceeding to give a deposition, or to produce books, records, papers, accounts, documents, or other objects necessary and proper for the purposes of the hearing or proceeding may receive reimbursement for transportation and other costs at rates established by the current Appropriations Act for state employees.

(B) The person requesting the attendance of the witness or deponent must deposit with the agency the funds estimated by the hearing examiner to accrue in accordance with subparagraph (A) of this paragraph when filing a motion for the issuance of a subpoena or a commission to take a deposition.

(7) Service. A return of service by the person who performed personal service, postal return receipt, or proof of mailing to the last known address shall be conclusive evidence of service.

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

Filed with the Office of the Secretary of State, on November 20,1998.

TRD-9817822
Susan K. Steeg
General Counsel

Texas Department of Health
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 458–7236

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Chapter 289. Radiation Control

Texas Department of Health (department) proposes the repeal of §289.115 and new §289.255, concerning radiation safety requirements and licensing and registration procedures for industrial radiography.

General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, requires each state agency to review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 289.115 has been reviewed and the department has determined that the reasons for adopting the section continue to exist in that a rule on this subject is needed; however the rule needs revision as described in this preamble.

Section proposed for repeal adopts by reference Part 31, titled "Radiation Safety Requirements and Licensing and Registration Procedures For Industrial Radiography" of the *Texas Regulations for Control of Radiation*. The proposed new section incorporates language from Part 31 that has been rewritten into *Texas Register* format and includes addition and revision of several subsections of the section. The repeal and new section are part of the renumbering phase in the process of rewriting the department's radiation rules in the *Texas Register* format. The new section reflects the renumbering.

The revision incorporates industrial radiography training requirements that are items of compatibility with the United States Nuclear Regulatory Commission and as an agreement state, Texas must adopt them. Additional options for personnel monitoring are added. The fee for industrial radiographer certification is raised to reflect a more accurate cost recovery by the department. References to other sections of this chapter are clarified to reflect the *Texas Register* format. Other minor grammatical changes are made to the section for clarification.

The department published a Notice of Intention to Review for §289.115 as required by Rider 167 in the *Texas Register* (23 TexReg 9079) on September 4, 1998. No comments were received by the department on this section.

Mrs. Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the sections will be in effect, there will be fiscal implications for state or local government as a result of enforcing or administering the sections as proposed. The proposed sections will result in an estimated increased revenue of $45,600 for industrial radiographer certifications issued each year.

Mrs. McBurney also has determined that for each year of the first five years the proposed sections will be in effect, the public benefit anticipated as a result of enforcing the sections will be to ensure that adequate radiation safety training is provided to radiographic personnel and that equipment is properly maintained resulting in increased public safety and a continued safe work environment for industrial radiographic personnel. The effects on small businesses and to persons who are required to comply with the sections as proposed are: an additional cost ranging from $100-$300 per new employee for licensees and registrants to administer a written or oral examination to demonstrate knowledge of rules, license and certificate of registration conditions, and operating, safety and emergency procedures if the licensee and registrant are not already doing this; an additional cost ranging from $200-$300 per new employee for licensees and registrants to administer a practical examination to demonstrate competence in use of equipment if the licensee and registrant are not already doing this; an additional cost ranging from $8-$15 per sample to analyze the sample for depleted uranium contamination; an additional cost of $20-$40 of employee time per sample to collect the sample and prepare paperwork necessary to submit the sample for analysis; an additional cost ranging from $80-$300 per year to administer the annual refresher training; and a cost savings ranging from $1,000-$1,600 per year due to the increased interval for internal audits from three months to six months. There is no anticipated impact on local employment.

Comments on the proposal may be presented to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, (512)834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public meeting to accept oral comments will be held at 10:00 a.m., Tuesday, December 15, 1998, in Conference Room N218, Texas Department of Health, Bureau of Radiation Control, located at the Exchange Building, 8407 Wall Street, Austin, Texas.

Subchapter C. Texas Regulations for Control of Radiation

25 TAC §289.115

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

The repeal is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board the authority to adopt rules for its procedures and the performance of each duty imposed by law on the board, the department, and the commissioner of health.

The repeal affects Health and Safety Code, Chapter 401; Health and Safety Code, Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§289.115. Radiation Safety Requirements and Licensing and Registration Procedures for Industrial Radiography.

This 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 November 20,1998.

TRD-9817823
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 3, 1999

For further information, please call: (512) 458–7236

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Subchapter F. License Regulations

25 TAC §289.255

The new section is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board the authority to adopt rules for its procedures and the performance of each duty imposed by law on the board, the department, and the commissioner of health.

The new section affects Health and Safety Code, Chapter 401; Health and Safety Code, Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§289.255. Radiation Safety Requirements and Licensing and Registration Procedures For Industrial Radiography.

(a) Purpose.

(1) The requirements in this section establish radiation safety requirements and licensing and registration procedures for using sources of radiation for industrial radiography and for certification of industrial radiographers.

(2) The requirements in this section apply to licensees and registrants who possess sources of radiation for industrial radiography, including radiation machines, accelerators, and sealed radioactive sources.

(3) Each licensee and registrant is responsible for ensuring compliance with this chapter, license and registration conditions, and orders of the agency.

(4) Each licensee and registrant is also responsible for ensuring that radiographic personnel performing activities under a license or registration comply with this chapter, license and registration conditions, and orders of the agency.

(b) Scope.

(1) The requirements of this section are in addition to and not in substitution for other applicable requirements of this chapter.

(2) The requirements of §289.251 of this title (relating to Exemptions, General Licenses, and General License Acknowledgements), §289.252 of this title (relating to Licensing of Radioactive Material), and §289.257 of this title (relating to Packaging and Transportation of Radioactive Material) apply to licensees subject to this section.

(3) The requirements of §289.226 of this title (relating to Registration of Radiation Machine Use and Services) apply to registrants subject to this section.

(4) The requirements of §289.119 of this title (relating to Radiation Safety Requirements for Particle Accelerators) apply to certain persons using accelerators subject to this section.

(5) The requirements of the following sections of this chapter apply to all licensed and registered industrial radiographic operations:

(A) §289.201 of this title (relating to General Provisions);

(B) §289.202 of this title (relating to Standards for Protection Against Radiation);

(C) §289.203 of this title (relating to Notices, Instructions, and Reports to Workers; Inspections);

(D) §289.204 of this title (relating to Fees for Certificates of Registration, Radioactive Material(s) Licenses, Emergency Planning and Implementation, and Other Regulatory Services); and

(E) §289.205 of this title (relating to Hearing and Enforcement Procedures).

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

(1) Additional authorized use/storage site - Authorized use/storage locations specifically named on a license or certificate of registration other than the main site specified on a license or certificate of registration or other than temporary job sites.

(2) ANSI - American National Standards Institute.

(3) Annual refresher safety training - A review conducted or provided by the licensee or registrant for its employees on radiation safety aspects of industrial radiography. The review may include, as appropriate, the results of internal audits, new procedures or equipment, new or revised regulations, accidents or errors that have been observed, and should also provide opportunities for employees to ask safety questions.

(4) Associated equipment - Equipment that is used in conjunction with a radiographic exposure device to make radiographic exposures that drives, guides, or comes in contact with the source, (such as, guide tube, control tube, control cable (drive cable), removable source stop, "J" tube and collimator when it is used as an exposure head).

(5) Cabinet x-ray system - An x-ray system with the x-ray tube installed in an enclosure independent of existing architectural structures except the floor on which it may be placed. An x-ray tube used within a shielded part of a building, or x-ray equipment that may temporarily or occasionally incorporate portable shielding, is not considered a cabinet x-ray system. The cabinet x-ray system is intended to:

(A) contain at least that portion of a material being irradiated;

(B) provide radiation attenuation; and

(C) exclude personnel from its interior during generation of radiation.

(6) Certifiable cabinet x-ray system - An existing uncertified x-ray system that has been modified to meet the certification requirements specified in 21 Code of Federal Regulations (CFR) 1020.40.

(7) Certification identification (ID) card - The document issued by the agency to individuals who have completed the requirements stated in subsection (m)(2)(A) of this section.

(8) Certified cabinet x-ray system - An x-ray system that has been certified in accordance with 21 CFR 1010.2 as being manufactured and assembled on or after April 10, 1975, according to the provisions of 21 CFR 1020.40.

(9) Certifying entity - An independent certifying organization meeting the requirements in Appendix A of 10 CFR Part 34 or an agreement state meeting the requirements in Appendix A, Parts II and III of 10 CFR Part 34.

(10) Collimator - A small radiation shield that is placed on the end of a guide tube or directly onto a radiographic exposure device to restrict the size of the radiation beam when the sealed source is cranked into position to make a radiographic exposure.

(11) Control cable (drive cable) - The cable that is connected to the source assembly and used to drive the source from and return it to the shielded position.

(12) Control mechanism (drive mechanism) - A device that enables the source assembly to be moved from and returned to the shielded position. A drive mechanism is also known as a crank assembly.

(13) Control tube - A protective sheath for guiding the drive cable. The control tube connects the drive mechanism to the radiographic exposure device.

(14) Crank-out device - The drive cable, control tube, and drive mechanism used to move the sealed source to and from the shielded position to make an industrial radiographic exposure.

(15) Enclosed radiography - Industrial radiography conducted in an enclosed cabinet or room and including shielded-room radiography.

(16) Exposure head - A device that locates the gamma radiography sealed source in the selected working position. An exposure head is also known as a source stop.

(17) Fluoroscopic imaging assembly - A subsystem in which x-ray photons produce a fluoroscopic image. It includes the image receptors such as the image intensifier and spot-film device, electrical interlocks, if any, and structural material providing linkage between the image receptor and source assembly.

(18) GED - General educational development.

(19) Guide tube - A flexible or rigid tube, such as a "J" tube, for guiding the source assembly and the attached control cable from the exposure device to the exposure head. The guide tube may also include the connections necessary for attachment to the exposure device and to the exposure head.

(20) Independent certifying organization - An independent organization that meets all of the criteria of Appendix A of 10 CFR Part 34.

(21) Industrial radiography (radiography) - A nondestructive testing method using ionizing radiation, such as gamma rays or x rays, to make radiographic images for the purpose of detecting flaws in objects without destroying them.

(22) Lay-barge radiography - Industrial radiography performed on any water vessel used for laying pipe.

(23) Lock-out survey - A radiation survey performed to determine that a sealed source is in its fully shielded position before moving the radiographic exposure device or source changer to a different temporary job site or before securing the radiographic exposure device or source changer against unauthorized removal.

(24) Offshore - Within the territorial waters of the state of Texas. The territorial waters of Texas extend to the three marine league line or nine nautical miles from the Texas coast.

(25) On-the-job training - Experience in all of the areas considered to be directly involved in the radiography process. The hours of on-the-job training do not include safety meetings, classroom training, travel, darkroom activities, film development and interpretation, or use of a cabinet x-ray unit.

(26) Permanent radiographic installation - An enclosed shielded room, cell, or vault, not located at a temporary jobsite, in which radiography is performed and meets the criteria of subsection (j) of this section.

(27) Permanent storage site - Any location that is specifically named on a license or certificate of registration and that is used only for storage of sources of radiation.

(28) Personal supervision - Guidance and instruction provided to a radiographer trainee by a radiographer trainer who is present at the site, in visual contact with the trainee while the trainee is using sources of radiation, associated equipment, and survey meters, and in such proximity that immediate assistance can be given if required.

(29) Pipeliners - A directional beam radiographic exposure device.

(30) Platform radiography - Industrial radiography performed on an offshore platform or other structure over a body of water.

(31) Practical examination - A demonstration through practical application of the safety rules and principles in industrial radiography including use of all appropriate equipment and procedures.

(32) Radiation safety officer (RSO) - An individual named by the licensee or registrant who has a knowledge of, responsibility for, and authority to enforce appropriate radiation protection rules, standards, and practices on behalf of the licensee or registrant and who meets the requirements of subsection (m)(4) of this section.

(33) Radiographer - Any individual who has successfully completed the training, testing, and documentation requirements of subsection (m)(2)(A) of this section and who is responsible to the licensee or registrant for assuring compliance with the requirements of the agency's regulations and conditions of the license or certificate of registration. These individuals may be referred to as certified industrial radiographers or certified radiographers. The individual may also:

(A) perform industrial radiographic operations; or

(B) be in attendance at the site where the sources of radiation are being used.

(34) Radiographer certification - Written approval received from a certifying entity stating that an individual has satisfactorily met certain established radiation safety, testing, and experience criteria.

(35) Radiographer trainee - Any individual who has successfully completed the training and documentation requirements of subsection (m)(1)(A) of this section and who must use sources of radiation and related handling tools or radiation survey instruments under the personal supervision of a radiographer trainer.

(36) Radiographer trainer - A radiographer who instructs and supervises radiographer trainees during on-the-job training and who meets the requirements of subsection (m)(3) of this section.

(37) Radiographic exposure device - Any instrument containing a sealed source that is used to make a radiograph (e.g., camera).

(38) Radiographic operations - All activities associated with the presence of x-ray machines or radioactive sources in a radiographic exposure device during the use of the machine or device or transport (except when being transported by a common or contract

transport). Radiographic operations include surveys to confirm the adequacy of boundaries, setting up equipment, and any activity inside restricted area boundaries.

(39) Radiographic personnel - Any radiographer, radiographer trainer, or radiographer trainee.

(40) Residential location - Any area where structures are located in which people lodge or live, and the grounds on which these structures are located including, but not limited to, houses, apartments, condominiums, and garages.

(41) S-tube - A tube through which the radioactive source travels when inside a radiographic exposure device.

(42) Shielded position - The location within the radiographic exposure device or source changer where the sealed source is secured and restricted from movement.

(43) Shielded-room radiography - Industrial radiography conducted in a room shielded so radiation levels at every location on the exterior meet the limitations specified in §289.202(n) of this title. A shielded room is also known as a bay or bunker.

(44) Source assembly (pigtail) - An assembly that consists of the sealed source and a connector that attaches the source to the control cable. The source assembly may also include a ball stop used to secure the source in the shielded position.

(45) Source changer - A device designed and used to replace sealed sources in radiographic exposure devices, including those used to transport and store sealed sources.

(46) Storage area - Any location, facility, or vehicle that is used to store and secure a radiation machine, radiographic exposure device, a storage container, or a sealed source when it is not used for radiographic operations. Storage areas are locked or have a physical barrier to prevent accidental exposure, tampering, or unauthorized removal of the machine, device, container, or source.

(47) Storage container - A device in which the sealed source is secured and stored.

(48) Storage facility - A structure designed to house one or more sources of radiation to provide security and shielding at a permanent storage site. A storage facility is also known as a vault.

(49) Temporary job site - Any location where industrial radiography is performed other than the specific use location(s) listed on a license or certificate of registration. If use of sources of radiation is authorized at a temporary job site, storage incident to that use is also authorized.

(50) Trainee status card - The document issued by the agency following completion of the requirements of subsection (m)(1)(A) of this section.

(51) Transport container - A package that is designed to provide radiation safety and security when sealed sources are transported and meets all applicable requirements of the United States Department of Transportation (DOT).

(52) Underwater radiography - Industrial radiography performed when the radiographic exposure device and/or related equipment are beneath the surface of the water.

(d) Exemptions.

(1) Uses of certified and certifiable cabinet x-ray systems are exempt from the requirements of this section except for the requirements of subsections (b)(3) and (5) and (u)(6)(C)-(E) and (7)(A) of this section.

(2) Industrial uses of hand-held light intensified imaging devices are exempt from the requirements in this section if the exposure level 18 inches from the source of radiation to any individual does not exceed 2 millirem per hour (mrem/hr) (0.02 millisievert per hour (mSv/hr)). Devices with exposure levels that exceed the 2 mrem/hr (0.02 mSv/hr) level shall meet the applicable requirements of this section and §289.252 of this title or §289.226 of this title, as applicable.

(3) Radiation machines determined by the agency to constitute a minimal threat to human health and safety in accordance with §289.201(q)(2) of this title, are exempt from the requirements in this section except for the requirements of paragraph (1) of this subsection.

(4) Facilities which utilize radiation machines for industrial radiography at permanent radiographic installations only are exempt from the requirements of this subsection except for the requirements of subsections (m)(1)(A) and (u)(6)(A), (B), (E) and (7)(A). The individual operating radiation machines at permanent radiographic installations must successfully complete a course of at least 40 hours on the applicable subjects outlined in subsection (y)(1) of this section. This exemption does not include accelerators.

(e) Receipt, transfer, and disposal of sources of radiation and devices using depleted uranium (DU) for shielding. Each licensee and registrant shall make and maintain records showing the receipt, transfer, and disposal of sources of radiation and devices using DU for shielding in accordance with subsection (w)(1) of this section.

(f) Radiation survey instruments.

(1) Each licensee and registrant shall have a sufficient number of calibrated, appropriate, and operable radiation survey instruments at each location where sources of radiation are present to perform the radiation surveys required by this section and §289.202(f) of this title. These radiation survey instruments shall be capable of measuring a range from 2 mrem/hr (0.002 mSv/hr) through 1 rem per hour (rem/hr) (0.01 sievert per hour (Sv/hr)).

(2) Each radiation survey instrument shall be calibrated:

(A) by a person licensed or registered by the agency, another agreement state, or the NRC to perform such service;

(B) at energies appropriate for the licensee's or registrant's use;

(C) at intervals not to exceed six months and after each instrument servicing other than battery replacement;

(D) at two points located approximately one-third and two-thirds of full-scale on each scale for linear scale instruments; for logarithmic scale instruments, at mid-range of each decade, and at two points of at least one decade; and for digital instruments, at three points between 2 and 1,000 mrem/hr (0.02 and 10 mSv/hr); and

(E) to demonstrate an accuracy within plus or minus 20% of the true radiation level at each point checked.

(3) Each radiation survey instrument shall be checked with a radiation source at the beginning of each day of use and at the beginning of each work shift to ensure it is operating properly.

(4) Records of the calibrations required by paragraph (2) of this subsection shall be maintained in accordance with subsection (w)(2) of this section.

(g) Quarterly inventory.

(1) Each licensee and registrant shall perform a physical inventory at intervals not to exceed three months to account for all sources of radiation and for devices containing DU received or possessed.

(2) Records of the quarterly inventories required by paragraph (1) of this subsection shall be made and maintained for agency inspection in accordance with subsection (w)(3) of this section.

(h) Utilization logs.

(1) Each licensee and registrant shall make and maintain current logs of the use, removal, and return to storage of each source of radiation. The information shall be recorded in the log when the source is removed from and returned to storage. The logs shall include:

(A) a unique identification, for example, the serial number, of the following:

(i) each radiation machine;

(ii) each radiographic exposure device containing a sealed source or transport and storage container in which the sealed source is located; and

(iii) each sealed source;

(B) the name of the radiographer using the source of radiation;

(C) the location(s) and date(s) where each source of radiation is used;

(D) the date(s) each source of radiation is removed from storage and returned to storage; and

(E) for permanent radiographic installations, the date(s) each radiation machine is energized.

(2) Utilization logs may be kept on BRC Form 255-2, Utilization Log, or on clear, legible records containing all the information required by paragraph (1) of this subsection.

(3) Records of utilization logs shall be made and maintained for agency inspection in accordance with subsection (w)(15) of this section.

(i) Inspection and maintenance of radiation machines, radiographic exposure devices, transport and storage containers, associated equipment, source changers, and survey instruments.

(1) Each day of use the radiographer shall:

(A) perform visual and operational checks on radiation machines, survey instruments, radiographic exposure devices, transport and storage containers, associated equipment and source changers to ensure that:

(i) the equipment is in good working condition;

(ii) the sources are adequately shielded in radiographic exposure devices; and

(iii) required labeling is present and legible.

(B) determine the survey instrument is responding using check sources or other appropriate means; and

(C) remove the equipment from service until repaired if equipment problems are found.

(2) Each licensee and registrant shall have written procedures for the following:

(A) inspection and routine maintenance of radiation machines, radiographic exposure devices, source changers, associated equipment, transport and storage containers, and survey instruments at intervals not to exceed three months to ensure the proper functioning of components important to safety. All appropriate components shall be maintained in accordance with manufacturers' specifications. Radiation machines, radiographic exposure devices, transport containers and source changers being stored are exempted from this requirement provided that each radiation machine, radiographic exposure device, transport container, or source changer is inspected and repaired prior to being returned to service. This program shall cover, as a minimum, the items listed in subsection (y)(2) of this section; and

(B) inspection and maintenance necessary to maintain the Type B packaging used to transport radioactive material. The inspection and maintenance program must include procedures to assure that Type B packages are shipped and maintained in accordance with the certificate of compliance or other approval.

(3) Records of equipment problems and of any maintenance performed in accordance with paragraph (1) of this subsection shall be made and maintained in accordance with subsection (w)(4) of this section.

(j) Permanent radiographic installations.

(1) Permanent radiographic installations shall have high radiation area entrance controls as described in §289.202(s)(1)-(4) of this title or if applicable, the *Texas Regulations for Control of Radiation* (TRCR) Part 35, § §35.8 and 35.9, as adopted by reference in §289.119 of this title (relating to Radiation Safety Requirements for Particle Accelerators).

(2) The entrance controls shall be tested for proper operation at the beginning of each day of equipment use.

(3) The alarm system shall be tested for proper operation with a source of radiation each day before the installation is used for radiographic operations. The test shall include a check for the visible and/or audible signals.

(4) Entrance control devices that reduce the radiation level upon entry (designated in paragraph (1) of this subsection) shall be tested monthly.

(5) If an entrance control device or alarm is operating improperly, it shall be immediately labeled as defective and repaired within seven calendar days. The facility may continue to be used during this seven-day period, provided the licensee or registrant implements the continuous surveillance requirements of subsection (r) of this section, ensures that radiographic personnel use an alarming ratemeter, and complies with the requirements of subsection (v)(7)(G) of this section.

(6) Records of the tests and repairs required by this subsection shall be made and maintained in accordance with subsection (w)(5) of this section.

(k) Notification of incidents.

(1) The agency shall be notified of the loss or theft of sources of radiation, overexposures, and excessive levels in accordance with §289.202(ww)-(yy), and (bbb) of this title.

(2) In addition, each licensee or registrant shall submit a written report within 30 days to the agency whenever one of the following events occurs:

(A) a source assembly cannot be returned to the fully-shielded position and properly secured;

(B) the source assembly becomes unintentionally disconnected from the control drive cable;

(C) any component critical to safe operation of the radiographic exposure device fails to properly perform its intended function;

(D) an indicator on a radiation machine fails to show that radiation is being produced;

(E) an exposure switch on a radiation machine fails to terminate production of radiation when turned to the off position; or

(F) a safety interlock fails to terminate x-ray production.

(3) The licensee or registrant shall include the following information in each report submitted in accordance with paragraph (2) of this subsection:

(A) a description of the equipment problem;

(B) cause of each incident, if known;

(C) manufacturer and model number of equipment involved in the incident;

(D) manufacturer and model and serial number of equipment involved in the incident;

(E) location, time, and date of the incident;

(F) actions taken to establish normal operations;

(G) corrective actions taken or planned to prevent recurrence; and

(H) names of personnel involved in the incident.

(l) Reciprocity.

(1) All reciprocal recognition of licenses or certificates of registration by the agency will be granted in accordance with §289.226(r) of this title or §289.252(s) of this title.

(2) Reciprocal recognition by the agency of an individual radiographer certification will be granted provided that:

(A) the individual holds a valid certification in the appropriate category and class issued by a certifying entity, as defined in subsection (c) of this section;

(B) the requirements and procedures of the certifying entity issuing the certification afford the same or comparable certification standards as those afforded by subsection (m)(2)(A)(i)-(iv) of this section; and

(C) the individual submits a legible copy of the certification to the agency prior to entry into Texas.

(3) Enforcement actions with the agency, another agreement state, or the NRC or sanctions by an independent certifying entity may be considered when reviewing a request for reciprocal recognition from a licensee, registrant, or certified radiographer.

(4) Certified radiographers who are granted reciprocity by the agency shall maintain the certification upon which the reciprocal recognition was granted, or prior to the expiration of such certification, shall meet the requirements of subsection (m)(2)(A) of this section.

(m) Requirements for qualifications of radiographic personnel.

(1) Radiographer trainee. No licensee or registrant shall permit any individual to act as a radiographer trainee until the individual possesses a current agency-issued trainee status card.

(A) To obtain an agency-issued trainee status card, the licensee, registrant, or the individual must document to the agency on BRC Form 255-E or equivalent that such individual has successfully completed a course of at least 40 hours on the applicable subjects outlined in subsection (y)(1) of this section. The course must be one accepted by the agency, another agreement state, or the NRC.

(B) The trainee must carry a copy of the completed BRC Form 255-E, in the interim period after submitting documentation to the agency and before receiving a trainee status card. The copy of the completed BRC Form 255-E that was submitted to the agency may be used in lieu of the trainee status card for a period of 60 days from the date recorded by the trainee on the documentation.

(C) The individual shall notify the agency by telephone, telegram, telefacsimile, electronic media transmission, or in writing of the need for a replacement trainee status card. The individual shall carry a copy of documentation of the request while performing industrial radiographic operations until a replacement trainee status card is received from the agency.

(2) Radiographer. No licensee or registrant shall permit any individual to act as a radiographer until the individual carries a valid radiographer certification. To obtain a radiographer certification, an individual must comply with subsection (p)(1) of this section and the following:

(A) the licensee, registrant, or the individual must document to the agency on BRC Form 255-R or equivalent that such individual:

(i) has completed the requirements of paragraph (1)(A) of this subsection;

(ii) has completed on-the-job training as a radiographer trainee supervised by one or more radiographer trainers authorized on a license or certificate of registration;

(I) The radiographer trainee must carry a radiographer trainee status card in accordance with paragraph (1) of this subsection while obtaining the on-the-job training specified in subclauses (II)-(VII) of this clause.

(II) The on-the-job training shall include at least 200 hours of active participation in radioactive materials industrial radiographic operations or 120 hours of active participation in x-ray industrial radiographic operations.

(III) Individuals performing industrial radiography utilizing radioactive materials and x rays must complete both segments (320 hours) of on-the-job training.

(IV) The hours of on-the-job training do not include safety meetings, classroom training, travel, darkroom activities, film development and interpretation, or use of a cabinet x-ray unit.

(V) One year of documented experience or on-the-job training as authorized by another agreement state or the NRC may be substituted for subclauses (II)or (III) of this clause. The documentation must be submitted to the agency on BRC Form 255-OOS or equivalent.

(VI) The trainee shall be under the personal supervision of a radiographer trainer whenever a radiographer trainee:

(-a-) uses radiation machines, radiographic exposure devices, or associated equipment; or

(-b-) performs radiation surveys required by subsection (v)(8) of this section to determine that the sealed source has returned to the shielded position after an exposure or the radiation machine has stopped producing radiation.

(VII) The personal supervision shall include the following.

(-a-) The radiographer trainer's physical presence at the site where the sources of radiation are being used;

(-b-) The availability of the radiographer trainer to give immediate assistance if required; and

(-c-) The radiographer trainer's direct observation of the trainee's performance of the operations referred to in this section.

(iii) has successfully completed within the last five years the appropriate agency-administered examination prescribed in subsection (o)(2) of this section or the appropriate examination of another certifying entity that affords the same or comparable certification standards as those afforded by this clause and clauses (i), (ii) and (iv) of this subparagraph; and

(iv) possesses a current certification ID card issued in accordance with subsection (p)(1) of this section or by another certifying entity that affords the same or comparable certification standards as those afforded by this clause and clauses (i)-(iii) of this subparagraph.

(B) Reciprocal recognition by the agency of an individual radiographer certification may be granted according to subsection (l)(2) and (3) of this section:

(C) Once an individual has completed the requirements of paragraph (2)(A)(iv) of this subsection, the licensee or registrant is not required to submit the documentation referenced in paragraph (2)(A)(i) and (ii) of this subsection.

(3) Radiographer trainer. No licensee or registrant shall permit any individual to act as a radiographer trainer until:

(A) it has been documented to the agency on BRC Form 255-T or equivalent that such individual has:

(i) met the radiographer certification requirements of paragraph (2)(A) of this subsection; and

(ii) one year of documented experience as a certified radiographer.

(B) such individual is named on the specific license or certificate of registration issued by the agency and under which the individual is acting as a radiographer trainer; and

(C) determination is made by the agency that the individual is not currently under order from the agency prohibiting the individual from acting as a radiographer trainer.

(4) RSO for radiography.

(A) A RSO shall be designated on every industrial radiography license and certificate of registration issued by the agency.

(B) The RSO's qualifications shall be submitted to the agency and shall include as a minimum:

(i) possession of a high school diploma or a certificate of high school equivalency based on the GED test;

(ii) completion of the training and testing requirements of paragraph (1)(A) and (2)(A)(ii) and (iii) of this subsection; and

(iii) two years of documented radiation protection experience, including knowledge of industrial radiographic operations with at least 40 hours of active participation in industrial radiographic operations.

(C) The specific duties of the RSO include, but are not limited to, the following:

(i) establishing and overseeing operating, safety, emergency, and as low as reasonably achievable (ALARA) procedures, and to review them regularly to ensure that the procedures are current and conform with the requirements of this chapter;

(ii) overseeing and approving all phases of the training program for radiographic personnel so that appropriate and effective radiation protection practices are taught;

(iii) ensuring that required radiation surveys and leak tests are performed and documented in accordance with this chapter, including any corrective measures when levels of radiation exceed established limits;

(iv) ensuring that personnel monitoring devices are calibrated and used properly by occupationally-exposed personnel;

(v) ensuring that timely notifications to employees are made as required by §289.203 of this title;

(vi) ensuring that timely notifications to the agency are made as required by this section and §289.202 of this title;

(vii) ensuring that any required interlock switches and warning signals are functioning and that radiation signs, ropes, and barriers are properly posted and positioned;

(viii) investigating, determining the cause, taking steps to prevent the recurrence, and reporting to the agency each:

(I) known or suspected case of radiation exposure to an individual or radiation level detected in excess of limits established by this chapter; and

(II) theft or loss of source(s) of radiation.

(ix) having a thorough knowledge of management policies and administrative procedures of the licensee or registrant;

(x) assuming control and having the authority to institute corrective actions including shutdown of operations when necessary in emergency situations or unsafe conditions;

(xi) maintaining records as required by this chapter in accordance with subsection (w) of this section;

(xii) ensuring the proper storing, labeling, transport, and use of exposure devices and sources of radiation;

(xiii) ensuring that inventory and inspection and maintenance programs are performed in accordance with subsections (g) and (i) of this section;

(xiv) ensuring that personnel are complying with the requirements of this chapter and the conditions of the license or the certificate of registration; and

(xv) ensuring that the operating, safety, and emergency procedures of the licensee or registrant are met in accordance with subsections (u)(4)(A)-(D) and (G) and (v)(7)(A)-(D) and (I) of this section.

(n) Additional qualification requirements.

(1) No licensee or registrant shall permit any individual to act as a radiographer trainee, radiographer, radiographer trainer, or RSO until such individual has:

(A) received copies of and demonstrated an understanding of the following by successful completion of a written or oral examination administered by the licensee or registrant covering this material:

(i) the requirements contained in this section and the applicable requirements of §289.201 of this title, §289.202 of this title, §289.203 of this title, and §289.257 of this title;

(ii) the appropriate conditions of the license(s) and certificate(s) of registration;

(iii) the licensee's or registrant's operating, safety, and emergency procedures; and

(B) demonstrated competence in the use of sources of radiation, radiographic exposure devices, associated equipment, related handling tools, and radiation survey instruments, that may be employed in industrial radiographic assignments by successful completion of a practical examination administered by the licensee or registrant covering such use.

(2) Records of the administration of and the examinations required by paragraph

(1) of this subsection shall be made and maintained for agency inspection in accordance with subsection (w)(7) of this section.

(o) Application and fee for radiographer certification examinations.

(1) Application.

(A) An application for taking the examination shall be on forms prescribed and furnished by the agency.

(B) The non-refundable application fee for examination shall be $25.

(C) The appropriate fee shall be submitted with the application when filing with the agency.

(D) The application and the non-refundable fee shall be submitted to the agency on or before the dates specified by the agency.

(2) Examination. The examination shall be given for the purpose of determining the qualifications of applicants.

(A) The scope of the examination and the methods of procedure, including determination of the passing score, shall be prescribed by the agency. The examination will assess the applicant's knowledge to safely use sources of radiation and related equipment and the applicant's knowledge of this section, §289.201 of this title, and §289.202 of this title.

(B) The examination will be administered by the agency or persons authorized by the agency.

(C) A candidate failing an examination may apply for re-examination in accordance with paragraph (1) of this subsection and will be re-examined. A candidate shall not retake the same version of the agency-administered examination.

(D) The examination will be held at times and dates at locations designated by the agency. The examination shall normally be offered once each month. Times, dates, and locations of the examination will be furnished by the agency.

(E) The examination will be in the English language.

(F) To take the examination, an individual shall have a photo identification card, such as a driver's license, at the time of the examination.

(G) Calculators will be permitted during the examination. However, calculators or computers with preprogrammed data or formulas, including exposure calculators, will not be permitted during the examination.

(H) The examination will be a "closed-book" examination.

(I) Any individual observed by an agency proctor to be compromising the integrity of the examination shall be required to surrender the examination, the answer sheet, and all scratch paper. Such individual will not be allowed to complete the examination, will forfeit the examination fee, and will leave the examination site to avoid disturbing other examinees. Such individual must wait 90 days before taking a new examination and must resubmit a new application and a $25 non-refundable examination fee.

(J) Examination material shall be returned to the agency at the end of the examination. No photographic or other copying of examination questions or materials shall be permitted. Disclosure by any individual of the contents of any examination prior to its administration is prohibited.

(K) The names and scores of individuals taking the examination shall be a public record.

(p) Radiographer certification.

(1) An application for radiographer certification shall be on BRC Form 255- R, BRC Form 255-OOS, or equivalent.

(A) The non-refundable fee for radiographer certification shall be $100.

(B) The appropriate fee shall be submitted with the application when filing with the agency.

(2) A certification ID card shall be issued to each individual who successfully completes the requirements of subsection (m)(2)(A)(i)-(iii) of this section.

(A) Each individual's certification ID card shall contain the individual's photograph. The agency will take the photograph at the time the examination is administered.

(B) The certification ID card remains the property of the agency and may be revoked or suspended under the provisions of paragraph (4) of this subsection.

(C) Any individual who needs to replace a certification ID card shall submit to the agency a written request for a replacement certification ID card, stating the reason a replacement certification ID card is needed. A non-refundable fee of $35 shall be paid to the agency for each replacement of a certification ID card. The prescribed fee shall be submitted with the written request for a replacement certification ID card. The individual shall carry a copy of the request while performing industrial radiographic operations until a replacement certification ID card is received from the agency.

(D) Each certification ID card is valid for a period of five years, unless revoked or suspended in accordance with paragraph (4) of this subsection. Each certification ID card expires at the end of the day, in the month and year stated on the certification ID card.

(3) Renewal of a radiographer certification.

(A) Applications for examination to renew a radiographer certification shall be filed in accordance with subsection (o)(1) of this section.

(B) The examination for renewal of a radiographer certification shall be administered in accordance with subsection (o)(2) of this section.

(C) A renewal certification ID card shall be issued in accordance with paragraph (2) of this subsection.

(4) Suspension or revocation of a radiographer certification.

(A) Any radiographer who violates the requirements of this chapter, or provides any material false statement in the application or any statement of fact required in accordance with this chapter, may be required to show cause at a formal hearing why the radiographer certification should not be suspended or revoked in accordance with §289.205 of this title.

(B) When an agency order has been issued for an industrial radiographer to cease and desist from the use of sources of radiation or the agency suspends or revokes the individual's radiographer certification, the radiographer shall surrender the certification ID card to the agency until the order is changed or the suspension expires.

(C) An individual whose radiographer certification has been suspended or revoked by the agency or another certifying entity shall obtain written approval from the agency to apply to take the examination.

(q) Personnel monitoring control.

(1) The personnel monitoring program shall meet the applicable requirements of §289.202 of this title.

(2) When performing industrial radiographic operations, the following shall apply:

(A) No licensee or registrant shall permit an individual to act as a radiographer, radiographer trainer, or radiographer trainee unless each individual wears, on the trunk of the body at all times during radiographic operations:

(i) either a film badge, a thermoluminescent dosimeter (TLD), or an optically stimulated luminescence (OSL) dosimeter;

(ii) direct-reading pocket dosimeter or an electronic personal dosimeter; and

(iii) an alarming ratemeter.

(B) For permanent radiographic installations where other appropriate alarming or warning devices are in routine use, the wearing of an alarming ratemeter is not required.

(C) Pocket dosimeters shall meet the criteria in ANSI 13.5-1972 at the time of manufacture and shall have a range of zero to 200 mrem (2 mSv). Electronic personal dosimeters may only be used in place of ion-chamber pocket dosimeters.

(D) Pocket dosimeters shall be recharged at the start of each work shift.

(E) As a minimum, direct reading pocket dosimeters shall be recharged and electronic personal dosimeters reset, and "start" readings recorded:

(i) immediately before checking out any source of radiation from an authorized storage location for the purposes of conducting industrial radiographic operations; and

(ii) before beginning radiographic operations on any subsequent calendar day (if the source of radiation has not been checked back into an authorized storage site).

(F) Whenever radiographic operations are concluded for the day, the "end" readings on pocket dosimeters or electronic personal dosimeters shall be recorded and the accumulated occupational doses for that day determined and recorded.

(G) If an individual's pocket dosimeter is discharged beyond its range (for example, goes "off-scale"), or if an individual's electronic personal dosimeter reads greater than 200 mrem (2 mSv), industrial radiographic operations by that individual shall cease and the individual's film badge, TLD, or OSL shall be processed immediately. The individual shall not return to work with sources of radiation until a determination of the radiation exposure has been made. This determination shall be made by the RSO or the RSO's designee. The results of this determination shall be included in the records maintained in accordance with subsection (w)(8) of this section.

(H) Each film badge, TLD, or OSL shall be assigned to and worn by only one individual.

(I) Film badges, TLDs, or OSLs must be replaced at least monthly. After replacement, each film badge, TLD, or OSL must be returned to the supplier for processing within 14 calendar days of the exchange date specified by the personnel monitoring supplier or as soon as practicable. In circumstances that make it impossible to return each film badge, TLD, or OSL within 14 calendar days, such circumstances must be documented and available for review by the agency.

(J) If a film badge, TLD, or OSL is lost or damaged, the worker shall cease work immediately until a replacement film badge, TLD, or OSL is provided and the exposure is calculated for the time period from issuance to loss or damage of the film badge, TLD, or OSL. The results of the calculated exposure and the time period for which the film badge, TLD, or OSL was lost or damaged shall be included in the records maintained in accordance with subsection (w)(8) of this section.

(3) Pocket dosimeters or electronic personal dosimeters shall be checked for correct response to radiation at periods not to exceed one year. Acceptable dosimeters shall read within plus or minus 20% of the true radiation exposure.

(4) Each alarming ratemeter shall:

(A) be checked without being exposed to radiation prior to use at the start of each work shift, to ensure that the audible alarm is functioning properly prior to use at the start of each work shift;

(B) be set to give an alarm signal at a preset dose rate of 500 mrem/hr (5 mSv/hr) or lower with an accuracy of plus or minus 20% of the true radiation dose rate;

(C) require special means to change the preset alarm function; and

(D) be calibrated for correct response to radiation at intervals not to exceed one year for correct response to radiation.

(5) The following records required by this subsection shall be made and maintained in accordance with subsection (w)(8) of this section.

(A) Records of pocket dosimeter response.

(B) Records of pocket dosimeter and electronic personal dosimeter readings of personnel exposures.

(6) The following records required by this subsection shall be maintained in accordance with subsection (w)(8) of this section.

(A) Records of alarming ratemeter calibrations.

(B) Records of film badge, TLD, or OSL personnel monitoring results received from the film badge, TLD, or OSL processor.

(r) Access control.

(1) During each industrial radiographic operation, a radiographer shall maintain visual surveillance of the operation to protect against unauthorized entry into a radiation area or high radiation area, except at permanent radiographic installations where all entryways are locked and the requirements of subsection (j) of this section are met.

(2) Radiographic exposure devices shall not be left unattended except when in storage or physically secured against unauthorized removal or tampering.

(s) Posting. All areas in which industrial radiography is being performed shall be posted conspicuously in accordance with §289.202 of this title including the following.

(1) Radiation areas. Each radiation area shall be posted conspicuously with a sign(s) displaying the radiation caution symbol and the words "CAUTION, RADIATION AREA" or "DANGER, RADIATION AREA."

(2) High radiation area. Each high radiation area shall be posted conspicuously with a sign(s) displaying the radiation caution symbol and the words "CAUTION, HIGH RADIATION AREA" or "DANGER, HIGH RADIATION AREA."

(3) Whenever practicable, ropes and/or barriers shall be used in addition to appropriate signs to designate areas in accordance with §289.202(n)(1) of this title and to help prevent unauthorized entry.

(4) During pipeline industrial radiographic operations, sufficient radiation signs and other barriers shall be posted to prevent unmonitored individuals from entering the area in accordance with §289.202(n)(1) of this title.

(5) In lieu of the requirements of subsection (s)(1) and (2) of this section, a restricted area may be established in accordance with §289.202(n)(1) of this title and be posted in accordance with subsection (s)(1) and (2) of this section, for example, both signs may be posted at the same location at the boundary of the restricted area.

(6) Exceptions listed in §289.202(bb) of this title do not apply to industrial radiographic operations.

(t) Specific requirements for radiographic personnel performing industrial radiography.

(1) At a job site, the following shall be supplied by the licensee or registrant:

(A) at least one operable, calibrated survey instrument for each exposure device or radiation machine in use;

(B) a current whole body personnel monitor, for example; a TLD, OSL, or film badge for each worker;

(C) an operable, calibrated pocket dosimeter or electronic personal dosimeter with a range of zero to 200 mrem (2 mSv) for each worker;

(D) an operable, calibrated, alarming ratemeter for each worker; and

(E) the appropriate barrier ropes and signs.

(2) Each radiographer at a job site shall carry a valid certification ID card issued by the agency or another certifying entity whose certification offers the same or comparable certification standards.

(3) Each radiographer trainee at a job site shall carry a valid trainee status card issued by the agency or equivalent documentation in accordance with subsection (m)(1)(A) of this section.

(4) Radiographic personnel shall not perform radiographic operations if any of the items in paragraphs (1)-(3) of this subsection are not available at the job site or are inoperable. Radiographic personnel shall ensure that the items listed in paragraph (1) of this subsection, radiographic exposure devices, and radiation machines are used in accordance with the requirements of this section.

(5) During an inspection by the agency, an agency inspector may terminate an operation if any of the items in paragraphs (1)-(3) of this subsection are not available and operable or if the required number of radiographic personnel are not present. Operations shall not be resumed until all required conditions are met.

(u) Radiation safety requirements for the use of radiation machines.

(1) Locking of radiation machines. The control panel of each radiation machine shall be equipped with a locking device that will prevent the unauthorized use of an x-ray system or the accidental production of radiation. The radiation machine shall be kept locked and the key removed at all times except when under the direct visual surveillance of a radiographer.

(2) Permanent storage precautions for the use of radiation machines. Radiation machines shall be secured while in storage to prevent tampering or removal by unauthorized individuals.

(3) Requirements for radiation machines used in industrial radiographic operations.

(A) Equipment used in industrial radiographic operations involving radiation machines manufactured after October 1, 1987, shall be certified at the time of manufacture to meet the criteria set forth by ANSI N537-1976, except accelerators used in industrial radiography.

(B) The registrant's name and city or town where the main business office is located shall be prominently displayed with a durable, legible, clearly visible label(s) on both sides of all vehicles used to transport radiation machines for temporary job site use.

(4) Operating and internal audit requirements for the use of radiation machines.

(A) Each registrant shall conduct an internal audit program to ensure that the requirements of this chapter, the conditions of the certificate of registration, and the registrant's operating, safety, and emergency procedures are followed by radiographic personnel.

(B) Each radiographer's and radiographer trainee's performance during an actual radiographic operation shall be audited and documented at intervals not to exceed six months.

(C) If a radiographer or a radiographer trainee has not participated in a radiographic operation during the six months since the last audit, the radiographer or the radiographer trainee shall demonstrate knowledge of the training requirements of subsection (n) of this section by an oral or written and practical examination administered by the registrant before the individual can next participate in a radiographic operation.

(D) The agency may consider alternatives in those situations where the individual serves as both radiographer and RSO.

(E) In those operations where a single individual serves as both radiographer and RSO and performs all radiography operations, an audit program is not required.

(F) The registrant shall provide annual refresher safety training, as defined in subsection (c) of this section, for each radiographer trainee, radiographer, or radiographer trainer at intervals not to exceed 12 months.

(G) No individual, other than a radiographer or a radiographer trainee, who is under the personal supervision of a radiographer trainer, shall manipulate controls or operate radiation machines used in industrial radiographic operations. Only one radiographer is required to operate radiation machines during industrial radiography.

(H) Radiographic operations shall not be conducted at storage sites unless specifically authorized by the certificate of registration.

(I) Records of audits specified in this subsection shall be made and maintained in accordance with subsection (w)(6)(A) of this section.

(J) Records of the annual refresher training required by subparagraph (F) of this paragraph shall be made and maintained in accordance with subsection (w)(7).

(5) Radiation surveys and survey records for the use of radiation machines.

(A) No industrial radiographic operation shall be conducted unless at least one calibrated and operable radiation survey instrument, as described in subsection (f) of this section, is used for each radiation machine energized.

(B) A physical radiation survey shall be made after each radiographic exposure using radiation machines to determine that the machine is "off."

(C) All potential radiation areas where industrial radiographic operations are to be performed shall be posted in accordance with subsection (s) of this section, based on estimated dose rates, before industrial radiographic operations begin. An area survey shall be performed during the first radiographic exposure to confirm that subsection (s) of this section requirements have been met and that unrestricted areas do not have radiation levels in excess of the limits specified in §289.202(n)(3) of this title.

(D) Records of the surveys required by subparagraph (C) of this paragraph shall be made and maintained in accordance with subsection (w)(12) of this section.

(6) Requirements and exemptions for radiation machines in enclosed radiography.

(A) Systems for enclosed radiography, including shielded-room radiography and cabinet x-ray systems not otherwise exempted, shall comply with all applicable requirements of this section.

(B) Systems for enclosed radiography designed to allow admittance of individuals and systems not otherwise exempted shall be evaluated at intervals not to exceed one year to ensure compliance with the applicable requirements of this section and §289.202(n)(1)-(3) of this title.

(C) Certified and certifiable cabinet x-ray systems, including those designed to allow admittance of individuals, are exempt from the requirements of this section except that:

(i) No registrant shall permit any individual to operate a cabinet x-ray system until the individual has received a copy of and instruction in the operating procedures for the unit.

(ii) Tests for proper operation of interlocks must be conducted and recorded at intervals not to exceed 12 months.

(iii) The registrant shall perform an evaluation to determine compliance with §289.202(n)(1)-(3) of this title and 21 CFR 1020.40 at intervals not to exceed one year.

(D) Certified cabinet x-ray systems shall be maintained in compliance with 21 CFR 1020.40 and no modification shall be made to the system unless prior agency approval has been granted in accordance with §289.201(c)(1) of this title.

(E) Records required by this subsection shall be made and maintained in accordance with subsection (w)(13) of this section.

(7) Registration requirements for industrial radiographic operations.

(A) Radiation machines used in industrial radiographic operations shall be registered in accordance with §289.226 of this title.

(B) In addition to the registration requirements in §289.226(c) and (h) of this title, an application for a certificate of registration shall include the following information:

(i) a schedule or description of the program for training radiographic personnel that specifies:

(I) initial training,

(II) annual refresher training,

(III) on-the-job training;

(IV) procedures for administering the oral and written examination to determine the knowledge, understanding, and ability of radiographic personnel to comply with the requirements of this chapter, the conditions of the certificate of registration, and the registrant's operating, safety, and emergency procedures; and

(V) procedures for administering the practical examination to demonstrate competence in the use of sources of radiation, radiographic exposure devices, related handling tools, and radiation survey instruments that may be employed in industrial radiographic assignments.

(ii) written operating, safety, and emergency procedures, including all items listed in subsection (y)(4) of this section;

(iii) a description of the internal audit program to ensure that radiographic personnel follow the requirements of this chapter, the conditions of the certificate of registration, and the

registrant's operating, safety, and emergency procedures at intervals not to exceed six months;

(iv) a list of permanent radiographic installations, descriptions of permanent storage use sites, and the location(s) where all records required by this section and other sections of this chapter will be maintained. Radiographic equipment shall not be stored or used at a permanent site unless such site is specifically authorized by the certificate of registration. A storage site is permanent if radiation machines are stored at that location and if one or more of the following applies:

(I) the registrant establishes telephone service that is used for contracting or providing industrial radiographic services for the registrant;

(II) industrial radiographic services are advertised for or from the site;

(III) radiation machines stored at that location are used for industrial radiographic operations conducted at other sites; or

(IV) any registrant conducting radiographic operations or storing radiation machines at any location not listed on the certificate of registration for a period in excess of 90 days in a calendar year, shall notify the agency prior to exceeding the 90 days.

(v) a description of the organization of the industrial radiographic program, including delegations of authority and responsibility for operation of the radiation safety program; and

(vi) procedures for verifying and documenting the certification status of radiographers and for ensuring that the certification of individuals acting as radiographers remains valid.

(C) A certificate of registration will be issued if the requirements of this paragraph of this subsection and §289.226(c) and (h) of this title are met.

(v) Radiation safety requirements for the use of sealed sources.

(1) Limits on external radiation levels from storage containers and source changers. The maximum exposure rate limits for storage containers and source changers are 200 mrem/hr (2 mSv/hr) at any exterior surface, and 10 mrem/hr (0.1 mSv/hr) at 1 meter from any exterior surface with the sealed source in the shielded position.

(2) Locking of radiographic exposure devices, storage containers and source changers.

(A) Each radiographic exposure device, storage container, and source changer shall have a lock or outer locked container designed to prevent unauthorized or accidental removal or exposure of a sealed source. Each exposure device and source changer shall be kept locked and, if a keyed lock, the key removed at all times except when under the direct visual surveillance of a radiographer or an individual specifically authorized by the agency.

(B) Each radiographic exposure device, storage container, and source changer shall be locked and the key removed from any keyed lock prior to being transported from one location to another and also prior to being stored at a given location.

(3) Permanent storage precautions for the use of sealed sources.

(A) Radiographic exposure devices, source changers, and transport containers that contain sealed sources shall be secured while in storage to prevent tampering or removal by unauthorized individuals.

(B) Radiographic exposure devices, source changers, or transport containers that contain radioactive material may not be stored in residential locations. This section does not apply to storage of radioactive material in a vehicle in transit for use at temporary job sites, if the licensee complies with paragraph (8)(G) of this subsection and if the vehicle does not constitute a permanent storage location as described in paragraph (12)(B)(iv) of this subsection.

(4) Performance requirements for industrial radiography equipment. Equipment used in industrial radiographic operations shall meet the following minimum criteria.

(A) Each radiographic exposure device, source assembly, sealed source, and associated equipment shall meet the criteria set forth by ANSI N432-1980.

(i) All newly manufactured radiographic exposure devices and associated equipment acquired by licensees after September 1, 1993, shall comply with the requirements of this section.

(ii) All radiographic exposure devices and associated equipment in use after January 1, 1996, shall comply with the requirements of this section.

(iii) In lieu of subparagraph (A) of this paragraph, equipment used in industrial radiographic operations need not comply with §8.9.2(c) of the Endurance Test in ANSI N432-1980, if the prototype equipment has been tested using a torque value representative of the torque that an individual using the radiography equipment can realistically exert on the lever or crankshaft of the drive mechanism.

(B) Engineering analysis may be submitted by a licensee to demonstrate the applicability of previously performed testing on similar individual radiography equipment components. Upon review, the agency may find this an acceptable alternative to actual testing of the component in accordance with subparagraph (A) of this paragraph.

(C) In addition to the requirements specified in subparagraph (A) of this paragraph the following requirements apply to radiographic exposure devices, source changers, source assemblies and sealed sources.

(i) Radiographic exposure devices intended for use as Type B transport containers shall meet the applicable requirements of §289.257 of this title.

(ii) Modification of radiographic exposure devices, source changers, source assemblies, and associated equipment is prohibited, unless specifically authorized on the license.

(D) In addition to the requirements specified in subparagraphs (A)-(C) of this paragraph, radiographic exposure devices, source assemblies, and associated equipment that allow the source to move outside the device shall meet the following criteria:

(i) The source assembly shall be designed so that the source will not become disconnected if cranked outside the guide tube. The source assembly must be such that it cannot be unintentionally disconnected under normal and reasonably foreseeable abnormal conditions.

(ii) The drive cable must be positively connected to the source assembly before the source assembly can be driven out of the fully shielded position in a radiographic exposure device or source changer.

(iii) The radiographic exposure device shall automatically secure the source assembly when it is cranked back into the fully shielded position within the radiographic exposure device. This securing system shall only be released by means of a deliberate operation on the radiographic exposure device.

(iv) The outlet nipple and drive cable fittings of each radiographic exposure device shall be equipped with safety plugs or covers that will protect the source assembly from damage and from other foreign matter, such as water, mud, or sand, during storage and transportation.

(v) Each sealed source or source assembly shall have attached to it or engraved on it, a durable, legible, visible label with the words "DANGER. RADIOACTIVE." The label may not interfere with the safe operation of the exposure device or associated equipment.

(vi) Guide tubes must be used when moving the source out of the radiographic exposure device.

(vii) Guide tubes other than "J" tubes shall have passed the kinking and crushing tests for control units as specified in ANSI N432-1980.

(viii) An exposure head, endcap, or similar device designed to prevent the source assembly from extending beyond the end of the guide tube shall be attached to the outermost end of the guide tube during radiographic operations.

(ix) The guide tube exposure head connection must be able to withstand the tensile test for control units as specified in ANSI N432-1980.

(x) Source changers shall provide a system for ensuring that the source will not be accidentally withdrawn from the changer when connecting or disconnecting the drive cable to or from a source assembly.

(5) Leak testing, repair, opening, and replacement of sealed sources and devices. Leak testing, repair, opening, and replacement of sealed sources and devices shall be performed according to the following criteria:

(A) Leak testing of sealed sources shall be done in accordance with §289.201(g) of this title, except records of leak tests shall be maintained in accordance with subsection (w)(11) of this section.

(B) The replacement, leak testing analysis, repair, opening, or any modification of a sealed source shall be performed only by persons specifically authorized to do so by the agency, the NRC, or another agreement state.

(C) Each exposure device using DU shielding and an "S" tube configuration shall be tested for DU contamination.

(i) Tests for DU contamination shall be performed at intervals not to exceed 12 months.

(ii) The analysis shall be capable of detecting the presence of 0.005 microcuries (185 Bq) of radioactive material on the test sample and shall be performed by a person specifically authorized by the agency or an agreement state to perform the analysis.

(iii) Should such testing reveal the presence of DU contamination, the exposure device shall be removed from use until an evaluation of the wear of the S-tube has been made.

(iv) Should the evaluation reveal that the S-tube is worn through, the device may not be used again.

(v) DU shielded devices do not have to be tested for DU contamination while in storage and not in use.

(vi) The device shall be tested for DU contamination before using or transferring such a device, if the interval of storage exceeds 12 months.

(D) A record of the DU leak test shall be maintained in accordance with subsection (w)(11) of this section.

(6) Labeling and storage.

(A) Each transport container shall have permanently attached to it a durable, legible, clearly visible label(s) that has, as a minimum, the standard trefoil radiation caution symbol conventional colors, for example, magenta, purple or black on a yellow background, having a minimum diameter of 25 millimeters, and the following wording "CAUTION. RADIOACTIVE MATERIAL. NOTIFY CIVIL AUTHORITIES (OR NAME OF COMPANY)" or "DANGER. RADIOACTIVE MATERIAL. NOTIFY CIVIL AUTHORITIES (OR NAME OF COMPANY)." In addition, transport containers shall meet applicable requirements of the DOT.

(B) Radiographic exposure devices, source changers, and storage containers shall be physically secured to prevent tampering or removal by unauthorized personnel. The licensee shall store radioactive material in a manner that will minimize danger from explosion or fire.

(C) The licensee shall lock and physically secure the transport package containing radioactive material in the transporting vehicle to prevent accidental loss, tampering, or unauthorized removal.

(D) The licensee's name and city or town where the main business office is located shall be prominently displayed with a durable, clearly visible label(s) on both sides of all vehicles used to transport radioactive material for temporary job site use.

(E) The licensee shall ensure that each radiographic exposure device has attached to it a durable, legible, clearly visible label bearing the following:

(i) chemical symbol and mass number of the radionuclide in the device;

(ii) activity and the date on which this activity was last measured;

(iii) manufacturer, model and serial number of the sealed source;

(iv) licensee's name, address, and telephone number; and

(v) as a minimum, the standard radiation caution symbol as defined in §289.202 of this title, and the following wording "CAUTION. RADIOACTIVE MATERIAL–DO NOT HANDLE. NOTIFY CIVIL AUTHORITIES (OR NAME OF COMPANY)" or "DANGER. RADIOACTIVE MATERIAL–DO NOT HANDLE. NOTIFY CIVIL AUTHORITIES (OR NAME OF COMPANY)."

(F) Each radiographic exposure device shall have a permanently stamped, legible, and clearly visible unique serial number.

(7) Operating and internal audit requirements for the use of sealed sources of radiation.

(A) Each licensee shall conduct an internal audit program to ensure that the requirements of this chapter, the conditions

of the license, and the licensee's operating, safety, and emergency procedures are followed by radiographic personnel.

(B) Each radiographer's and radiographer trainee's performance during an actual radiographic operation shall be audited and documented at intervals not to exceed six months.

(C) If a radiographer or a radiographer trainee has not participated in a radiographic operation during the six months since the last audit, the radiographer or the radiographer trainee shall demonstrate knowledge of the training requirements of subsection (n) of this section by an oral or written and practical examination administered by the licensee before these individuals can next participate in a radiographic operation.

(D) The agency may consider alternatives in those situations where the individual serves as both radiographer and RSO.

(E) In those operations where a single individual serves as both radiographer and RSO, and performs all radiography operations, an inspection program is not required.

(F) Each licensee shall provide annual refresher safety training, as defined in subsection (c) of this section, for each radiographer and radiographer trainee at intervals not to exceed 12 months.

(G) Each licensee shall provide, as a minimum, two radiographic personnel for each exposure device in use for any industrial radiography conducted at a location other than at a permanent radiographic installation (shielded room, bay, or bunker) meeting the requirements of subsection (j)(1) of this section. If one of the personnel is a radiographer trainee, the other shall be a radiographer trainer authorized by the license.

(H) Collimators shall be used in industrial radiographic operations that use crank-out devices except when physically impossible.

(I) No individual other than a radiographer or a radiographer trainee who is under the personal supervision of a radiographer trainer shall manipulate controls or operate radiographic exposure devices and associated equipment used in industrial radiographic operations.

(J) Radiographic operations shall not be conducted at storage sites unless specifically authorized by the license.

(K) Records of audits specified in this subsection shall be made and maintained by the licensee in accordance with subsection (w)(6)(B) of this section.

(L) Records of the annual refresher training required by subparagraph (F) of this paragraph shall be made and maintained in accordance with subsection (w)(7) of this section.

(8) Radiation surveys and survey records for the use of sealed sources of radiation.

(A) No industrial radiographic operation shall be conducted unless at least one calibrated and operable radiation survey instrument, as described in subsection (f) of this section, is used at each site where radiographic exposures are made.

(B) A survey with a radiation survey instrument meeting the requirements of subsection (f)(1)-(3) of this section shall be made after each radiographic exposure to determine that the sealed source has been returned to its fully shielded position and before exchanging films, repositioning the exposure head, or dismantling equipment. The entire circumference of the radiographic exposure device shall be surveyed. If the radiographic exposure device has a source guide tube, the survey shall also include the source guide tube and any collimator.

(C) All potential radiation areas where industrial radiographic operations are to be performed shall be posted in accordance with subsection (s) of this section, based on calculated dose rates, before industrial radiographic operations begin. An area survey shall be performed during the first radiographic exposure (for example, with the sealed source in the exposed position) to confirm that the requirements of subsection (s) of this section have been met.

(D) Each time re-establishment of the restricted area is required, the requirements of subparagraph (C) of this paragraph shall be met.

(E) The requirements of subparagraph (D) of this paragraph do not apply to pipeline industrial radiographic operations when the conditions of exposure including, but not limited to, the radiographic exposure device, duration of exposure, source strength, pipe size, and pipe thickness remain constant.

(F) A lock-out survey, in which all accessible surfaces of the radiographic exposure device or source changer are surveyed, shall be performed.

(G) Surveys shall be performed on storage containers to ensure that radiation levels do not exceed the limits specified in §289.202(n)(1) of this title. These surveys shall be performed initially with the maximum amount of radioactive material present in the storage location and thereafter at the time of the quarterly inventory and whenever storage conditions change.

(H) A survey meeting the requirements of subparagraph (B) of this paragraph shall be performed on the radiographic exposure device and the source changer after every sealed source exchange.

(I) Records of the surveys required by subparagraphs (C), (D), and (F)-(H) of this paragraph shall be made and maintained in accordance with subsection (w)(12) of this section.

(9) Requirements for sealed sources in enclosed radiography.

(A) Systems for enclosed radiography, including shielded-room radiography not otherwise exempted, shall comply with all applicable requirements of this section.

(B) Systems for enclosed radiography designed to allow admittance of individuals and systems not otherwise exempted shall be evaluated at intervals not to exceed one year to ensure compliance with the applicable requirements of this section and §289.202(n)(1)-(3) of this title.

(C) Tests for proper operation of interlocks must be conducted and recorded in accordance with subsection (j) of this section.

(D) Records required by this subsection shall be made and maintained in accordance with subsection (w)(14) of this section.

(10) Underwater, offshore platform, and lay-barge radiography.

(A) Underwater, offshore platform, and/or lay-barge radiography shall not be performed unless specifically authorized in a license issued by the agency in accordance with subsection (v)(12) of this section.

(B) In addition to the other requirements of this section, the following requirements apply to the performance of offshore platform or lay-barge radiography.

(i) Cobalt-60 sources with activities in excess of 20 curies (nominal) and iridium-192 sources with activities in excess of 100 curies (nominal) shall not be used in the performance of offshore platform or lay-barge radiography.

(ii) Collimators shall be used for all industrial radiographic operations performed on offshore platforms or lay-barges.

(11) Prohibitions.

(A) Industrial radiography performed with a sealed source that is not fastened to or contained in a radiographic exposure device (fishpole technique) is prohibited unless specifically authorized in a license issued by the agency.

(B) Retrieval of disconnected sources or sources that cannot be returned by normal means to a fully shielded position or automatically secured in the radiographic exposure device, shall not be performed unless specifically authorized by a license condition.

(12) Licensing requirements for industrial radiographic operations.

(A) Sealed sources used in industrial radiographic operations shall be licensed in accordance with §289.252 of this title.

(B) In addition to the licensing requirements in §289.252 of this title, an application for a license shall include the following information.

(i) A schedule or description of the program for training radiographic personnel that specifies:

(I) initial training;

(II) annual refresher training;

(III) on-the-job training;

(IV) procedures for administering the oral and written examinations to determine the knowledge, understanding, and ability of radiographic personnel to comply with the requirements of this chapter, the conditions of the license, and the licensee's operating, safety, and emergency procedures; and

(V) procedures for administering the practical examination to demonstrate competence in the use of sources of radiation, radiographic exposure devices, related handling tools, and radiation survey instruments that may be employed in industrial radiographic assignments.

(ii) Written operating, safety, and emergency procedures, including all items listed in subsection (y)(4) of this section.

(iii) A description of the internal audit program to ensure that radiographic personnel follow the requirements of this chapter, the conditions of the license, and the licensee's operating, safety, and emergency procedures at intervals not to exceed six months.

(iv) A list of permanent radiographic installations, descriptions of permanent storage and use sites, and the location(s) where all records required by this section and other sections of this chapter will be maintained. If records are to be maintained at a headquarters office in Texas and no use or storage is authorized for the site, this site will be designated as the main site. Radioactive material shall not be stored or used at a permanent use site unless such site is specifically authorized by the license. Any licensee conducting radiographic operations or storing radioactive material at any location not listed on the license for a period in excess of 90 days in a calendar year, shall notify the agency prior to exceeding the 90 days. A storage site is permanent if radioactive material is stored at that location and if any one or more of the following applies:

(I) the licensee establishes telephone service that is used for contracting or providing industrial radiographic services for the licensee;

(II) industrial radiographic services are advertised for or from the site;

(III) radioactive material stored at that location is used for industrial radiographic operations conducted at other sites; or

(IV) any licensee conducting radiographic operations or storing radioactive material at any location not listed on the license for a period in excess of 90 days in a calendar year.

(v) A description of the organization of the industrial radiographic program, including delegations of authority and responsibility for operation of the radiation safety program.

(vi) A description of the program for inspection and maintenance of radiographic exposure devices and transport and storage containers (including items in subsection (y)(2) of this section and the applicable items in subsection (i) of this section).

(vii) If a license application includes underwater radiography, as a minimum a description of:

(I) radiation safety procedures and radiographer responsibilities unique to the performance of underwater radiography;

(II) radiographic equipment and radiation safety equipment unique to underwater radiography; and

(III) methods for gas-tight encapsulation of equipment; and

(viii) If a license application includes offshore platform and/or lay-barge radiography, as a minimum a description of:

(I) transport procedures for radioactive material to be used in industrial radiographic operations;

(II) storage facilities for radioactive material; and

(III) methods for restricting access to radiation areas.

(C) Procedures for verifying and documenting the certification status of radiographers and for ensuring that the certification of individuals acting as radiographers remains valid.

(D) If a licensee intends to perform leak testing of sealed sources or exposure devices containing DU shielding, the licensee shall describe the procedures for performing the leak test.

(E) If the licensee intends to analyze its own wipe samples, the application shall include a description of the procedures to be followed. The description shall include at least the following:

(i) instruments to be used;

(ii) methods of performing the analysis; and

(iii) pertinent experience of the person who will analyze the wipe samples.

(F) If the licensee intends to perform "in-house" calibrations of survey instruments, the licensee shall describe methods to be used and the relevant experience of the person(s) who will perform the calibrations.

(G) A license will be issued if the requirements of this paragraph of this subsection and §289.252 of this title are met.

(w) Record keeping requirements.

(1) Records of receipt, transfer, and disposal of sources of radiation and devices using DU for shielding.

(A) Each licensee and registrant shall maintain records showing the receipt, transfer, and disposal of sources of radiation and devices using DU for shielding as required by subsection (e) of this section for agency inspection until disposal is authorized by the agency.

(B) These records shall include the following, as appropriate:

(i) date of receipt, transfer, or disposal;

(ii) name of the individual making the record;

(iii) radionuclide;

(iv) number of curies (becquerels) or mass (for DU); and

(v) manufacturer, model, and serial number of each source of radiation and/or device.

(2) Records of radiation survey instruments. Each licensee shall maintain records of the calibrations required by subsection (f)(2) of this section for agency inspection for two years after the calibration date.

(3) Records of quarterly inventory.

(A) Each licensee shall maintain records of the quarterly inventory of sealed sources and of devices containing DU as required by subsection (g) of this section for agency inspection for two years from the date of the inventory.

(B) The record shall include the following for each sealed source of radiation, as appropriate:

(i) manufacturer, model, and serial number;

(ii) radionuclide;

(iii) number of curies (except for depleted uranium);

(iv) location of each source of radiation;

(v) date of the inventory; and

(vi) name of the individual making the inventory.

(4) Records of inspection and maintenance of radiation machines, radiographic exposure devices, transport and storage containers, associated equipment, source changers, and survey instruments.

(A) Each licensee shall maintain records specified in subsection (i)(3) of this section of equipment problems found in daily checks and quarterly inspections of:

(i) radiographic exposure devices;

(ii) transport and storage containers;

(iii) associated equipment;

(iv) source changers; and

(v) survey instruments.

(B) The record shall include the following:

(i) date of check or inspection;

(ii) name of inspector;

(iii) equipment involved;

(iv) any problems found; and

(v) what repairs or maintenance, if any, were done.

(C) Each record shall be maintained for agency inspection for two years from the date of the inspection.

(5) Records of alarm systems and entrance control checks at permanent radiographic installations. Each licensee shall maintain records of alarm system and entrance control device tests required by subsection (j) of this section for agency inspection until disposal is authorized by the agency.

(6) Records of operating and internal audit requirements.

(A) Records of operating and internal audit requirements for the use of radiation machines specified by subsection (u)(4) of this section shall be maintained by the registrant for agency inspection for two years from the date of the audit.

(B) Records of operating and internal audit requirements for the use of sealed sources specified by subsection (v)(7) of this section shall be maintained by the licensee for agency inspection for two years from the date of the audit.

(7) Records of training and certification.

(A) Each licensee and registrant shall maintain for agency inspection the following clear and legible training and certification records that demonstrate that the applicable requirements of subsections (m)(1)(A) and (2)(A) and (n) of this section are met for all industrial radiographic personnel for agency inspection. A copy of the trainee status card will satisfy the documentation requirements of subsection (m)(1)(A) of this section. A copy of the certification ID card will satisfy the documentation requirements of subsection (m)(2)(A) of this section.

(i) Records of training shall include the following:

(I) radiographer certification documents and verification of certification status;

(II) copies of written tests administered by the licensee or registrant;

(III) dates of oral and practical examinations and names of individuals conducting and receiving the oral and practical examinations; and

(IV) a list of items tested and the results of the oral and practical examinations.

(ii) Records of annual refresher safety training and audits of job performance made in accordance with subsections (u)(4) and (v)(7) of this section shall include the following:

(I) list the topics discussed during the refresher safety training;

(II) dates the annual refresher safety training was conducted;

(III) names of the instructors and attendees; and

(IV) for audits of job performance, the records shall also include a list showing the items checked and any noncompliance observed by the RSO or designee.

(B) Records required by subsections (m)(1)(A) and (2)(A) and (n) of this section shall be maintained for agency inspection until disposal is authorized by the agency.

(C) Records of the annual refresher training required by subsections (u)(4)(F) and (v)(7)(F) of this section shall be maintained for agency inspection for two years after the record is made.

(8) Records of personnel monitoring procedures. Each licensee and registrant shall maintain the following exposure records specified in subsection (q) of this section.

(A) Direct-reading dosimeter readings and yearly operational checks required by subsection (q) of this section shall be maintained for agency inspection for two years. If the dosimeter readings were used to determine external radiation dose (for example, no film badge, TLD, or OSL exposure records exist), the records shall be maintained until the agency authorizes disposal.

(B) Records of alarming ratemeter calibrations shall be maintained for agency inspection for two years.

(C) Reports received from the film badge, TLD, or OSL processor shall be maintained for agency inspection until disposal is authorized by the agency.

(D) Records of estimates of exposures as a result of off-scale personal direct-reading dosimeters, or lost or damaged film badges, TLDs, or OSLs, shall be maintained for agency inspection until disposal is authorized by the agency.

(9) Records and documents required at additional authorized use/storage sites.

(A) Each licensee or registrant maintaining additional authorized use/storage sites where industrial radiography operations are performed shall have copies of the following records and documents specific to that site available at each site for inspection by the agency:

(i) a copy of the appropriate license or certificate of registration authorizing the use of licensed or registered sources of radiation;

(ii) operating, safety, and emergency procedures in accordance with subsection (y)(4) of this section;

(iii) applicable sections of this chapter as listed in the license or certificate of registration;

(iv) records of receipt, transfer, and disposal of sources of radiation and devices using DU for shielding at the additional site in accordance with subsection (e) of this section;

(v) records of the latest survey instrument calibrations in use at the site in accordance with subsection (f) of this section;

(vi) records of the latest calibrations of alarming ratemeters and operational checks of pocket dosimeters and/or electronic personal dosimeters in accordance with subsection (q) of this section;

(vii) inventories in accordance with subsection (g) of this section;

(viii) utilization records for each radiographic exposure device and radiation machine dispatched from that location in accordance with subsection (h) of this section;

(ix) records of equipment problems identified in daily checks of equipment in accordance with subsection (i) of this section, if applicable;

(x) records of alarm systems and entrance control checks in accordance with subsection (j) of this section;

(xi) training records in accordance with subsection (n) of this section;

(xii) records of direct-reading dosimeter readings in accordance with subsection (q) of this section;

(xiii) audits in accordance with subsections (u)(4)(A)-(C) and (v)(7)(A)-(C) of this section;

(xiv) latest radiation survey records in accordance with subsections (u)(5)(D) and (v)(8)(J) of this section;

(xv) records of interlock testing in accordance with subsections(u)(6)(C)(ii) and (v)(9)(C) of this section;

(xvi) records of annual evaluation of cabinet x-ray systems in accordance with subsection (u)(6)(C)(iii) of this section;

(xvii) records of leak tests for specific devices and sources at the additional site in accordance with subsection (v)(5) of this section;

(xviii) shipping papers for the transportation of sources of radiation in accordance with §289.257 of this title; and

(xix) a copy of the agreement state license or certificate of registration authorizing the use of sources of radiation, when operating under reciprocity in accordance with §289.226 of this title and §289.252 of this title.

(B) Records required in accordance with this subsection shall be maintained for agency inspection for a period of two years.

(C) Records required in accordance with this subsection shall also be maintained at the main authorized site.

(10) Records required at temporary job sites. Each licensee and registrant conducting industrial radiography at a temporary job site shall have the following records available at that site for agency inspection:

(A) a copy of the appropriate license or certificate of registration or equivalent document authorizing the use of sources of radiation;

(B) operating, safety, and emergency procedures in accordance with subsection (y)(4) of this section;

(C) applicable sections of this chapter as listed in the license or certificate of registration;

(D) latest radiation survey records required in accordance with subsections (u)(5)(D) and (v)(8)(I) of this section for the period of operation at the site;

(E) the daily pocket dosimeter records for the period of operation at the site;

(F) utilization records for each radiographic exposure device or radiation machine dispatched from that location in accordance with subsection (h) of this section; and

(G) the latest instrument calibration and leak test records for devices at the site. Acceptable records include tags or labels that are attached to the devices or survey instruments and decay charts for sources that have been manufactured within the last six months.

(11) Records of leak testing of sealed sources and devices containing DU. Each licensee shall maintain records of leak testing of sealed sources and devices containing DU required by subsection (v)(5) of this section for agency inspection for two years from the date of the leak test.

(12) Records of radiation surveys. Records of the surveys required by subsections (u)(5) and (v)(8) of this section shall be maintained for agency inspection for two years after completion of the survey. If a survey was used to determine an individual's exposure due to loss of personnel monitoring data, the records of the survey shall be maintained until the agency authorizes disposal.

(13) Records of requirements and exemptions for radiation machines in enclosed radiography.

(A) Records of evaluations required by subsection (u)(6)(B) of this section shall be maintained for agency inspection for two years after the evaluation.

(B) Records of operating instructions in cabinet x-ray systems required by subsection (u)(6)(C)(i) of this section and interlock tests required by subsection (u)(6)(C)(ii) of this section shall be maintained for agency inspection until disposal is authorized by the agency.

(C) Records of evaluation of certified cabinet x-ray systems required by subsection (u)(6)(C)(iii) of this section shall be maintained for agency inspection for two years after the evaluation.

(14) Records of requirements for sealed sources in enclosed radiography.

(A) Records of evaluations required by subsection (v)(9)(B) of this section shall be maintained for agency inspection for two years after the evaluation.

(B) Records of interlock tests required by subsection (v)(9)(C) of this section shall be maintained for agency inspection until disposal is authorized by the agency.

(15) Records of utilization logs shall be maintained for agency inspection until disposal is authorized by the agency.

(x) Form of records.

(1) Each record required by this section shall be legible throughout the specified retention period.

(2) The record shall be the original or a reproduced copy or a microform provided that the copy or microform is authenticated by authorized personnel and that the microform is capable of reproducing a clear copy throughout the required retention period.

(3) The record may also be stored in electronic media with the capability for producing legible, accurate, and complete records during the required retention period.

(4) Records, such as letters, drawings, and specifications, shall include all pertinent information, such as stamps, initials, and signatures.

(5) The licensee or registrant shall maintain adequate safeguards against tampering with and loss of records.

(y) Appendices.

(1) Subjects to be included in training courses for radiographer trainees. Training provided to qualify individuals as radiographer trainees in compliance with subsection (m)(1)(A) of this section shall be presented on a formal basis. The training shall include the following subjects.

(A) Fundamentals of radiation safety to include the following:

(i) characteristics of radiation;

(ii) units of radiation dose in rems (sieverts) and quantity of radioactivity in curies (becquerels);

(iii) significance of radiation dose to include:

(I) radiation protection standards;

(II) biological effects of radiation dose;

(III) hazards of exposure to radiation; and

(IV) case histories of radiography accidents;

(iv) levels of radiation from sources of radiation; and

(v) methods of controlling radiation dose to include:

(I) working time;

(II) working distances; and

(III) shielding.

(B) Radiation detection instrumentation to include the following:

(i) use, operation, calibration and limitations of radiation survey instruments;

(ii) survey techniques; and

(iii) use of personnel monitoring equipment to include:

(I) film badges;

(II) TLDs;

(III) OSLs;

(IV) pocket dosimeters;

(V) alarming ratemeters; and

(VI) electronic personal dosimeters.

(C) Radiographic equipment to be used including the following:

(i) remote handling equipment;

(ii) operation and control of radiographic exposure devices and sealed sources, including pictures or models of source assemblies (pigtails);

(iii) storage and transport containers, source changers;

(iv) operation and control of x-ray equipment;

(v) collimators;

(vi) storage, control, and disposal of radioactive material; and

(vii) inspection and maintenance of equipment.

(D) Requirements of pertinent federal and state regulations.

(E) Generic written operating, safety, and emergency procedures (see subsection (y)(4) of this section).

(2) General requirements for inspection of industrial radiographic equipment.

(A) Radiographic exposure devices shall be inspected for:

(i) abnormal surface radiation levels anywhere on camera, collimator, or guide tube;

(ii) condition of safety plugs;

(iii) proper operation of locking mechanism;

(iv) condition of pigtail connector;

(v) condition of carrying device (straps, handle, etc.); and

(vi) proper and legible labeling.

(B) Source tubes shall be inspected for:

(i) rust, dirt, or sludge buildup inside the source tube;

(ii) condition of source tube connector;

(iii) condition of source stop;

(iv) kinks or damage that could prevent proper operation; and

(v) presence of radioactive contamination.

(C) Control cables and drive mechanisms shall be inspected for:

(i) proper drive mechanism with camera, as appropriate;

(ii) changes in general operating characteristics;

(iii) condition of connector on drive cable;

(iv) drive cable flexibility, wear, and rust;

(v) excessive wear or damage to crank assembly parts;

(vi) damage to drive cable conduit that could prevent the cable from moving freely;

(vii) proper connector mating between the drive cable and the pigtail;

(viii) proper operation of source position indicator, if applicable; and

(ix) presence of radioactive contamination.

(D) Pipeliners shall be inspected for:

(i) abnormal surface radiation;

(ii) changes in the general operating characteristics of the unit;

(iii) proper operation of shutter mechanism;

(iv) chafing or binding of shutter mechanism;

(v) damage to the device that might impair its operation;

(vi) proper operation of locking mechanism;

(vii) proper drive mechanism with camera, as appropriate;

(viii) condition of carrying device (strap, handle, etc.); and

(ix) proper and legible labeling.

(E) X-ray equipment shall be inspected for:

(i) change in the general operating characteristics of the unit;

(ii) wear of electrical cables and connectors;

(iii) proper and legible labeling of console;

(iv) proper console with machine, as appropriate;

(v) proper operation of locking mechanism;

(vi) proper operation of timer run-down cutoff; and

(vii) damage to tube head housing that might result in excessive radiation levels.

(3) Time requirements for record keeping. The following are time requirements for record keeping.
Figure: 25 TAC §289.255(y)(3)

(4) Operating, safety, and emergency procedures. The licensee's or registrant's operating, safety, and emergency procedures shall include instructions in at least the following:

(A) handling and use of sources of radiation for industrial radiography such that no individual is likely to be exposed to radiation doses that exceed the limits established in §289.202 of this title;

(B) methods and occasions for conducting radiation surveys, including lock-out survey requirements;

(C) methods for controlling access to industrial radiography areas;

(D) methods and occasions for locking and securing sources of radiation;

(E) personnel monitoring and the use of personnel monitoring equipment, including steps to be taken immediately by industrial radiographic personnel in the event a pocket dosimeter is found to be off-scale (see subsection (q)(2)(F) of this section);

(F) methods of transporting equipment to field locations, including packing of sources of radiation in the vehicles, placarding of vehicles, and controlling of sources of radiation during transportation (including applicable DOT requirements);

(G) methods or procedures for minimizing exposure of individuals in the event of an accident, including procedures for a disconnect accident, a transportation accident, and loss of a sealed source;

(H) procedures for notifying proper personnel in the event of an accident;

(I) specific posting requirements;

(J) maintenance of records (see subsection (y)(3) of this section);

(K) inspection, maintenance, and operational checks of radiographic exposure devices, source changers, storage containers,

transport containers, source guide tubes, crank-out devices, and radiation machines;

(L) method of testing and training in accordance with subsections (m) and (n) of this section; and

(M) source recovery procedures if the licensee is authorized to perform source recovery.

This 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 November 20,1998.

TRD-9817824
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 458–7236

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Subchapter C. Texas Regulations for Control of Radiation

25 TAC §289.125

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

The Texas Department of Health (department) proposes the repeal of existing §289.125, concerning licensing requirements for near-surface land disposal of radioactive waste. The section proposed for repeal adopts by reference Part 45, titled "Licensing Requirements for Near-Surface Land Disposal of Radioactive Waste" of the *Texas Regulations for Control of Radiation*.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 289.125 has been reviewed and the department has determined that the reasons for adopting the section no longer exist.

The regulation of the disposal of radioactive waste is under the jurisdiction of the Texas Natural Resource Conservation Commission (TNRCC). TNRCC has now adopted rules for near-surface land disposal of radioactive waste.

The department published a Notice of Intention to Review for §289.125 as required by Rider 167 in the *Texas Register* (23 TexReg 9079) on September 4, 1998. No comments were received by the department on this section.

Mrs. Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the section is repealed, there will be no fiscal implications for state or local government as a result of the repeal as proposed.

Mrs. McBurney also has determined that for each year of the first five years the proposed section is repealed, the public benefit anticipated as a result of repealing the section will be to eliminate a rule that the department does not have the authority to enforce. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as repealed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, (512)834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*.

The repeal is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeal affects Health and Safety Code, Chapter 401; Health and Safety Code, Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§289.125. Licensing Requirements for Near-Surface Land Disposal of Radioactive Waste.

This 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 November 20,1998.

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Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 458–7236

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Chapter 289. Radiation Control

The Texas Department of Health (department) proposes the repeal of §289.127 and new §289.259, concerning licensing requirements for naturally occurring radioactive material (NORM). The section proposed for repeal adopts by reference Part 46, titled "Licensing Requirements for Naturally Occurring Radioactive Material (NORM)" of the *Texas Regulations for Control of Radiation*. The proposed new section incorporates language from Part 46 that has been rewritten into *Texas Register* format and includes addition and revision of subsections of the section. The repeal and new section are part of the renumbering phase in the process of rewriting the department's radiation rules in the *Texas Register* format. The new section reflects the renumbering.

The General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government code, Chapter 2001 (Administrative Procedure Act). Section 289.127 has been reviewed and the department has determined that the reasons

for adopting the section continue to exist in that a rule on this subject is needed; however the rule needs revision as described in this preamble.

The revision includes new definitions that support the changes in the rule. It redefines exemptions for oil and gas NORM waste and clarifies exemptions for pipe contaminated with NORM. Specific licensing requirements for spinning pipe gauge operations that perform NORM decontamination and for persons receiving NORM waste from other persons for processing or storage are added. The revision clarifies that maintenance which provides a different pathway for exposure than is found in daily operations and increases the potential for additional exposure is not "routine maintenance." Also added is a requirement specifying that land contaminated with NORM above the exempt limits shall not be released for unrestricted use.

The department published a Notice of Intention to Review for §289.127 as required by Rider 167 in the *Texas Register* (23 TexReg 9079) on September 4, 1998. No comments were received by the department on this section.

Mrs. Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the sections as proposed.

Mrs. McBurney has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as result of enforcing or administering the section will be to ensure continued protection of the public, workers, and the environment from unnecessary exposure to NORM radiation. The effects on small businesses and to persons who are required to comply with the section as proposed vary. There will be a cost savings of $190 per sample for oil and gas NORM waste licensees because they will no longer be required to test for radon emanation. Persons who commercially process NORM received from other persons will be required to obtain a specific license at an annual cost of $9,090. Persons who store NORM waste received from other persons will be required to obtain a specific license at an annual cost of $555. Persons who must now decontaminate land for release for unrestricted use will have a maximum cost of $4,200 a day to decontaminate a site. There are no anticipated economic costs to persons who are required to comply with the sections as repealed. There is no anticipated impact on local employment.

Comments on the proposal may be submitted to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, (512)834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public meeting to accept oral comments will be held at 10:00 a.m., Thursday, December 17, 1998, in Conference Room N218, Texas Department of Health, Bureau of Radiation Control, located at the Exchange Building, 8407 Wall Street, Austin, Texas.

Subchapter C. Texas Regulations for Control of Radiation

25 TAC §289.127

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

The repeal is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The repeal affects Health and Safety Code, Chapter 401; Health and Safety Code, Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§289.127. Licensing of Naturally Occurring Radioactive Material (NORM).

This 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 November 20,1998.

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Susan K. Steeg
General Counsel
Texas Department of Health
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For further information, please call: (512) 458–7236

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Subchapter F. License Regulations

25 TAC §289.259

The new section is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with the authority to adopt rules for its procedure and for the performance of every duty imposed by law on the board, the department, and the commissioner of health.

The new section affects Health and Safety Code, Chapter 401; Health and Safety Code, Chapter 12; and the General Appropriations Act, House Bill 1, Article IX, Rider 167, passed by the 75th Legislature.

§289.259. Licensing of Naturally Occurring Radioactive Material (NORM).

(a) Purpose. This section establishes radiation protection standards for the possession, use, transfer, transport, and/or storage of naturally occurring radioactive material (NORM) or the recycling of NORM-contaminated materials not subject to regulation under the Atomic Energy Act of 1954 (AEA), as amended. This section is not intended to regulate the disposal of radioactive substances.

(b) Scope.

(1) This section applies to any person who engages in the extraction, mining, beneficiating, processing, use, transfer, transport, or storage of NORM or the recycling of NORM-contaminated materials.

(2) This section addresses the introduction of NORM into products in which neither the NORM nor the radiation emitted from the NORM is considered to be beneficial to the products. The manufacture and commercial distribution of products containing NORM in which the NORM or its associated radiation(s) are considered to be a beneficial attribute are licensed in accordance with the provisions of §289.252 of this title (relating to Licensing of Radioactive Material).

(3) The requirements of this section are in addition to and not in substitution for other applicable requirements of §289.201 of this title (relating to General Provisions), §289.202 of this title (relating to Standards for Protection Against Radiation), §289.203 of this title (relating to Notices, Instructions and Reports to Workers; Inspections), §289.204 of this title (relating to Fees for Certificates of Registration, Radioactive Material(s) Licenses, Emergency Planning and Implementation, and Other Regulatory Services), §289.205 of this title (relating to Hearing and Enforcement Procedures), §289.252 of this title, and §289.257 of this title (relating to Packaging and Transportation of Radioactive Material).

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

(1) Beneficial attribute or beneficial to the product - The radioactivity of the product is necessary to the use of the product.

(2) Beneficiating - The processing of materials for the purpose of altering chemical or physical properties to improve the quality, purity, or assay grade.

(3) Decontamination - The cleaning process of removing or reducing residual radioactivity from equipment, buildings, structures, and land owned, possessed, or controlled by other persons to a level that permits release of equipment, buildings, structures and land for unrestricted use or termination of license.

(4) Naturally occurring radioactive material (NORM) - Naturally occurring materials not regulated under the AEA whose radionuclide concentrations have been increased by or as a result of human practices. NORM does not include the natural radioactivity of rocks or soils, or background radiation, but instead refers to materials whose radioactivity is technologically enhanced by controllable practices (or by past human practices). NORM does not include source, byproduct, or special nuclear material.

(5) Other media - Any volumetric material other than soils or liquids (for example: sludge, scale, slag, etcetera).

(6) Product - Something produced, made, manufactured, refined, or beneficiated.

(7) Recycling - A process by which materials that have served their intended use are collected, separated, or processed and returned to use in the form of raw materials in the production of new products. Recycling shall not include the use of a material in a manner that constitutes disposal.

(d) Exemptions.

(1) Persons who receive, possess, use, process, transfer, transport, store, or commercially distribute:

(A) Oil and gas NORM waste are exempt from the requirements of this chapter if the material contains, or is contaminated at, concentrations of:

(i) 30 picocuries per gram (pCi/gm) or less of technologically enhanced radium-226 or radium-228 in:

(I) soil, averaged over any 100 square meters (m^2) and averaged over the first 15 centimeters (cm) of soil below the surface; or

(II) other media; or

(ii) 150 pCi or less per gram of any other NORM radionuclide in:

(I) soil, averaged over any 100 m^2 and averaged over the first 15 cm of soil below the surface, provided that these concentrations are not exceeded at any time; or

(II) other media, provided that these concentrations are not exceeded at any time.

(B) NORM are exempt from the requirements of this chapter if the materials contain, or are contaminated at, concentrations of:

(i) 30 pCi/gm or less of technologically enhanced radium-226 or radium-228 in:

(I) soil, averaged over any 100 m^2 and averaged over the first 15 cm of soil below the surface, provided the radon emanation rate is less than 20 picocuries per square meter per second ($pCi/m^2/sec$); or

(II) other media, provided the radon emanation rate is less than 20 $pCi/m^2/sec$;

(ii) 5 pCi/gm or less of technologically enhanced radium-226 or radium-228 in:

(I) soil, averaged over any 100 m^2 and averaged over the first 15 cm of soil below the surface, in which the radon emanation rate is equal to or greater than 20 $pCi/m^2/sec$; or

(II) other media, in which the radon emanation rate is equal to or greater than 20 $pCi/m^2/sec$; or

(iii) 150 pCi or less per gram of any other NORM radionuclide in:

(I) soil, averaged over any 100 m^2 and averaged over the first 15 cm of soil below the surface, provided that the radon emanation rate is less than 20 $pCi/m^2/sec$; or

(II) other media, provided that these concentrations are not exceeded at any time.

(2) Materials and equipment in the recycling process contaminated with NORM scale or residue not otherwise exempted are exempt from the requirements of this section if the maximum radiation exposure level does not exceed 50 microroentgens per hour (μR/hr) including the background radiation level at any accessible point.

(3) Pipe contaminated with NORM scale or residue not otherwise exempted is exempt from the requirements of this section if the maximum radiation exposure level does not exceed 50 μR/hr including the background radiation level at any accessible point.

(4) Products or materials containing NORM distributed in accordance with a specific license issued by the agency in accordance with subsection (k)(4) of this section or an equivalent license issued by another licensing state are exempt from the requirements of this section.

(5) The manufacture, commercial distribution, use, or storage of the following products/materials or the recycling of equipment or containers used to produce, contain, or transport these products are exempt from the requirements of this section:

(A) potassium and potassium compounds that have not been isotopically enriched in the radionuclide K-40;

(B) byproducts from fossil fuel combustion (bottom ash, fly ash, and flue-gas emission control byproducts); and

(C) material used for building construction, industrial processing, sand blasting, metal casings, or other NORM in which the radionuclide content has not been concentrated to higher levels than found in its natural state.

(6) The wholesale and retail commercial distribution (including custom blending), possession, and use of the following products/materials or the recycling of equipment or containers used to produce, contain, or transport these products, are exempt from the requirements of this section. The manufacture of phosphate and potash fertilizer is subject to the general license requirements in subsections (f)-(h) of this section:

(A) phosphate and potash fertilizer;

(B) phosphogypsum for agricultural uses if such commercial distribution and uses meet the requirements of 40 Code of Federal Regulations (CFR) 61.204; and

(C) materials used for building construction if the materials contain NORM that has not been concentrated to higher levels than found in its natural state.

(7) The possession, storage, use, transportation, and commercial distribution of natural gas and natural gas products and of crude oil and crude oil products containing NORM are exempt from the requirements of this section. The processing of natural gas and crude oil and the manufacture of natural gas products and crude oil products containing NORM are subject to the general license requirements in subsections (f)-(h) of this section.

(8) Possession of produced waters from crude oil and natural gas production is exempt from the requirements of this section if the produced waters are reinjected in a well approved by the agency having jurisdiction to regulate such reinjection or if the produced waters are discharged under the authority of the agency having jurisdiction to regulate such discharge.

(e) Radiation survey instruments.

(1) Radiation survey instruments used to determine exemptions in accordance with subsection (d)(2) and (3) of this section and radiation survey instruments used to make surveys in accordance with subsection (f) of this section shall be able to measure from 1 μR/hr through at least 500 μR/hr.

(2) Radiation survey instruments used to make surveys required by this section and §289.202(p)(1) of this title shall be calibrated, appropriate, and operable.

(3) Each radiation survey instrument shall be calibrated:

(A) by a person licensed or registered by the agency, another agreement state or licensing state, or the United States Nuclear Regulatory Commission (NRC) to perform such service;

(B) at energies appropriate for the licensee's use;

(C) at intervals not to exceed 12 months, and after each instrument servicing other than battery replacement; and

(D) to demonstrate an accuracy within plus or minus 20% using a reference source provided by a person authorized in accordance with subparagraph (A) of this paragraph.

(4) Records of these calibrations shall be maintained for agency inspection for five years after the calibration date.

(f) General license.

(1) A general license is hereby issued to mine, extract, receive, possess, own, use, process, transport, store, and transfer for disposal NORM or to recycle NORM-contaminated materials not exempted in subsection (d) of this section without regard to quantity. This general license does not authorize the manufacture or commercial distribution of products containing NORM in concentrations greater than those specified in subsection (d)(1)(B) of this section, or of NORM in any food, beverage, cosmetic, drug, or other commodity designed for ingestion or inhalation by, or application to, a human being. The melting of scrap metal is authorized by the general license if the dilution of the NORM in the end-products or melt byproducts is sufficient to reduce any expected average concentration of NORM to levels not to exceed the concentration specified in subsection (d)(1)(B) of this section.

(2) Equipment, buildings, and structures contaminated with NORM in excess of the levels set forth in subsection (w) of this section, land contaminated with NORM in excess of the soil concentrations set forth in subsection (d) of this section, and equipment not otherwise exempted under the provisions of subsection (d)(2) and (3) of this section shall not be released for unrestricted use. The decontamination of equipment, buildings, structures, and land as described in subsection (i)(2) of this section shall be performed only by persons specifically licensed by the agency or another licensing state to conduct such work, including contractors of a general licensee, except that a general licensee or a contractor under the control and supervision of a general licensee can perform routine maintenance on equipment, buildings, structures, and land owned or controlled by the general licensee. (Maintenance that provides a different pathway for exposure than is found in daily operations and that increases the potential for additional exposure is not considered routine.) Persons conducting activities specified in subsection (i)(2) of this section and working as a contractor under the control and supervision of a general licensee must possess a specific license issued by the agency in accordance with subsection (k) of this section.

(3) The handling or processing by a general licensee of NORM-contaminated materials not otherwise exempted from the requirements of this section for the purpose of recycling is authorized by the agency if the radiation level 18 inches from the NORM-contaminated material does not exceed 2 millirem per hour (mrem/hr).

(4) The transfer of NORM not exempt from the requirements of this section from one general licensee to another general licensee is authorized by the agency if the:

(A) equipment, buildings, structures, and land contaminated with NORM are to be used by the recipient for the same purpose or at the same site;

(B) materials being transferred are ores or raw materials for processing or refinement; or

(C) materials being transferred are in the recycling process.

(5) The general license authorized in subsection (f)(1) of this section does not include transfer of land to a private landowner for unrestricted use unless land is decontaminated to unrestricted limits.

(g) Protection of workers and the general population. Each person subject to the general license in subsection (f) of this section shall conduct operations in compliance with the standards

for radiation protection established in §289.202(f)-(o), (ww)-(zz) of this title, and §289.203 of this title, except for transfer for disposal, which shall be governed by subsection (h) of this section.

(h) Transfer of waste for disposal.

(1) Each person subject to the general license in subsection (f) of this section shall manage and dispose of wastes containing NORM:

(A) in accordance with the United States Environmental Protection Agency's (EPA) applicable requirements for disposal of such wastes;

(B) by transfer of the wastes for disposal to a person specifically licensed to receive waste containing NORM and which is licensed under requirements equivalent to those for uranium and thorium byproduct materials in §289.260 of this title (relating to Licensing of Uranium Recovery and Byproduct Material Disposal Facilities);

(C) by transfer of the wastes for disposal to a facility licensed in accordance with requirements equivalent to those in 10 CFR Part 61 licensed by the NRC, an agreement state, or a licensing state; or

(D) in accordance with alternate methods authorized by the agency having jurisdiction to regulate disposal of such waste.

(2) Records of disposal, including waste manifests, shall be maintained according to the provisions of §289.202 of this title.

(3) Transfers of waste containing NORM for disposal shall be made only to a person specifically authorized to receive such waste.

(i) Specific license.

(1) Unless otherwise exempted under the provisions of subsection (d) of this section or licensed under the provisions of §289.252 of this title, the manufacture and commercial distribution of any material or product containing NORM shall be specifically licensed in accordance with this section or in accordance with the equivalent requirements of another licensing state.

(2) Persons conducting deliberate operations to decontaminate the following shall be specifically licensed in accordance with the requirements of this section:

(A) buildings and structures owned, possessed, or controlled by other persons and contaminated with NORM in excess of the levels set forth in subsection (w) of this section; or

(B) equipment or land owned, possessed, or controlled by other persons and not otherwise exempted under the provisions of subsection (d) of this section.

(3) Unless otherwise exempted in accordance with subsection (d) of this section, persons receiving NORM waste from other persons for storage or processing or persons who process NORM for other persons at temporary job sites shall be specifically licensed in accordance with the requirements of this section.

(4) Spinning pipe gauge licensees performing reclamation activities shall obtain specific authorization to perform NORM decontamination on pipe. Alternatively, spinning pipe gauge licensees may survey tubing before reclamation activities are performed. If the exposure rate on the outside of a pipe, measured at any accessible point, is greater than 50 μR/hr, then the spinning pipe gauge licensee shall obtain a NORM decontamination license. If the exposure rate of the pipe measures less than 50 μR/hr, a spinning pipe gauge licensee may perform the scale removal activity without additional authorization on their license.

(j) Filing application for specific licenses.

(1) Applications for specific licenses shall be filed in duplicate on a form prescribed by the agency.

(2) The agency may at any time after the filing of the original application, and before the expiration of the license, require further information in order to determine whether the application should be granted or denied, or whether a license should be modified or revoked.

(3) Each application shall be signed by the applicant or licensee, or a person duly authorized to act for and on the licensee's behalf.

(4) A license application may include a request for a license authorizing one or more activities.

(5) Applications and documents submitted to the agency may be made available for public inspection. The agency may, however, withhold any document or part thereof from public inspection in accordance with §289.201(n) of this title.

(6) Each application for a specific license shall be accompanied by the fee prescribed in §289.204 of this title.

(k) Requirements for the issuance of specific licenses.

(1) A license application will be approved if the agency determines that:

(A) the applicant is qualified by reason of training and experience to use the material in question for the purpose requested, according to this section, and in a manner that minimizes danger to public health and safety, property, or the environment;

(B) the applicant's proposed buildings, structures, and procedures are adequate to minimize danger to public health and safety, property, or the environment;

(C) the issuance of the license will not adversely affect the health and safety of the public;

(D) the applicant satisfies any applicable special requirements in this section; and

(E) the applicant has met the financial security requirements of subsection (v) of this section.

(2) An application for a specific license to decontaminate equipment or land not otherwise exempted under the provisions of subsection (d) of this section or buildings and structures contaminated with NORM in excess of the levels set forth in subsection (w) of this section, as applicable, will be approved if:

(A) the applicant satisfies the requirements specified in paragraph (1) of this subsection; and

(B) the applicant has adequately addressed the following items in the application:

(i) procedures and equipment for monitoring and protection of workers;

(ii) an evaluation of the radiation levels and concentrations of contamination expected during normal operations;

(iii) operating and emergency procedures, and quality assurance of items released for unrestricted use; and

(iv) a method of managing the NORM waste removed from contaminated equipment, buildings, structures, and land for disposal or storage.

(3) An application for a specific license to perform NORM decontamination for spinning pipe gauges not otherwise exempted from the requirements of this section in accordance with subsection (d)(3) of this section will be approved if:

(A) the applicant satisfies the requirements specified in paragraph (1) of this subsection; and

(B) the applicant has adequately addressed the following items in the application:

(i) procedures and equipment for monitoring and protection of workers;

(ii) an evaluation of the radiation levels and concentrations of contamination expected during normal operations;

(iii) operating and emergency procedures, and quality assurance of items released for unrestricted use; and

(iv) a method of managing the NORM waste removed from contaminated pipes for disposal or storage.

(4) An application for a specific license to manufacture and/or commercially distribute products or materials containing NORM to persons exempted from the requirements of this section in accordance with subsection (d)(4) of this section will be approved if:

(A) the applicant satisfies the requirements specified in paragraph (1) of this subsection;

(B) the NORM is not contained in any food, beverage, cosmetic, drug, or other commodity designed for ingestion or inhalation by, or application to, a human being; and

(C) the applicant submits sufficient information relating to the design, manufacture, prototype testing, quality control procedures, labeling or marking, and conditions of handling, storage, use, and disposal of the NORM material or product to demonstrate that the material or product will meet the safety criteria set forth in subsection (l) of this section. The information shall include:

(i) a description of the material or product and its intended use or uses;

(ii) the type, quantity, and concentration of NORM in each material or product;

(iii) the chemical and physical form of the NORM in the material or product, and changes in chemical and physical form that may occur during the useful life of the material or product;

(iv) an analysis of the solubility in water and human body fluids of the NORM in the material or product;

(v) the details of manufacture and design of the material or product relating to containment and shielding of the NORM and other safety features under normal and severe conditions of handling, storage, use, reuse, and disposal of the material or product;

(vi) the type and extent of human access to the material or product during normal handling, use, and disposal;

(vii) the total quantity of NORM expected to be distributed annually in the material or product;

(viii) the expected useful life of the material or product;

(ix) the proposed method for labeling or marking each unit of the material or product to identify the manufacturer and/or commercial distributor of the product and the radionuclide(s) and quantity of NORM in the material or product;

(x) procedures for prototype testing of the material or product to demonstrate the effectiveness of the containment, shielding, and other safety features under both normal and severe conditions of handling, storage, use, reuse, and disposal;

(xi) results of the prototype testing of the material or product, including any change in the form of the NORM contained in it, the extent that the NORM may be released to the environment, any change in radiation levels, and any other changes in safety features;

(xii) the estimated external radiation doses and dose commitments relevant to the safety criteria in subsection (l) of this section and the basis for such estimates;

(xiii) a determination that the probabilities with respect to doses referred to in subsection (l) of this section meet the criteria;

(xiv) quality control procedures to be followed in assuring each production lot meets agency-approved quality control standards; and

(xv) any additional information, including experimental studies and tests, required by the agency to facilitate a determination of the safety of the material or product.

(5) An application for a specific license for persons who receive NORM waste from other persons for processing or persons who process NORM for other persons at temporary job sites in accordance with subsection (i)(3) of this section will be approved if:

(A) the applicant satisfies the requirements specified in paragraph (1) of this subsection; and

(B) the applicant has adequately addressed the following items in the application:

(i) procedures and equipment for monitoring and protection of workers;

(ii) an evaluation of the radiation levels and concentrations of contamination expected during normal operations; and

(iii) operating and emergency procedures, including quality assurance of items released for unrestricted use.

(6) Notwithstanding the provisions of paragraph (4) of this subsection, the agency may deny an application for a specific license if the end uses of the product are frivolous or cannot be reasonably foreseen through complete technical documentation.

(l) Safety criteria. An applicant for a license under subsection (k)(4) of this section shall demonstrate that the product is designed and will be manufactured so that:

(1) during routine use and disposal, it is unlikely that the external radiation dose in any one year, or the dose equivalent resulting from the intake of radioactive material, excluding radon and radon decay products, in any one year, to a suitable sample of the group of individuals expected to be most highly exposed to radiation or radioactive material from the consumer end-use material

or product, will exceed the doses in column I of subsection (m) of this section;

(2) during routine handling and storage of the quantities of the industrial material or product likely to accumulate in one location during marketing, commercial distribution, installation, and servicing of the material or product, it is unlikely that the external radiation dose in any one year, or the dose equivalent resulting from the intake of radioactive material, excluding radon, in any one year, to a suitable sample of the group of individuals expected to be most highly exposed to radiation or radioactive material from the industrial material or product, will exceed the doses in column II of subsection (m) of this section;

(3) during routine use, disposal, handling, and storage, it is unlikely that the radon released from the material or product will result in an increase in the average radon concentration in air of more than 0.4 picocurie per liter (pCi/l); and

(4) it is unlikely that there will be a significant reduction in the effectiveness of the containment, shielding, or other safety features of the material or product from wear and abuse likely to occur in normal handling and use of the material or product during its useful life.

(m) Table of allowable organ doses. The following table describes the doses allowed per specific organ.
Figure: 25 TAC §289.259(m)

(n) Issuance of specific licenses.

(1) When an application meets the requirements of the Act and rules of the agency, the agency will issue a specific license authorizing the proposed activity in such form and containing appropriate or necessary conditions and limitations.

(2) The agency may incorporate in a license at the time of issuance, or thereafter by amendment, any additional requirements and conditions with respect to the licensee's receipt, possession, use, and transfer of NORM subject to this section as it considers appropriate or necessary in order to:

(A) minimize danger to public health and safety, property, or the environment;

(B) require such reports and the keeping of such records, and to provide for such inspections of activities under the license as may be appropriate or necessary; and

(C) prevent loss or theft of material subject to this section.

(o) Conditions of licenses issued under subsection (k) of this section.

(1) General terms and conditions.

(A) Each license issued in accordance with this section shall be subject to all the provisions of the Act, now or hereafter in effect, and to all rules and orders of the agency.

(B) No license issued or granted under this section and no right to possess or utilize NORM granted by any license issued in accordance with this section shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person unless the agency, after securing full information, finds that the transfer is in accordance with the provisions of the Act, and gives its consent in writing.

(C) Each person licensed by the agency in accordance with this section shall use and possess the licensed material at the locations and for purposes authorized in the license.

(D) Each person licensed by the agency in accordance with this section is subject to the general license provisions of subsection (g) of this section.

(E) Each person licensed by the agency in accordance with this section shall manage and dispose of wastes containing NORM:

(i) in accordance with EPA applicable requirements for disposal of such wastes;

(ii) by transfer of the wastes for disposal to a person specifically licensed to receive waste containing NORM and that is licensed under requirements equivalent to those for uranium and thorium byproduct materials in §289.260 of this title;

(iii) by transfer of the wastes for disposal to a facility licensed in accordance with the requirements equivalent to those in the 10 CFR Part 61 by NRC, an agreement state, or a licensing state; or

(iv) in accordance with alternate methods authorized by the agency having jurisdiction to regulate such wastes.

(F) Notification to the agency.

(i) Each licensee shall notify the agency, in writing, immediately following the filing of a voluntary or involuntary petition for bankruptcy by or against:

(I) a licensee;

(II) an entity controlling a licensee or listing the license of the licensee as property of the estate; or

(III) an affiliate of the licensee.

(ii) This notification shall include:

(I) the bankruptcy court in which the petition for bankruptcy was filed;

(II) the name of the entity in bankruptcy; and

(III) the date of the filing of the petition.

(2) Quality control, labeling, and reports of transfer. Each person licensed under subsection (k)(4) of this section shall:

(A) carry out adequate control procedures in manufacturing the material or product to assure that each production lot meets the quality control standards approved by the agency;

(B) label or mark each unit to identify the manufacturer, processor, producer, or commercial distributor of the material or product and the NORM in the material or product; and

(C) maintain records identifying, by name and address, each person to whom NORM is transferred for use under subsection (d)(4) of this section or the equivalent requirements of another licensing state, and stating the kinds, quantities, and uses of NORM transferred. An annual summary report stating the total quantity of each radionuclide transferred under the specific license shall be filed with the agency. Each report shall cover the year ending December 31, and shall be filed within 30 days thereafter. If no transfers of radioactive material have been made in accordance with (k)(4) of this section during the reporting period, the report shall so indicate.

(p) Expiration and termination of licenses.

(1) Except as provided in paragraph (6) of this subsection and subsection (q)(2) of this section, each specific license shall expire at the end of the specified day in the month and year stated in the license.

(2) Each licensee shall notify the agency immediately, in writing, and request termination of the license when the licensee decides to terminate all activities involving materials authorized under the license or when the licensee decides to terminate a licensed location. This notification and request for termination of the license or a licensed location must include the reports and information specified in paragraph (4)(D) of this subsection. The licensee is subject to the provisions of paragraphs (3)-(5) of this subsection, as applicable.

(3) No less than 30 days before the expiration date specified in a specific license, the licensee shall either:

(A) submit an application for license renewal under subsection (q) of this section; or

(B) notify the agency in writing, under paragraph (2) of this subsection, if the licensee decides to discontinue all activities involving NORM.

(4) If a licensee terminates a licensed location or if a licensee does not submit an application for license renewal under subsection (q) of this section, the licensee shall, before a licensed location can be removed from the license, or on or before the expiration date specified in the license:

(A) terminate use of NORM;

(B) remove radioactive contamination to the extent practicable;

(C) properly dispose of NORM; and

(D) submit a record of NORM disposal and radiation survey(s) to confirm the absence of NORM or to establish the levels of residual radioactive contamination. The licensee shall, as appropriate:

(i) submit a record of disposal of radioactive material and radiation survey(s) of the licensee's permanent location of use or storage. Levels of radiation shall be reported in units as required by subsection (w) of this section; and

(ii) specify the instruments(s) used and certify that each instrument is properly calibrated and tested.

(5) If no radioactivity attributable to activities conducted under the license is detected, the licensee shall submit a certification that no detectable radioactive contamination exceeding the levels listed in subsections (d)(1) and (w) of this section was found. If the agency determines that the information submitted under this paragraph and paragraph (4)(D) of this subsection is adequate and surveys conducted by the agency confirm the findings, the agency will notify the licensee in writing that the license is terminated.

(6) If detectable levels of residual radioactivity attributable to activities conducted under the license are found, the requirements of the license continue in effect beyond the expiration date, if necessary, with respect to possession of residual NORM until the agency notifies the licensee in writing that the requirements of the license have been completed. During this time, the licensee is subject to the provisions of paragraph (7) of this subsection. In addition to the information submitted under paragraph (4)(D) of this subsection, the licensee shall submit a plan, if appropriate, for decontaminating the location(s) and disposing of the residual NORM.

(7) Each licensee who possesses residual radioactive material under paragraph (6) of this subsection, following the expiration date specified in the license, shall:

(A) be limited to actions involving NORM related to preparing the location(s) for release for unrestricted use; and

(B) continue to control entry to restricted areas until the location(s) is suitable for release for unrestricted use and the release is approved by the agency in writing.

(q) Renewal of licenses.

(1) Applications for renewal of specific licenses shall be filed in accordance with subsection (j) of this section.

(2) If a licensee has filed the appropriate application form for renewal (or for a new license authorizing the same activities) at least 30 days prior to the expiration date of the existing license, that license shall not expire until final action by the agency.

(r) Amendment of licenses at request of licensee. Applications for amendment of a license shall be filed in writing and in accordance with subsection (j)(2)-(6) of this section and shall specify how the licensee desires the license to be amended and the grounds for such amendment.

(s) Agency action on applications to renew and amend. In considering an application by a licensee to renew, amend, or transfer the license, the agency will apply the criteria set forth in subsection (k) of this section.

(t) Modification and revocation of licenses. Modification, suspension, and revocation of licenses shall be in accordance with §289.205 of this title.

(u) Reciprocal recognition of licenses. Subject to this section, any person who holds a specific license from any agreement state, or any licensing state, and issued by the agency having jurisdiction where the licensee maintains an office for directing the licensed activity and at which radiation safety records are normally maintained, is hereby granted a general license to conduct the activities authorized in such licensing document within the state of Texas provided that:

(1) the requirements in §289.252(s) of this title are met; and

(2) the out-of-state licensee shall not transfer or dispose of NORM possessed or used under the general license provided in paragraph (1) of this subsection except by transfer to a person:

(A) specifically licensed by the agency, the Texas agency authorized to regulate disposal of radioactive waste, or by another licensing state to receive such material; or

(B) exempt from the requirements for a license for such material under subsection (d) of this section.

(v) Financial security requirements.

(1) Each person specifically licensed in accordance with this section for possession of NORM shall comply with the financial security requirements of §289.252(u) of this title.

(2) On (effective date of this section), current licenses in effect may continue provided that the required security arrangements be submitted to the agency by (six months from effective date).

(3) No later than 90 days after the licensee notifies the agency that decontamination and decommissioning have been completed, the agency shall determine if these have been conducted in accordance with the requirements of this section and the conditions of

the license. If the agency finds that the requirements have been met, the Director of the Radiation Control Program shall direct the return or release of the licensee's security in full plus any accumulated interest. If the agency finds that the requirements have not been met, the agency will notify the licensee of the steps necessary for compliance.

(w) Acceptable surface contamination levels for NORM. The following table is to be used in determining compliance with subsections (f)(2) and (p) of this section.
Figure: 25 TAC §289.259(w)

This 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 November 20,1998.

TRD-9817817
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 458–7236

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Chapter 289. Radiation Control

The Texas Department of Health (department) proposes the repeal of §289.230 and new §289.230 concerning certification of mammography systems and accreditation of mammography facilities.

The existing §289.230 is repealed due to the significant revisions of text to incorporate the final federal Mammography Quality Standards Act (MQSA) requirements. The new section adds new and clarifying language on state requirements concerning stereotactic biopsy systems, terminations, and items to be included in operating and safety procedures. The new section also includes additional fees for reevaluation of phantom images and a provision for reimbursement of actual expenses for on-site visits required after three denials of accreditation.

Mrs. Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, has determined that for each year of the first five years the sections are in effect, there will be fiscal implications for state or local government as a result of enforcing or administering the sections as proposed.

The fees for accreditation of mammography facilities and for reevaluation of clinical images specified in §289.230(ee)(4)(A)-(C) were implemented August 9, 1998, and were published in the July 31, 1998, issue of the *Texas Register* (23 TexReg 7810). These fees are not being changed in this proposed new rule. The new rule adds fees regarding reevaluation of phantom images, additional mammography review, and an on-site visit after a third denial of an accreditation. The department will receive an estimated additional $360 in revenue for the first year, $1,800 in revenue the second year, and $3,960 for each remaining year of the first five years. Approximately 3.0% of the state or local government entities that choose accreditation with the state will pay an additional $360 for reevaluation of phantom images and an additional mammography review. Approximately one state or local government entity choosing accreditation with the state will reimburse the state for actual expenses for an on-site visit after a third denial of an accreditation. The cost of the on-site visit is estimated to be between $1,400 and $2,500.

Mrs. McBurney also has determined that for each year of the first five years the proposed sections are in effect, the public benefit anticipated as a result of enforcing the sections will be to ensure continued protection of the public and workers from unnecessary exposure to radiation by recovering the majority of the costs of the regulatory program from those entities possessing sources of radiation and by requiring appropriate training for individuals operating and evaluating mammography equipment. The specific effect on small businesses and persons who are required to comply with the sections as proposed will vary depending on the number of mammography machines authorized on a certificate of registration. Approximately 3.0% of the mammography facilities that choose accreditation with the state will pay an additional $110 for reevaluation of phantom images per machine. Approximately one facility choosing accreditation with the state will reimburse the state for actual expenses for an on-site visit after a third denial of an accreditation. The cost of the on-site visit is estimated to be between $1,400 and $2,500. There is no anticipated impact on local employment.

Comments on the proposal may be presented to Ruth E. McBurney, C.H.P., Director, Division of Licensing, Registration and Standards, Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189, (512)834-6688 or electronic mail at Ruth.McBurney@tdh.state.tx.us. Public comments will be accepted for 30 days following publication of this proposal in the *Texas Register*. In addition, a public hearing to accept oral comments will be held at 10:00 a.m., Wednesday, December 16, 1998, in Conference Room N218, Texas Department of Health, Bureau of Radiation Control, located at the Exchange Building, 8407 Wall Street, Austin, Texas.

Subchapter E. Registration Regulations

25 TAC §289.230

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

The repeal is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with authority to adopt rules for its procedures and for the performance of every duty imposed by law on the board, the department and the commissioner of health.

The repeal affects Health and Safety Code, Chapter 401, and Health and Safety Code, Chapter 12.

§289.230. Certification of Mammography Systems.
This 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 November 20,1998.

TRD-9817837
Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 3, 1999

For further information, please call: (512) 458–7236

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The new section is proposed under the Health and Safety Code, Chapter 401, which provides the Texas Board of Health (board) with authority to adopt rules and guidelines relating to the control of radiation; and §12.001, which provides the board with authority to adopt rules for its procedures and for the performance of every duty imposed by law on the board, the department and the commissioner of health.

The new section affects Health and Safety Code, Chapter 401, and Health and Safety Code, Chapter 12.

§289.230. Certification of Mammography Systems and Accreditation of Mammography Facilities.

(a) Purpose.

(1) This section provides for the certification of mammography systems and the accreditation of mammography facilities. No person shall use x-ray producing machines for mammography of humans except as authorized in a state certification of mammography systems issued by the agency in accordance with the requirements of this section and in a certificate issued by the United States Food and Drug Administration (FDA).

(2) The use of all mammography machines certified in accordance with this section shall be by or under the supervision of a physician licensed by the Texas State Board of Medical Examiners with license in good standing.

(b) Scope. In addition to the requirements of this section, all registrants are subject to the requirements of §289.201 of this title (relating to General Provisions), §289.202 of this title (relating to Standards for Protection Against Radiation), §289.203 of this title (relating to Notices, Instructions, and Reports to Workers; Inspections), §289.204 of this title (relating to Fees for Certificates of Registration, Radioactive Material(s) Licenses, Emergency Planning and Implementation, and Other Regulatory Services), §289.205 of this title (relating to Hearing and Enforcement Procedures), and §289.226 of this title (relating to Registration of Radiation Machine Use and Services).

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

(1) Accreditation - An approval of a mammography facility by an accreditation body.

(2) Accreditation body - An entity approved by the FDA under 42 United States Code §263b(e)(1)(A) to accredit mammography facilities.

(3) Action limit - The minimum or maximum value of a quality assurance measurement representing acceptable performance. Values less than the minimum or greater than the maximum action limit indicate that corrective action must be taken by the facility.

(4) Adverse event - An undesirable experience associated with mammography activities within the scope of this section. Adverse events include but are not limited to:

(A) poor image quality;

(B) failure to send mammography reports within 30 days to the referring physician or in a timely manner to the self-referred patient; and

(C) use of personnel that do not meet the applicable requirements of subsection (f) of this section.

(5) Air kerma - The kerma in a given mass of air. The unit used to measure the quantity of air kerma is the Gray (Gy). For x-rays with energies less than 300 kiloelectronvolts (keV), 1 Gy = 100 rad = 114 roentgens (R) of exposure.

(6) Automatic exposure control (AEC) - A device that automatically controls one or more technique factors in order to obtain at preselected locations a required quantity of radiation.

(7) Average glandular dose - The value in millirad (mrad) or milligray (mGy) for a given breast or phantom thickness that estimates the average absorbed dose to the glandular tissue extrapolated from free air exposures and based on fixed filter thickness and target material.

(8) Beam-limiting device - A device that provides a means to restrict the dimensions of the x-ray field.

(9) Breast implant - A prosthetic device implanted in the breast.

(10) Calendar quarter - Any one of the following time periods during a given year; January 1-March 31, April 1-June 30, July 1-September 30, or October 1-December 31.

(11) Calibration of instruments - The comparative response or reading of an instrument relative to a series of known radiation values over the range of the instrument.

(12) Category I continuing medical education units (CMEU) - Educational activities approved by the Accreditation Council for Continuing Medical Education, the American Osteopathic Association, a state medical society, or an equivalent organization.

(13) Certification of mammography systems (state certification) - A form of permission given by the agency to an applicant who has met the requirements for mammography system certification set out in the Act and this chapter.

(14) Clinical image - See the definition for mammogram.

(15) Consumer - An individual who chooses to comment or complain in reference to a mammography examination. The individual may be the patient or a representative of the patient, such as a family member or referring physician.

(16) Contact hour - 50 minutes of attendance and/or participation in instructor-directed activities.

(17) Continuing education - Acquiring contact hours by attendance and/or participation in lectures, conferences, or seminars. Continuing education hours may also be acquired in the following manner:

(A) computer based instruction with a post test; or

(B) reading approved articles with a post test.

(18) Continuing education unit (CEU) - One contact hour of training.

(19) Control panel - That part of the radiation machine control upon which are mounted the switches, knobs, push buttons, and other hardware necessary for manually setting the technique factors.

(20) Dedicated mammographic equipment - Equipment that has been specifically designed and manufactured for mammography.

(21) Direct supervision - Oversight of operations that include the following.

(A) During joint interpretation of mammograms, the supervising interpreting physician reviews, discusses, and confirms the diagnosis of the physician being supervised and signs the resulting report before it is entered into the patient's record.

(B) During performance of a mammography examination, the supervising medical radiologic technologist is present to observe and correct, as needed, the individual who is performing the examination.

(C) During performance of a survey of the registrant's equipment and quality assurance program, the supervising medical physicist is present to observe, and correct, as needed, the individual who is conducting the survey.

(22) Established operating level - The value of a particular quality assurance parameter that has been established as an acceptable normal level by the registrant's quality assurance program.

(23) Facility - A hospital, outpatient department, clinic, radiology practice, mobile unit, an office of a physician, or other person that conducts breast cancer screening or diagnosis through mammography activities, including any or all of the following:

(A) the operation of equipment to produce a mammogram;

(B) processing of film;

(C) initial interpretation of the mammogram; or

(D) maintaining the viewing conditions for that interpretation.

(24) Final assessment categories - The overall final assessment of findings in a report of a mammography examination, classified in one of the following categories:

(A) "negative" indicates nothing to comment upon (if the interpreting physician is aware of clinical findings or symptoms, despite the negative assessment, these shall be explained);

(B) "benign" is also a negative assessment;

(C) "probably benign" indicates a finding(s) that has a high probability of being benign;

(D) "suspicious" indicates a finding(s) without all the characteristic morphology of breast cancer but indicating a definite probability of being malignant;

(E) "highly suggestive of malignancy" indicates a finding(s) that has a high probability of being malignant; or

(F) "incomplete" indicates there is a need for additional imaging evaluation. Reasons why no assessment can be made shall be stated by the interpreting physician.

(25) First allowable time - The earliest time a resident physician is eligible to take the diagnostic radiology boards from an FDA-designated certifying body.

(26) Formal training - Attendance and participation in instructor-directed activities. This does not include self-study programs.

(27) Half-value layer (HVL) - The thickness of a specified material that attenuates the beam of radiation to an extent such that the exposure rate is reduced to one-half of its original value. In this definition, the contribution of all scattered radiation, other than any that might be present initially in the beam concerned, is deemed to be excluded.

(28) Interpreting physician - A licensed physician who interprets mammographic images and who meets the requirements of subsection (f)(1) of this section.

(29) Image receptor - Any device, such as a fluorescent screen or radiographic film, that transforms incident x-ray photons either into a visible image or into another form that can be made into a visible image by further transformations.

(30) Image review board - a group of qualified physicians and other individuals approved by FDA who review the clinical and phantom images.

(31) Institutional review board (IRB) - Any board, committee, or other group formally designated by an institution to review, approve the initiation of, and conduct periodic review of biomedical research involving human subjects.

(32) Kerma - The sum of the initial energies of all the charged particles liberated by uncharged ionizing particles in a material of given mass.

(33) Laterality - The designation of either the right or left breast.

(34) Lead interpreting physician - The interpreting physician assigned the general responsibility for ensuring that a facility's quality assurance program meets all of the requirements of subsections (k), (l), and (m) of this section.

(35) Mammogram - A radiographic image produced through mammography.

(36) Mammography - The use of x-radiation to produce an image of the breast on film, paper, or digital display that may be used to detect the presence of pathological conditions of the breast. For the purposes of this section, mammography does not include radiography of the breast performed as follows:

(A) during invasive interventions for localization or biopsy procedures except as specified in subsection (q) of this section; or

(B) with an investigational mammography device as part of a scientific study conducted in accordance with FDA's investigation device exemption regulations.

(37) Mammographic modality - A technology for radiography of the breast. Examples are screen-film mammography or xeromammography.

(38) Mammography medical outcomes audit - A systematic collection of mammography results compared with outcomes data.

(39) Mammography system - A system that includes the following:

(A) an x-ray unit used as a source of radiation in producing images of breast tissue;

(B) an imaging system used for the formation of a latent image of breast tissue;

(C) an imaging processing device for changing a latent image of breast tissue to a visual image that can be used for diagnostic purposes;

(D) a viewing device used for the visual evaluation of an image of breast tissue if the image is produced in interpreting visual data captured on an image receptor;

(E) a medical radiological technologist who performs a mammography; and

(F) a physician who engages in, and who meets the requirements of this section relating to the reading, evaluation, and interpretation of mammograms.

(40) Mammography unit(s) - Components assembled for the production of x-rays for use during mammography. These include, at a minimum, the following:

(A) an x-ray generator;

(B) an x-ray control;

(C) a tube housing assembly;

(D) a beam limiting device; and

(E) supporting structures.

(41) Mean optical density - The average of the optical densities measured using phantom thicknesses of 2, 4, and 6 centimeters (cm) with values of kilovolt peak (kVp) clinically appropriate for those thicknesses.

(42) Medical physicist - An individual who performs surveys and evaluations of mammographic equipment in accordance with this section and who meets the qualifications in subsection (f)(3) of this section.

(43) Medical radiological technologist (operator of equipment) - An individual specifically trained in the use of radiographic equipment and the positioning of patients for radiographic examinations who performs mammography examinations in accordance with this section and who meets the qualifications in subsection (f)(2) of this section.

(44) Mobile services - The use of mammography units in temporary locations for limited time periods. The units may be fixed inside a mobile van or transported to temporary locations.

(45) Multi-reading - Two or more physicians interpreting the same mammogram. At least one physician shall be qualified as an interpreting physician.

(46) Optical density (OD) - A measure of the fraction of incident light transmitted through a developed film and defined by the equation.
Figure: 25 TAC §289.230(c)(46)

(47) Patient - Any individual who undergoes a mammography examination in a facility, regardless of whether the person is referred by a physician or is self-referred.

(48) Phantom - A test object used to simulate radiographic characteristics of compressed breast tissue and containing components that radiographically model aspects of breast disease and cancer. The phantom shall be accepted by FDA.

(49) Phantom image - A radiographic image of a phantom.

(50) Physical science - This includes physics, chemistry, radiation science (including medical physics and health physics), and engineering.

(51) Positive mammogram - A mammogram that has an overall assessment of findings that are either "suspicious" or "highly suggestive of malignancy."

(52) Qualified instructor - An individual whose training and experience prepares him or her to carry out specified training assignments. Interpreting physicians, medical radiologic technologists, or medical physicists who meet the requirements of subsection (f) of this section would be considered qualified instructors in their respective areas of mammography. Other examples of individuals who may be qualified instructors for the purpose of providing training to meet the regulations of this section include, but are not limited to, instructors in a post-high school training institution and manufacturer's representatives.

(53) Quality control technologist - An individual meeting the requirements of subsection (f)(2) of this section who is responsible for those quality assurance responsibilities not assigned to the lead interpreting physician or to the medical physicist.

(54) Self-referral mammography - The use of x-radiation to test asymptomatic women for the detection of diseases of the breasts when such tests are not specifically and individually ordered by a licensed physician.

(55) Serious adverse event - An adverse advent that may significantly compromise clinical outcomes, or an adverse event for which a facility fails to take appropriate corrective action in a timely manner.

(56) Serious complaint - A report of a serious adverse event.

(57) Source-to-image receptor distance (SID) - The distance from the source to the center of the input surface of the image receptor.

(58) Standard breast - A 4.2 cm thick compressed breast consisting of 50% glandular and 50% adipose tissue.

(59) Survey - An on-site physics consultation and evaluation of a mammography system and quality assurance program performed by a medical physicist.

(60) Technique chart - A chart that provides all necessary generator control settings and geometry needed to make clinical radiographs.

(61) Technical aspects of mammography - In relation to continuing education, some or all of the following subjects must be included:

(A) anatomy and physiology of the female breast;

(B) mammographic positioning;

(C) technical factors used in mammography;

(D) mammographic film evaluation and critique;

(E) breast pathology; or

(F) mammographic quality assurance procedures.

(62) Time cycle - The film development time in processing.

(63) Traceable to a national standard - Calibrated at either the National Institute of Standards and Technology (NIST) or at a calibration laboratory that participates in a proficiency program with NIST at least once every two years. The results of the proficiency test conducted within 24 months of calibration shall show agreement within plus or minus 3.0% of the national standard in the mammography energy range.

(d) Prohibitions.

(1) Radiographic equipment designed for general purpose or special nonmammography procedures shall not be used for mammography. This includes systems that have been modified or equipped with special attachments for mammography.

(2) The agency may prohibit use of machines that pose significant threat or endanger public health and safety, in accordance with §289.201 of this title and §289.205 of this title.

(3) Individuals shall not be exposed to the useful beam except for healing arts purposes and unless such exposure has been authorized by a licensed physician. This provision specifically prohibits deliberate exposure for the following purposes:

(A) exposure of an individual for training, demonstration, or other non-healing arts purposes;

(B) exposure of an individual for the purpose of healing arts screening (self referral mammography) except as authorized by subsection (h) of this section; and

(C) exposure of an individual for the purpose of research except as authorized by subsection (p) of this section.

(e) Exemptions.

(1) Mammography machines or cabinet x-ray units used exclusively for examination of breast biopsy specimens are exempt from the requirements of this section. These units are required to meet applicable provisions of §289.226 of this title and §289.227 of this title (relating to Use of Radiation Machines in the Healing Arts and Veterinary Medicine).

(2) Xerography systems not used for detection of diseases of the breast are exempt from the requirements of this section. These units are required to meet applicable provisions of §289.226 of this title and §289.227 of this title.

(3) Mammography systems used exclusively for invasive interventions for localization or biopsy procedures or other unique mammographic imaging modalities are exempt from the requirements of this section except for those listed in subsection (q) of this section.

(4) All mammography registrants are exempt from the radiation protection program requirements of §289.202(e) of this title.

(5) All mammography registrants are exempt from the posting of radiation area requirements of §289.202(aa)(1) of this title provided that the operator has continuous surveillance and access control of the radiation area.

(f) Personnel qualifications. The following requirements apply to all personnel involved in any aspect of mammography including the production and interpretation of mammograms.

(1) Interpreting physician. Each physician interpreting mammograms shall meet the following qualifications.

(A) Initial qualifications. Before interpreting mammograms independently, the physician shall:

(i) hold a current Texas license issued by the Texas State Board of Medical Examiners and;

(I) be certified by the American Board of Radiology, the American Osteopathic Board of Radiology, or one of the other bodies approved by the FDA to certify interpreting physicians; or

(II) have at least three months of documented formal training in the interpretation of mammograms and in topics related to mammography in accordance with subsection (nn)(2) of this section; and

(ii) have had 60 hours of documented category I CMEUs in mammography. Hours spent in residency specifically devoted to mammography will be equivalent to category I CMEUs and accepted if documented in writing by the appropriate representative of the training institution. The residency program must be approved by the Accreditation Council for Graduate Medical Education or the Council on Postdoctoral Training of the American Osteopathic Association; and

(iii) have interpreted or multi-read, under the direct supervision of an interpreting physician, at least 240 mammographic examinations within the six month period immediately prior to the date that the physician qualifies as an interpreting physician.

(B) Exemptions.

(i) Physicians who qualified as interpreting physicians prior to April 28, 1999, are considered to have met the initial requirements of subparagraph (A) of this paragraph.

(ii) Physicians who have interpreted or multi-read at least 240 mammographic examinations under the direct supervision of an interpreting physician in any six month period during the last two years of a diagnostic radiology residency and who became board certified at the first allowable time, are exempt from subparagraph (A)(iv) of this paragraph.

(C) Continuing education and experience. Each interpreting physician shall maintain qualifications by meeting the following requirements:

(i) participating in education programs either by teaching or completing at least 15 category I CMEUs in mammography in the 36 months immediately preceding the date of the registrant's annual inspection or the last day of the calendar quarter preceding the inspection or any date in between the two. This period will begin following the third anniversary date of the end of the calendar quarter in which the physician became qualified as an interpreting physician. Training shall include at least six category I CMEUs in each modality used by the interpreting physician in his/her practice. CMEUs earned through teaching a specific course can be counted only once during the 36 month period;

(ii) interpreting or multi-reading at least 960 mammographic examinations during the 24 months immediately preceding the date of the registrant's annual inspection or the last day of the calendar quarter preceding the inspection or any date in between the two. This period will begin following the second anniversary date of the end of the calendar quarter in which the physician became qualified as an interpreting physician; and

(iii) accumulating at least eight hours of CMEUs in any mammography modality in which the interpreting physician has not been previously trained, prior to independently using the new modality.

(D) Reestablishing qualifications. Interpreting physicians who fail to maintain the required continuing education or experience requirements shall reestablish their qualifications before resuming independent interpretation of mammograms as follows:

(i) obtain a sufficient number of additional category I CMEUs to bring their total up to the credits required in the previous 36 months;

(ii) interpret or multi-read the following, within the six months immediately prior to resuming independent interpretation and under the direct supervision of an interpreting physician:

(I) at least 240 mammographic examinations; or

(II) a sufficient number of mammographic examinations to bring the total up to 960 examinations for the prior 24 months, whichever is less; or

(iii) complete both clauses (i) and (ii) of this subparagraph, if an interpreting physician fails to maintain both the continuing education and experience requirements.

(2) Medical radiologic technologists (operators of equipment). Each person performing mammographic examinations shall meet the following qualifications.

(A) General requirements. Before performing mammographic examinations, the operator of equipment shall have:

(i) current certification as a medical radiologic technologist under Texas Civil Statutes, Article 4512m;

(ii) completed a minimum of 40 contact hours of training as outlined in subsection (nn)(1) of this section by a qualified instructor; and

(iii) performed a minimum of 25 mammographic examinations under the direct supervision of an individual qualified in accordance with subparagraph (A) of this paragraph.

(B) Exemptions. Equipment operators who qualified as medical radiologic technologists to perform mammography prior to April 28, 1999, are considered to have met the general requirements of subparagraph (A) of this paragraph.

(C) Continuing education and experience. Each medical radiologic technologist shall maintain qualifications by meeting the following requirements:

(i) accumulating at least 15 CEUs in mammography in the 36 months immediately preceding the date of the registrant's annual inspection or the last day of the calendar quarter preceding the inspection or any date in between the two. This period will begin following the third anniversary date of the end of the calendar quarter in which the individual became qualified to perform mammography. At least six of the CEUs required shall be related to each mammographic modality used by the technologist. CEUs earned through teaching a specific course can be counted only once during the 36 month period;

(ii) performing a minimum of 200 mammographic examinations during the 24 months immediately preceding the facility's annual inspection or the last day of the calendar quarter or any date in between the two. This period will begin following the second anniversary date of the end of the calendar quarter in which the individual became qualified to perform mammography, or October 28, 1997, whichever is later; and

(iii) accumulating at least eight hours of CEUs in any mammography modality in which the medical radiologic technologist has not been previously trained, prior to independently using the new modality.

(D) Requalification. Medical radiologic technologists who fail to maintain the continuing education or experience requirements shall reestablish their qualifications before resuming independent performance of mammograms as follows:

(i) obtaining a sufficient number of additional CEUs to bring their total up to the credits required in the previous 36 months;

(ii) performing a minimum of 25 mammographic examinations under the direct supervision of a qualified medical radiologic technologist; or

(iii) completing both clauses (i) and (ii) of this subparagraph, if a medical radiologic technologist fails to maintain both the continuing education and experience requirements.

(3) Medical physicist. Each medical physicist performing mammographic surveys and evaluating mammographic systems in accordance with this section shall meet the following qualifications:

(A) Initial qualifications. Before performing surveys and evaluating mammographic systems independently, the medical physicist shall:

(i) hold a current Texas license under the Medical Physics Practice Act, Article 4512n, in diagnostic radiological physics;

(ii) be registered with the agency or employed by a business registered with the agency, in accordance with §289.226(e) of this title and the Texas Radiation Control Act, unless exempted by §289.226(b)(6) of this title;

(iii) have a masters degree or higher in a physical science from an accredited institution, with no less than 20 semester hours or equivalent (30 quarter hours) of college undergraduate or graduate level physics. (Certification in an appropriate specialty area by one of the bodies determined by FDA to have procedures and requirements to ensure that medical physicists certified by the body are competent to perform physics surveys is considered an equivalent requirement);

(iv) have 20 contact hours of documented specialized training in conducting surveys of mammography facilities; and

(v) have experience conducting surveys of at least one mammography facility and a total of at least ten mammography units. No more than one survey of a specific unit within a period of 60 days can be counted towards the total mammography unit survey requirement; or

(B) Alternative initial qualifications. Individuals who met the qualifications of subparagraph (A)(i) and (ii) of this paragraph prior to April 28, 1999, and have the following additional qualifications, are determined to have met the initial qualifications:

(i) a bachelor's degree or higher in a physical science from an accredited institution with no less than ten semester hours or equivalent of college undergraduate or graduate level physics;

(ii) 40 contact hours of documented specialized training in conducting surveys of mammography facilities; and

(iii) experience conducting surveys of at least one mammography facility and a total of at least 20 mammography units. No more than one survey of a specific unit within a period of 60 days can be counted towards the total mammography unit survey requirement. The training and experience requirements must be met after fulfilling the degree requirements.

(C) Continuing education and experience. Each medical physicist shall maintain their qualifications by meeting the following requirements:

(i) participating in education programs, either by teaching or completing at least 15 CEUs in mammography in the 36 months immediately preceding the date of the registrant's annual inspection or the last day of the calendar quarter preceding the inspection or any date in between the two. This period will begin following the third anniversary date of the end of the calendar quarter in which the individual became qualified as a medical physicist. The continuing education shall include hours of training appropriate to each mammographic modality evaluated by the medical physicist during his or her surveys. CEUs earned through teaching a specific course can be counted only once during the 36 month period;

(ii) performing surveys of two mammography facilities and a total of at least six mammography units during the 24 months immediately preceding the date of the facility's annual inspection or the last day of the calendar quarter or any date in between the two. The continuing education period will begin following the second anniversary date of the end of the calendar quarter in which the individual became qualified as a medical physicist. No more than one survey of a specific facility within a ten month period on a specific unit within a period of 60 days can be counted towards the total mammography unit survey requirement; and

(iii) accumulating at least eight hours of CEUs in any mammography modality in which the medical physicist has not been previously trained, prior to independently using the new modality.

(D) Reestablishing qualifications. Medical physicists who fail to maintain the continuing education or experience requirements shall reestablish their qualifications before resuming independent performance of surveys and equipment evaluations applicable as follows:

(i) obtaining a sufficient number of additional CEUs to bring their total up to the credits required in the previous 36 months;

(ii) performing a sufficient number of surveys under the direct supervision of a qualified medical physicist to bring their total up to the credits required in the previous 24 months; or

(iii) completing both clauses (i) and (ii) of this subparagraph, if a medical physicist fails to maintain both the continuing education and experience requirements.

(4) Retention of personnel records. Records documenting the qualifications, continuing education, and experience of personnel in subsection (f)(1)-(3) shall be maintained for inspection by the agency in accordance with subsection (nn)(3) of this section.

(g) Equipment standards. Only x-ray systems meeting the following standards shall be used.

(1) System design. The equipment shall have been specifically designed and manufactured for mammography in accordance with 21 Code of Federal Regulations (CFR) 1010.2, 1020.30, and 1020.31.

(2) Motion of tube-image receptor assembly. The assembly shall be capable of being fixed in any position where it is designed to operate. Once fixed in any such position, it shall not undergo unintended motion. In the event of power interruption, this mechanism shall not fail.

(3) Image receptor sizes. Systems using screen-film image receptors shall, at a minimum, provide for the following:

(A) operation with image receptors of 18 x 24 cm and 24 x 30 cm;

(B) moving grids matched to all image receptor sizes provided;

(C) operation with the grid removed for magnification procedures; and

(D) image receptors to rest, post-loading, 15 minutes between exposures.

(4) Beam limitation. All systems shall have beam-limiting devices that allow the useful beam to extend to or beyond the chest wall edge of the image receptor.

(5) Magnification. Systems used to perform noninterventional problem solving procedures shall have radiographic magnification capability available for use with, at a minimum, at least one magnification value within the range of 1.4 to 2.0.

(6) Focal spot selection. When more than one focal spot or target material is provided, the system shall indicate, prior to exposure, which focal spot or target material is selected. When the target material and/or focal spot is selected by a system algorithm that is based on the exposure or on a test exposure, the system shall display, after the exposure, the target material and/or focal spot actually used during the exposure.

(7) Compression. All mammography systems shall incorporate a compression device.

(A) Systems shall be equipped with different sized compression paddles that match the sizes of all full-field image receptors provided for the system.

(B) Compression paddles for special purposes, including those smaller than the full size of the image receptor (spot compression) may be provided. Such paddles are not subject to the requirements of subparagraphs (E) and (F) of this paragraph.

(C) Except as provided in subparagraph (D) of this paragraph, the compression paddle shall be flat and parallel to the breast support table and shall not deflect from parallel by more than 1.0 cm at any point on the surface of the compression paddle when compression is applied.

(D) Equipment intended by the manufacturer's design to not be flat and parallel to the breast support table during compression shall meet the manufacturer's design specifications and maintenance requirements.

(E) The chest wall edge of the compression paddle shall be straight and parallel to the edge of the image receptor.

(F) The chest wall edge may be bent upward to allow for patient comfort, but shall not appear on the image.

(8) Technique factor selection and display. Technique factor selection and display shall be as follows.

(A) Manual selection of milliampere seconds (mAs) or at least one of its component parts, milliampere (mA) and/or time, shall be available.

(B) The technique factors (peak tube potential in kilovolts (kV) and either tube current in mA and exposure time in seconds or the product of tube current and exposure time in mAs) to be used during an exposure shall be indicated before the exposure begins, except when AEC is used, in which case the technique factors that are set prior to the exposure shall be indicated.

(C) When the AEC mode is used, the system shall indicate the actual kVp and mAs used during the exposure. The mAs may be displayed as mA and time.

(9) Automatic exposure control. Each screen-film system shall provide an AEC mode that is operable in all combinations of equipment configuration provided, for example; grid, nongrid, magnification, non magnification, and various target filter combinations.

(A) The positioning or selection of the detector shall permit flexibility in the placement of the detector under the target tissue.

(i) The size and available positions of the detector shall be clearly indicated at the x-ray input surface of the breast compression paddle.

(ii) The selected position of the detector shall be clearly indicated.

(B) The system shall provide means to vary the selected optical density from the normal (zero) setting.

(10) X-ray film. The registrant shall use x-ray film for mammography that has been designated by the film manufacturer as appropriate for mammography.

(11) Intensifying screens. The registrant shall use intensifying screens for mammography that have been designated by the screen manufacturer as appropriate for mammography and shall use film that is matched to the screen's spectral output as specified by the manufacturer.

(12) Film processing solutions. For processing mammography films, the registrant shall use chemical solutions that are capable of developing the films used by the facility in a manner equivalent to the minimum requirements specified by the film manufacturer.

(13) Lighting. The registrant shall make available special lights for film illumination (hot lights) capable of producing light levels greater than that provided by the view box.

(14) Film masking devices. Registrants shall ensure that film masking devices that can limit the illuminated area to a region equal to or smaller than the exposed portion of the film are available to all interpreting physicians interpreting for the facility.

(15) Equipment variances. Registrants with mammography equipment that has been issued variances by FDA to 21 CFR 1020.2, 1020.30, 1020.31 or meets the requirements for the alternatives to the quality standards for equipment in 21 CFR 900.18(b), shall maintain copies of those variances or alternative standards.

(h) Self-referral mammography. Any person proposing to conduct a self-referral mammography program shall not initiate such a program without prior approval of the agency. When requesting such approval, that person shall submit the following information:

(1) the number and type of views (or projections);

(2) the age of the population to be examined and the frequency of the exam following established, nationally recognized criteria, such as those of the American Cancer Society, American College of Radiology (ACR), or the National Council on Radiation Protection and Measurements;

(3) written procedures to include methods of:

(A) advising patients and private physicians of the results of the mammography examination in accordance with subsection (i)(2) of this section;

(B) follow-up with patients and physicians in accordance with subsection (i)(3) of this section; and

(C) recommending to patients who do not have a physician means of selecting a physician;

(4) methods for educating mammography patients in breast self-examination techniques and on the necessity for follow-up by a physician.

(i) Medical records and mammography reports.

(1) Contents and terminology. Each registrant shall prepare a written report of the results of each mammography examination that shall include the following information:

(A) name of the patient and an additional patient identifier;

(B) date of the examination;

(C) name and signature of the interpreting physician who interpreted the mammogram (electronic signatures are acceptable);

(D) overall final assessment of findings as defined in subsection (b) of this section; and

(E) recommendations made to the practitioner about what additional actions, if any, should be taken. All clinical questions raised by the referring physician shall be addressed in the report to the extent possible, even if the assessment is negative or benign.

(2) Communication of mammography results to the patient and physicians. Each registrant shall send the following reports as soon as possible, but no later than 30 days from the date of the mammography examination:

(A) to patients advising them of the results of the mammography examination and any further medical needs indicated. The report shall include a summary written in language easily understood by a lay person; and

(B) to physicians advising them of the results of the mammography examination and any further medical needs indicated.

(3) Follow-up with patients and physicians. Each registrant shall follow-up to confirm the following:

(A) that patients with positive findings and patients needing repeat exams have received proper notification; and

(B) that physicians have received proper notification of patients with positive findings needing repeat exams.

(4) Retention of clinical images. Each registrant that performs mammograms shall do the following.

(A) Maintain mammography films and reports in a permanent medical record for a minimum of five years and if no additional mammograms of the patient are performed at the facility, they shall be maintained for a minimum of ten years.

(B) Upon request or on behalf of the patient, permanently or temporarily transfer the original mammograms and copies of the patient's reports to a medical institution, a physician, or to the patient directly.

(C) If the medical records are permanently forwarded, the institution or physician shall maintain and become responsible for the original film until the fifth or tenth anniversary, as specified in subparagraph (A) of this paragraph.

(5) Mammographic image identification. Each mammographic image shall have the following information indicated on it in

a permanent, legible manner and placed so as not to obscure anatomic structures:

(A) name of patient and an additional patient identifier;

(B) date of examination;

(C) view and laterality (this information shall be placed on the image in a position near the axilla);

(D) facility name and location (at a minimum the location shall include city, state, and zip code);

(E) technologist identification;

(F) cassette/screen identification; and

(G) mammography unit identification if there is more than one unit in the facility.

(6) Information shall also be maintained for each clinical image by utilizing a label on each film, recording on the film jacket, or maintaining a log or other means. The information shall include, but is not limited to, compressed breast thickness or degree of compression, and kVp.

(j) Processing of mammographic images. Each registrant shall utilize the same processor for clinical and phantom images. Clinical images shall be processed within an interval not to exceed 24 hours from the time the first clinical image is taken. Facilities utilizing batch processing shall:

(1) use a container to transport clinical images that will protect the film from exposure to light and radiation; and

(2) maintain a log to include each patient name and unique identification number, date, and time of the first exam of each batch, and date and time of batch development.

(k) Quality assurance - general. Each registrant shall establish and maintain a written quality assurance program to ensure the safety, reliability, clarity, and accuracy of mammography services performed at the mammography facility, including corrective actions to be taken if images are of poor quality.

(1) Responsible individuals. Responsibility for the quality assurance program and for each of its elements shall be assigned to individuals who are qualified for their assignments and who shall be allowed adequate time to perform these duties.

(A) Lead interpreting physician. The registrant shall identify a lead interpreting physician who shall have the general responsibility of:

(i) ensuring that the quality assurance program meets all requirements of this subsection and subsections (l) and (m) of this section;

(ii) reviewing and documenting the technologists' quality control test results at least every three months or more frequently if consistency has not yet been achieved;

(iii) reviewing the physicists' results annually or more frequently when needed; and

(iv) assigning the quality assurance tasks in subparagraphs (B)-(D) of this paragraph.

(B) Interpreting physicians. All interpreting physicians interpreting mammograms for the registrant shall:

(i) follow the registrant's procedures for corrective action when the images they are asked to interpret are of poor quality. These procedures shall be included in the facility's operating and safety procedures; and

(ii) participate in the medical outcomes audit program.

(C) Medical physicist. Each registrant shall use the services of a licensed medical physicist to survey mammography equipment and oversee the equipment-related quality assurance practices of the facility. At a minimum, the medical physicist shall be responsible for:

(i) performing surveys of the items listed in subsection (l)(5)-(6) of this subsection;

(ii) performing mammography equipment evaluations in accordance with subsection (l)(10) of this section; and

(iii) providing the registrant with the reports described in subsection (l)(9) of this subsection.

(D) Quality control technologist. The quality control technologist, or other personnel qualified to perform the tasks as designated by the lead interpreting physician, shall ensure performance of the items designated in subsection (l)(1)-(4), (6), (8), and (11) of this section.

(2) Quality assurance records. The lead interpreting physician, quality control technologist, and medical physicist shall ensure that records concerning employee qualifications to meet assigned quality assurance tasks, mammography technique and procedures, quality control (include monitoring data, corrective actions, and the effectiveness of the corrective actions), safety, and protection are properly maintained and updated. These quality control records shall be kept for subsections (k) and (m) of this section and for each test specified in subsection (l) of this section, in accordance with subsection (nn)(3) of this section.

(l) Quality assurance - equipment. Registrants with screen-film systems shall perform the following quality control tests at the intervals specified. In addition to the intervals specified in (l)(4)(B) and (5)(H), the tests shall be performed prior to initial use.

(1) Daily quality control tests. Film processors used to develop mammograms shall be adjusted and maintained to meet the technical development specifications for the mammography film in use. A processor performance test shall be completed on each day that examinations are performed before any clinical films are processed that day.

(A) Processor performance test. Using mammography film used clinically at the facility, sensitometer tests shall include assessment of the following:

(i) base plus fog density that shall be within plus or minus 0.03 of the established operating level;

(ii) mid-density that shall be within plus or minus 0.15 of the established operating level; and

(iii) density difference that shall be within plus or minus 0.15 of the established operating level.

(B) Backup processor. A processor, other than the one commonly in use, may be used temporarily provided that the backup processor has been tested and meets the requirements of subparagraph (A) of this paragraph. Prior to the first patient exposure, a phantom image shall be acquired and run in the backup processor and shall meet the requirements of paragraph (2) of this section.

(C) Film processors being used for mammography at multiple locations, such as a mobile service, shall be subject to the requirements of this paragraph.

(D) The calibration of the densitometer and sensitometer must be in accordance with the manufacturer's specifications.

(E) Film processors utilized for mammography shall be adjusted to and operated at the specifications recommended by the mammographic film manufacturer, or at other settings such that the sensitometric performance is at least equivalent.

(2) Weekly quality control tests. An image quality evaluation test, using an FDA-accepted phantom, shall meet the following parameters.

(A) The optical density of the film at the center of an image of a standard FDA-accepted phantom shall be at least 1.20 when exposed under a typical clinical condition and shall not change by more than plus or minus 0.20 from the established operating level.

(B) The density difference between the background of the phantom and an added test object, used to assess image contrast, shall be measured and shall not vary by more than plus or minus 0.05 from the established operating level.

(C) The phantom image shall be made on the standard mammographic film in use at the facility with techniques used for clinical images of a standard breast. The phantom image shall meet the requirements in subparagraphs (A) and (B) of this paragraph and clause (i) of this subparagraph. No mammograms shall be taken on patients if any of these minimums are not met.

(i) The mammographic unit shall be capable of producing images of the mammographic phantom in accordance with the phantom image scoring protocol in subsection (nn)(5) of this section.

(ii) Each phantom image and a record of the evaluation of that image shall be maintained at the location where the mammography image was produced or with the radiographic equipment for mobile services.

(3) Quarterly quality control tests. These tests shall be performed within the calender quarter at an interval not to exceed 90 days.

(A) Fixer retention in film. The residual fixer shall be no more than 5 micrograms per square cm.

(B) Repeat analysis. A repeat analysis on clinical images repeated or rejected shall be performed, analyzed, and documented. Corrective action shall be taken if the retake rate for the facility exceeds 5.0%. Test films, cleared films, or film processed as a result of exposure of a film bin are not to be included in the count for repeat analysis. Films included in the repeat analysis are not required to be kept after completion of the analysis.

(4) Semiannual quality control tests. These tests shall be performed within the calender quarter at an interval not to exceed six months.

(A) Darkroom fog. The optical density attributable to darkroom fog shall not exceed 0.05 when a mammography film of the type used in the facility, which has a mid-density of no less than 1.2 OD, is exposed to typical darkroom conditions for two minutes while such film is placed on the counter top, emulsion side up. If the darkroom has a safelight used for mammography film, it shall be on during this test.

(B) Screen-film contact. Testing for screen-film contact shall be conducted using 40 mesh copper screen. The entire clinically exposed area of all cassettes that are used in the facility for mammography shall be tested.

(C) Compression device performance. The x-ray system shall be capable of compressing the breast with a force of at least 25 pounds and shall be capable of maintaining this compression for at least 15 seconds. For systems with automatic compression, the maximum force applied without manual assistance shall not exceed 40 pounds;

(5) Annual quality control tests. These tests shall be performed within the calender quarter at an interval not to exceed 13 months.

(A) Automatic exposure control performance. The AEC shall be capable of maintaining film optical density within plus or minus 0.30 of the mean optical density when thickness of a homogeneous material is varied over a range of 2 to 6 cm and the kVp is varied appropriately for such thicknesses over the kVp range used clinically in the facility. If this requirement cannot be met, a technique chart shall be developed showing appropriate techniques (kVp and density control settings) for different breast thicknesses and compositions that must be used so that optical densities within plus or minus 0.30 of the average under phototimed conditions can be produced.

(B) Kilovoltage peak accuracy and reproducibility. At the most commonly used clinical settings of kVp, the coefficient of variation of reproducibility of the kVp shall be equal to or less than 0.02. The kVp shall be accurate to within plus or minus 5.0% of the indicated or selected kVp at the following:

(i) the lowest clinical kVp that can be measured by a kVp test device;

(ii) the most commonly used clinical kVp; and

(iii) the highest available clinical kVp.

(C) Focal spot condition. Focal spot condition shall be evaluated either by determining system resolution or by measuring focal spot dimensions.

(i) System resolution.

(I) Each x-ray system used for mammography, in combination with the mammography screen-film combination used in the facility, shall provide a minimum resolution of 11 cycles/millimeters (mm) (line-pairs/mm) when a high contrast resolution bar test pattern is oriented with the bars perpendicular to the anode-cathode axis, and a minimum resolution of 13 line-pairs/mm when the bars are parallel to that axis.

(II) The bar pattern shall be placed 4.5 cm above the breast support surface, centered with respect to the chest wall edge of the image receptor, and with the edge of the pattern within 1 cm of the chest wall edge of the image receptor.

(III) When more than one target material is provided, the measurement in subclause (I) of this clause shall be made using the appropriate focal spot for each target material.

(IV) When more than one SID is provided, the test shall be performed at the SID most commonly used clinically.

(V) Test kVp shall be set at the value used clinically by the facility for a standard breast and shall be performed in the AEC mode, if available. If necessary, a suitable absorber may be placed in the beam to increase exposure times. The screen-film

cassette combination used by the facility shall be used to test for this requirement and shall be placed in the normal location used for clinical procedures.

(ii) Focal spot dimensions. Measured values of the focal spot length (dimension parallel to the anode cathode axis) and width (dimension perpendicular to the anode cathode axis) shall be within the tolerance limits specified as follows.
Figure: 25 TAC §289.230(l)(5)(C)(ii)

(D) Beam quality and half-value layer (HVL). The HVL shall meet the specifications of 21 CFR 1020.30(m)(l) for the minimum HVL. These values, extrapolated to the mammographic range, are shown as follows. Values not shown in Table II may be determined by linear interpolation or extrapolation.
Figure: 25 TAC §289.230(l)(5)(D)

(E) Breast entrance air kerma and AEC reproducibility. The coefficient of variation for both air kerma and mAs shall not exceed 0.05.

(F) Dosimetry. The average glandular dose delivered during a single craniocaudal view of an FDA accepted phantom simulating a standard breast shall not exceed 3.0 milligray (mGy) (0.3 rad) per exposure.

(G) X-ray field/light field/image receptor/compression paddle alignment. All systems shall meet the following:

(i) All systems shall have beam-limiting devices designed so that the x-ray field at the plane of the image receptor does not extend beyond any edge of the image receptor at any designated SID except the edge of the image receptor adjacent to the chest wall, where the x-ray field may not extend beyond this edge by more than 2.0% of the SID.

(ii) If a light field that passes through the x-ray beam limitation device is provided, it shall be aligned with the x-ray field so that the total of any misalignment of the edges of the light field and the x-ray field along either the length or the width of the visually defined field at the plane of the breast support surface shall not exceed 2.0% of the SID.

(iii) The chest wall edge of the compression paddle shall not extend beyond the chest wall edge of the image receptor by more than 1.0% of the SID when tested with the compression paddle placed above the breast support surface at a distance equivalent to standard breast thickness. The shadow of the vertical edge of the compression paddle shall not be visible on the image.

(H) Uniformity of screen speed. Uniformity of screen speed of all the cassettes in the facility shall be tested and the difference between the maximum and minimum optical densities shall not exceed 0.30. Screen artifacts shall also be evaluated during this test.

(I) System artifacts. System artifacts shall be evaluated with a high-grade, defect-free sheet of homogeneous material large enough to cover the mammography cassette and shall be performed for all cassette sizes used in the facility using a grid appropriate for the cassette size being tested. System artifacts shall also be evaluated for all available focal spot sizes and target filter combinations used clinically.

(J) Radiation output. The system shall be capable of producing a minimum output of 4.5 mGy air kerma per second (513 milliroentgen (mR) per second) when operating at 28 kVp in the standard mammography (molybdenum/molybdenum) mode at any SID where the system is designed to operate and when measured by a detector with its center located 4.5 cm above the breast support surface with the compression paddle in place between the source and the detector. The system shall be capable of maintaining the required minimum radiation output averaged over a 3.0 second period.

(K) Decompression. If the system is equipped with a provision for automatic decompression after completion of an exposure or interruption of power to the system, the system shall be tested to confirm that it provides the following:

(i) an override capability to allow maintenance of compression;

(ii) a continuous display of the override status; and

(iii) a manual emergency compression release that can be activated in the event of power or automatic release failure.

(L) The technique settings used for subparagraphs (D) and (F) of this paragraph and paragraph (2) of this subsection shall be those used by the facility for its clinical images of a standard breast.

(6) Quality control tests - other modalities. For systems with image receptor modalities other than screen-film, the quality assurance program shall be substantially the same as the quality assurance program recommended by the image receptor manufacturer, except that the maximum allowable dose shall not exceed the maximum allowable dose for screen-film systems in paragraph (5)(F) of this subsection.

(7) Mobile units. The registrant shall verify that mammography units used to produce mammograms at more than one location meet the requirements in paragraphs (1)-(6) of this subsection. In addition, at each examination location, before any examinations are conducted, the registrant shall verify satisfactory performance of such units by using a test method that establishes the adequacy of the image quality produced by the unit. Processor performance shall be in accordance with paragraph (1) of this subsection.

(8) Use of test results. After completion of the tests specified in paragraphs (1)-(7) of this subsection, the registrant shall do the following.

(A) Compare the test results to the corresponding specified action limits; or, for nonscreen-film modalities, to the manufacturer's recommended action limits; or for post-move, preexamination testing of mobile units, to the limits established in the test method used by the facility.

(B) If the test results in the following are outside of the action limits, corrective actions shall be taken before any further examinations are performed or any films are processed using the component of the mammography system that failed the test:

(i) paragraph (1) of this subsection describing processor quality control;

(ii) paragraph (2) of this subsection describing phantom image quality;

(iii) paragraph (4)(B) of this subsection describing screen-film contact;

(iv) paragraph (4)(C) of this subsection describing compression device performance;

(v) paragraph (5)(A) of this subsection describing AEC;

(vi) paragraph (5)(C) of this subsection describing focal spot condition;

(vii) paragraph (5)(E) of this subsection describing reproducibility;

(viii) paragraph (5)(F) of this subsection describing dosimetry;

(ix) paragraph (6) of this subsection describing quality control tests of other modalities; and

(x) paragraph (7) of this subsection describing quality control tests for mobile units.

(C) Corrective action for all other tests described in subsection (l) of this section shall be performed within 30 days of the test date.

(D) Documentation of the tests and the corrective actions described in subparagraphs (A)-(C) of this paragraph shall be maintained in accordance with subsection (nn)(3) of this section.

(9) Surveys. At least once a year, each facility shall undergo a survey by a medical physicist or by an individual under the direct supervision of a medical physicist.

(A) The medical physicist shall provide the following to the facility:

(i) a written report of the results of the tests listed in paragraphs (5) and (6) of this subsection and a review of the weekly phantom image test in accordance with paragraph (2) of this subsection;

(ii) written recommendations for corrective actions according to the test results; and

(iii) a review of the test results with the lead interpreting physician or his/her designee and the technologist(s) performing the quality control.

(B) The survey report shall be sent to the registrant within 30 days of the date of the survey and shall be maintained by the registrant in accordance with subsection (nn)(3) of this section. If deficiencies are noted that involve any of the items listed in paragraph (8)(B) of this subsection, a preliminary oral or written report of the deficiencies shall be given to the facility within 72 hours of the survey.

(C) The survey report shall be dated and signed by the medical physicist performing or supervising the survey. If the survey was performed entirely or in part by another individual under the direct supervision of the medical physicist, that individual and the part of the survey that individual performed shall also be identified in the survey.

(10) Mammography equipment evaluations. Additional evaluations of mammography units or image processors shall be conducted whenever a new unit or processor is installed, a unit or processor is dissembled and reassembled at the same or a new location, major components of a mammography unit are changed or repaired, or a processor is repaired. These evaluations shall be used to determine whether the new or changed equipment meets the requirements of applicable standards in subsections (g) and (l) of this section.

(A) All problems shall be corrected before the new or changed equipment is put into service for examinations or film processing. Dosimetry in accordance with paragraph (5)(F) of this subsection shall be verified within 60 days of tube or tube insert replacement.

(B) The mammography equipment evaluation and dosimetry shall be performed by a medical physicist or by an individual under the direct supervision of a medical physicist.

(11) Facility cleanliness. The registrant shall establish and implement adequate protocols for maintaining darkroom, screen, and view box cleanliness and shall document that all cleaning procedures are performed at the frequencies specified in the protocols.

(12) Calibration of air kerma measuring instruments. Instruments used by medical physicists in their annual survey to measure the air kerma or air kerma rate from a mammography unit shall be calibrated at least once every two years and each time the instrument is repaired. The instrument calibration must be traceable to a national standard and calibrated with an accuracy of plus or minus 6.0% (95% confidence level) in the mammography energy range.

(m) Quality assurance-mammography medical outcomes audit. Each registrant shall establish and maintain a mammography medical outcomes audit program to follow-up positive mammographic assessments and to correlate pathology results with the interpreting physician's findings.

(1) General requirements. Each registrant shall establish a system to collect and review outcome data for all mammograms performed, including follow-up on the disposition of all positive mammograms and correlation of pathology results with the interpreting physician's mammography report. Analysis of these outcome data shall be made individually and collectively for all interpreting physicians at the facility. In addition, any cases of breast cancer among women imaged at the facility that subsequently become known to the facility shall prompt the facility to initiate follow-up on surgical and/or pathology results and review of the mammograms taken prior to the diagnosis of a malignancy.

(2) Frequency of audit analysis. The facility's first audit analysis shall be initiated no later than 12 months after the date the facility becomes certified, or 12 months after April 28, 1999, whichever date is the latest. This audit analysis shall be complete within an additional 12 months to permit completion of diagnostic procedures and data collection. Subsequent audit analyses will be conducted at least once every 12 months. These shall be maintained in accordance with subsection (nn)(3) of this section.

(3) Reviewing interpreting physician. Each lead interpreting physician or an interpreting physician designated by the lead interpreting physician shall review the medical outcomes audit data at least once every 12 months. This individual shall analyze the results of the audit and shall be responsible for the following:

(A) recording the dates of the audit period(s);

(B) documenting the results;

(C) notifying other interpreting physicians of their results and the registrant's aggregate results; and

(D) documenting any follow up actions and the nature of the follow up.

(n) Mammographic procedure and techniques for mammography of patients with breast implants. Each registrant shall have a procedure to inquire whether or not the patient has breast implants prior to the mammographic exam. Except where contraindicated, or unless modified by a physician's's directions, patients with breast implants shall have mammographic views to maximize the visualization of breast tissue.

(o) Clinical image quality. Clinical images produced by any certified facility must continue to comply with the standards for clinical image quality established by that facility's accreditation body.

(p) Any research using radiation producing devices on humans must be approved by an IRB as required by 45 CFR 46 and 21 CFR 56. The IRB must include at least one licensed physician to direct any use of radiation in accordance with §289.201(a) of this title.

(q) Requirements for mammography systems used exclusively for invasive interventions for localizations or biopsy procedures. Mammography systems used exclusively for invasive interventions for localizations or biopsy procedures are exempt from this section except for the following:

(1) purpose and scope in accordance with subsections (a) and (b) of this section;

(2) the applicable definitions in subsection (c) of this section;

(3) prohibitions in accordance with subsection (d)(2) and (3) of this section;

(4) exemptions in accordance with subsection (e)(3) and (4) of this section;

(5) personnel requirements in accordance with subsection (f)(2) and (3) of this section;

(6) equipment standards in accordance with subsection (g)(6), (9), and (15) of this section;

(7) having a quality assurance program in accordance with subsection (k) of this section (lead interpreting physician and interpreting physician are not required), and the applicable portions of subsections (k)(2) and (l) of this section;

(8) performing AEC, kVp, focal spot condition, HVL, and dosimetry tests in accordance with subsection (l)(5)(A)-(D) and (F) of this section;

(9) the applicable portions concerning mobile services in accordance with subsection (l)(7) of this section;

(10) the applicable portions of the quality assurance test results in accordance with subsection (l)(8) of this section;

(11) having a medical physicist annual survey in accordance with subsection (l)(9) of this section;

(12) maintaining applicable records in subsection (r)(1)-(3);

(13) operating and safety procedures in accordance with subsection (s)(1) of this section;

(14) occupational dose limits in accordance with subsection (s)(2) of this section;

(15) technique chart in accordance with subsection (s)(3) of this section;

(16) receipt, transfer, disposal, calibration, and maintenance records in accordance with subsection (s)(4) and (7);

(17) viewing system in accordance with subsection (s)(5) of this section;

(18) exposure of individuals other than the patient in accordance with subsection (s)(6) of this section;

(19) certification requirements except for FDA accreditation in accordance with subsection (t) of this section;

(20) issuance of certification and specific terms and conditions of certification in accordance with subsections (u) and (v) of this section;

(21) responsibilities of a registrant in accordance with the applicable portions of subsection (w) of this section;

(22) expiration, termination, renewal, modification and revocation, and reciprocity of certification in accordance with subsections (x)-(vv) of this section;

(23) inspections in accordance with subsection (cc) of this section, except for subsection (cc)(1) of this section;

(24) technologist training in accordance with subsection (nn)(1) of this section;

(25) time requirements for record keeping in accordance with the applicable portions of subsection (nn)(3) of this section; and

(26) operating and safety procedures in accordance with the applicable portions of subsection (nn)(4) of this section.

(r) Records required to be kept with units authorized for mobile services.

(1) Copies of the following shall be kept with units authorized for mobile services:

(A) operating and safety procedures in accordance with subsection (r)(1) of this section;

(B) medical radiologic technologists' credentials;

(C) current quality control records for at least the last 90 calendar days for on-board processors in accordance with subsection (l)(1) of this section;

(D) current §§289.201 of this title, 289.202 of this title, 289.203 of this title, §289.205 of this title, §289.226 of this title, and §289.230 of this title.

(E) copy of certification of mammography system;

(F) certification of inspection or notice of failure from last inspection, if applicable; and

(G) copy of mammography facility accreditation.

(2) All other records required by this section shall be maintained at a specified location for inspection by the agency. Records may be maintained electronically in accordance with §289.201(d)(3) of this title.

(3) Records required at authorized use locations. Copies of the following shall be kept at authorized use locations. Records may be maintained electronically in accordance with §289.201(d)(3) of this title:

(A) operating and safety procedures in accordance with subsection (s)(1) of this subsection;

(B) quality assurance program in accordance with subsections (k), (l), and (m) of this section;

(C) credentials for interpreting physicians operating at that location in accordance with subsection (f)(1) of this section;

(D) credentials for medical radiologic technologists operating at that location in accordance with subsection (f)(2) of this section;

(E) credentials for medical physicists operating at that location in accordance with subsection (f)(3) of this section;

(F) quality control records in accordance with subsection (k)(2) of this section;

(G) continuing education and experience records for interpreting physicians, medical radiologic technologists, and medical physicists operating at that location in accordance with subsection (f)(1)(C), (2)(C), and (3)(C) of this section;

(H) current physicist annual survey of the mammography system;

(I) current §§289.201 of this title, 289.202 of this title, 289.203 of this title, 289.204 of this title, 289.205 of this title, §289.226 of this title, and §289.230 of this title;

(J) copy of certification of mammography system;

(K) certification of inspection or notification of failure, if applicable;

(L) records of receipts, transfers, and disposal in accordance with subsection (s)(4) of this section;

(M) calibration, maintenance, and modification records in accordance with subsection (s)(7) of this section; and

(N) copy of mammography facility accreditation.

(s) Other operating procedures.

(1) Operating and safety procedures. Each registrant shall have and implement written operating and safety procedures that shall be made available to each individual operating x-ray equipment, including any restrictions of the operating technique required for the safe operation of the particular x-ray system. These procedures shall include, but are not limited to, the items in subsection (nn)(4) of this section.

(2) Occupational dose limits and personnel monitoring. Except as otherwise exempted, all individuals who are associated with the operation of a radiation machine are subject to the occupational dose requirements of §289.202(f), (j), (l), and (m) of this title regarding dose limits to individuals and the personnel monitoring requirements of §289.202(q) of this title.

(3) Technique Chart. A chart or manual shall be provided or electronically displayed in the vicinity of the control panel of each machine that specifies technique factors to be utilized versus patient's anatomical size. The technique chart shall be used by all operators.

(4) Receipt, transfer, and disposal of mammographic machines. Each registrant shall maintain records showing the receipt, transfer, and disposal of mammographic machines. These records shall include the date of receipt, transfer, or disposal, the name and signature of the individual making the record, and the manufacturer's model and serial number from the control panel of the mammographic machine. Records shall be maintained for inspection by the agency until the certification of mammography system is terminated.

(5) Viewing system. Windows, mirrors, closed circuit television, or an equivalent system shall be provided to permit the operator to continuously observe the patient during irradiation. The operator shall be able to maintain verbal, visual, and aural contact with the patient.

(6) Exposure of individuals other than the patient. Only the staff and ancillary personnel required for the medical procedure or training shall be in the room during the radiation exposure.

(7) Calibration, maintenance, and modifications. Each registrant shall maintain records showing calibrations, maintenance, and modifications performed on each mammographic machine. These records shall include the date of the calibration, maintenance, or modification performed, the name of the individual making the record, and the manufacturer's model and serial number of the control panel of the mammographic machine. These records may be maintained in electronic format.

(t) Certification requirements. In addition to the requirements of §289.226(c) and if applicable, (g) of this title, each applicant shall comply with the following.

(1) Each person having a mammographic x-ray unit shall apply for and receive certification for the mammography system from the agency before beginning use of the mammographic x-ray unit on humans.

(2) An application for mammography certification shall be signed by a licensed physician. The signature of the applicant and the radiation safety officer (RSO) shall also be required.

(3) An applicant for certification must obtain a certification on each mammography system that is used by the applicant or the applicant's agent (for the purposes of the requirements of this paragraph, the word "used" refers to the entity other than the technologist that directs the application of radiation to humans). An application for mammography system certification may contain information on multiple mammography x-ray units. Each x-ray unit must be identified by referring to the machine's manufacturer, model number, and serial number of the control panel. The registrant shall maintain and provide proof of current accreditation and FDA certification status. If accreditation or FDA certification expires before the expiration of the certification of mammography systems, the registrant shall submit proof of renewed status to the agency.

(4) The applicant shall be qualified by reason of training and experience to use the mammographic machines for the purpose requested in accordance with this chapter in such a manner as to minimize danger to public health and safety.

(5) Each applicant shall submit documentation of the following:

(A) quality assurance program in accordance with subsection (k) of this section;

(B) personnel qualifications, including dates of licensure or certification, in accordance with subsection (f) of this section;

(C) model and serial number of each mammographic unit control panel;

(D) evidence of the following by a physicist meeting the requirements of subsection (f)(3) of this section:

(i) that each unit meets the equipment standards in subsection (g)of this section; and

(ii) the average glandular dose for one craniocaudal-caudal view for each unit does not exceed the value in subsection (l)(5)(F) of this section; and

(E) self-referral program information in accordance with subsection (h) of this section, if the facility offers self-referral mammography.

(6) Applications shall be processed in accordance with the following time periods.

(A) The first period is the time from receipt of an application by the Division of Licensing, Registration and Standards to the date of issuance or denial of the certification or a written notice outlining why the application is incomplete or unacceptable. This time period is 60 days.

(B) The second period is the time from receipt of the last item necessary to complete the application to the date of issuance or denial of the certification. This time period is 30 days.

(C) These time periods are exclusive of any time period incident to hearings and post-hearing activities required by the Government Code, Chapters 2001 and 2002.

(7) Notwithstanding the provisions of §289.204 of this title, reimbursement of application fees may be granted in the following manner.

(A) In the event the application is not processed in the time periods as stated in paragraph (6) of this subsection, the applicant has the right to request of the director of the Radiation Control Program full reimbursement of all application fees paid in that particular application process. If the director does not agree that the established periods have been violated or finds that good cause existed for exceeding the established periods, the request will be denied.

(B) Good cause for exceeding the period established is considered to exist if:

(i) the number of applications for certification to be processed exceeds by 15% or more the number processed in the same calendar quarter the preceding year;

(ii) another public or private entity utilized in the application process caused the delay; or

(iii) other conditions existed giving good cause for exceeding the established periods.

(C) If the request for full reimbursement authorized by subparagraph (A) of this paragraph is denied, the applicant may then request a hearing by appeal to the Commissioner of Health for a resolution of the dispute. The appeal will be processed in accordance with Formal Hearing Procedures, Chapter 1, §§1.21-1.34 of this title (relating to the Texas Board of Health).

(u) Issuance of certification of mammography systems. Issuance of certification of mammography systems shall be in accordance with §289.226(k) of this title.

(v) Specific terms and conditions of certification of mammography systems. Specific terms and conditions of certification of mammography systems shall be in accordance with §289.226(l) of this title.

(w) Responsibilities of registrant.

(1) In addition to the requirements of §289.226(m)(2) and (4)-(7) of this title, a registrant shall notify the agency in writing prior to any changes that would render the information contained in the application or the certification of mammography systems inaccurate. These include but are not limited to the following:

(A) name and mailing address;

(B) street address where machine(s) will be used; and

(C) mammographic x-ray units.

(2) Prior to employing the individuals listed in subparagraphs (A)-(E) of this paragraph, the registrant is required to verify and maintain copies of their qualifications. Registrants utilizing relief interpreting physicians or technologists from a temporary service do not need to notify the agency unless these personnel will be at the facility for a period exceeding four weeks. Documentation of qualifications of individuals listed in subparagraphs (A)-(E) of this paragraph and notification of a change in any of the following is required within 30 days of such change:

(A) radiation safety officer;

(B) lead interpreting physician;

(C) interpreting physicians;

(D) operators of equipment;

(E) licensed medical physicist;

(F) changes in the facilities' operating and safety procedures or quality control program.

(3) Prior to operating mammography equipment at an additional use location, the registrant shall submit an application to the agency for approval and receive an amendment to the certification of mammography systems.

(4) The following criteria applies to new, replacement, or loaner units and units used for clinical trial evaluations.

(A) All mammography units shall have either current accreditation or have submitted an application to an accreditation body for review. If accreditation expires, mammograms shall cease to be performed until such time as the accreditation application is received by the accreditation body and approval is given. Mammography units that are loaner units as described in subparagraph (C) of this paragraph or units involved in clinical trial evaluations as described in subparagraph (D) of this paragraph are exempt from accreditation requirements.

(B) A facility with an existing certification of mammography system may begin using a new or replacement unit before receiving an updated certification if the paperwork regarding the unit has been submitted to the agency with a licensed medical physicist's report in accordance with subsection (l)(9) of this section verifying compliance of the new unit with the regulations. The physicist's report is required prior to using the unit on patients.

(C) Loaner units may be used on patients for 60 days without adding the unit to the certification. A licensed medical physicist's report verifying compliance of the loaner unit with this section shall be completed prior to use on patients. The results of the survey must be submitted to the agency with a cover letter indicating period of use.

(D) Units involved in clinical trial evaluations may be used on patients for 60 days without adding the unit to an existing certification. A licensed medical physicist's report verifying compliance of the loaner unit with this section shall be completed prior to use on patients. The results of the survey must be submitted to the agency with a cover letter indicating period of use. If the use period will exceed 60 days, the facility shall add the unit to their certification and a prorated fee will be assessed.

(E) No fees will be assessed for loaner units or evaluation periods of 60 days or less.

(F) Loaner units or units involved in clinical trial evaluations are exempt from the inspection requirement in subsection (cc)(1) of this section.

(5) Records of training and experience and all other records required by this section shall be maintained for review in accordance with subsection (nn)(3) of this section.

(x) Expiration of certification of mammography systems.

(1) Except as provided by subsection (z) of this section, each certification of mammography systems expires at the end of the day in the month and year stated on the certificate of registration on the expiration date specified. Expiration of the certification of mammography systems does not relieve the registrant of the requirements of this chapter.

(2) If a registrant does not submit an application for renewal of the certification of mammography systems under subsection (z) of this section, as applicable, the registrant shall on or before the expiration date specified in the certification of mammography systems:

(A) terminate use of all mammography machines;

(B) submit a record of the disposition of the mammography units; and

(C) pay any outstanding fees in accordance with §289.204 of this title.

(y) Termination of certification of mammography systems. When a registrant decides to terminate all activities involving mammography machines authorized under the certification of mammography systems, the registrant shall:

(1) notify the agency immediately;

(2) request termination of the certification of mammography systems in writing;

(3) submit a record of the disposition of the mammography units;

(4) pay any outstanding fees in accordance with §289.204 of this title; and

(5) notify the agency of the film storage location of mammography patient's films.

(z) Renewal of certification of mammography systems.

(1) Application for renewal of certification shall be filed in accordance with this subsection and §289.226(c) and (g) of this title, as applicable.

(2) If a registrant files an application in proper form at least 30 days before the existing certification expires, such existing certification shall not expire until the application status has been determined by the agency.

(3) A certification for a mammographic unit is valid for three years from the date of issuance unless the certification of the facility is revoked prior to such deadlines. This is effective for certificates issued after September 1, 1997.

(A) If a registrant fails to renew the certification by the required date, the registrant may renew the certification on payment of the annual fee and a late fee. If the certification is not renewed before the 181st day after the date on which the certification expired, the registrant must apply for an original certification under this section.

(B) A mammography system may not be used after the expiration date of the certification unless the holder of the expired certification has made a timely and sufficient application for renewal of the certificate as provided in this subsection and §289.226(c) and (g) of this title, as applicable.

(aa) Modification and revocation of certification of mammography systems. Modification and revocation of certification of mammography systems shall be in accordance with §289.226(q) of this title.

(bb) Reciprocal recognition of out-of-state certificates of registration. Mammographic x-ray units will not be granted reciprocal recognition and must comply with the requirements of this section.

(cc) Inspections. In addition to the requirements of §289.201(e) of this title, the following applies to inspections of mammography systems.

(1) The agency shall inspect each mammography system that receives a certification in accordance with this chapter not later than the 60th day after the date the certification is issued.

(2) The agency shall inspect, at least once annually, each mammography system that receives a certification.

(3) To protect the public health, the agency may conduct more frequent inspections than required by this subsection.

(4) The agency shall make reasonable attempts to coordinate inspections in this section with other inspections required in accordance with this chapter for the facility where the mammography system is used.

(5) After each satisfactory inspection, the agency shall issue a certificate of inspection for each mammography system inspected. The certificate of inspection shall be posted at a conspicuous place on or near the place where the mammography system is used. The certificate of inspection shall include the following:

(A) specific identification of the mammography system inspected;

(B) the name and address of the facility where the mammography system was used at the time of the inspection; and

(C) the date of the inspection.

(6) Any Severity Level I violation involving a mammography system, found by the agency, in accordance with §289.205 of this title, constitutes grounds for posting notice of failure of the mammography system to satisfy agency requirements.

(A) Notification of such failure shall be posted:

(i) on the mammography x-ray unit at a conspicuous place if the violation is machine-related; or

(ii) near the place where the mammography system practices if the violation is personnel-related; and

(iii) in a sufficient number of places to permit the patient to observe the notice.

(B) The notice of failure shall remain posted until the facility is authorized to remove it by the agency. A facility may post documentation of corrections of the violations submitted to the agency along with the notice of failure until approval to remove the notice of failure is received from the agency.

(7) The agency shall require registrants who receive a severity level I violation to notify patients on whom the facility performed a mammogram during the 30 days preceding the date of the inspection that revealed the failure. The facility shall:

(A) inform the patient that the mammography system failed to satisfy the agency's certification standards;

(B) recommend that the patient have another mammogram performed at a facility with a certified mammography system; and

(C) list the three facilities closest to the original testing facility that have a certified mammography system.

(8) In addition to the requirements of paragraph (7) of this subsection, the agency may require a facility to notify a patient of any other failure of the facility's mammography system to meet the agency's certification standards.

(9) The patient notification shall include the following:

(A) explanation of the mammography system failure to the patient; and

(B) the potential consequences to the mammography patient.

(10) The registrant shall maintain a record of the mammography patients notified in accordance with paragraphs (7) and (8) of this subsection for inspection by the agency. The records shall include the name and address of each mammography patient notified, date of notification, and a copy of the text sent to the individual.

(dd) Accreditation of mammography facilities.

(1) All mammography facilities shall be accredited by an authorized FDA accreditation body. All facilities applying for and receiving accreditation through the agency shall comply with §289.201(c), (h)-(j) and (l)-(n) of this title, §289.203 of this title, §289.205 of this title, and subsections (f)-(g), (i)-(o), (s), (w), (cc), (ee) and (nn)(1)-(4) of this section.

(2) In order to be accredited by the agency, the applicant shall submit an application for accreditation on forms and in accordance with accompanying instructions prescribed by the agency.

(A) Each application shall be signed by a licensed physician.

(B) The agency may at any time after the filing of the original application, require further statements in order to enable the agency to determine whether the accreditation document should be issued, denied, modified, or revoked.

(C) Applications and documents submitted to the agency may be made available for public inspection except that the agency may withhold any document or part thereof from public inspection in accordance with §289.201(n) of this title.

(D) Each application for accreditation shall be accompanied by the fee prescribed in subsection (ee) of this section.

(E) Each applicant shall submit documentation of the following:

(i) personnel qualifications, training, and experience in accordance with subsection (f) of this section;

(ii) model and serial number of each mammographic unit control panel; and

(iii) evidence that no earlier than six months before the date of application for accreditation by the facility, a medical physicist performed the following:

(I) a survey in accordance with subsection (l)(9) of this section; and

(II) a mammography equipment evaluation in accordance with subsection (l)(10) of this section.

(F) Upon notification by the agency, each applicant shall directly submit clinical and phantom images to the image review board in accordance with their procedures.

(ee) Fees for accreditation of mammography facilities.

(1) Each new and renewal application for accreditation of a mammography facility shall be accompanied by a nonrefundable fee. No application will be accepted for filing or processed prior to payment of the full amount specified in paragraph (4) of this subsection.

(2) The nonrefundable fee in accordance with paragraph (4) of this subsection shall be paid every three years for each accredited mammography unit.

(3) Fee payments shall be in cash or by check or money order made payable to the Texas Department of Health. The payments may be mailed or made by personal delivery to the Bureau of Radiation Control, Texas Department of Health, 1100 West 49th Street, Austin, Texas 78756-3189.

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

(A) The accreditation fee for the first mammography unit is $720.

(B) The accreditation fee for each additional mammography unit is $345.

(C) The fee for reevaluation of clinical images due to failure during the accreditation process is $220 per unit.

(D) The fee for reevaluation of phantom images due to failure during the accreditation process is $110 per unit.

(E) The fee for an additional required mammography review is $250 per unit.

(F) Each facility for which an on-site visit due to three denials of accreditation is required will be charged for actual expenses to the agency arising from such visit. Payment of this fee shall be made within 60 days following the date of invoice.

(ff) Issuance of accreditation of a mammography facility. An accreditation document will be issued when the mammography facility meets the requirements of subsections (dd) and (ee) of this section and becomes accredited by the agency. In order for an accreditation to be issued, the agency must be notified by the image review board that the applicant met the criteria for clinical images, phantom images, and processor quality control.

(gg) Specific terms and conditions of accreditation of mammography facilities.

(1) Each accreditation document issued in accordance with this section shall be subject to the applicable provisions of the Act, now or hereafter in effect, and to the applicable requirements and orders of the agency.

(2) No accreditation document issued by the agency under this section shall be transferred, assigned, or in any manner disposed of, either voluntarily or involuntarily, to any person.

(hh) Responsibilities of an accredited facility. A facility shall notify the agency of any changes that would render the information contained in the application inaccurate.

(ii) Expiration and renewal of accreditation of mammography facilities.

(1) The accreditation shall expire on the date specified on the accreditation document.

(2) Application for renewal of accreditation shall be filed in accordance with subsections (dd) and (ee) of this section.

(3) If a mammography facility files an application for renewal in proper form at least 30 days before the existing accreditation expires, the facility may continue to perform mammography under approval by the FDA until the review process is complete and accreditation status has been determined by the agency.

(4) Accreditation for a mammographic facility is valid for three years from the date of issuance, unless accreditation of the facility is revoked prior to such deadline.

(5) Issuance of renewal of accreditation shall be in accordance with subsection (ff)of this section.

(jj) Denial of accreditation of mammography facilities.

(1) Any application for accreditation may be denied by the agency when the applicant fails to meet established criteria for accreditation or fails to respond to requests for information. Agency action on an application will be abandoned due to lack of response by the applicant. Abandonment of such actions does not provide an opportunity for a hearing; however, the applicant retains the right to resubmit the application at any time.

(2) Before the agency denies an application for accreditation, the agency shall give notice by personal service or by certified mail, return receipt requested, of the intent to deny, the facts warranting the denial, and afford the applicant an opportunity for a hearing. If no request for a hearing is received by the director of the Radiation Control Program within 30 days of personal service or the date of mailing, the agency may proceed to deny. The applicant shall have the burden of proof showing cause why the application should not be denied.

(kk) Modification and revocation of accreditation of mammography facilities. Modification and revocation of accreditation of mammography facilities shall be in accordance with §289.205 of this title.

(ll) On-site facility visit and random film checks. Each accredited facility shall:

(1) afford the agency, at all reasonable times, opportunity to audit the facility where mammography equipment or associated equipment is used or stored;

(2) make available to the agency for inspection, upon reasonable notice, records maintained in accordance with this chapter; or

(3) make available to the image review board, random clinical images upon request by the agency.

(mm) Complaints. Each registrant shall do the following:

(1) establish a written procedure for collecting and resolving consumer complaints;

(2) maintain a record of each serious complaint received by the facility in accordance with subsection (nn)(3) of this section;

(3) report unresolved serious complaints to the agency within (30) days of receiving the complaint; and

(4) post the following address where complaints may be filed with the Texas Department of Health, Bureau of Radiation Control, Mammography Accreditation Program, 1100 West 49th Street, Austin, Texas 78756-3189;

(nn) Appendices.

(1) Subjects to be included in mammography training for medical radiologic technologists shall include, but not be limited, to the following:

(A) anatomy and physiology of the female breast that shall include:

(i) mammary glands;

(ii) external anatomy;

(iii) retromammary space;

(iv) central portion;

(v) Cooper's ligament;

(vi) vessels, nerves, lymphatics; and

(vii) breast tissue:

(I) fibro-glandular;

(II) fibro-fatty;

(III) fatty; and

(IV) lactating;

(B) mammography positioning that shall include actual positioning of patients and/or models as follows:

(i) craniocaudal;

(ii) mediolateral oblique;

(iii) supplemental;

(iv) magnification;

(v) errors in positioning;

(vi) postoperative breast and the augmented breast;

(vii) breast localization and specimen radiography; and

(viii) use of compression;

(C) technical factors;

(D) film evaluation and critique;

(E) pathology; and

(F) quality assurance program.

(2) Subjects to be included in mammography training for interpreting physicians shall include, but not be limited to, the following:

(A) radiation physics, including radiation physics specific to mammography;

(B) radiation effects;

(C) radiation protection; and

(D) interpretation of mammograms. This shall be under the direct supervision of a physician who meets the requirements of subsection (f)(1) of this section.

(3) Time requirements for record keeping. Time requirements for record keeping shall be in accordance with the following chart.

Figure: 25 TAC §289.230(nn)(3)

(4) Operating and safety procedures. The registrant's operating and safety procedures shall include, but are not limited to, the following procedures as applicable:

(A) ordering x-ray exams in accordance with §289.201(a) of this title; and

(B) occupational dose requirements in accordance with §289.202(f), (j), and (l)-(n) of this title;

(C) posting of a radiation area in accordance with §289.202(g) of this title.

(D) personnel monitoring requirements in accordance with §289.202(p)-(r) of this title;

(E) posting notices to workers in accordance with §289.203(b) of this title;

(F) instructions to workers in accordance with §289.203(c) of this title;

(G) notifications and reports to individuals in accordance with §289.203(d) of this title;

(H) credentialing requirements for lead interpreting physicians, interpreting physicians, medical radiologic technologists, and medical physicists in accordance with subsection (f) of this section;

(I) self-referral mammography in accordance with subsection (h) of this section;

(J) retention of clinical images in accordance with subsection (i)(4) of this section;

(K) quality assurance program in accordance with subsections (k), (l)(11), and (m) of this section;

(L) image quality and corrective action for images of poor quality in accordance with subsection (k)(1)(B)(i) of this section;

(M) repeat analysis in accordance with subsection (l)(3) of this section;

(N) procedures and techniques for mammography patients with breast implants;

(O) use of a technique chart in accordance with subsection (s)(3) of this section;

(P) exposure of individuals other than the patient in accordance with subsection (s)(6) of this section; and

(Q) procedure to handle complaints in accordance with subsection (mm) of this section.

(5) Phantom image scoring protocol. Each of the following object groups are to be scored separately. In order to receive a passing score on the phantom image, all three test object groups must pass. A failure in any one of the areas results in a phantom failure.

(A) Fibers. A score of 4.0 for fibers is required to meet the evaluation criteria. The diameter size of fibers are 1.56 mm, 1.12 mm, 0.89 mm, 0.75 mm, 0.54 mm, and 0.40 mm. Score the fibers as follows.

(i) Begin with the largest fiber and move down in size, adding one point for each full fiber until a score of zero or one half is given. Stop counting at the first point where you lose visibility of objects.

(ii) If the entire length of the fiber can be seen and its location and orientation are correct, that fiber receives a score of one.

(iii) If at least half, but not all, of the fiber can be seen and its location and orientation are correct, that fiber receives a score of one half.

(iv) If less than one half of a fiber can be seen or if the location or orientation are incorrect, that fiber receives a score of zero.

(v) After determining the last fiber to be counted, look at the overall background for artifacts. If there are background objects that are fiber-like in appearance and are of equal or greater brightness than the last visible half or full fiber counted, subtract the last half or full fiber scored.

(B) Speck groups. A score of 3.0 for speck groups is required to meet the evaluation criteria. Diameter sizes of speck groups are 0.54 mm, 0.40 mm, 0.32 mm, 0.24 mm, and 0.16 mm. There are six specks per group. Score the speck groups as follows.

(i) Begin with the largest speck group and move down in size adding one point for each full speck group until a score of one half or zero is given, then stop.

(ii) If at least four of the specks in any group are visualized, the speck group is scored as one.

(iii) If two or three specks in a group are visualized, the score for the group is one half.

(iv) If one speck or no specks from a group are visualized, the score is zero.

(v) After determining the last speck group to receive a full or one/half point, look at the overall background for artifacts. If there are speck-like artifacts within the insert region of the phantom that are of equal or greater brightness than individual specks counted in the last visible half or full speck group counted, subtract the artifact speck from the observed specks, one by one. Repeat the scoring of the last visible speck group after these deductions.

(C) Masses. A score of 3.0 is required to meet the evaluation criteria. Diameter sizes of masses are 2.00 mm, 1.00 mm, 0.75 mm, 0.50 mm, and 0.25 mm. Score the masses as follows.

(i) Begin with the largest mass and add one point for each full mass observed until a score of one half or zero is assigned.

(ii) Score one for each mass that appears as a minus density object in the correct location that can be seen clearly enough to observe round, circumscribed borders.

(iii) Score one half if the mass is clearly present in the correct location, but the borders are not visualized as circular.

(iv) After determining the last full or half mass to be counted, look at the overall background for artifacts. If there are background objects that are mass-like in appearance and are of equal or greater visibility than the last visible mass, subtract the last full or half point assigned from the original score.

This 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 November 20,1998.

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Susan K. Steeg
General Counsel
Texas Department of Health
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 458–7236

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TITLE 28. INSURANCE

Part I. Texas Department of Insurance

Chapter 3. Life, Accident, Health Insurance and Annuities

Subchapter HH. Standards for Reasonable Cost Control and Utilization Review for Chemical Dependency Treatment Centers

28 TAC §§3.8001–3.8002, 3.8004–3.8005, 3.8007, 3.8019, 3.822–3.8030

The Texas Department of Insurance proposes amendments and new sections to Chapter 3, Subchapter HH, concerning utilization review for chemical dependency treatment centers, by amending §§3.8001-3.8002, 3.8004-3.8005, 3.8007, 3.8019 and 3.8022, and adding new §§3.8023-3.8030. In conjunction with these proposed amendments and new sections, the department is proposing the repeal of existing §3.8006. Notice of the proposed repeal is published elsewhere in this issue of the *Texas Register*. The proposal is necessary to make utilization review standards for chemical dependency treatment consistent with broader standards promulgated pursuant to Insurance Code Article 21.58A, relating to health care utilization review agents, which was amended by Acts 1997, 75th Legislature, Chapter 163, §§2, 3, & 4 and Chapter 1025, §§1, 2, 3, 4, 5, 6, 7, 8, 9, & 10. These amendments and new sections are also necessary to update oversight of the utilization review process, expand the pool of professionals capable of making mental health decisions, define emergency procedures in accord with new statutory standards, and update the range of treatment modes by adopting standards for outpatient chemical dependency treatment. These amendments will bring Texas into accord with national standards for clinical and social prevention, intervention and treatment and will promote the delivery of quality health care in a cost-effective manner by requiring utilization review agents to adhere to such standards when conducting reviews. The amendments will further facilitate consistent and appropriate utilization management decisions by insurers and health maintenance organizations (HMOs) regarding the type and duration of individual services, assure that utilization review agents adhere to reasonable standards for conducting utilization reviews, and foster greater coordination and cooperation between health care providers and utilization review agents. Finally, the amendments will improve communications and knowledge of benefits among all parties concerned before expenses are incurred. These new sections will outline the benefit package and utilization review criteria for use by insurance companies, HMOs, and limited service HMOs in Texas. These sections provide comprehensive length-of-stay, placement, and discharge guidelines. Proposed amendments to §3.8001 add new definitions for intensive outpatient services and qualified credentialed counselor. The proposal also amends the existing definitions of chemical dependency treatment center and partial hospitalization. The proposed amendment to §3.8002 makes a minor revision for clarification. The proposed amendment to §3.8004 enables qualified credentialed counselors to authorize admission to certain treatment regimens. The proposed amendment to §3.8005 substitutes qualified credentialed counselor for physician and incorporates the provisions of 28 TAC Chapter 19, Subchapter R (relating to Utilization Review Agents) into this subchapter. The proposed amendment to §3.8007 adds an additional qualifying condition for inpatient detoxification services. The proposed amendment to §3.8019 redefines intensive outpatient rehabilitation/treatment service. The proposed amendment to §3.8022 alters the recommended length of stay for intensive outpatient rehabilitation treatment service. New §§3.8023-3.8030 add provisions outlining admission criteria, continued stay criteria, discharge criteria, and recommended length of stay for outpatient treatment service and outpatient detoxification treatment service.

The department will consider the adoption of amendments to §§3.8001-3.8002, 3.8004-3.8005, 3.8007, and 3.8019, and new §§3.8023-3.8030 in a public hearing under Docket Number 2392, scheduled for 9:00 a.m. on January 6, 1999, in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street, Austin, Texas.

Karen Thrash, deputy commissioner, HMO/URA Division, has determined that for each of the first five years the proposed sections will be in effect, any fiscal impact on state government will be the cost to the Texas Department of Insurance associated with notification of assignment to the patient and the patient's provider of record. Ms. Thrash estimates that the cost associated with notification will be $.33 per notification, and $.66 per request for independent review. As utilization review for chemical dependency treatment is already available in Texas, Ms. Thrash estimates that any additional cost to the department for notification resulting from the adoption of these rules will be minimal.

There will be no fiscal impact on local government as a result of enforcing or administering the proposal. There will be no measurable effect on local employment or local economy.

Ms. Thrash has also determined that for each year of the first five years the proposed sections are in effect, the public benefits anticipated as a result of the proposed sections will be a cost effective mechanism to assure greater access to necessary health care by consumers and to promote quality of care by providing independent review of issues of medical necessity. The proposed sections afford those individuals who have received an adverse determination of medical necessity an additional review process on the question of medical necessity and the receipt of benefits from health insurers, health maintenance organizations and other managed care entities. This review will be an independent review performed by an entity with no relation to the payor of benefits and will ensure that requested reviews of adverse determinations are conducted fairly and impartially. The amendments will also establish reasonable standards for chemical dependency treatment utilization review, promote greater coordination and cooperation between health care providers and utilization review agents, improve communication and knowledge of benefits among all parties concerned, and update the range of treatment modes by adopting standards for outpatient chemical dependency treatment.

Except as specifically enumerated below, any costs to persons required to comply with these sections each year of the first five

years the proposed sections will be in effect are the result of the legislative amendment to Article 21.58A of the Insurance Code. Regarding any additional benefits provided pursuant to the rule, the department estimates, based on discussions with private industry as well as the Texas Department of Mental Health and Mental Retardation, the cost per day of providing inpatient treatment will be $525 for chemical dependency treatment, and $800 for detoxification treatment. The cost per day of providing outpatient treatment will be $100.00. As outpatient treatment of chemical dependency is significantly less expensive than inpatient treatment, the department anticipates that the rule's establishment of standards for outpatient treatment will result in a reduction of per day costs for payors affected by the rule.

Ms. Thrash has determined that, except as enumerated specifically below, any economic costs to any person qualifying as a small business under Government Code §2006.001 that complies with the proposed sections for each year of the first five years the proposed new sections will be in effect are the result of the legislative enactment of Insurance Code Article 21.58A and not as a result of the adoption, enforcement, or administration of the proposed sections. With regard to the benefit standards this rule establishes, the total cost to payors is not dependent upon the size of the business, but rather is dependent upon the number of persons to whom the business must provide services under the rule as amended. The cost per hour of labor would not vary between the smallest and largest businesses, assuming that small business insurers and HMOs and the largest insurers and HMOs have to provide these types of services and treatment to approximately the same percentage of their insured or enrolled populations. Therefore, it is the department's position that the adoption of these proposed sections will have no adverse economic effect on small businesses. Regardless of the fiscal effect, the department does not believe it legal or feasible to waive the requirements of these rules for small businesses. To do so would allow differentiation of benefits between the insureds/enrollees of small insurers and HMOs compared to those benefits provided to the insureds/enrollees of large insurers and HMOs.

Comments on the proposal must be submitted in writing within 30 days after publication of the proposal in the *Texas Register* to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. An additional copy of the comments should be submitted to Karen Thrash, Deputy Commissioner, HMO/URA Group, Mail Code 103-6A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104.

The sections are proposed under Insurance Code Articles 21.58A, 3.51-9, and 1.03A. Insurance Code Article 21.58A, §13 provides that the commissioner of insurance may adopt rules to regulate the conduct and activities of health care utilization review agents. Insurance Code Article 3.51-9, §2A authorizes and requires the Texas Department of Insurance to adopt rules with standards for the reasonable control of costs necessary for treatment of chemical dependency. Insurance Code Article 1.03A provides that the commissioner of insurance may adopt rules and regulations to execute the duties and functions of the Texas Department of Insurance as authorized by statute.

The following articles are affected by this proposal: Insurance Code, Article 21.58A & 3.51-9

§3.8001. Definitions.

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

(1) Abusable glue or aerosol paint–Glue or aerosol paint that is:

(A) packaged in a container holding a pint or less by volume or less than two pounds by weight; and

(B) labeled in accordance with the labeling requirements concerning precautions against inhalation established under the Federal Hazardous Substances Act (15 United States Code §1261, et seq.), and under regulations adopted under that Act.

(2) Adolescent–A person who is 17 years of age or younger.

(3) Advanced clinical practitioner–An individual certified as an advanced clinical practitioner by the Texas Department of Human Services.

(4) Aerosol paint–An aerosol paint product, including a clear or pigmented lacquer or finish.

(5) Certified social worker–An individual who is certified as a certified social worker by the Texas Department of Human Services.

(6) Chemical dependency–The abuse of, or the psychological or physical dependence on, or the addiction to, alcohol or a controlled substance.

(7) Chemical dependency counselor–A person who is [~~certified by the Texas Certification Board for Alcoholism and Drug Abuse Counselors (TCBADAC) or~~] licensed by the Texas Commission on Alcohol and Drug Abuse.

(8) Chemical dependency treatment center–A facility which provides a program for the treatment of chemical dependency pursuant to a written treatment plan approved and monitored by a physician or qualified credentialed counselor and which facility is also:

(A) affiliated with a hospital under a contractual agreement with an established system for patient referral; or

(B) accredited as such a facility by the Joint Commission on Accreditation of Hospitals; or

(C) licensed as a chemical dependency treatment program by the Texas Commission on Alcohol and Drug Abuse; or

(D) licensed, certified, or approved as a chemical dependency treatment program or center by any other state agency having legal authority to so license, certify, or approve.

(9) Controlled substance–A toxic inhalant, or a substance designated as a controlled substance in the Texas Controlled Substances Act (the Health and Safety Code, §481.002(5)).

(10) Facility–An individual program, entity, organization, or other provider of chemical dependency treatment services.

(11) Glue–An adhesive substance intended to be used to join two surfaces.

(12) Intensive outpatient services–An organized nonresidential service providing structured group and individual therapy, educational services, and life skills training which consists of at least 10 hours per week for four to 12 weeks, but less than 24 hours per day.

(13) Licensed professional counselor–An individual licensed as a professional counselor by the Texas State Board of Examiners of Professional Counselors.

(14) Licensed vocational nurse–A nurse licensed by the Texas State Board of Vocational Nurse Examiners.

(15) Partial hospitalization–The provision of treatment for chemical dependency for persons who require care or support or both in a hospital or chemical dependency treatment center but who do not require 24-hour supervision at least 20 hours per week up to 8 weeks.

(16) Payor–An insurer writing health insurance policies; any preferred provider organization, health maintenance organization, self-insurance plan; or any other person or entity which provides, offers to provide, or administers hospital, outpatient, medical, or other health benefits to persons treated by a health care provider in this state pursuant to any policy, plan or contract. [~~Any insurer, any nonprofit hospital, and medical service plan corporation subject to the Insurance Code, Chapter 20, any health maintenance organization providing group health coverage, and any employer, trustee, or other self-funded or self-insured plan or arrangement transacting health insurance or providing other health coverage or services in this state but excluding any employer, trustee, or any other self-funded or self-insured plan or arrangement with 250 or fewer employees or members, or any individual insurance policies regardless of the method of solicitation or sale, or any individual health maintenance organization policies, or any health insurance policies that only provide cash indemnity for hospital or other confinement benefits, or supplemental or limited benefit coverage, or coverage for specified diseases or accidents, or disability income coverage, or any combination thereof.~~]

(17) Physician–A [~~An individual who is~~] licensed doctor of medicine or a doctor of osteopathy by the Texas State Board of Medical Examiners.

(18) Program–A particular type or level of service that is organizationally distinct within a facility.

(19) Psychiatrist–An individual who is licensed in the State of Texas to practice psychiatry, who is eligible for, or has received, board certification, and who has hospital affiliation and experience in appropriate use of psychotropic drugs.

(20) Psychologist–An individual licensed as a psychologist by the Texas State Board of Examiners of Psychologists.

(21) Qualified credentialed counselor–An individual who:

(A) meets the definition established by the Texas Commission on Alcohol and Drug Abuse; or

(B) is employed outside the State of Texas and licensed, certified, or registered in a profession corresponding to those described in the definition of Qualified Credentialed Counselor established by the Texas Commission on Alcohol and Drug Abuse.

[~~Qualified credentialed professional– An individual:~~]

[~~(A) who is a chemical dependency counselor, or who is certified, licensed, or registered by the State of Texas as a certified social worker, advanced clinical practitioner, licensed professional counselor, physician, psychologist, physician assistant, advanced nurse practitioner, registered nurse, or licensed vocational nurse; or~~]

[~~(B) who is employed outside the State of Texas and licensed, certified, or registered in a profession corresponding to those described in subparagraph (A) of this definition.~~]

(22) Toxic inhalant–A volatile chemical under this section or under the Health and Safety Code, §484.002, or abusable glue or aerosol paint under this section or under the Health and Safety Code, §485.001.

(23) Treatment provider–Any "chemical dependency treatment center" as defined in this section or in the Insurance Code[,] Article 3.51-9, §2A, and also any certified or licensed practitioner or facility licensed to provide treatment for chemical dependency.

(24) Utilization review–A system for prospective or concurrent review of the appropriateness of health care services being provided or proposed to be provided in this state.

(25) Volatile chemical–A chemical or an isomer of a chemical listed in subparagraphs (A)-(X) of this definition, as follows:

(A) acetone;

(B) aliphatic hydrocarbons;

(C) amyl nitrite;

(D) butyl nitrite;

(E) carbon tetrachloride;

(F) chlorinated hydrocarbons;

(G) chlorofluorocarbons;

(H) chloroform;

(I) cyclohexanone;

(J) diethyl ether;

(K) ethyl acetate;

(L) glycol ether inter solvent;

(M) glycol ether solvent;

(N) hexane;

(O) ketone solvent;

(P) methanol;

(Q) methyl cellosolve acetate;

(R) methyl ethyl ketone;

(S) methyl isobutyl ketone;

(T) petroleum distillate;

(U) toluene;

(V) trichloroethane;

(W) trichloroethylene; and

(X) xylol or xylene.

§3.8002. Purpose and General Provisions.

(a) (No change.)

(b) Applicability of this subchapter to control [~~of~~] costs. To reasonably control the costs of inpatient and outpatient treatment of chemical dependency, benefits for each individual should be provided for the appropriate level in accordance with the provisions of this subchapter.

(c) Reporting of misuse or abuse of standards. Misuse or abuse of the standards in this subchapter by qualified credentialed counselors [~~professionals~~] shall be reported to the appropriate credentialing entity. Misuse or abuse of these standards by payors shall

be reported to the Texas Department [State Board] of Insurance and the Texas Commission on Alcohol and Drug Abuse. Misuse of these standards by treatment providers shall be reported to the Texas Commission on Alcohol and Drug Abuse and the Texas Department [State Board] of Insurance.

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

§3.8004. [Physician] Admission and Monitoring.

(a) The admitting or attending physician shall review and approve in writing within 24 hours each admission to an inpatient hospital, residential detoxification program, or outpatient detoxification [24-hour residential chemical dependency treatment center, or partial hospitalization] program. Physician review and approval shall include determination of the appropriate diagnosis and application of the standards and corresponding criteria as set out in this subchapter to determine the appropriate level of treatment. A physician assessment shall occur prior to any change in the level of treatment or discharge from treatment.

(b) A qualified credentialed counselor shall authorize and approve in writing each admission to a 24-hour residential chemical dependency treatment center, partial hospitalization program, detoxification program, or outpatient program. Review and approval shall include determination of the appropriateness for admission and application of the standards and corresponding criteria as set out in this subchapter to determine the appropriate level of treatment. An assessment completed by a qualified credentialed counselor shall occur prior to any change in the level of treatment or discharge from treatment.

§3.8005. Utilization Review.

(a) Treatment providers and payors shall provide for utilization review in accordance with the provisions of this subchapter and of Chapter 19, Subchapter R of this title (relating to Utilization Review Agents). [Each payor shall provide for utilization review prior to admission and/or within one working day of notification by the treatment provider in accordance with the provisions of this subchapter in order to reserve the right to contest or deny claims based on the medical necessity or appropriateness of treatment, including level of care.] Both payor and treatment provider shall make available a qualified credentialed counselor [physician] to discuss the appropriateness of treatment, including levels of care, should this become necessary.

[(b) Within one working day of the time an individual is admitted or transferred to any level of treatment, the treatment provider's qualified credentialed professional shall initiate utilization review and provide to the payor the diagnosis and level of treatment. Within one working day of the receipt of the information required by these rules, the payor's qualified credentialed professional shall provide to the treatment provider an initial utilization review decision. A review shall be conducted by a physician on any determination not to certify treatment, the results of which shall be in writing and shall specify the reasons for denial, and that physician should be reasonably available to telephonically discuss that determination with the admitting or attending physician.]

(b) [(c)] Since utilization review as proposed in these standards must be accomplished in a timely manner, information provided telephonically must be supported by documentation in the patient record and available on request for review.

[(d) At least one working day prior to the expiration of the initial treatment period, follow-up utilization review will be initialed by the treatment provider's qualified credentialed professional to determine if the patient should be moved to another level of treatment or continued for extended treatment. Within one working day of the receipt of the information required by this provision, the payor's qualified credentialed professional shall provide to the treatment provider a follow-up utilization review decision. A review shall be conducted by a physician on any determination not to certify treatment, the results of which shall be in writing and shall specify the reasons for denial, and that physician should be reasonably available to telephonically discuss that determination with the admitting or attending physician. Follow-up utilization review shall be based on the standards and corresponding criteria as set out in this subchapter. The provider and/or patient must show, and document if so requested, specific reasons for denial of coverage for continued or extended care, or its recommended level of care. The treatment provider shall initiate and begin documentation of discharge planning within five days after admission to the program, in order that a transfer, if necessary, or discharge can be accomplished in a timely fashion and as clinically appropriate. If it is determined at any time that continued treatment is necessary but at a different level, a reasonable number of days to provide for a transfer that is clinically appropriate shall be allowed, provided said discharge planning, as set out in this subsection, has occurred.]

§3.8007. Admission Criteria for Inpatient (Hospital or 24-hour Residential) Detoxification Services.

An individual is considered eligible for inpatient (hospital or 24-hour residential) admission for detoxification services when the individual either meets the conditions of paragraphs (1) and (2) of this section or fails two previous treatment episodes of outpatient detoxifications. An individual who otherwise meets the clinical criteria for inpatient detoxification must not be required to fail outpatient detoxification to qualify for inpatient services.

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

§3.8019. Admission Criteria for Intensive Outpatient Rehabilitation/ Treatment Service.

(a) An intensive outpatient rehabilitation/treatment service is defined as one consisting of at least 10 [12] hours per week for four to 12 weeks, but less than 24 hours per day.

(b) (No change.)

§3.8022. Recommended Length of Stay for Intensive Outpatient Rehabilitation Treatment Service.

The recommended stay period for intensive outpatient rehabilitation/ treatment services is from four to 12 weeks, meeting at least 10 [12] hours per week, based on the criteria in §3.8019 of this title (relating to Admission Criteria for Intensive Outpatient Rehabilitation/Treatment Service), with utilization review points, based on the criteria in §3.8020 of this title (relating to Continued Stay Criteria for Intensive Outpatient Rehabilitation/Treatment Service), and recommended treatment periods depending on the condition of the patient, accompanied by the commencement of appropriate utilization review and discharge planning at the time of admission.

§3.8023. Admission Criteria for Outpatient Treatment Service.

(a) An outpatient treatment service is defined as one consisting of at least one to two hours per week.

(b) An individual is considered eligible for treatment in an outpatient treatment service when the individual meets the conditions of paragraphs (1) through (3) of this subsection.

(1) The diagnosis must meet the criteria for the definition of chemical dependence, as detailed in the most current revision of the International Classification of Diseases, or the most current revision of the diagnostic and statistical manual for professional practitioners, accompanied by evidence that some of the symptoms have persisted

for at least one month or have occurred repeatedly over a longer period of time.

(2) Concerning the diagnosis of alcohol/drug abuse, the individual must meet the criteria for the definition of chemical substance abuse, as detailed in either the most current revision of the International Classification of Diseases, or the most current revision of the diagnostic and statistical manual for professional practitioners.

(3) Concerning the factors for admission to an outpatient treatment service, the patient must have met the diagnostic criteria for chemical dependency under paragraph (1) of this subsection or for abuse under paragraph (2) of this subsection, and must meet the conditions of all three subparagraphs (A)-(C) of this paragraph.

(A) Category 1: medical functioning. The patient has no medical complications that would hamper the patient's participation in the outpatient treatment service.

(B) Category 2: family, social, academic dysfunction. The patient must meet the criteria of at least one clause out of clauses (i) or (ii) of this subparagraph. The patient's living environment should be considered as a factor. An individual living in an environment where licit or illicit mood altering substances are being used may not be a candidate for this level of care early in episode of care (early considered the first 30 days).

(i) The patient's social system and significant others are supportive of recovery to the extent that the patient can adhere to a treatment plan and treatment service schedules without substantial risk of reactivating the patient's addiction.

(ii) The patient has no primary or social support system to assist with immediate recovery, but has the social skills to obtain such a support system or to become involved in a self-help fellowship.

(C) Category 3: emotional/behavioral status. The patient must meet the criteria under all three clauses (i)-(iii) of this subparagraph.

(i) Patient is coherent, rational and oriented for treatment.

(ii) Mental state of the patient does not preclude the patient's ability to :

(I) comprehend and understand the materials presented; and

(II) participate in rehabilitation/treatment process

(iii) There is documentation that the patient expresses an interest to work toward rehabilitation/treatment goals.

§3.8024. Continued Stay Criteria for Outpatient Treatment Services.

(a) A patient is considered eligible for continued stay in the outpatient treatment service when the patient meets the diagnostic criteria and the conditions under at least one paragraph out of paragraphs (1) or (2) in subsection (b) of this section.

(b) Factors for continued outpatient treatment services are listed in paragraphs (1) and (2) of this subsection.

(1) Alcohol/drug rehabilitation/treatment complications. The patient must meet the conditions of subparagraphs (A) or (B) of this paragraph.

(A) Patient demonstrates an insight and understanding into the patient's personal relationship with mood-altering chemicals, yet is not effectively addressing the life functions of work, social or primary relationships without the use of mood altering chemicals.

(B) Patient, while physically abstinent from chemical substance use, remains mentally preoccupied with such use to the extent that the patient is unable to adequately address primary relationships, social or work tasks, but there are indications that with continued treatment, the patient will effectively address these issues.

(2) Psychiatric or medical complications. Documentation in the record indicates an intervening medical or psychiatric event which was serious enough to interrupt rehabilitation/treatment, but the patient is again progressing in treatment.

§3.8025. Discharge Criteria for Outpatient Treatment Service.

The patient is considered eligible for discharge from the outpatient treatment service when he or she meets the conditions for discharge as stated in any one of paragraphs (1)-(4) of this section.

(1) A documented assessment which supports that the patient does not meet the diagnostic criteria for alcohol/drug dependence or abuse.

(2) Psychiatric illness or medical complication. The patient must meet the conditions in subparagraphs (A) or (B) of this paragraph, as follows:

(A) documentation that a psychiatric or medical condition should be treated in another setting; or

(B) documentation that a psychiatric or medical condition which is interfering with alcohol/drug recovery is not being treated.

(3) Alcohol/drug rehabilitation/treatment. The patient must meet all the conditions in subparagraphs (A) or (B) of this paragraph.

(A) Patient displays behaviors which demonstrate that the patient:

(i) recognizes or identifies with the severity of chemical substance use;

(ii) has insight into the patient's defeating relationship with alcohol/drugs: and

(iii) is applying the essential coping skills necessary to cope with the alcohol and/or drug problem and to maintain abstinence.

(B) Patient is functioning adequately in assessed deficiencies in the life task areas of work, social functioning, or primary relationships.

(4) Behavioral factors. The patient must meet all the conditions in subparagraphs (A) and (B) of this paragraph.

(A) Patient is consistently uncooperative, to the degree that no further progress is likely to occur.

(B) Greater intensity of service or transfer to another treatment provider would not have a positive impact on the problem.

§3.8026. Recommended Length of Stay for Outpatient Treatment Service.

The recommended stay period for outpatient treatment services is up to 6 months, meeting at least one hour every two weeks based on the criteria in §3.8023 of this title (relating to Admission Criteria for Outpatient Treatment Service); with utilization review, based on the criteria in §3.8024 of this title (relating to Continued Stay Criteria for Outpatient Treatment Service), and recommended treatment

periods depending on the condition of the patient, accompanied by the commencement of appropriate utilization review and discharge planning at the time of admission.

§3.8027. Admission Criteria for Outpatient Detoxification Treatment Service.

An individual is considered eligible for treatment in an outpatient detoxification treatment service when the individual meets the conditions of paragraphs (1) and (2) of this subsection.

(1) The diagnosis must meet the criteria for the definition of substance (chemical) dependence, as detailed in the most current revision of the international classification of diseases, or the most current revision of the diagnostic and statistical manual for professional practitioners, accompanied by evidence that some of the symptoms have persisted for at least one month or have occurred repeatedly over a longer period of time.

(2) Once the diagnostic criteria for substance (chemical) dependency as described in subsection (1) have been met, the conditions of all subparagraphs (A)-(D) of this paragraph must also be met.

(A) Category 1: chemical substance withdrawal. The individual is expected to have a stable withdrawal from alcohol/drugs.

(B) Category 2: medical functioning. The patient must meet all the criteria in clauses (i)-(viii) of this subparagraph.

(i) No history of recent seizures or past history of seizures on withdrawal,

(ii) Lack clinical evidence of altered mental state as manifested by:

(I) disorientation to self,

(II) alcoholic hallucinations,

(III) toxic psychosis, (IV) altered level of consciousness, as manifested by clinical significant obtundation, stupor, or coma.

(iii) The symptoms are not due to a general medical condition.

(iv) Absence of any presumed new asymmetric and/or focal findings (i.e., limb weakness, clonus, spasticity, unequal pupils, facial asymmetry, eye ocular movement paresis, papilledema, or localized cerebellar dysfunction, as reflected in asymmetrical limb coordination).

(v) The patient must have vital signs interpreted by a physician to be stable, without a previous history of complications from acute chemical substance withdrawal, and judged to be free of a physician-determined health risk.

(vi) The patient has no evidence of a coexisting serious injury or systemic illness, newly discovered or progressive in nature.

(vii) Absence of serious disulfiram-alcohol (Antabuse) reaction with hypothermia, chest pains, arrhythmia or hypotension.

(viii) The patient's clinical condition allows for a comprehensive and satisfactory assessment of items cited in clauses (i)-(vii) of this subparagraph and paragraphs (A)-(D).

(C) Category 3: family, social, academic dysfunction. The patient must meet the criteria of at least one clause out of clauses (i)-(iv) of this subparagraph.

(i) The patient's social system and significant others are supportive of recovery to the extent that the patient can adhere to a treatment plan and treatment service schedules without substantial risk of reactivating the patient's addiction.

(ii) The patient's family and/or significant others are willing to participate in the outpatient detoxification treatment program.

(iii) The patient may or may not have a primary or social support system to assist with immediate recovery, but has the social skills to obtain such a support system and/or to become involved in a self-help fellowship.

(iv) The patient's living environment should be considered as a factor. An individual living in an environment where licit or illicit mood altering substances are being used may not be a candidate for this level of care.

(D) Category 4: emotional/behavioral status. The patient must meet all the criteria under clauses (i)-(vii) of this subparagraph.

(i) Patient is coherent, rational and oriented for treatment.

(ii) Mental state of the patient does not preclude the patient's ability to :

(I) comprehend and understand the materials presented; and

(II) participate in outpatient detoxification treatment process.

(iii) There is documentation that the patient expresses an interest to work toward outpatient detoxification treatment goals.

(iv) Patient has no neuropsychiatric condition that places the client at imminent risk of harming self or others (e.g. pathological intoxication, alcohol idiosyncratic intoxication, etc.),

(v) Patient has no neurological, psychological, or uncontrolled behavior that places the individual at imminent risk of harming self or others (depression, anguish, mood fluctuations, overreactions to stress, lower stress tolerance, impaired ability to concentrate, limited attention span, high level of distractibility, negative emotions, anxiety, etc.).

(vi) Patient has no documented DSM-IV axis I condition or disorder which, in combination with alcohol and/or drug use, compounds a pre-existing or concurrent emotional or behavioral disorder and presents a major risk to the patient.

(vii) The patient has no mental confusion and/or fluctuating orientation.

(E) Category 5: recent chemical substance use. The patient must meet the criteria in at least one clause out of clauses (i) and (ii) of this subparagraph.

(i) The patient's chemical substance use is excessive, and the patient has attempted to reduce or control it, but has been unable to do so (as long as chemical substances are available).

(ii) The patient is motivated to stop using alcohol/drugs, and is in need of a supportive structured treatment program to facilitate withdrawal from chemical substances.

§3.8028. Continued Stay Criteria for Outpatient Detoxification Treatment Services.

(a) A patient is considered eligible for continued stay in the outpatient detoxification treatment service when the patient meets the diagnostic criteria and the conditions under at least one paragraph out of paragraphs (1) or (2) in subsection (b) of this section.

(b) Factors for continued outpatient detoxification treatment services are listed in paragraphs (1) and (2) of this subsection.

(1) Chemical substance withdrawal complications. The patient must meet the conditions of subparagraphs (A) or (B) of this paragraph.

(A) Patient, while physically abstinent from chemical substance use, is exhibiting incomplete stable withdrawal from alcohol/drugs, as evidenced by psychological and physical cravings.

(B) Patient, while physically abstinent from chemical substance use, is exhibiting incomplete stable withdrawal from alcohol/drugs, as evidenced by significant drug levels.

(2) Psychiatric or medical complications. Documentation in the record indicates an intervening medical or psychiatric event which was serious enough to interrupt outpatient detoxification treatment, but the patient is again progressing in treatment.

§3.8029. Discharge Criteria for Outpatient Treatment Service.

The patient is no longer considered eligible for outpatient detoxification treatment service when the patient fails to meets the criteria for continued stay for outpatient detoxification treatment services, as addressed in §3.8028 of this title (relating to Continued Stay Criteria for Outpatient Detoxification Treatment Service)

§3.8030. Recommended Length of Stay for Outpatient Detoxification Treatment Service.

The recommended stay period for outpatient treatment services is from 5 to 10 days, with the understanding of the individual's dependency on high doses of sedative hypnotics or has been taking high doses of opiate medications or if individual is pregnant, may require longer than 10 days of outpatient detoxification based on the decision of the treating physician and based on the admission criteria for outpatient detoxification treatment services in §3.8027 of this title (relating to Admission Criteria for Outpatient Detoxification Treatment Services) with utilization review points, based on continued stay criteria in §3.8028 of this title (relating to Continued Stay Criteria for Outpatient Detoxification Treatment Service), and recommended treatment periods depending on the condition of the patient, accompanied by the commencement of appropriate utilization review and discharge planning at the time of admission.

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

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TRD-9817846
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 463–6327

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28 TAC §3.8006

(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.)

The Texas Department of Insurance proposes the repeal of §3.8006, concerning utilization review disputes. Repeal of this section is necessary because the department has adopted mandatory standards for the resolution of utilization review disputes. Simultaneous to this proposed repeal, proposed amendments to §3.8005 are published elsewhere in this issue of the *Texas Register*. Amendments to §3.8005 incorporate the provisions of 28 TAC Chapter 19, Subchapter R (relating to Utilization Review Agents) into this subchapter.

Karen Thrash, deputy commissioner, HMO/URA Division, has determined that during the first five years that the proposed repeal is in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the sections. There will be no measurable effect on local employment or the local economy as a result of the proposal.

Ms. Thrash 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 administration and enforcement of the repealed section will be a more certain and efficient process for resolving utilization review disputes. 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.

Comments on the proposal must be submitted within 30 days after publication of the proposed section in the *Texas Register* to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-1C, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be submitted to Karen Thrash, Deputy Commissioner, HMO/URA Group, Mail Code 103-6A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. Any requests for a public hearing should be submitted separately to the Office of the Chief Clerk.

Repeal of §3.8006 is proposed pursuant to the Insurance Code Articles 21.58A, 3.51-9, and 1.03A. Insurance Code Article 21.58A, §13 provides that the Commissioner of Insurance may adopt rules and regulations to implement the provisions of that article. Insurance Code Article 3.51-9, §2A authorizes and requires the Texas Department of Insurance to adopt rules with standards for the reasonable control of costs necessary for the treatment of chemical dependency. Insurance Code Article 1.03A provides that the Commissioner of Insurance may adopt rules and regulations to execute the duties and functions of the Texas Department of Insurance as authorized by statute.

The proposed repeal affects the following statutes: The Insurance Code, Articles 21.58A & 3.51-9.

§3.8006. Utilization Review Disputes.

This 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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Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
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For further information, please call: (512) 463–6327

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Chapter 7. Corporate and Financial Regulation

Subchapter A. Examination and Financial Analysis

28 TAC §7.83

(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.)

The Texas Department of Insurance proposes the repeal of §7.83 concerning the filing and adoption of examination reports of insurance companies. The repeal of this section is necessary to eliminate unnecessary provisions and enable the Texas Department of Insurance simultaneously to propose a new §7.83 which will replace the existing section with a simplified procedure for an insurance company to appeal an examination report. Notification of the proposed new section appears elsewhere in this issue of the *Texas Register*.

José Montemayor, Associate Commissioner-Financial Program for the Texas Department of Insurance has determined that, for the first five-year period the repeal of the section will be in effect, there will be no fiscal implications for state or local government or small business as a result of enforcing or administering the repeal, and there will be no effect on local employment or local economy.

Mr. Montemayor also has determined that, for each year of the first five years the repeal of the section will be in effect, the public benefit anticipated as a result of the repeal will be more efficient processing of examination reports of insurance companies. There will be no economic cost to persons who are required to comply with the repeal as proposed.

Comments on the proposal must be submitted in writing within 30 days after publication of the proposed repeal in the *Texas Register* to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments should be submitted to E. Joy Little, Chief Examiner, Mail Code 305-2E, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104.

The repeal of the section is proposed under the Insurance Code, Article 1.15, which authorizes the commissioner of insurance to adopt procedures for the filing and adoption of examination reports and Article 1.03A, which authorizes the commissioner of insurance to adopt rules and regulations for the conduct and execution of the duties and functions of the department as authorized by statute.

Insurance Code, Article 1.15, is affected by the section.

§7.83. Examination Reports.

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

Filed with the Office of the Secretary of State, on November 23, 1998.

TRD-9817912

Lynda H. Nesenholtz

General Counsel and Chief Clerk

Texas Department of Insurance

Earliest possible date of adoption: January 3, 1999

For further information, please call: (512) 463–6327

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The Texas Department of Insurance proposes new §7.83 concerning procedures for the filing, hearings, appeal and adoption of examination reports of insurance companies and other entities examined under the authority of Insurance Code, Article 1.15. The new section is proposed to replace the existing §7.83 which is proposed for repeal elsewhere in this issue of the *Texas Register*. The proposed new section will shorten the process for resolving disagreements between the department and an examined company concerning the content of an examination report. The existing §7.83 was adopted in response to the enactment of an amendment to Insurance Code, Article 1.15 in 1991. That amendment directed the commissioner of insurance to adopt procedures for the filing and adoption of examination reports and for hearings to be held under the article and guidelines for orders issued under the article. The existing §7.83 provides a formal procedure to be utilized by the department to resolve disagreements concerning examination reports and provides procedural safeguards to assure that the content of examination reports was complete and accurate. The procedure prior to the adoption of the existing §7.83 consisted of informal hearings or meetings, granted at the discretion of the department, with the chief examiner, associate commissioner-financial program and the commissioner of insurance. The practice of informal hearings with the chief examiner continued after the existing §7.83 was adopted. While an informal hearing before the associate commissioner-financial program is not required by the existing §7.83, the associate commissioner-financial program frequently grants such hearings if a company requests one. If a company still disagrees with any part of the examination report following consideration of the company's appeal to, and any action by, the associate commissioner-financial program, then the company can file an appeal with the commissioner of insurance. Under current departmental practice, the appeal to the commissioner is treated as a contested case under the Administrative Procedure Act (APA) (Texas Government Code §§2001.001-2001.902).

Based on the department's experience with the existing §7.83, the department proposes a new §7.83 which will streamline the appeals process while giving examined companies ample opportunity for review of an examination report to assure the report is complete and accurate. In the proposed new section a company will have a right to an informal hearing or meeting with the associate commissioner-financial program in addition to the company's right to an informal hearing with the chief examiner. Because, beginning January 1, 1999, the quality of care examinations of health maintenance organizations will be performed by examining staff under the direction of the deputy commissioner, HMO/URA division and the associate commissioner for life, health and managed care, the new rule proposes that the appeal process for quality of care exams be through the supervisory chain to the associate commissioner of life, health and managed care, including the informal hearings or meetings. The new section will end the appeal process with the appropriate associate commissioner by having the commissioner delegate to the appropriate associate commissioner the authority to adopt the examination report. This will eliminate the necessity

for the contested case hearing before the commissioner of insurance which is now conducted under the existing §7.83. The department believes a formal adjudicative hearing, like the contested case hearing provided for under the APA, while necessary for some types of decision making, is not well suited to the review of examination reports. An examination report involves the exercise of professional judgement by a qualified examiner. Informal meetings with the examiner who prepares the report, the examiner's supervisor and the supervisor of the examiner's supervisor provide substantial procedural safeguards to assure an accurate and complete examination report. The department believes a formal contested case hearing is not required by Insurance Code, Article 1.15, the state constitutional right to due course of law and the federal constitutional right to due process, nor is a formal contested case hearing necessary to protect a company's interest in an accurate and complete examination report. If the department determines to take regulatory or other enforcement action against the company as a result of information and findings in the examination report, the company is entitled to a contested case hearing under the APA.

The proposed new section continues the practice of existing §7.83 of deeming the examination reports of foreign and alien insurers by other states as adopted by the department when they are received by the department. The proposed new section formalizes the requirement that the board of directors review an examination report by requiring the board of directors of an examined company to review an adopted examination report and note that fact in the minutes of the board of directors.

José Montemayor, Associate Commissioner-Financial Program for the Texas Department of Insurance has determined that, for the first five-year period the new section is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section, and there will be no effect on local employment or local economy. The elimination of the APA contested case hearing in the proposed new rule will reduce the administrative duties of the Texas Department of Insurance and the State Office of Administrative Hearings. There have been few such hearings in the past, so the fiscal implications of the elimination of the hearing are insignificant.

Mr. Montemayor also has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the section will be more efficient processing of examination reports of insurance companies and other entities examined under the authority of Insurance Code, Article 1.15. Insurance companies and other entities that appeal an examination report under the proposed new section will benefit from the elimination of the formal adjudicative hearing now conducted under the existing §7.83 and the shorter amount of time required to resolve disagreements concerning examination reports. There are no anticipated economic costs to persons who are required to comply with the section as proposed since the proposed new section merely describes the procedure an insurance company or other entity follows to appeal an examination report and does not impose any duty or create any obligations for an insurance company or other entity subject to the section. To the extent that there are any economic costs incurred in the appeal of an examination report, those costs are a result of the examination required by Insurance Code, Article 1.15, and not the section. There will be no effect on small business.

Comments on the proposal must be submitted in writing within 30 days after publication of the proposed section in the *Texas Register* to the Office of the Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104. An additional copy of the comments should be submitted to E. Joy Little, Chief Examiner, Mail Code 305-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas, 78714-9104.

The new section is proposed under the Insurance Code, Articles 1.15, 20A.17 and 1.03A. Article 1.15 authorizes the commissioner of insurance to adopt procedures for the filing and adoption of examination reports. Article 20A.17 provides that Article 1.15 shall be construed to apply to health maintenance organizations, except to the extent that the commissioner of insurance determines that the nature of the examination of a health maintenance organization renders such clearly inappropriate. Article 1.03A authorizes the commissioner of insurance to adopt rules and regulations for the conduct and execution of the duties and functions of the department as authorized by statute.

Insurance Code, Articles 1.15 and 20A.17, are affected by the section.

§7.83. Appeal of Examination Reports.

(a) Purpose and Scope. This section implements Insurance Code, Article 1.15 which directs the commissioner of insurance to adopt procedures for filing and adoption of examination reports and for hearings to be held under Insurance Code, Article 1.15 and guidelines governing orders issued under Insurance Code, Article 1.15. The section provides an appeals process to preserve both the right of a company to a fair and impartial examination and promote respect for the independence and the importance of the on-site examiner who actually observes the conditions being reported. The purpose of an appeal process is not to replace the examination in the field, nor is it to substitute the judgment of the supervisory or management personnel for that of the examiner. It is to properly weigh the examination report, and to determine whether there is any error or bias which should be corrected. This section applies to all examinations conducted of any entity examined under the authority of Insurance Code, Article 1.15.

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

(1) Adopted examination report–An examination report that has been adopted by the department pursuant to this section.

(2) Company–Any entity examined by the department under the authority of Insurance Code, Article 1.15.

(3) Examination report–A report prepared by or on behalf of the department as a result of an examination under Insurance Code, Article 1.15.. An examination report does not include work papers related to the examination.

(4) Final examination report–An examination report that has been reviewed by the chief examiner or, for quality of care examination reports, the deputy commissioner, HMO/URA division, and transmitted to the examined company.

(5) Department–Texas Department of Insurance.

(c) Computation of Time. A day is a calendar day. In computing any period of time prescribed or allowed by these sections, by order of the agency, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run shall not be included, but the last day of the period so computed shall be included, unless it be a Saturday, Sunday, or legal holiday,

in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday.

(d) Exit Conference. At the conclusion of an examination, the examiner-in-charge shall hold an exit conference with company management on the findings and conclusions of the examination. Following the exit conference, the examiner-in-charge shall complete the examination report and file it with the chief examiner, or the deputy commissioner, HMO/URA division, as appropriate.

(e) Transmittal of Final Examination Report. After the chief examiner or, for quality of care examinations, the deputy commissioner, HMO/URA, has reviewed an examination report, the final examination report shall be transmitted to the examined company with a cover letter identifying the report as a final examination report and notifying the company that it has the right to appeal the report under subsection (f)of this section.

(f) Appeal of Examination Report.

(1) First Level Appeal. The first level of appeal is to the chief examiner or, for quality of care examinations, the deputy commissioner, HMO/URA division. Within 14 days of the receipt by the company of a final examination report, the company may file with the chief examiner or, for quality of care examinations, the deputy commissioner, HMO/URA division:

(A) a written rebuttal to the final examination report specifying the error or bias in the examination report,

(B) documentation demonstrating the error or bias, and

(C) a request for a hearing before the chief examiner or, for quality of care examinations, the deputy commissioner, HMO/URA.

(2) Consideration of First Level Appeal. The chief examiner or deputy commissioner, HMO/URA division shall consider the written rebuttal and documentation submitted by the company and any information received at a first level appeal hearing, if the examined company requests one. No later than 14 days following receipt of a written rebuttal pursuant to paragraph (1) of this subsection or the conclusion of a first level appeal hearing, the chief examiner or deputy commissioner, HMO/URA division may make changes to the report to correct error or bias. After any such changes are made, the chief examiner or deputy commissioner, HMO/URA division shall transmit a copy of the amended examination report to the company or notify the company that no changes have been made.

(3) Second Level Appeal. Second level appeals shall be made to the associate commissioner-financial program or, for quality of care examinations, to the associate commissioner-life, health, managed care (regulation and safety program) only after a company has completed an appeal under paragraph (2) of this subsection. Within 14 days of the receipt by the company of the amended examination report or notice described in paragraph (2) of this subsection, the company may file with the appropriate associate commissioner:

(A) a written rebuttal to the final examination report specifying the error or bias in the examination report,

(B) documentation demonstrating the error or bias, and

(C) a request for a hearing before the associate commissioner

(4) Consideration of Appeal by Associate Commissioner. The associate commissioner shall consider the written rebuttal and the documentation submitted by the company and any information received at a second level hearing, if the examined company requests one. No later than 14 days following receipt of a written rebuttal to the examination report under paragraph (3) of this subsection or the conclusion of a second level hearing, the associate commissioner may make changes to the examination report to correct error or bias. After any such changes are made, the associate commissioner shall cause a copy of the amended examination report to be transmitted to the company or the company shall be notified that no changes have been made.

(g) Adoption of Examination Reports. An examination report is deemed adopted if no appeal is pursued under subsection (f)(1) or (3) of this section. An examination report appealed to the associate commissioner shall be adopted by order of the appropriate associate commissioner after consideration under subsection (f)(4).

(h) Review of Report by Board of Directors. The board of directors of the company shall review the adopted examination report. The minutes of the meeting of the board of directors at which the adopted examination report is considered shall reflect that each member of the board of directors has reviewed the adopted examination report.

(i) Examination Reports of Foreign and Alien Companies.

(1) Examination reports of foreign and alien insurance companies authorized to transact business in this state which are prepared by other jurisdictions and filed with the department may be accepted by the department in lieu of examining such foreign or alien company.

(2) Examination reports of foreign or alien insurance companies authorized to transact business in this state which are filed with the department under paragraph (1) of this subsection are deemed adopted when received.

(j) Extensions of Time. Any of the deadlines in this section may be extended by mutual agreement of the company and the department's employee assigned to conduct that portion of the appeal.

(k) Other Matters.

(1) Commissioner's authority. Notwithstanding this section the commissioner may take regulatory action at any time against a company, using any information obtained during the course of any examination. Nothing contained in this section shall be construed to limit the commissioner's authority to use any final or preliminary examination report, any examiner or company workpapers or other documents, or any other information discovered or developed during the course of any examination in the furtherance of any legal or regulatory action which the commissioner of insurance may, in his or her sole discretion deem appropriate.

(2) Disclosure by commissioner. Nothing contained herein shall be construed to prohibit the commissioner from disclosing the content of an examination report, preliminary examination report or results, or any matter relating thereto, to the insurance department of any other state or country in which the examined company does business, or to law enforcement officials of this or any other state, or to an agency of the federal government at any time. The commissioner may request any recipient of such reports or matters relating thereto to agree in writing to hold it confidential in a manner consistent Insurance Code, Article 1.15.

This 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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Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
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For further information, please call: (512) 463–6327

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Chapter 11. Health Maintenance Organizations

Subchapter Y. Limited Service HMOs

28 TAC §§11.2401–11.2405

The Texas Department of Insurance proposes new Subchapter Y, Limited Service HMOs, §§11.2401-11.2405 to Chapter 11, concerning health maintenance organizations (HMOs). This proposed new subchapter is necessary to implement legislation enacted by the 75th Legislature in Senate Bill 382, amending provisions of Article 20A to provide for the creation of limited service HMOs. Limited service HMOs will allow the growing number of provider sponsored networks, as well as other entities, to provide services in an HMO format for conditions that require a broader range of treatment than is available through a single service HMO, without requiring that the HMO provide the extensive range of services required of basic service HMOs. Proposed new §11.2401 defines terms relating to limited service HMOs. Proposed new §11.2402 describes in general the requirements for description of coverages provided by limited service HMOs to enrollees and the contents of limited service HMO evidences of coverage. Proposed new §11.2403 sets forth prohibited provisions of limited service HMO evidences of coverage. Proposed new §11.2404 sets forth prohibited practices for single service HMOs. Proposed §11.2405 sets forth the minimum benefits limited service mental health care HMOs must provide.

The department will consider the adoption of new §§11.2401-11.2405 in a public hearing under Docket Number 2391, scheduled for 9:00 a.m. on January 6, 1999, in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street, Austin, Texas.

Karen Thrash, deputy commissioner, HMO/URA Division, has determined that for each year of the first five years the new sections are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the new sections. There will be no adverse effects on local employment or the local economy.

Ms. Thrash has determined that for each year of the first five years the proposed sections are in effect, the public benefits anticipated as a result of the proposed sections will be increased availability and accessibility of quality mental health care services as basic health care benefits. Except as specifically enumerated below, any costs to HMOs complying with the new sections each year of the first five years the proposed sections will be in effect are the result of the legislative changes to Articles 3.51-14, 20A.02, 20A.04, 20A.05, 20A.09, 20A.13, 20A.20, 20A.26, 20A.33, and 20A.36 of the Insurance Code, and compliance with Title XIII, Public Health Services Act (42 U.S.C. Section 300e-1). Pursuant to discussions with private industry as well as the Texas Department of Mental Health and Mental Retardation, Ms. Thrash estimates that the cost per day of providing court ordered or non-serious mental illness inpatient treatment will be $525 for mental health or chemical dependency treatment, and $800 for detox treatment. The cost per day of providing outpatient treatment for non-serious mental illness will be $75.00 for mental health services or $100.00 for chemical dependency services.

Ms. Thrash has determined that, except as enumerated specifically below, any economic costs to any HMO qualifying as a small business under Government Code §2006.001 that complies with the new sections for each year of the first five years the proposed new sections will be in effect are the result of the legislative enactment of Insurance Code Articles 3.51-14, 20A.02, 20A.04, 20A.05, 20A.09, 20A.20, and compliance with Title XIII, Public Health Services Act (42 U.S.C. Section 300e-1), and not as a result of the adoption, enforcement, or administration of the proposed new sections. With regard to the benefit standards this rule establishes, the total cost to the HMO is not dependent upon the size of the HMO, but rather is dependent upon the HMO's number of enrollees who qualify for treatment pursuant to the benefit standards. The cost per hour of labor would not vary between the smallest and largest businesses, assuming that a small business and the largest business have to provide these types of services and treatment to approximately the same percentage of their applicants. Therefore, it is the department's position that the adoption of these proposed new sections will have no adverse economic effect on small business HMOs. Regardless of the fiscal effect, the department does not believe it legal or feasible to waive the requirements of these rules for small businesses. To do so would allow differentiation of benefits between the enrollees of small business HMOs compared to those benefits provided to the enrollees of large HMOs.

Comments on the proposal must be submitted within 30 days after publication of the proposed section in the *Texas Register* to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas, 78714-9104. Additional copies of the comment are to be submitted to Karen Thrash, Deputy Commissioner, HMO/URA Group, Mail Code 107-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas, 78714-9104..

The new sections are proposed under the Insurance Code, Chapter 20A, as amended by the 75th Legislature in Senate Bill 385, and Article 1.03A. Insurance Code, Article 20A.02(b) provides that basic health care services mean health care services which the commissioner determines an enrolled population might reasonably require in order to be maintained in good health, including, at a minimum, services designated as basic health services under Section 1302, Title XIII, Public Health Service Act (42 U.S.C., Section 300e-1(1)). Insurance Code Article 20A.22(a) provides that the commissioner may promulgate rules and regulations as are necessary and proper to carry out the provisions of the HMO Act (Insurance Code, Chapter 20A). Article 20A.22(b) provides that the commissioner is specifically authorized to promulgate rules to ensure that enrollees have adequate access to health care services and to establish minimum physician/patient ratios, mileage requirements for primary and specialty care, maximum travel times, and maximum waiting times for obtaining appointments. Article 20A.04(b) provides that the commissioner may promulgate such reasonable rules and regulations as he deems necessary for the proper admin-

istration of the HMO Act to require an HMO, subsequent to receiving its certificate of authority, to submit the modifications or amendments to the operations or documents submitted upon application for a certificate of authority to the commissioner, either for his approval or for information only, prior to the effectuation of the modification or amendment, or to require the HMO to indicate the modifications to the commissioner at the time of the next site visit or examination. Article 20A.05(b) sets forth the determinations the commissioner must make prior to granting a certificate of authority to an HMO. Article 20A.37 provides that the commissioner by rule may establish minimum standards and requirements for ongoing internal quality assurance programs for HMOs, including, but not limited to, standards for assuring availability, accessibility, quality, and continuity of care. Article 1.03A provides that the Commissioner of Insurance may adopt rules necessary for the conduct and execution of the duties and functions of the Texas Department of Insurance only as authorized by statute.

Insurance Code, Articles 20A.02, 20A.04, 20A.05, and 20A.09; Title XIII, Public Health Services Act (42 U.S.C. Section 300e-1(1)); and Section 534.101, Health and Safety Code are affected by this proposal.

§11.2401. Definitions.

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

(1) Acute Day Treatment–Program-based services focused on the short-term, acute treatment of adults with serious mental illness and severely emotionally disturbed children who require multi-disciplinary treatment in order to obtain maximum control of symptoms. Services are provided in a highly structured and safe environment with constant supervision. Contacts with staff are frequent, activities and services constantly available, and developmental and social supports encouraged and facilitated. Staff receive specialized training in crisis management. Activities are goal oriented, focusing on improving peer interaction, appropriate social behavior, and stress tolerance. The initial prescribed length of stay for adults may not exceed 10 consecutive days. Extensions may be authorized by the state Medicaid agency or its designee based on evidence that the extension is medically necessary to improve an individual's current condition or to prevent hospitalization.

(2) Assessment–The clinical process of obtaining and evaluating historical, social, functional, psychiatric, developmental, or other information from the member and family seeking services to determine priority population eligibility, level of need (including urgency), and specific treatment needs (including the preferences of the individual seeking services). Additional assessment, if indicated, may be delegated to the provider.

(3) Case Management–Case management activities are provided to assist eligible members with severe and persistent mental illness and children who are severely emotionally disturbed in gaining access to medical, social, educational, and other appropriate services that will help them achieve a quality of life and community participation acceptable to each individual. The role of persons who provide case management activities is to support and assist the person in achieving goals.

(4) Crisis Hotline–A continuously available staffed telephone service providing information, support, and referrals to callers 24 hours per day, seven days per week.

(5) Crisis Respite–Those services provided for temporary, short term, periodic relief to members or their primary caregivers during a crisis. Program-based respite services involve temporary residential placement outside the usual living situation. Community-based respite services involve introducing respite staff into the usual living situation or providing a place for the individual to go during the day or other services considered to provide a respite.

(6) Crisis Services–Services including crisis hotline, crisis intervention, and crisis respite.

(7) Intensive outpatient–An organized non-residential service providing structured group and individual therapy, educational services, and life skills training which consists of at least 10 hours per week for four to 12 weeks, but less than 24 hours per day.

(8) Medication administration–A service provided to an individual and/or family member or other collateral by a licensed nurse (or other qualified and properly trained persons under the direct supervision of a physician or registered nurse as provided by state law) to ensure the direct application of a medication to the body of the individual by any means including handing the individual a single dose of medication to be taken orally.

(9) Medication monitoring–A service provided to an individual and/or family member or other collateral by a licensed nurse (or other qualified and properly trained persons under the direct supervision of a physician or registered nurse as provided by state law) for the purpose of assessment of medication actions, target symptoms, side effects and adverse effects, potential toxicity, and the impact of medication for the individual and family in accordance with the plan of care.

(10) Medication training–A service to an individual and/or family member or other collateral by a licensed nurse (or other appropriately trained professional or paraprofessional) for the purpose of teaching the knowledge and skills needed by the individual/family/collateral in the proper administration and monitoring of prescribed medication in accordance with the individual's plan of care.

(11) Medication-related services–Services including medication administration, medication monitoring, medication training, and pharmacological management.

(12) Partial hospitalization–The provision of treatment for chemical dependency for persons who require care or support or both in a hospital or chemical dependency treatment center but who do not require 24-hour supervision at least 20 hours per week up to 8 weeks.

(13) Pharmacological management– Service provided to an individual or collateral by a physician for the purpose of determining symptom remission and the medication regimen needed to initiate and/or maintain an individual's plan of care.

(14) Screening–Gathering triage information necessary to determine a need for in-depth assessment. This information is collected through interview or by phone with the consumer or collateral as part of the admission/intake process or as necessary.

(15) Treatment planning–Activities for the purpose of medically necessary, prioritized, comprehensive, collaborative, and measurable treatment that reflects the needs and wishes of the individual and builds upon the strengths of the individual. Details of the treatment plan elements may be delegated to the provider.

§11.2402. General Provisions.

(a) Each limited service HMO shall provide uniquely described services with any corresponding copayments for each covered service and benefit and shall provide a limited health care service plan

as defined under Insurance Code Article 20A.02(l). Each limited service HMO must comply with all requirements for a limited health care service plan specified in this subchapter.

(b) Each limited service HMO schedule of enrollee copayments shall specify an appropriate description of covered services and benefits and may specify recognized procedure codes or other information which is used for the purpose of maintaining a statistical reporting system, as required under §11.1606 of this title (relating to Organization of an HMO and Service Area).

(c) Each limited HMO evidence of coverage shall include a glossary of terminology defining the terms, including but not limited to, such terms used in the evidence of coverage required by §11.501 of this title (relating to Evidence of Coverage). Such glossary shall be included in the information to prospective and current group contract holders and enrollees, as required under Insurance Code Article 20A.11.

(d) In the event of a conflict between the provisions of this subchapter and other provisions of Chapter 11 of this title (relating to Health Maintenance Organizations), this subchapter prevails with regard to limited service HMOs. It is not considered a conflict if a topic that is not addressed in this subchapter appears elsewhere in Chapter 11 of this title.

§11.2403. Limitations and Exclusions.

Limited service HMOs are prohibited from:

(1) Excluding services required for pre-existing conditions which would otherwise be covered under the plan;

(2) Establishing waiting periods for coverage of pre-existing conditions; and

(3) Imposing a lifetime coverage maximum for any covered service or benefit.

§11.2404. Prohibited Practices.

(a) A limited service HMO shall not limit or otherwise interfere with an enrollee's right to terminate his or her membership in the plan before the end of the enrollment year.

(b) A limited service HMO shall not limit coverage for emergency services under a limited health care service plan.

(c) A limited service HMO shall not charge an emergency fee in addition to a copayment for emergency services.

(d) A limited service HMO shall not count medication related services against the outpatient visit total for either serious or basic mental illness.

§11.2405. Minimum Standards, Mental Health Care Services and Benefits.

(a) Each limited service HMO evidence of coverage which uses any mental health procedure codes must use such codes as specified in the current version of CDT, as defined in §11.2200 of this title (relating to Definitions).

(b) Each limited service HMO evidence of coverage providing coverage for mental health care services and benefits shall cover court ordered mental health care treatment and may, if clearly disclosed, require the enrollee to have such treatment completed by a participating provider in the Health Maintenance Organization Delivery Network, as defined under Insurance Code Article 20A.02(w), or as otherwise arranged by the limited service HMO.

(c) Each limited service HMO evidence of coverage providing coverage for mental health care services and benefits shall provide primary mental health care services and benefits, including, but not limited to:

(1) For treatment of serious mental illness, up to 45 inpatient days per year, up to 60 outpatient visits per year, which include assessment/screening, treatment planning, and crisis services.

(2) For treatment of non-serious mental illness, up to 30 inpatient days per year, up to 30 outpatient visits per year, which include assessment/screening, treatment planning, and crisis services.

(3) Any other mental health services necessary and appropriate to treat mental illness/chemical dependency or required by the Insurance Code, Health and Safety Code, and other applicable laws and regulations of this State.

(d) Each limited service HMO evidence of coverage providing coverage for mental care services and benefits shall demonstrate the capacity to provide, and may provide, secondary intensive rehabilitative and community support services for mental illness/chemical dependency, including, but not limited to, case management, partial hospitalization, residential, acute day treatment, intensive outpatient, ACT teams, and habilitative/rehabilitative services for pervasive developmental disorders .

This 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 November 23, 1998.

TRD-9817844
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 463–6327

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Chapter 21. Trade Practices

Subchapter R. Diabetes

28 TAC §§21.2601–21.2607

The Texas Department of Insurance proposes new sections to Chapter 21, by adding new Subchapter R, §§21.2601-21.2607. These proposed new sections are necessary to implement legislation enacted by the 75th Legislature in Senate Bills 162 and 163, amending Chapter 21, Subchapter E by adding Art. 21.53D, Guidelines for Diabetes Care, which requires the Commissioner by rule to adopt minimum standards for benefits provided to enrollees with diabetes in health benefit plans, and Art 21.53G, Coverage for Supplies and Services Associated with Treatment of Diabetes, which requires coverage under health benefit plans for equipment and supplies and self-management training associated with the treatment of diabetes.

Proposed new §21.2601 defines terms used in this subchapter. Proposed new §21.2602 describes in general the requirements for description of coverages provided by Articles 21.53D and 21.53G. Proposed new §21.2603 sets forth how benefits required under this subchapter are to be made, subject to deductible, copayment, or coinsurance requirements. Proposed new §21.2604 sets forth minimum standards for benefits, services and care to be provided to insured individuals with diabetes. Proposed §21.2605 sets forth the type of supplies and

equipment to be covered as required benefits as well as the circumstances under which additional equipment and supplies will become required benefits as improvements occur in the treatment, monitoring equipment and supplies associated with diabetes. Proposed §21.2606 sets forth the standards for self-management training to be covered or provided and sets forth the requirements for health care practitioners who provide the training that is covered or provided. Proposed §21.2607 sets forth a phase-in period until January 1, 2001 to allow provision or coverage for self-management training obtained from certain providers by individuals who live in areas that are currently underserved by providers who meet the requirement to provide self-management training set forth in proposed §21.2606.

The department will consider the adoption of the sections in a public hearing under Docket Number 2395 scheduled for 9:00 a.m. on January 5, 1999, in Room 100 of the William P. Hobby, Jr. State Office Building, 333 Guadalupe Street, Austin, Texas.

Rose Ann Reeser, Senior Associate Commissioner of Regulation and Safety, has determined that for each year of the first five years the proposed new sections are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed new sections. There will be no adverse effects on local employment or the local economy.

Ms. Reeser has determined that for each year of the first five years the proposed new sections are in effect, the public benefits anticipated as a result of the proposed sections will be: if the cost of preventive care associated with diabetes is covered, the amount of complications, including blindness, kidney failure, amputations, stroke and death, and hospital admissions that occur when preventive care is not available, will be reduced. By increasing the availability of preventive care to individuals with diabetes, the overall costs of disabling and devastating complications of the disease, which is currently ranked sixth among the top ten causes of death in Texas, will decrease.

Ms. Reeser has determined that the economic costs to an insurer complying with the new sections for each year of the first five years the proposed sections will be in effect, other than the costs listed herein, are the result of the legislative enactment of Insurance Code Articles 21.53D and 21.53G, and not the result of the adoption, enforcement, or administration of the proposed new sections.

The intent of Senate Bill 163 is to ensure training, supplies and equipment necessary for diabetic self-management and preventive care. The development of minimum standards, as required by Senate Bill 162, is intended to improve diabetes care. This legislation represents a departure from the way benefits are usually covered by health benefit plans. For example, the insured's physician or practitioner, rather than predetermined plan limits, will determine the number of lancets, test strips, syringes, and units of insulin needed each month by the individual insured. Since these amounts will be determined by the provider based on the individual needs of each insured, there can be no average cost per insured because every insured is different. The department can estimate the costs of each type of benefit, but cannot estimate cost of supplies or equipment per insured. Therefore, for purposes of these proposed rules, costs are estimated per required benefit, as an analysis cannot be made on an average or annual cost per individual insured basis because there is no such thing as an average diabetic. Section 3 of Article 21.53G requires:

A health benefit plan that provides benefits for the treatment of diabetes must provide coverage to each qualified insured for (1) diabetes equipment; (2) diabetes supplies; and (3) diabetes self-management training. The term "diabetes supplies" is defined in the statute at Section 1(2) to mean: Test strips for glucose monitors; visual reading and urine test strips; lancets and lancet devices; insulin and insulin analogs; injection aids; syringes; prescriptive and non-prescriptive oral agents for controlling blood sugar levels; and glucagon emergency kits.

The term "diabetes equipment" is defined at Section 1(1) as: blood glucose monitors, including monitors designed to be used by blind individuals; insulin pumps and associated appurtenances; insulin infusion devices; and podiatric appliances for prevention of complications associated with diabetes.

Proposed §21.2605(a) (Diabetes Equipment and Supplies) tracks the above referenced statutory provisions with the exception of paragraph (8), biohazard disposal containers, and paragraph (12) which requires podiatric appliances, including up to two pairs of therapeutic footwear per year, for the prevention of complications associated with diabetes. Therefore, of the supplies and equipment required as benefits by §21.2605(a), only the costs in paragraphs (8) and (12) are costs added by the rules. The maximum estimated retail costs for these items are as follows: biohazard disposal containers - $12.00 per unit; and two pairs of therapeutic shoes-$1070. However, HMOs should be able to contract with suppliers to reduce costs below these levels.

Paragraph (10) of proposed §21.2605(a) requires coverage for repairs and necessary maintenance of insulin pumps not otherwise provided for under a manufacturer's warranty or purchase agreement, and rental fees for pumps during the repair and necessary maintenance of insulin pumps, neither of which should exceed the purchase price of a similar replacement pump. Therefore this section does not add any costs beyond those already required for the cost of furnishing a new pump, a statutorily required cost.

Diabetes self-management training is defined at Section 4 of Article 21.53G of the Insurance Code. Article 21.53G Section 3 requires insurers to provide diabetes self-management training as a benefit. The proposed rules require nothing in excess of the cost of the training that was not required by the enactment of Article 21.53G and will therefore engender no additional costs.

The minimum standards which the commissioner is required to adopt by rule under Section 3 of Article 21.53D are based almost entirely on minimum standards which have already been implemented by the Texas Diabetes Council. The Texas Diabetes Council, in turn, has based its minimum standards on the minimum standards promulgated by the American Diabetes Association, which reflect the standard of care adopted by most practitioners with training and knowledge about the treatment of diabetes.

On the HMO side, the minimum standards set forth in §21.2604(a) and (b) have been voluntarily adopted by many HMOs for providing services to individuals with diabetes. The standards do require coverage for an annual referral to a retinal camera examination to be performed by an ophthalmologist or therapeutic optometrist for insureds under the age of eighteen. This is a service that reflects a departure from what HMOs are

currently providing. These examinations are estimated to cost $276 per visit.

For insurers that are not HMOs, the minimum standards in §21.2604(d) reflect prevailing national standards for the treatment of diabetes. Therefore, most services represented by these standards would be deemed medically necessary and should constitute covered benefits. The minimum standards for insurers that are not HMOs which add new costs include: required immunizations estimated to cost $41.00 each, and costs for equipment and supplies for which estimated costs are set forth, above in the discussion relating to proposed §21.2605.

Both small businesses and the largest businesses affected by these sections would incur the same cost per hour of labor. Therefore, it is the department's position that the adoption of these proposed sections will have no adverse economic effect on small businesses. Regardless of the fiscal effect, the requirements of this rule are mandated by the underlying state statutes, and considering the statute's purposes, it is neither legal nor feasible to waive or modify the requirement of these sections for small businesses, as doing so would result in a disparate effect on persons needing diabetes treatment.

Comments on the proposal must be submitted within 30 days after publication of the proposed section in the *Texas Register* to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas, 78714-9104. Additional copies of the comment are to be submitted to Linda Von Quintus, Deputy Commissioner, Regulation and Safety Division, Mail Code 107-2A, Texas Department of Insurance, P. O. Box 149104, Austin, Texas, 78714-9104.

The new sections are proposed under the Insurance Code, Chapter 21, Subchapter E, as amended by the 75th Legislature in Senate Bills 162 and 163, and Article 1.03A. Insurance Code Article 21.53D Section 3 provides that the commissioner shall by rules adopt minimum standards for benefits to enrollees with diabetes. Article 21.53G Section 7 provides that the commissioner may promulgate rules and regulations as are necessary and proper to carry out the provisions of Article 21.53G. Article 1.03A provides that the Commissioner of Insurance may adopt rules necessary for the conduct and execution of the duties and functions of the Texas Department of Insurance only as authorized by a statute.

The following chapters are affected by this proposal: Insurance Code, Chapters 3, 10, 20, 20A, 21, 22, and 26 are affected by this proposal.

§21.2601. Definitions.

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

(1) Basic benefit–Health care service or coverage which is included in the evidence of coverage, policy, or certificate, without additional premium.

(2) Caretaker–A family member or significant other responsible for ensuring that an insured not able to manage his or her illness (due to age or infirmity) is properly managed, including overseeing diet, administration of medications, and use of equipment and supplies.

(3) Diabetes–Diabetes mellitus. A chronic disorder of glucose metabolism that can be characterized by an elevated blood glucose level. The terms diabetes and diabetes mellitus are synonymous.

(4) Diabetes equipment–The term "diabetes equipment" includes, but is not limited to, items defined in Insurance Code Article 21.53 G Section 1(1) and Section 5.

(5) Diabetes supplies–The term "diabetes supplies" includes, but is not limited to, items defined in Insurance Code Article 21.53 G Section 1(2) and Section 5.

(6) Diabetes self-management training –Instruction enabling an insured and/or his or her caretaker to understand the care and management of diabetes, including nutritional counseling and proper use of diabetes equipment and supplies.

(7) Health benefit plan–A health benefit plan, for purposes of this subchapter, means:

(A) a plan that provides benefits for medical or surgical expenses incurred as a result of a health condition, accident, or sickness, including:

(i) an individual, group, blanket, or franchise insurance policy or insurance agreement, a group hospital service contract, or an individual or group evidence of coverage that is offered by:

(I) an insurance company;

(II) a group hospital service corporation operating under Chapter 20 of the Texas Insurance Code;

(III) a fraternal benefit society operating under Chapter 10 of the Texas Insurance Code;

(IV) a stipulated premium insurance company operating under Chapter 22 of the Insurance Code;

(V) a reciprocal exchange operating under Chapter 19 of the Texas Insurance Code; or

(VI) a health maintenance organization (HMO) operating under the Texas Health Maintenance Organization Act (Chapter 20A, Texas Insurance Code);

(ii) to the extent permitted by the Employee Retirement Income Security Act of 1974 (29 USC Section 1002), a health benefit plan that is offered by a multiple employer welfare arrangement as defined by Section 3, Employee Retirement Income Security Act of 1974 (29 USC Section 1002) that holds a certificate of authority under Insurance Code Article 3.95-2; or

(iii) notwithstanding Section 172.014, Local Government Code, or any other law, health and accident coverage provided by a risk pool created under Chapter 172, Local Government Code.

(B) A plan offered by an approved nonprofit health corporation that is certified under Section 5.01(a), Medical Practice Act, and that holds a certificate of authority issued by the commissioner under Insurance Code Article 21.52F.

(C) A health benefit plan is not:

(i) a plan that provides coverage:

(I) only for a specified disease or other limited benefit;

(II) only for accidental death or dismemberment;

(III) for wages or payments in lieu of wages for a period during which an employee is absent from work because of sickness or injury;

(IV) as a supplement to liability insurance;

(V) for credit insurance;

(VI) dental or vision care only; or

(VII) hospital confinement indemnity coverage only.

(ii) a small employer plan written under Chapter 26 of the Insurance Code;

(iii) a Medicare supplemental policy as defined by Section 1882(g)(1), Social Security Act (42 USC Section 1395 ss);

(iv) workers' compensation insurance coverage;

(v) medical payment insurance issued as part of a motor vehicle insurance policy; or

(vi) a long-term care policy, including a nursing home fixed indemnity policy, unless the commissioner determines that the policy provides benefit coverage so comprehensive that the policy is a health benefit plan as described by subparagraph (A) of this paragraph.

(8) Insured–A person enrolled in a health benefit plan who has been diagnosed with:

(A) insulin dependent or noninsulin dependent diabetes;

(B) elevated blood glucose levels induced by pregnancy; or another medical condition associated with elevated glucose levels.

(9) Physician–A Doctor of Medicine or a Doctor of Osteopathy licensed by the Texas State Board of Medical Examiners.

(10) Practitioner–An Advanced Practice Nurse, Doctor of Dentistry, Physician Assistant, Doctor of Podiatry, or other licensed person with prescriptive authority.

§21.2602. Required Benefits for Persons with Diabetes.

(a) Health benefit plans, notwithstanding Section 172.014, Local Government Code, or any other law, health and accident coverage provided by a risk pool created under Chapter 172, Local Government Code, delivered, issued for delivery, or renewed on or after January 1, 1998, that provide benefits for the treatment of diabetes and associated conditions must provide coverage to an insured for diabetes equipment, diabetes supplies, and diabetes self-management training programs, in accordance with §21.2603 of this title (relating to Out of Pocket Expenses), §21.2605 of this title (relating to Diabetes Equipment and Supplies) and §21.2606 of this title (relating to Diabetes Self-Management Training).

(b) Health benefit plans (other than reciprocal exchanges operating under Chapter 19 of the Texas Insurance Code) delivered, issued for delivery, or renewed on or after January 1, 1999, must provide coverage to each insured in accordance with §21.2603 of this title and §21.2604 of this title (relating to Minimum Standards for Benefits for Persons with Diabetes).

(c) Health benefits plans delivered, issued for delivery, or renewed on or after January 1, 1998, by an entity other than an HMO, which provide coverage limited to hospitalization expenses, shall provide coverage to each insured for diabetes equipment, diabetes supplies, and diabetes self-management training programs, in accordance with §21.2603 of this title (relating to Out of Pocket Expenses), §21.2605 of this title (relating to Diabetes Equipment and Supplies), and §21.2606 of this title (relating to Diabetes Self-Management Training), during hospitalization of the insured.

§21.2603. Out of Pocket Expenses.

(a) The basic benefits required under this subchapter shall not be subject to a deductible, coinsurance, or copayment requirement that exceeds the applicable deductible, coinsurance, or copayment applicable to other analogous chronic medical conditions or other similar benefits provided under the plan.

(b) The basic benefits required by this subchapter shall not be subject to dollar limitations other than the health benefit plan's lifetime maximum benefits.

(c) No more than one copayment shall be charged for a thirty-day supply of any item of diabetes supplies listed in §21.2605 of this title (relating to Diabetes Equipment and Supplies). The amount of supplies that constitutes a thirty-day supply for an insured is the amount prescribed as a thirty-day supply by the physician or practitioner of the insured.

§21.2604. Minimum Standards for Benefits for Persons with Diabetes, Requirement for Periodic Assessment of Physician and Organizational Compliance.

(a) Health benefit plans provided by HMOs shall provide coverage for the services in paragraphs (1) through (7) of this subsection and shall contract with providers that agree to comply with the minimum practice standards outlined in subsection (b) of this section. Services to be covered include:

(1) office visits and consultations with physicians and practitioners for monitoring and treatment of diabetes, including office visits and consultations with appropriate specialists;

(2) immunizations required by Insurance Code Article 21.53F, Coverage for Childhood Immunizations;

(3) immunizations for influenza and pneumococcus;

(4) inpatient services, and physician and practitioner services when the insured is confined to:

(A) a hospital;

(B) a rehabilitation facility; or

(C) a skilled nursing facility;

(5) inpatient and outpatient laboratory and diagnostic imaging services;

(6) diabetes equipment and supplies in accordance with §21.2605 of this title (relating to Diabetes Equipment and Supplies), except notwithstanding §172.014, Local Government Code, or any other law, this subsection does not apply to health benefits provided by a risk pool created under Chapter 172, Local Government Code; and

(7) diabetes self-management training, in accordance with §21.2606 of this title (relating to Diabetes Self-Management Training) or §21.2607 of this title (relating to Accessibility and Availability of Diabetes Self-Management Training Prior to January 1, 2001), except, notwithstanding §172.014, Local Government Code, or any other law, this subsection does not apply to health benefits provided by a risk pool created under Chapter 172, Local Government Code;

(b) HMOs shall contract with providers who, at a minimum, provide care that complies with subsection (a) that includes:

(1) for all insureds:

(A) at initial visit by the insured:

(i) a complete history and physical including an assessment of immunization status;

(ii) development of a management plan addressing all of the following that are applicable to the insured:

(I) nutrition and weight evaluation;

(II) medications;

(III) an exercise regimen;

(IV) glucose and lipid control;

(V) high risk behaviors;

(VI) frequency of hypoglycemia and hyperglycemia;

(VII) compliance with applicable aspects of self care;

(VIII) assessment of complications;

(IX) follow up on any referrals;

(X) psychological and psychosocial adjustment;

(XI) general knowledge of diabetes; and

(XII) self-management skills;

(iii) diabetes self-management training given or referred by the physician or practitioner as required by §21.2606 of this title (relating to Diabetes Self-Management Training) and §21.2607 of this title (relating to Accessibility and Availability of Diabetes Self-Management Training prior to January 1, 2001);

(iv) referral for a dilated funduscopic eye exam to be performed by an ophthalmologist or therapeutic optometrist for an insured with Type 2 Diabetes.

(B) at every visit the following:

(i) weight and blood pressure taken,

(ii) foot exam performed without shoes or socks, and

(iii) dental inspection.

(C) every six months the following:

(i) review of the management plan, and

(ii) glycosylated hemoglobin test.

(D) annually the following:

(i) lipid profile,

(ii) microalbuminuria;

(iii) influenza immunization;

(iv) referral for a dilated funduscopic eye exam performed by an ophthalmologist or therapeutic optometrist; and

(v) for insureds under eighteen years of age, a referral for a retinal camera examination to be performed by an ophthalmologist or therapeutic optometrist.

(2) For treatment of an insured sixty-five years of age and over or an insured with complications affecting two or more body systems:

(A) minimum practice standards as set forth in paragraph (1); and

(B) specific inquiries into and consideration of treatment goals for comorbidity and polypharmacy.

(3) For pregnant insureds with pre-existing or gestational diabetes:

(A) minimum practice standards as set forth in paragraph (1); and

(B) enhanced fetal monitoring based on the standards promulgation by the American College of Gynecologists and Obstetricians.

(4) For insureds with Type 1 Diabetes:

(A) minimum practice standards as set forth in paragraph (1);

(B) an initial diagnosis, consideration of hospitalization due to the insured's:

(i) age;

(ii) physical condition;

(iii) psychosocial circumstances; or

(iv) lack of access to outpatient diabetes self-management training as required in §21.2606 of this title (relating to Diabetes Self-Management Training) or §21.2607 of this title (relating to Accessibility and Availability of Diabetes Self-Management Training Prior to January 1, 2001); and

(C) on-going management which include quarterly office visits at which evaluation includes:

(i) weight;

(ii) blood pressure;

(iii) ophthalmologic exam;

(iv) thyroid palpation;

(v) cardiac exam;

(vi) examination of pulses;

(vii) foot exam;

(viii) skin exam;

(ix) neurological exam;

(x) dental inspection;

(xi) results of home glucose self monitoring;

(xii) frequency and severity of hypoglycemia or hyperglycemia;

(xiii) medical nutrition plan;

(xiv) exercise regimen;

(xv) adherence problems;

(xvi) psychosocial adjustment;

(xvii) reevaluation of short and long term self-management goals;

(xviii) anticipatory guidance related to issues of Type 1 Diabetes;

(xix) glycosylated hemoglobin;

(xx) counseling for high risk behaviors; and

(xxi) for insureds under eighteen years of age, growth assessment.

(c) Health plans provided by HMOs shall periodically assess physician and organizational compliance with the minimum practice standards contained in subsection (b) of this section.

(d) Health benefit plans provided by entities other than HMOs shall provide coverage at a minimum for:

(1) office visits and consultations with physicians and practitioners for monitoring and treatment of diabetes, including office visits and consultations with appropriate specialists;

(2) immunizations required by Insurance Code Article 21.53F, Coverage for Childhood Immunizations;

(3) immunizations for influenza and pneumococcus;

(4) inpatient services, physician, and practitioner services when an insured is confined to:

(A) a hospital;

(B) a rehabilitation facility; or

(C) a skilled nursing facility;

(5) inpatient and outpatient laboratory and diagnostic imaging services;

(6) diabetes equipment and supplies in accordance with §21.2605 of this title (relating to Diabetes Equipment and Supplies), except notwithstanding §172.014, Local Government Code, or any other law, this subsection does not apply to health benefits provided by a risk pool created under Chapter 172, Local Government Code; and

(7) diabetes self-management training, in accordance with §21.2606 of this title (relating to Diabetes Self-Management Training) or §21.2607 of this title (relating to Accessibility and Availability of Diabetes Self-Management Training Prior to January 1, 2001), except, notwithstanding §172.014, Local Government Code, or any other law, this subsection does not apply to health benefits provided by a risk pool created under Chapter 172, Local Government Code.

§21.2605. Diabetes Equipment and Supplies.

(a) A health benefit plan shall provide coverage for equipment and supplies for the treatment of diabetes for which a physician or practitioner has written an order, including:

(1) blood glucose monitors, including those designed to be used by or adapted for the legally blind;

(2) test strips specified for use with a corresponding glucose monitor;

(3) lancets and lancet devices;

(4) visual reading strips and urine testing strips and tablets which test for glucose, ketones and protein;

(5) insulin and insulin analog preparations;

(6) injection aids, including devices used to assist with insulin injection and needleless systems;

(7) insulin syringes;

(8) biohazard disposal containers;

(9) insulin pumps, both external and implantable, and associated appurtenances, which include:

(A) insulin infusion devices;

(B) batteries;

(C) skin preparation items;

(D) adhesive supplies;

(E) infusion sets;

(F) insulin cartridges;

(G) durable and disposable devices to assist in the injection of insulin; and

(H) other required disposable supplies;

(10) repairs and necessary maintenance of insulin pumps not otherwise provided for under a manufacturer's warranty or purchase agreement, and rental fees for pumps during the repair and necessary maintenance of insulin pumps, neither of which shall exceed the purchase price of a similar replacement pump;

(11) prescription medications and medications available without a prescription for controlling the blood sugar level;

(12) podiatric appliances, including up to two pairs of therapeutic footwear per year, for the prevention of complications associated with diabetes; and

(13) glucagon emergency kits.

(b) As new or improved treatment and monitoring equipment or supplies become available and are approved by the United States Food and Drug Administration, such equipment or supplies shall be covered if determined to be medically necessary and appropriate by a treating physician or other practitioner through a written order.

(c) All supplies, including medications, and equipment for the control of diabetes shall be dispensed as written, including brand name products, unless substitution is approved by the physician or practitioner who issues the written order for the supplies or equipment.

§21.2606. Diabetes Self-Management Training.

(a) A health benefit plan shall provide diabetes self-management training or coverage for diabetes self-management training to each insured from:

(1) a Certified Diabetes Educator certified by the National Certification Board for Diabetes Educators (CDE);

(2) a multidisciplinary team under the direction of a CDE, consisting of at least a dietitian and a nurse educator; other team members may include a pharmacist and a social worker. Other than a social worker, all team members must have recent didactic and experiential preparation in diabetes clinical and educational issues; or,

(3) a diabetes self-management training program recognized by the American Diabetes Association.

(b) All individuals providing self-management training pursuant to subsection (a) of this section must be licensed, registered, or certified in Texas to provide appropriate health care services.

(c) Self-management training shall include the development of an individualized management plan which is created and regularly updated for and in collaboration with the insured and which meets the requirements of the minimum standards for benefits in accordance with §21.2604 of this title (relating to Minimum Standards for Benefits for Persons with Diabetes).

(d) Medical nutritional counseling and instructions on the proper use of diabetes equipment and supplies shall be provided or covered as part of the training.

(e) Diabetes self-management training sessions shall be provided, or coverage for diabetes self-management training sessions shall be provided, upon the following occurrences relating to an insured:

(1) the initial diagnosis of diabetes;

(2) a significant change in the symptoms or condition of the insured that requires changes in the insured's self-management regime, as diagnosed by a physician or practitioner;

(3) the written order of a physician or practitioner of periodic or episodic continuing education as warranted by the development or new techniques and treatment for diabetes;

(4) if the need for a caretaker for the insured necessitates diabetes management training for the caretaker, provided that any training involving the administration of medications must comply with the applicable delegation rules from the appropriate licensing agency; or

(5) not less than twice per plan year, if the need for a change in caretakers for the insured necessitates diabetes management training for the new caretaker provided that any training involving the administration of medications must comply with the applicable delegation rules from the appropriate licensing agency.

(f) An HMO shall provide oversight of its diabetes self-management training program on an ongoing basis to ensure compliance with this section.

(g) Health benefit plans provided by entities other than HMOs shall disclose in the plan how to access providers or benefits described in subsection (a) and §21.2607 of this title (relating to Accessibility and Availability of Diabetes Self-Management Training Prior to January 1, 2001).

§21.2607. Accessibility and Availability of Diabetes Self-Management Training Prior to January 1, 2001.

(a) Prior to January 1, 2001, an insured may obtain diabetes self-management training from a source other than the three set forth in §21.2606 of this title (relating to Diabetes Self-Management Training) under the circumstances set forth in subsections (b), (c) or (d) of this section. Until that date the components of the self-management training may be obtained from the following individuals, provided that the individual is licensed, certified or registered in Texas and has recent didactic and experiential preparation in diabetes clinical and educational issues:

(1) a dietician shall provide any nutritional counseling component;

(2) a pharmacist shall provide any pharmaceutical component; and

(3) a physician, a physician assistant, a registered nurse, or an advanced practice nurse shall provide all other components of the training.

(b) If the health benefit plan is provided by an HMO and the sources for the training set forth in §21.2606 of this title (relating to Diabetes Self-Management Training) are not available with 75 miles of the site of eligibility of the insured because the sources are not located within that distance, the HMO is unable to obtain contracts after good faith attempts, or sources meeting the HMO's minimum quality of care and credentialing requirements are not located within that distance, the HMO shall submit a plan to the department for approval, at least 30 days before implementation. For purposes of this subsection, "site of eligibility" refers to the address of the location that renders the insured eligible for coverage. The plan shall include the following:

(1) the geographic area identified by county, city, ZIP code, mileage, or other identifying data in which the diabetes self-management sources set forth in §21.2606 of this title (relating to Diabetes Self-Management Training) are not available along with the reason the sources cannot be made available;

(2) a map, with key and scale, which identifies the areas in which the diabetes self-management sources set forth in §21.2606 of this title (relating to Diabetes Self-Management Training) are not available;

(3) the HMO's general plan for making diabetes self-management training available to insureds in each identified geographic area by the individuals listed in subsection (a) of this section;

(4) the names and addresses of the individual participating providers who are providing the diabetes self-management training through the HMO delivery network to insureds covered under the HMO's general plan required under paragraph (3) of this subsection;

(5) the names and addresses of other individuals providing diabetes self-management training to be made available in the geographic area in addition to those providers participating in the HMO delivery network listed under paragraph (4) of this subsection; and,

(6) any other information which is necessary to assess the HMO's plan.

(c) If the health benefit plan is provided by an insurer through an insurance policy with preferred provider benefits and the insurer is unable to contract with the diabetes self-management training providers set forth in §21.2606 of this title (relating to Diabetes Self-Management Training), as preferred providers within the service area, the insurer may contract with the individuals set forth in subsection (a) of this section as preferred providers of diabetes self-management training. Nothing in this subsection alters the requirements of Insurance Code Article 3.70-3C, Sec.8.

(d) If the health plan is provided by an insurer through an insurance policy and the sources for diabetes self-management training set forth in §21.2606 of this title (relating to Diabetes Self-Management Training) are not available in the geographic area in which the insured normally receives services, the insured may receive all of the training components from the individuals set forth in subsection (a) of this section.

(e) A health benefit plan provided by an insurer under subsections (c) or (d) of this section shall reimburse an insured for all training performed by individuals listed in subsections (a)(1), (a)(2), and (a)(3) of this section.

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

Filed with the Office of the Secretary of State, on November 23, 1998.

TRD-9817895
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 3, 1999

For further information, please call: (512) 463–6327

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Chapter 26. Small Employer Health Insurance Regulations

The Texas Department of Insurance proposes amendments to Chapter 26 by amending §26.14, concerning coverage for minimum inpatient stay in a health care facility and postdelivery care following the birth of a child and amending §26.305, concerning coverage of certain tests for detection of prostate cancer, group coverage of certain students, and access to certain obstetrical or gynecological care. The amended sections are necessary to implement legislation enacted by the 75th Legislature and the federal government.

During the 75th Legislative Session, various coverages were added to the benefits that must be provided by certain health benefit plans in House Bill 864, Senate Bill 258, House Bill 102 and Senate Bill 54. If a health benefit plan conditions dependent coverage for a child 21 years of age or older on the child being a full-time student at an educational institution, Insurance Code Article 21.24-2, §3 (relating to group coverage of certain students) (House Bill 864) requires the plan to cover an entire academic term during which the child begins as a full-time student and remains enrolled. If a health benefit plan includes diagnostic medical procedures, Insurance Code Article 21.53F §3 (relating to coverage of certain tests for detection of prostate cancer) (Senate Bill 258) requires the plan to provide a diagnostic test for detection of prostate cancer. If a health benefit plan includes coverage for maternity or childbirth, Article 21.53F §4 (relating to coverage for minimum inpatient stay in a health care facility and postdelivery care following the birth of a child) (House Bill 102) requires minimum inpatient or postdelivery care following childbirth. Insurance Code Article 21.53D (relating to access to certain obstetrical or gynecological care) (Senate Bill 54) requires certain health benefit plans to provide a female enrollee the right to select an OB/GYN in addition to a primary care physician to provide health care services within the scope of the professional specialty services.

Proposed §26.14(j) provides that a small employer health benefit plan containing maternity benefits must include coverage for minimum inpatient stay in a health care facility and postdelivery care in accordance with Insurance Code Article 21.53F §4. The mandated benefit requiring minimum in-patient care for maternity and childbirth coverage includes small employer plans in the definition of health benefit plan because the minimum inpatient maternity stay is required by federal law pursuant to the Newborns' and Mothers' Health Protection Act of 1996 (NMHPA), Pub. L. No. 104-204 Tit. VI §§601-606. In order to maintain regulatory authority over health benefit plans in the State of Texas, the commissioner is required to implement the provisions of the Health Insurance Portability and Accessibility Act (HIPAA), which was amended to include the NMHPA.

Proposed §26.305(l), (m) and (n) provide that large employer health benefit plans must include benefits for prostate cancer examinations, certain students, and obstetrical or gynecological care. Insurance Code Articles 21.24-2 §2(c)(2) (House Bill 864), 21.53D §2(c)(2) (Senate Bill 54) and 21.53F §2(b)(2) (Senate Bill 258) exclude from the definition of health benefit plan those plans that are written under Chapter 26 of the Insurance Code. During the same legislative session in which House Bill 864, Senate Bill 54 and Senate Bill 258 were passed, however, Chapter 26 was amended by House Bill 1212 to add large employer plans, whereas previously it had contained only small employer plans. A determination has been made that by excluding health benefit plans under Chapter 26 from Insurance Code Articles 21.24-2 §2(c)(2) (House Bill 864), 21.53D §2(c)(2) (Senate Bill 54) and 21.53F §2(b)(2) (Senate Bill 258), the Legislature intended only to exclude small employer plans from these mandated benefits. The Legislature obviously did not intend to mandate these coverages only to exclude most plans from compliance but intended to exempt only small employer plans from coverages of certain tests for detection of prostate cancer, group coverage of certain students and access to certain obstetrical or gynecological care.

Rose Ann Reeser, Senior Associate Commissioner of regulation and safety, has determined that for each year the proposed sections are in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the proposed new sections. There will be no adverse effects on local employment or the local economy.

Ms. Reeser has determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of the proposed sections will be that enrollees of small employer health benefit plans will receive benefits mandated by the Legislature for inpatient care for maternity and childbirth, and enrollees of large employer health benefit plans will receive benefits for diagnostic examinations for detection of prostate cancer, additional coverage for certain students, and access to certain obstetrical or gynecological care by female enrollees.

Ms. Reeser estimates that the costs to comply with these proposed sections result from the legislative enactment of the Insurance Code Articles 21.53F (relating to coverage for minimum inpatient stay in health care facility and postdelivery care following birth of child) (House Bill 102), 21.24-2 (relating to group coverage of certain students) (House Bill 864), 21.53F (relating to coverage of certain tests for detection of prostate cancer) (Senate Bill 258), and 21.53D (relating to access to certain obstetrical or gynecological care) (Senate Bill 54).

Ms. Reeser has determined that any effect of these sections on small businesses results entirely from the legislative enactment of the Insurance Code Articles 21.53F (House Bill 102), 21.24-2 (House Bill 864), 21.53F (Senate Bill 258), and 21.53D (Senate Bill 54). Assuming that a small business and the largest businesses administered health benefit plans with approximately the same number of enrollees to whom these benefits must be provided, the cost of hour per labor would not vary between small and the largest businesses. The benefits required by these sections are mandated by the underlying statutes, and cannot be waived for small businesses.

Comments on the proposal must be submitted within 30 days after publication of the proposed sections in the *Texas Register* to Lynda H. Nesenholtz, General Counsel and Chief Clerk, Mail Code 113-1C, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comment must be submitted to Linda Von Quintus, Deputy Commissioner, Regulation and Safety Division, Mail Code 107-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any requests for a public hearing should be submitted separately to the Office of the Chief Clerk.

Subchapter A. Small Employer Health Insurance Portability and Availability Act Regulations

28 TAC §26.14

The amendments to §26.14 of Chapter 26 are proposed under the Insurance Code Articles 21.53F (House Bill 102), 21.24-2 (House Bill 864), 21.53F (Senate Bill 258), and 21.53D (Senate Bill 54); the Health Insurance Portability and Accessibility Act; the Newborns' and Mothers' Health Protection Act of 1996; the Insurance Code Articles 26.04, 3.95-15, and 1.03A. The Insurance Code Article 21.24-2 (House Bill 864) as added by the 75th Legislature, implements certain mandated coverage for a dependent child who is 21 years of age or older and a student at an educational institution. The Insurance Code Article 21.53F (Senate Bill 258) as added by the 75th Legislature, implements mandated coverage for prostate cancer examinations. The Insurance Code Article 21.53D (Senate Bill 54), as added by the 75th legislature, implements mandated coverage for female enrollees by providing the right to select an OB/GYN in addition to a primary care physician. The Insurance Code Article 21.53F (House Bill 102), as added by the 75th Legislature, implements mandated coverage for inpatient maternity and childbirth benefits. The minimum requirements of federal law for inpatient maternity benefits are contained in HIPAA, as amended by the Newborns' and Mothers' Health Protection Act of 1996. Inclusion of small employer plans in the inpatient maternity and childbirth benefits are necessary to meet the minimum requirements of federal law. The Insurance Code Articles 26.04 and 3.95-15, as amended by the 75th Legislature, instruct the commissioner to adopt rules to meet the minimum requirements of federal law and regulations. The Insurance Code Article 1.03A provides that the Commissioner of Insurance may adopt rules and regulations to execute the duties and functions of the Texas Department of Insurance only as authorized by statute.

The following articles are affected by this proposal: Texas Insurance Code Articles 21.24-2 (House Bill 864), 21.53D (Senate Bill 54), 21.53F (Senate Bill 258), AND 21.53F (House Bill 102).

§26.14. Coverage.

(a)-(i) (No change.)

(j) Every small employer carrier providing a health benefit plan to a small employer shall comply with Insurance Code Article 21.53F if the plan provides maternity coverage, including benefits for childbirth.

This 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 November 18, 1998.

TRD-9817692
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 463–6327

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Subchapter C. Large Employer Health Insurance Portability Availability Act Regulation

28 TAC §26.305

The amendments to §26.14 of Chapter 26 are proposed under the Insurance Code Articles 21.53F (House Bill 102), 21.24-2 (House Bill 864), 21.53F (Senate Bill 258), and 21.53D (Senate Bill 54); the Health Insurance Portability and Accessibility Act; the Newborns' and Mothers' Health Protection Act of 1996; the Insurance Code Articles 26.04, 3.95-15, and 1.03A. The Insurance Code Article 21.24-2 (House Bill 864) as added by the 75th Legislature, implements certain mandated coverage for a dependent child who is 21 years of age or older and a student at an educational institution. The Insurance Code Article 21.53F (Senate Bill 258) as added by the 75th Legislature, implements mandated coverage for prostate cancer examinations. The Insurance Code Article 21.53D (Senate Bill 54), as added by the 75th legislature, implements mandated coverage for female enrollees by providing the right to select an OB/GYN in addition to a primary care physician. The Insurance Code Article 21.53F (House Bill 102), as added by the 75th Legislature, implements mandated coverage for inpatient maternity and childbirth benefits. The minimum requirements of federal law for inpatient maternity benefits are contained in HIPAA, as amended by the Newborns' and Mothers' Health Protection Act of 1996. Inclusion of small employer plans in the inpatient maternity and childbirth benefits are necessary to meet the minimum requirements of federal law. The Insurance Code Articles 26.04 and 3.95-15, as amended by the 75th Legislature, instruct the commissioner to adopt rules to meet the minimum requirements of federal law and regulations. The Insurance Code Article 1.03A provides that the Commissioner of Insurance may adopt rules and regulations to execute the duties and functions of the Texas Department of Insurance only as authorized by statute.

The following articles are affected by this proposal: Texas Insurance Code Articles 21.24-2 (House Bill 864), 21.53D (Senate Bill 54), 21.53F (Senate Bill 258), AND 21.53F (House Bill 102).

§26.305. Enrollment and Coverage.

(a)-(k) (No change.)

(l) If dependent coverage is offered to enrollees under a large employer health benefit plan, and the plan conditions dependent coverage for a child 21 years of age or older on the child's being a full-time student at an educational institution, the plan shall provide coverage for the child in accordance with Insurance Code Article 21.24-2.

(m) If benefits for diagnostic medical procedures are included under a large employer health benefit plan, then the plan shall provide coverage for each male enrolled in the plan for expenses incurred in conducting an annual medically recognized diagnostic examination for the detection of prostate cancer in accordance with Insurance Code Article 21.53F.

(n) An HMO issuing coverage to a large employer whose health benefit plan requires an enrollee to obtain certain specialty health care services through a referral made by a primary care physician or other gatekeeper, shall permit female enrollees access to obstetrical or gynecological care in accordance with Insurance Code Article 21.53D and Chapter 11 of this Title (relating to Health Maintenance Organizations).

This 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 November 18, 1998.

TRD-9817693
Lynda H. Nesenholtz
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 463–6327

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TITLE 30. ENVIRONMENTAL QUALITY

Part I. Texas Natural Resource Conservation Commission

Chapter 336. Radioactive Substance Rules

Subchapter A. General Provisions

30 TAC §336.12

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

The Texas Natural Resource Conservation Commission (commission) proposes the repeal of §336.12, concerning Appendix B, Memorandum of Understanding between Railroad Commission of Texas, Texas Department of Health, and Texas Natural Resource Conservation Commission Regarding Uranium Surface Mining, Uranium Ore Milling, and Tailings Ponds and Impoundments.

EXPLANATION OF PROPOSED RULES. The purpose of the repeal is to remove a Memorandum of Understanding (MOU) from the rules that is no longer needed because there are no active uranium surface mines or uranium ore milling sites and no new ones are expected in the future. Therefore, the participating state agencies have jointly agreed to elimination of this MOU. The continuing need for the MOU was reviewed as a result of the transfer of the source material licensing and by-product disposal jurisdiction from the commission to the Texas Department of Health (TDH) by Senate Bill (SB) 1857, 75th Legislature, 1997.

Section 336.12 (relating to Appendix B. Memorandum of Understanding between Railroad Commission of Texas, Texas Department of Health, and Texas Natural Resource Conservation Commission Regarding Uranium Surface Mining, Uranium Ore Milling, and Tailings Ponds and Impoundments) is proposed to be repealed.

FISCAL NOTE. Mr. Jeffrey Horvath, Strategic Planning and Appropriations, has determined that for the first five-year period the repeal as proposed is in effect, there will be no significant fiscal implications for state government. There are also no fiscal implications for units of local government.

PUBLIC BENEFIT. Mr. Horvath has also determined that for the first five years the repeal as proposed is in effect the public benefit anticipated will be the elimination of an MOU that is no longer needed. The proposed repeal will result in no increase in costs to affected parties. Cost savings are not anticipated to any person or business, large or small.

DRAFT REGULATORY IMPACT ANALYSIS. The commission has reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and has determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act, and it does not meet any of the four applicability requirements listed in §2001.0225(a).

This is not a major environmental rulemaking because it does 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.

In addition, this rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law, exceed a requirement of a delegation agreement, or adopt a rule solely under the general powers of the agency. The rulemaking merely eliminates an MOU among state agencies that is no longer needed.

TAKINGS IMPACT ASSESSMENT. The commission has prepared a Takings Impact Assessment for these rules pursuant to Texas Government Code, §2007.043. The following is a summary of that assessment. The primary purpose of the rules is to eliminate an MOU that is no longer needed. The rules will substantially advance this specific purpose by repealing §336.12 (relating to Appendix B. Memorandum of Understanding between Railroad Commission of Texas, Texas Department of Health, and Texas Natural Resource Conservation Commission Regarding Uranium Surface Mining, Uranium Ore Milling, and Tailings Ponds and Impoundments). Promulgation and enforcement of these rules will not burden private real property which is the subject of the rules because they merely repeal an agreement among state agencies on their joint jurisdiction and areas of cooperation.

COASTAL MANAGEMENT PROGRAM CONSISTENCY REVIEW. The commission has reviewed the proposed rulemaking and found that the rule is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11, nor will it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11. Therefore, the proposal is not subject to the Coastal Management Program.

SUBMITTAL OF COMMENTS. Written comments may be mailed to Bettie Bell, Texas Natural Resource Conservation Commission, Office of Policy and Regulatory Development, MC 205, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. All comments must be received by January 4, 1999 and should reference Rule Log Number 98031-336-WS. Comments received by 5:00 p.m. on that date will be considered by the commission prior to any final action on the proposal. For further information, please contact Kathy Vail at (512) 239-6637.

STATUTORY AUTHORITY. This repeal is proposed under the Texas Water Code, §5.104, and Texas Health and Safety Code, §361.016 and §401.069, which requires the commission to adopt by rule any MOU or a revision to an MOU. The repeal is also proposed under the Texas Radiation Control Act, Texas Health and Safety Code §§401.011, 401.051, and 401.412, and Texas Water Code §5.103, which gives the commission authority to adopt rules necessary to carry out its responsibilities to regulate and license the disposal of radioactive substances and to protect water in the state.

This repeal implements the Texas Water Code and the Texas Health and Safety Code Chapter 401 (relating to Radioactive Materials and Other Sources of Radiation).

§336.12. Appendix B. Memorandum of Understanding between Railroad Commission of Texas, Texas Department of Health, and Texas Natural Resource Conservation Commission Regarding Uranium Surface Mining, Uranium Ore Milling, and Tailings Ponds and Impoundments.

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

Filed with the Office of the Secretary of State on November 20, 1998.

TRD-9817835
Margaret Hoffman
Director, Environmental Law Division
Texas Natural Resource Conservation Commission
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 239-6087

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

Part X. Texas Water Development Board

Chapter 353. Introductory Provisions

The Texas Water Development Board (board) proposes the repeal of 31 TAC §§353.1, 353.7, 353.8 353.11, 353.13, 353.15, 353.21-353.26, 353.41-353.43, 353.59, 353.71, and 353.72, which were found to no longer be necessary, and amendments to §§353.2-353.4, 353.6, 353.9, 353.10, 353.51, 353.52, 353.55-353.58, 353.60, 353.80-353.83 and 353.85, to update and clarify provisions of Chapter 353, Introductory Provisions. Sections 353.2-353.6, 353.9, 353.10, 353.12 and 353.14 will comprise Subchapter A, General Provisions. Sections 353.51-353.58 and 353.60 will comprise Subchapter B, Rulemaking Public Hearings of the Board. Sections 353.80-353.94 will comprise Subchapter C, Relationship Between the Board and Donors.

Section 353.1 is proposed for repeal as it does not add substantially to the chapter and is unneeded. The proposed amendment to §353.2 corrects references to the administrative offices to reflect that they are offices of the board. The proposed amendments to §353.3 conforms the section to statutory authority to indicate the Board's ability to recess its meetings, and to reference that the chair or the vice-chair presides at board meetings.

The proposed amendments to §353.4 are for grammatical clarification, to correct statutory references, and also to expressly state the board's ability to require persons or entities that are closely aligned to utilize a common representative for presentations at board meetings. Amendments also reflect that the board is not required to allow public comments and oral presentation at all meetings. These amendment are considered necessary in order to allow the board meeting to proceed expeditiously but still assure the public has adequate opportunity to input at appropriate instances in the meetings.

Amendments to §353.6 are proposed to allow the vice-chair of the board to sign minutes of the board. This will allow the timely completion of the minutes in the event that the chair is not available to sign the minutes.

Sections 353.7 and 353.8 are proposed for repeal as unnecessary. Section 353.7 currently provides for the naming of the liaison to the Secretary of State for purposes of Texas Register filing. This is not required to be done in rule. Section 353.8 currently addresses citation of statutes in the board's rules, and is not necessary as the Texas Register rules control citation references, and because the citations are self-explanatory in each section.

Proposed amendments to §353.9 do not change the meaning of the rule, but merely provide more clarity in the reading of the section, and specifically provide for the delegation of authority to conduct hearings to include those hearings relating to feasibility of federal projects under Texas Water Code, §12.051.

Section 353.10 amendments make technical corrections to statutory citations and changes the term "department," which referred to Texas Department of Water Resources, to "board."

Section 353.11 is proposed for repeal because the charges for public records are now established in and governed by rules of General Services Commission, or from exceptions to those charges that are specifically approved by General Services Commission.

Section 353.13 is proposed for repeal. The section adopts by reference the memorandum of understanding between the board and Texas Department of Information Resources. The section is proposed for repeal because the responsibilities discussed in the memorandum are now more formally established by legislation creating the Texas Geographic Information Council passed in 1997.

Section 353.15 is proposed for repeal. The section contains the Memorandum of Understanding between the board and Texas State Soil and Water Conservation Board. The memorandum expired by its own terms on August 31, 1997.

Sections 353.21 through 353.26, which govern the use of environmental impacts statement, and Sections 353.41 through 353.43, which provide guidelines on the preparation of environmental, social and economic impact statements, are proposed for repeal. The sections are not needed in the general introductory provisions relating the board's procedure, as much more detailed and specific provisions regarding environmental review and consideration are contained in the rules relating to financial assistance programs. Rules on environmental review in the state and regional water planning also are contained in chapters of the board's rules relating to those programs.

Section 353.51 is amended to correct internal references.

Amendments to §353.52 and §353.56 are proposed to clarify that a representative conducting a rulemaking hearing on behalf of the board has the same powers and flexibility as the board in conducting and determining the manner of the hearing. The board often delegates rulemaking hearings to a representative, which then reports back to the board. The amendment merely provides clarification as to discretion of this representative in the conduct of the hearing, including the administration of oaths, establishing order of presentation, and limiting time or repetitious evidence.

Amendments proposed to §353.55 clarify that the public may submit comments and evidence relating to a proposed rule until the deadline for receipt of such comments specified in the publication of the rule in the *Texas Register*. As written, the section requires all information to be submitted by the time of a rule making hearing.

Proposed amendment to §353.57 clarifies that the board will consider comments to proposed rules in its rulemaking process. This is consistent with state law in the Administrative Procedures Act.

Proposed amendments to §353.58(a) and (b) clarify that a petition for adoption of rules is to be delivered to the board's executive administrator, and that the time for board action regarding the petition begins to run from the executive administrator's receipt of the petition. The rule currently requires written submittal of the petition, but does not specify to whom the petition is delivered. Amendments to (a)(1) are proposed to clarify that a separate petition need only be filed for amendments to each proposed rule chapter. As currently adopted, the section requires a separate petition for "each rule," but does not specify if that means a separate petition for each section of the rules. Separate petitions for each rule section would be an unduly burdensome requirement. The proposed amendment also requires the petition to include a justification for adoption of the proposed rule. This will better allow the board to understand the reasons for adoption, and to make a better determination of whether to grant or deny the petition. It will also aid the board in the meeting the statutory requirements for adoption of the rule.

The board proposes repeal of §353.59 regarding emergency rules. The section is merely a repetition of the requirements found in the Administrative Procedures Act, and therefore is not necessary.

Proposed amendments to §353.60 provides that the executive administrator as well as the board itself may convene an advisory conference or consultation of rules, and that both the board and the executive administrator may use negotiated rulemaking. The section makes it clear that the executive administrator may take actions to convene such panels by his own action. This amendment will assure that the agency continues to consult with experts or interested persons early in the rulemaking process.

Sections 353.71 and 353.72, relating to the board's designation of local sponsors for federal projects, are proposed for repeal. This function has been statutorily transferred to Texas Natural Resource Conservation Commission.

Proposed amendments to §§353.80-353.85 generally reflect changes to state law relating the an agency's acceptance of gifts. The subchapter previously dealt only with donations from entities other than governmental entities. The proposed amendments will expand certain provisions to relate to gifts by any entity, including governmental entities. The amendments to §353.80 and §353.81 clarify the expansion of the chapter by including the term "gifts" into the coverage of the provisions. Amendment to §353.82 adds a definition of "gifts" to be donations or money or property from any source, consistent with the use of the term in the Government Code, Chapter 575. The term "donor" is amended to clarify that it does not include a governmental entity, thus preserving certain of the subchapter's sections as relevant only to donations from individuals or non-governmental entities (the original purpose of the subchapter). The proposed amendment to §353.83 specifies that gifts are deposited in accordance with state law. The section previously stated that donations from private sources are deposited into the treasury. The amendment will provide the greatest flexibility in the deposit of money in accordance with donors' instructions and state law. The amendment to §353.85 substitutes the term "gift" for "donation" to make the section's provisions on acceptance apply to both public and private entities and persons. The amendments reflect that the board must accept all gifts valued at $500 or more, but that the executive administrator may continue to receive gifts if less than $500. The section also incorporates provisions in Government Code Chapter 375 that require the board to accept gifts of $500 or more in open meeting, by majority vote of board members, and record the gifts in the minutes of the board.

Ms. Patricia Todd, Director of Accounting and Finance, has determined that for the first five-year period these sections are in effect there will not be fiscal implications on state and local government as a result of enforcement and administration of the sections.

Ms. Todd has also determined that for the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to delete unnecessary provisions and to update and clarify other provisions in the Chapter. Ms. Todd has determined there will not be economic costs to small businesses or individuals required to comply with the sections as proposed.

Comments on the proposed amendments will be accepted for 30 days following publication and may be submitted to Suzanne Schwartz, (512) 475-2051, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231.

Subchapter A. General Provisions

31 TAC §§353.1, 353.7, 353.8, 353.11, 353.13, 353.15

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed pursuant to Texas Water Code, Section 6.101, which requires the board to adopt rules necessary to carry out its powers and duties.

The statutes affected by the proposed repeals are Texas Water Code Chapter 6.

§353.1. Purposes of Sections.

§353.7. Liaison with Secretary of State.

§353.8. Statutory References.

§353.11. Charges for Public Records.

§353.13. Adoption of Memorandum of Understanding by Reference.

§353.15. Memorandum of Understanding Between Texas Water Development Board and Texas State Soil and Water Conservation Board.

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

Filed with the Office of the Secretary of State, on November 20, 1998.

TRD-9817825
Suzanne Schwartz

General Counsel
Texas Water Development Board
Earliest possible date of adoption: January 21, 1999
For further information, please call: (512) 463–7981

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31 TAC §§353.2–353.4, 353.6, 353.9, 353.10

The amendments are proposed pursuant to Texas Water Code, Section 6.101, which requires the board to adopt rules necessary to carry out its powers and duties.

The statutes affected by the proposed amendments are Texas Water Code Chapter 6.

§353.2. Business Offices and Mailing Address of the Board and Executive Administrator.

The board's [~~executive administrator's~~] central offices are located in the City of Austin, Texas, in the Stephen F. Austin Building, 17th Street and Congress Avenue. The mailing address is P.O. Box 13231, Capitol Station, Austin, Texas 78711.

§353.3. Board Meetings.

The board shall meet at least once every other month on a day and a place within the state selected by it subject to recesses at the discretion of the board. The chair [~~chairman~~] or two board members may call a special meeting at any time by giving notice to the other members and other parties required by law to be notified of the meeting. All meetings are subject to the Texas Open Meetings Act, Government Code, Chapter 551 [~~Article 6252-17~~]. The chair or in the chair's absence, the vice-chair, shall preside at all meetings of the board.

§353.4. Public Participation.

(a) Board meetings, unless recessed into executive session pursuant to the Texas Open Meetings Act, shall be open to the public.

(b) Any person seeking to address the board concerning an item on the board's agenda posted with the secretary of state shall sign a registration form at the meeting. The board may administer oaths to those persons testifying before the board. When the board is required to accept or invites public comments at its meetings, the board will establish the order for presentation of argument or comments concerning items about which the public seeks to address the board. When necessary in order to prevent undue meeting length, the board may limit the number of times a person may testify, the time period for oral presentations, and the time period for raising questions. The board may limit or exclude cumulative or unduly repetitious presentations, and may require that one representative present the information and position of an entity or persons and entities that are closely aligned.

(c) A person desiring to file briefs, affidavits , information, or any written statements or documents relating to an agenda item shall submit the document no later than the date of the meeting, provided the board may grant additional time for submission. Since the board will take action on most agenda items at the scheduled meeting, persons seeking to file written information with the board should attempt to provide the information to the executive administrator as early as possible before the board meeting.

§353.6. Minutes of the Board.

The minutes of the board are kept by the general counsel of the board in a form and manner as the board may prescribe from time to time in accordance with existing laws. They shall be signed by the chair or vice-chair [~~chairman~~] and attested to by the executive administrator.

§353.9. Delegation of Responsibility.

The board may itself appoint, and hereby delegates to the executive administrator the authority to appoint a department employee, who is an attorney licensed to practice law in this state, to conduct a hearing and to make a written report to the board on any matter to be considered by the board, including, but not limited to, consideration of a petition to the board for the adoption of a rule and the feasibility of federal projects under Texas Water Code, §12.051. [~~The board may direct the executive administrator to appoint a department employee, who is an attorney licensed to practice law in this state, to conduct a hearing and to make a written report to the board on any matter before the board.~~]

§353.10. Official Records Are Public.

(a) Subject to the limitations provided in the Act administered by the board and the Texas Open Records Act, Government Code, Chapter 552, [~~Texas Civil Statutes, Article 6252-17a,~~] all information collected, assembled, or maintained by the board [~~department~~] are public records open to inspection and copying during regular business hours.

(b) A person submitting data or information to the board may request the data or information be designated as classified or confidential under an exception to the Open Records Act. If the executive administrator agrees with the designation, the data or information is not open for public inspection; shall be kept in confidence by the agency; and may upon request be returned to the person submitting the data or information after it has served the purpose for which it was submitted. If such information is requested by any other person, the executive administrator shall comply with the provisions of the Open Records Act, including §7 thereof.

This 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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Suzanne Schwartz
General Counsel
Texas Water Development Board
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Subchapter B. Environmental Impact Statement

31 TAC §§353.21–353.26

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed pursuant to Texas Water Code, Section 6.101, which requires the board to adopt rules necessary to carry out its powers and duties.

The statutes affected by the proposed repeals are Texas Water Code Chapter 6.

§353.21. Relevance of Impacts Evidence.

§353.22. Filing of Federal Statement Required.

§353.23. Executive Administrator's Recommendation.

§353.24. Statement Filed with Executive Administrator.

§353.25. Impacts Statement Guidelines.

§353.26. Impacts Statement Supplemented by Testimony.

This 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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Suzanne Schwartz
General Counsel
Texas Water Development Board
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Subchapter C. Guidelines on the Preparation of Environmental, Social, and Economic Impact Statements

31 TAC §§353.41–353.43

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed pursuant to Texas Water Code, Section 6.101, which requires the board to adopt rules necessary to carry out its powers and duties.

The statutes affected by the proposed repeals are Texas Water Code Chapter 6.

§353.41. Introduction.

§353.42. The Impacts Assessment Process.

§353.43. Specific Guidelines for the Impacts Assessment Statement.

This 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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Suzanne Schwartz
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Subchapter D. Rulemaking Public Hearings of the Board

31 TAC §§353.51, 353.52, 353.55–353.58, 353.60

The amendments are proposed pursuant to Texas Water Code, Section 6.101, which requires the board to adopt rules necessary to carry out its powers and duties.

The statutes affected by the proposed amendments are Texas Water Code Chapter 6.

§353.51. General.

This subchapter governs [~~This undesignated head applies to~~] the procedure and practice for public hearings conducted by the board for the adoption and amendment of rules [~~sections~~] which by statute or order of the board require notice and an opportunity for a public hearing.

§353.52. Policy.

The public hearing may be conducted in the manner the board , or the board's representative designated pursuant to §353.9 of this title (relating to Delegation of Responsibility), deems most suitable in order to obtain all the relevant information and testimony pertaining to the proposed rule as conveniently, inexpensively, and expeditiously as possible without prejudicing the rights of any person at the hearing.

§353.55. Submission of Documents.

A person desiring to file briefs, affidavits, written statements, protests, comments, exhibits, technical reports, and any other document relating to the proposed rule shall submit the document no later than the deadline for receipt of public comment specified in the *Texas Register* rule publication [~~time of the hearing~~], provided that the board may grant additional time for submission of additional documents.

§353.56. Oral Presentations.

(a) A person desiring to make an oral presentation shall advise the board or board's representative of his or her desire [~~that he desires~~] to be heard.

(b) The board or board's representative may administer oaths to each person who testifies.

(c) The board or board's representative will recognize and establish the order for presentation of comments, evidence and argument concerning the proposed rule.

(d) (No change.)

(e) The board or board's representative may limit or exclude cumulative or unduly repetitious presentations.

§353.57. Action after Hearing Concluded.

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

(c) The board shall consider any written comments, objections, exceptions, or briefs submitted by any person concerning the proposed rule.

(d) (No change.)

§353.58. Petition for Adoption of Rules.

(a) Any interested person may petition the board requesting the adoption of a rule. Petitions shall be submitted in writing by delivering the petition to the executive administrator. The petition [~~and~~] shall comply with the following requirements.

(1) A [~~Each rule requested must be submitted by~~] separate petition shall be submitted for each rule chapter for which adoption is sought.

(2) Each petition must state the name and address of the petitioner.

(3) Each petition shall include:

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

(C) justification for adoption of the proposed rule;

(D) [~~(C)~~] a statement of the statutory or other authority under which the rule is to be promulgated; and

(E) [~~(D)~~] an allegation of injury or inequity which could result from the failure to adopt the proposed rule.

(4) (No change.)

(b) Within 60 days after the executive administrator's receipt [~~submission~~] of a petition, the board shall consider the petition at its meeting and shall either deny the petition in writing, stating its reasons for the denial, or shall initiate rulemaking proceedings in accordance with the Administrative Procedures [~~Procedure~~] and Texas Register Act, §5.

§353.60. Advisory Conference on Rules.

Prior to the initiation of any formal action, and while the board may be contemplating the need for a new or amended rule, the board or executive administrator may convene informal conferences and consultations to obtain viewpoints and advice of interested persons. The board may also appoint committees of experts or interested persons or representatives of the general public to advise it regarding any contemplated rulemaking. The powers of such committees are advisory only. The board or executive administrator may utilize the procedures of negotiated rulemaking.

This 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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Suzanne Schwartz
General Counsel
Texas Water Development Board
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31 TAC §353.59

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed pursuant to Texas Water Code, Section 6.101, which requires the board to adopt rules necessary to carry out its powers and duties.

The statutes affected by the proposed repeals are Texas Water Code Chapter 6.

§353.59. Emergency Rules.

This 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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Suzanne Schwartz
General Counsel
Texas Water Development Board
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Subchapter E. Local Sponsorship

31 TAC §353.71, §353.72

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed pursuant to Texas Water Code, Section 6.101, which requires the board to adopt rules necessary to carry out its powers and duties.

The statutes affected by the proposed repeals are Texas Water Code Chapter 6.

§353.71. Designation of Local Sponsor in Federal Projects.

§353.72. Functions of Local Sponsor.

This 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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Suzanne Schwartz
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Subchapter F. Relationship Between the Board and Donors

31 TAC §§353.80–353.83, 353.85

The amendments are proposed pursuant to Texas Water Code, Section 6.101, which requires the board to adopt rules necessary to carry out its powers and duties.

The statutes affected by the proposed amendments are Texas Water Code Chapter 6.

§353.80. Purpose of Rules.

The purpose of this subchapter [~~chapter~~] is to establish procedures for the acceptance of gifts, including private donations made to the board and to create standards of conduct to govern the relationship between the board and the donors and between the board and private organizations designed to further the purposes and duties of the board.

§353.81. Introduction.

The Texas Water Development Board is statutorily authorized to accept gifts [~~donations~~] pursuant to the Texas Water Code, §6.192. It shall be the policy of the board to accept only those gifts [~~donations~~] that advance the mission of the agency.

§353.82. Definitions.

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

(1) Donation–Money and other assistance from any source other than from governmental entities and political subdivisions for the purpose of furthering the powers and duties of the board.

(2) Donation agreement–The donative instrument executed by the executive administrator and the donor which identifies the donation and outlines any special conditions of the donation.

(3) Donor–One or more individuals or organizations other than a governmental entity or political subdivision that offer or give a donation to the board.

(4) Executive administrator–The executive administrator of the board or his designee.

(5) Gifts–Donations of money or property from any source.

(6) Support organization–A legally incorporated or otherwise associated nonprofit organization which is organized or designed to support or further the purposes, duties and programs of mutual interest to the organization and the board.

§353.83. Procedures for Acceptance of Donations.

(a) (No change.)

(b) Deposited funds. The board shall deposit monetary contributions from gifts or donations in accordance with state law [~~private sources in the state treasury~~]. The money contributed shall be used to carry out the purposes of the board and, to the extent possible, the purposes specified by the donors.

§353.85. Acceptance of Gifts [~~Donations~~].

(a) All gifts [~~donations~~] made to the board if less than $500 shall be accepted by the executive administrator.

(b) The board shall accept all gifts valued at $500 or more by a majority vote of the board in open meeting. For gifts valued at $500 or more, the minutes of the board shall reflect the name of the person or entity making the gift, a description of the gift, and a statement of the purpose of the gift.

(c) [~~(b)~~] All gifts [~~donations~~] will be accepted on behalf of the board. No officers or employees of the board can accept gifts [~~donations~~] in their individual capacities or receive a personal benefit from gifts [~~donations~~].

This 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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Suzanne Schwartz
General Counsel
Texas Water Development Board
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Chapter 355. Research and Planning Funding

The Texas Water Development Board (board) proposes amendments to 31 TAC §§355.1-355.5, 355.8-355.10 and §§355.70-355.73 concerning the Research and Planning Fund. In Subchapter A, General Research and Planning, amendments are proposed to §§355.1-355.5 and 355.8-355.10 to bring rules into compliance with statutory changes and to provide more detail on criteria for evaluation of applications. In Subchapter B, concerning Economically Distressed Areas Facility Engineering, amendments are proposed to §§355.70-355.73 to clarify procedures for obtaining grants in the Economically Distressed Areas Program.

Proposed amendments to §355.1, which generally describes the subchapter, would delete the aquifer storage and recovery planning program from eligibility for Research and Planning Grant funding. This is done because Senate Bill 1, 75th Legislature, Regular Session (1997), amended Chapter 11 of the Water Code to make aquifer storage and recovery a recognized water management technique that no longer requires grants for study or planning. Senate Bill 1 also clarified that water resource facilities are part of the Research and Planning Programs.

The proposed amendment to §355.2, relating to Definitions, deletes the definition of "aquifer storage and recovery planning" to conform the rules with the change in the law and amends the definition of "regional planning for water resources" to clarify that this applies to water resource facilities and thus distinguishes this planning from regional water planning under Subchapter C of Chapter 355 (Senate Bill 1 regional planning). Amendments are also proposed to number definitions in accordance with new Texas Register requirements.

The proposed amendment to §355.3, relating to Legal and Fiscal Information, clarifies that there are three categories for grants under the Research and Planning Programs. There were previously four programs, but aquifer storage and recovery has been removed from eligibility.

The proposed amendment to §355.4, relating to Eligibility, clarifies that aquifer storage and recovery planning grants are no longer available. The amendment also clarifies that regional planning grants apply to water resource facilities, not to Senate Bill 1 Regional Planning.

The proposed amendment to §355.5, relating to Criteria, removes the language about aquifer storage and recovery planning grant criteria from the rule, to be consistent with state law. The amendment also adds language to clarify the criteria for applications for research projects that are sent in response to solicitation and those applications that are unsolicited.

The proposed amendment to §355.8, relating to Notice Requirements, clarifies that aquifer storage and recovery planning is no longer part of the Research and Planning Program and that regional planning projects apply only to water resource facility planning projects.

The proposed amendment to §355.9, relating to Contracts, clarifies that the executive administrator may designate a deputy to sign contracts, as the board currently has authorized by separate board action.

The proposed amendment to §355.10(a) clarifies these provisions apply only to water resource facility planning. The proposed amendment to subsections (e) and (f) remove references to expired legislation, and provide a general exception to allow funding in excess of 75% if specifically authorized by the Legislature. Deletion of subsection (g), removes the language about aquifer storage and recovery planning program.

In §355.70, Definitions, the definition of "facility planning" is amended to reflect that preparation of plans and specifications of water or wastewater facilities for an economically distressed area is an optional task that may be required by the board but is not always included in the tasks or studies that are included in a facility plan. The definition of "economically distressed area" is amended to include areas that were added to the statutory definition in the Texas Water Code, §17.921(1). The definition of "minimal water supply needs" is amended to specify state water treatment, conveyance and storage regulatory requirements as established by the Texas Natural Resource Conservation Commission. The definition of "minimal wastewater needs" is amended to reflect compliance with the state regulatory requirements for minimum wastewater service. Amendments

are also proposed to number definitions in accordance with new Texas Register requirements.

The proposed amendment to §355.71, relating to Purposes and Policy, deletes the word "applicable" because the term is surplus language that can only create confusion to the requirement of signing and sealing plans by a professional engineer.

The proposed amendment to §355.72, relating to Criteria for Eligibility, is to clarify that the model subdivision rules were in fact adopted as part of separate action of the board and not a part of these rules and to reflect the current agency position responsible for responding to requests for copies of the model subdivision rules. The section is also amended to more accurately reflect the requirement imposed by Health and Safety Code §366.035 that any local governmental entity that applies for facility engineering grant funds must receive and maintain a designation of authorized agent as set forth in that code.

The proposed amendment to §355.73, relating to Scope of Facility Plan, adds as an additional optional task the preparation of water and wastewater facility plans and specifications that may be required to be included in the facility plan at the discretion of the board.

Ms. Patricia Todd, Director of Accounting and Finance, has determined that for the first five-year period these sections are in effect there will be no fiscal implications on state and local government as a result of enforcement and administration of the sections over and above those associated with the adoption of the original rule.

Ms. Todd has also determined that for the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to provide political subdivisions the means to obtain grants for water, wastewater and flood protection planning. Ms. Todd has determined there will be no economic costs to small businesses or individuals required to comply with the sections as proposed.

Comments on the proposed amendments will be accepted for 30 days following publication and may be submitted to Suzanne Schwartz (512) 463-7981, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, or by fax at (512) 463-5580.

Subchapter A. General Research and Planning

31 TAC §§355.1–355.5, 355.8–355.10

The amendments are proposed under the authority of the Texas Water Code, §6.101 and §15.403 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code, including Chapter 15, and other laws of the State.

The statutory provision affected by the proposed amendments are Texas Water Code, Chapter 15, Subchapter F.

§355.1. General.

This subchapter shall govern the board's use of the research and planning fund to provide money for water research, flood control planning and [,] regional facility planning [~~for water resources and aquifer storage and recovery planning~~].

§355.2. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in the applicable provisions of the Texas Water Code, Chapter 15, and not defined here shall have the meanings provided by such chapter. [~~Aquifer storage and recovery planning–The process of determining the feasibility of aquifer storage and recovery projects prior to implementation of pilot projects for storage of appropriated water in aquifers and subsequent retrieval of such waters for beneficial use.~~]

(1) Flood protection planning–The process of developing the means of providing protection from flooding through structural and nonstructural measures.

(A) Planning for flood protection includes studies and analyses to:

(i) determine and describe problems resulting from or relating to flooding;

(ii) determine the views and needs of the affected public relating to flooding problems;

(iii) identify potential solutions;

(iv) estimate benefits and costs of potential solutions, including structural and nonstructural measures;

(v) recommend feasible solutions to flood protection problems; and

(vi) determine that any proposed solutions are consistent with appropriate regional or statewide plans and relevant laws and regulations.

(B) Planning, as herein defined, does not include those activities directly related to the preparation of applications for state or federal permits or other approvals, activities associated with administrative or legal proceedings by regulatory agencies, nor preparation of engineering plans and specifications.

(2) Regional facility planning for water resources–The process of identifying existing and potential problems, problem solutions and their relative costs and benefits, and recommending the most feasible solution(s) for regional water supply or wastewater facilities, except to the extent that such matters are being or have been studied under Texas Water Code, §16.053. Planning, as herein defined, does not include those activities directly related to the preparation of applications for state or federal permits or other approvals, activities associated with administrative or legal proceedings by regulatory agencies, nor preparation of engineering plans and specifications.

(3) Research–Scientific activities that are undertaken to address practical problems rather than to expand the frontiers of knowledge. Research can include development, which refers to activities undertaken to solve the technical problems involved in bringing a new product or process into production. Research may include regional water quality assessments performed by river authorities pursuant to the provisions of the Texas Water Code, §26.0135 and §26.178

§355.3. Legal and Fiscal Information.

As funds become available, and needs are identified, the executive administrator will publish notice in the *Texas Register* requesting applications from eligible applicants for grants in one or more of the three [~~four~~] categories. Applicants shall submit application(s) in the form and in the manner [~~numbers~~] prescribed by the executive administrator. The executive administrator may request additional information needed to evaluate the application, and may return any incomplete applications. Applicants may also submit and the executive administrator may also consider applications at any time, depending on availability of funds and demonstrated need.

§355.4. Eligibility.

Any person may apply for research grants, but only political subdivisions may apply for flood control and [,] regional facility planning grants [, and aquifer storage and recovery planning grants]. Funding of projects shall be at the discretion of the board from funds in the research and planning fund.

§355.5. Criteria.

Applications will be evaluated by the executive administrator, considering, at a minimum, the following criteria:

(1) Research project evaluation criteria for unsolicited applications:

(A) (No change.)

(B) description of the proposed research project [overall project organization and budget];

(C) approach to organizing and managing the research project;

(D) detailed estimate of the cost of the proposed research project;

(E) estimated time required to complete the research project;

(F) ability to perform the research and complete the project;

(G) [(C)] potential economic impact; and

(H) [(D)] environmental enhancement and conservation impact.

(2) Research project evaluation criteria for solicited applications:

(A) description of the proposed research project;

(B) responsiveness of the application to the request for proposals for requests for qualifications;

(C) approach to organizing and managing the research project;

(D) detailed estimate of the cost of the proposed research project;

(E) estimated time required to complete the research project; and

(F) ability to perform the research and complete the project.

(3) [(2)] Flood control planning project criteria:

(A) degree to which proposed planning duplicates previous or ongoing flood plans;

(B) project service area is regional versus local;

(C) history of flooding in project area;

(D) participation in National Flood Insurance Program;

(E) project organization and budget; and

(F) scope and potential benefits of project.

(4) [(3)] Regional facility planning project criteria:

(A) degree to which proposed planning duplicates previous or ongoing plans;

(B) regional nature of project;

(C) conformance to certified water quality management plans;

(D) adequacy of water conservation plan and commitment to water conservation;

(E) project organization and budget; [and]

(F) scope and potential benefits of project; and [.]

(G) the degree to which the regional facility planning is consistent with an approved regional water plan for the area in which the political subdivision is located.

[(4) Aquifer storage and recovery planning project criteria:]

[(A) degree to which proposed planning duplicates previous or ongoing plans;]

[(B) overall project organization and budget;]

[(C) adequacy of water conservation plan and commitment to water conservation; and]

[(D) feasibility level scope of project.]

§355.8. Notice Requirements.

For flood protection and [,] regional facility planning [projects, and aquifer storage and recovery planning] projects, applicants must notify all cities, counties, non-profit water supply corporations, regional planning agencies, regional water planning groups, and all districts and authorities created under the Texas Constitution, Article III, Chapter 52, or Article XVI, Chapter 59, in the planning area by certified mail that an application for planning assistance is being filed with the board. The notice shall include the name and address of the applicant and the name of the applicant's manager or official representative; and brief description of the planning area; the purposes of the planning project; the board's name, address, and the name of a contact person with the board; a statement that any comments must be filed with the executive administrator and the applicant within 30 days of the date on which the notice is mailed. Prior to action by the board, the applicant must provide one copy of the notice sent to affected political subdivisions, a list of the political subdivisions to which notice was sent, and the date on which the notice was sent. The board may not act on such application before the end of the 30-day notice period unless all political subdivisions to which notice is required to be sent agree in writing to waive the notice period.

§355.9. Contracts.

The board may authorize the executive administrator or his designee to enter into contracts with persons or political subdivisions, within available funds. Such contracts shall include:

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

§355.10. Funding Limitations.

(a) Grants for regional facility planning and flood control planning shall be limited to 50% of the total cost of the project, except that the board may supply up to 75% of the total cost to political subdivisions which have unemployment rates exceeding the state average by 50% or more, and which have per capita income which is 65% or less of the state average for the last reporting period available.

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

(e) Grants in excess of 75% for regional facility planning or flood control planning will be provided if authorized by specific

legislation or legislative appropriation language. [pursuant to the provisions in Rider Number 8, Emergency Financial Assistance, General Appropriations Bill (House Bill 1, 72nd Legislature, 1991, First Called Session) may be up to 100% of the total cost of the project.]

[(f) Grants for flood control programs pursuant to the provisions in Rider Number 11, Emergency Financial Assistance, General Appropriations Bill (House Bill 1, 72nd Legislature, 1991, First Called Session) shall be for 100% of the total cost of the required studies.]

[(g) Grants for aquifer storage and recovery planning shall be limited to 50% of the total cost of the project.]

This 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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Suzanne Schwartz
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Subchapter B. Economically Distressed Areas Facility Engineering

31 TAC §§355.70–355.73

The amendments are proposed under the authority of the Texas Water Code, §6.101 and §15.403 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code, including Chapter 15, and other laws of the State.

The statutory provision affected by the proposed amendments are Texas Water Code, Chapter 15, Subchapter F.

§355.70. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in the Texas Water Code, Chapter 15 or 17, and not defined here shall have the meaning provided by the appropriate chapter:

(1) Affected county–A county that:

(A) has a per capita income that averaged 25% below the state average for the most recent three consecutive calendar years for which United States Bureau of Economic Analysis statistics are available and an unemployment rate that averaged 25% above the state average for the most recent three consecutive calendar years for which Texas Employment Commission statistics are available and is on a list, calculated annually, and maintained by the executive administrator of the Texas Water Development Board; or

(B) is adjacent to an international border.

(2) Economically distressed area–An area within an affected county in which:

(A) water or wastewater facilities are inadequate to meet minimal water supply or wastewater needs of residential users as defined by the minimum state standards adopted by the board;

(B) financial resources are inadequate to provide water or wastewater facilities that will meet those needs; and

(C) the percentage of the dwellings occupied on June 1, 1989, to be served by financial assistance under this subchapter was at least:

(i) 80%; or

(ii) 50%, if the services provided by financial assistance under this subchapter can be provided by common or regional facilities in a cost-effective manner in conjunction with service provided to an economically distressed area as determined under the other provisions of this subdivision. [80% or more of the dwellings to be served by the facilities covered by an application for financial assistance were occupied on June 1, 1989.]

(3) Facility planning–The studies and tasks that are required to be performed pursuant to §355.73(a) of this title (relating to Scope of Facility Plan) to determine the engineering feasibility of water or wastewater facilities [and to obtain plans and specifications for constructing the water or wastewater facilities] for an economically distressed area , including the studies and tasks that may be required to be performed under §355.73(b). [Facility planning consists of a facility plan task and a plans and specifications task.]

(4) Minimal wastewater needs–A wastewater system that complies with the minimum state wastewater conveyance and treatment requirements as established by the Texas Natural Resource Conservation Commission [facility that does not create a nuisance or public health problems].

(5) Minimal water supply needs–A water [supply] system that complies with the minimum state water treatment, conveyance, and storage regulatory requirements for human consumption [meets the water quality and quantity standards for a community water system] as established by the Texas Natural Resource Conservation Commission [Department of Health].

(6) Wastewater facilities–Any devices and systems which are used in the transport, storage, individual treatment, on-site treatment, cluster system treatment, centralized treatment, conservation, recycling, and reclamation of domestic waste or which are necessary to recycle or reuse reclaimed domestic wastewater at the most economical cost over the estimated life of the new works, including intercepting sewers, outfall sewers, sewage collections systems, pumps, power equipment, septic tanks (including surface or subsurface drainage facilities and other improvements for proper functioning of septic tank systems), nonconventional treatment methods, and other equipment and their appurtenances; and extensions, improvements, remodeling, additions, and alterations to existing wastewater facilities. The term does not include devices and systems within dwellings, businesses, or institutions.

(7) Water facilities–Any devices and systems which are used in the collection, supply, development, protection, storage, transmission, treatment, and retail distribution of water for safe human use and consumption. The term does not include devices and systems within dwellings, businesses, or institutions.

§355.71. Purpose and Policy.

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

(c) Professional engineer. All [applicable] facility planning reports and plans shall be signed and sealed by a professional engineer in accordance with the Texas Engineering Practice Act, Texas Civil Statutes, Article 3271a.

§355.72. Criteria for Eligibility.

(a) (No change.)

(b) Political subdivisions must meet the appropriate requirements of this section before the board may provide financial assistance for facility planning.

(1) A county within which the political subdivision applying for assistance is wholly or partially located must have adopted the model subdivision rules required by the Texas Water Code, §16.343. The board has adopted [~~adopts~~] these model political subdivision rules by reference. Copies of the model subdivision rules are available upon request from the Texas Water Development Board, [~~Project~~] Director, Border, Project Management Division, [~~Economically Distressed Areas,~~] P.O. Box 13231, Austin, Texas 78711.

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

(6) If the applicant is a local governmental entity as defined in the Health and Safety Code, Chapter 366, then the applicant must provide satisfactory evidence that it has taken and will take all actions necessary to receive and maintain a designation as an authorized agent of the commission as set forth in that chapter. [~~The applicant must present evidence from the Texas Department of Health that there is an authorized agent that has jurisdiction over the project area pursuant to Texas Health and Safety Code, §366.033, and Texas Civil Statutes, Article 4477-7e, §5(h).~~]

(7) (No change.)

§355.73. Scope of Facility Plan.

(a) (No change.)

(b) The facility plan assistance shall include the items of work described in this subsection if approved or required by the board:

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

(3) the preparation of applications for necessary state and federal wastewater permits. Facility planning may not include activities associated with administrative or legal proceedings by regulatory agencies; [~~and~~]

(4) ~~the preparation of plans and specifications for constructing the water or wastewater facilities; and~~

(5) [~~(4)~~] other engineering tasks approved by the executive administrator. This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

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

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Chapter 363. Financial Assistance Programs

The Texas Water Development Board (the board) proposes amendments to 31 TAC §§363.2, 363.17, 363.704, 363.712, 363.713, 363.721, and 363.731 and new §§363.81-363.87 and §363.715, concerning Grants for Emergency and the Small Community Emergency Loan Program. The amendments and new sections are proposed to provide grants and short-term loans to community water and wastewater systems in need of emergency assistance due to emergency conditions.

Section 363.2, Definitions of Terms, is proposed for amendment to add definitions for "bonds, "delivery," "emergency," "grants for emergency" and "economically distressed areas" because these are terms used in the rules that govern the program. Proposed amendments also number definitions in compliance with Texas Register requirements. Section 363.17 addresses grants from the Water Loan Assistance Fund and is proposed for amendment to add to the list of projects which may receive grants, those water and/or sewer services which suffer a temporary interruption of service due to emergency conditions.

Sections 363.81-363.87, Grants for Emergency, are proposed new sections that set out the eligibility criteria for political subdivisions that apply for and receive grants in response to emergency conditions. The proposed new sections provide for the use of a grant agreement to detail the requirements for environmental review, design standards, and closing and release of funds.

Proposed new §363.81, Grants for Emergency, addresses eligibility factors in receiving grants. To meet eligibility criteria, a political subdivision must serve an economically distressed area and must suffer an interruption of existing water or wastewater services because of the emergency condition.

Proposed new §363.82, Terms of Financial Assistance, provides that the amount of grants shall be limited to the amount necessary to restore service or ensure uninterrupted delivery of service. This limitation is imposed because the grants are intended only to address the problem that arises from the emergency condition. Proposed new §363.83, Application, directs that the grant applicant must submit an application for grant assistance in the form and numbers required by the executive administrator in order to be considered for grant assistance.

Proposed new §363.84, Applicability, provides that applications for grant assistance must submit the same general, legal, fiscal and engineering information that is required for loan applications. The information will enable the agency to determine the eligibility of the application for an emergency grant.

Proposed new §363.85, Grant Agreement, provides for notice to a grant recipient of the terms of the grant through the means of a grant agreement. The provisions of the grant agreement will include the term of the grant commitment, conditions for closing, environmental approvals and engineering design standards that must be met to receive grant assistance.

Proposed new §363.86, Environmental Review Before Board Approval, requires that staff will make a written report to the executive administrator on known or potentially significant social or environmental concerns prior to approval of the grant by the Board. As a means of ensuring that project design and implementation is environmentally responsible and complies with current law, the proposed new section further provides that the terms and conditions for completion of the environmental review process and identified mitigation measures will be included in the grant agreement. New §363.87, Release of Funds, provides notice to the applicant of criteria for release of funds.

Section 363.704, Eligibility Requirements, states the requirements for eligibility for small community emergency loan consideration. The proposed amendment adds as an emergency the condition of drought that poses a threat to public health and safety.

Proposed amendment to §363.712, Environmental Review before Board Approval, adds the requirement that the loan agreement provide for terms of completing the environmental review process and with identified mitigation measures so as to ensure that project design and implementation is environmentally responsible and complies with current law. Section 363.713 is proposed for amendment to delete the requirement that a recommendation on a loan application will be prepared within three days of submittal of a completed application. This requirement has been found to be unnecessarily burdensome for staff and achieves no purpose for the applicant as all loan recommendations must wait for the monthly board meetings to be considered by the board for approval.

New section 363.715, Notes and Loan Agreements, is proposed to provide an option to borrowers to receive financial assistance either by issuing bonds or by entering into a loan agreement. The new section provides applicants with the option of entering into a note and loan agreement as a method of receiving funds. Prior to this amendment, applicants could only issue bonds which the agency purchased. The bond issuance method can result in delays of time. The new option offers a quicker means of completing the loan transaction. However, the option limits the term of the loan to one year.

Proposed amendments to §363.721 address closing requirements for borrowers which select the new loan option offered pursuant to §363.715.

Section 363.731 is proposed for amendment to ensure environmental compliance by adding the requirement that the project engineer must include in his assurances that the construction work is being performed in a satisfactory manner and that provision has been made for environmental mitigative measures.

Ms. Patricia Todd, Director of Accounting and Finance, has determined that for the first five-year period these sections are in effect there will not be fiscal implications on state and local government as a result of enforcement and administration of the sections.

Ms. Todd has also determined that for the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be to provide emergency assistance to water or wastewater systems that have failed or are threatened with failure as a result of an emergency condition. Ms. Todd has determined there will be no economic costs to small businesses or individuals required to comply with the sections as proposed.

Comments on the proposed amendments will be accepted for 30 days following publication and may be submitted to Gail L. Allan, 512/463-7804, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231.

Subchapter A. General Provisions

Division 1. Introductory Provisions

31 TAC §363.2

The amendment is proposed under the Texas Water Code, Chapter 6, §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

Statutory provisions affected by the amendments are Chapter 15, Subchapter C and Chapter 17, Subchapter C, Texas Water Code.

§363.2. Definitions of Terms.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in the Texas Water Code Chapters 15, 16 or 17, and not defined here shall have the meanings provided by the appropriate Texas Water Code chapter.

(1) Applicant - A political subdivision or subdivisions which file an application with the board for financial assistance or associated actions.

(2) Board - Texas Water Development Board.

(3) Bonds - All bonds, notes, certificates, book-entry obligations, and other obligations authorized to be issued by any political subdivision.

(4) Building - Erecting, building, acquiring, altering, remodeling, improving, or extending a water supply project, treatment works, or flood control measures.

(5) Closing - The time at which the requirements for loan closing have been completed under §363.42 of this title (relating to Loan Closing) and an exchange of debt for funds to either the applicant, an escrow agent bank, or a trust agent has occurred.

(6) Commission - Texas Natural Resource Conservation Commission.

(7) Commitment - An action of the board evidenced by a resolution approving a request for financial assistance from any loan program account.

(8) Corporation - A nonprofit water supply corporation created and operating under Chapter 76, Acts of the 43rd Legislature, 1st Called Session, 1933 as amended (Article 1434a, Vernon's Texas Civil Statutes).

(9) Debt - All bonds, notes, certificates, book-entry obligations, and other obligations authorized to be issued by any political subdivision.

(10) Delivery - The time at which payment is made by the board to the loan recipient against the purchase price of the recipient's debt, and the board takes possession of the instruments evidencing the debt. Delivery may occur simultaneously with a release of funds, or without release of funds pursuant to an escrow agreement or master agreement.

(11) Department - Texas Department of Health.

(12) Economically distressed areas - For the purposes of §§363.81-363.88 of this title (relating to Grants for Emergency), an area in which water supply or sewer services are or are expected to be inadequate to meet minimal needs of residential users and in which financial resources are inadequate to provide water supply or sewer services that will satisfy those needs.

(13) Emergency - For the purposes of §§363.81-363.88 of this title, a condition in which a public water or wastewater system has already failed or which poses an imminent threat of failure, causing the health or safety of residential users to be in danger. The emergency shall be the result of natural or man-

made catastrophes, riots, or hostile military or paramilitary action, including such conditions recognized by a declaration of disaster by the governor of the State.

(14) Escrow - The transfer of funds to a custodian of the funds which will act as the escrow agent or trust agent.

(15) Escrow agent - The third party appointed to hold the funds which are not eligible for release to the loan recipient.

(16) Escrow agent bank - The financial institution which has been appointed to hold the funds which are not eligible for release to the loan recipient.

(17) Executive administrator - The executive administrator of the board or a designated representative.

(18) Financial assistance - Loans, grants, or state acquisition of facilities by the board pursuant to the Texas Water Code, Chapters 15; Subchapters B, C, E, and J, Chapter 16; Subchapters E and F, and Chapter 17; Subchapters D, F, G, I, and K.

(19) Grants for Emergency - For the purposes of §§363.81-363.88 of this title, financial assistance by the board pursuant to Texas Water Code, Chapter 15, Subchapter C as provided by state appropriations and/or federal funds.

(20) Innovative technology - Nonconventional methods of treatment such as rock reed, root zone, ponding, irrigation or other technologies which represent a significant advance in the state of the art.

(21) Release - The time at which funds are made available to the loan recipient.

(22) Trust agent - The party appointed by the applicant and approved by the executive administrator of the board to hold the funds which are not eligible for release to the loan recipient.

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

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Texas Water Development Board
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Division 2. General Application Procedures

31 TAC §363.17

The amendment is proposed under the Texas Water Code, Chapter 6, §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

Statutory provisions affected by the amendments are Chapter 15, Subchapter C and Chapter 17, Subchapter C, Texas Water Code.

§363.17. Water Loan Assistance Fund.

The board may provide grants from the Water Loan Assistance Fund for projects that include supplying water or wastewater service to areas in which:

(1) water supply services:

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

(C) do not exist or are not provided, including a temporary interruption of service due to emergency conditions; and

(D) (No change.)

(2) sewer services:

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

(C) do not exist or are not provided, including a temporary interruption of service due to emergency conditions; and

(D) (No change.)

(3) (No change.)

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

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Division 7. Grants for Emergency

31 TAC §§363.81-363.87

The new sections are proposed under the Texas Water Code, Chapter 6, §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

Statutory provisions affected by the new sections are Chapter 15, Subchapter C and Chapter 17, Subchapter C, Texas Water Code.

§363.81. Grants for Emergency.

Grants for emergencies may be provided by the board from the Water Loan Assistance Fund to political subdivisions for projects that address the interruption of water or wastewater service due to an emergency and which serve an economically distressed area.

§363.82. Terms of Financial Assistance.

The board shall determine the amount and form of grants for emergencies. The amount of grants shall be limited to the amount necessary to restore service or ensure the uninterrupted delivery of service.

§363.83. Application.

An applicant shall submit an application in the form and numbers prescribed by the executive administrator. The executive administrator may request additional information needed to evaluate the application and may return any incomplete applications.

§363.84. Applicability.

The provisions of §363.12 of this title (relating to General, Legal and Fiscal Information), the engineering information of §363.711(b)(2) of this title (relating to Applications), and the preliminary environmental information of §363.711(b)(3) of this title shall apply to applications for grant assistance under this subchapter.

§363.85. Findings of the Board.

The board, by resolution, may approve an application for an emergency grant if the board finds:

(1) that an emergency exists; and

(2) that the public interest requires state participation in the project.

§363.86. Grant Agreement.

The applicant will execute a grant agreement that sets out the terms and requirements pursuant to which a grant for the emergency will be awarded. These conditions and requirements will include the term of the grant commitment, closing conditions, conditions for environmental approvals, and standards for engineering design approvals.

§363.87. Environmental Review before Board Approval.

Board staff will use preliminary environmental data provided by the applicant, as specified in §363.711(b)(3) of this title (relating to Applications), and make a written report to the executive administrator on known or potentially significant social or environmental concerns. The executive administrator may recommend approval of the project to the board if, based on preliminary information, there appear to be no significant environmental, permitting, or social issues associated with the project. The grant agreement will provide the terms and conditions for completion of the environmental review process which will be consistent with §363.16 of this title (relating to Predesign Funding Option) and with identified mitigation measures with the intent to ensure environmentally responsible and legally compliant project design and implementation.

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

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Subchapter G. Small Community Emergency Loan Program

Division 1. Introductory Provisions

31 TAC §363.704

The amendment is proposed under the Texas Water Code, Chapter 6, §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

Statutory provisions affected by the amendments are Chapter 15, Subchapter C and Chapter 17, Subchapter C, Texas Water Code.

§363.704. Eligibility Requirements.

An applicant must meet all of the following requirements to be eligible for financial assistance under this subchapter:

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

(3) Emergency. An emergency must exist that meets the criteria of subparagraphs (A)-(D) or (E) of this paragraph.

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

(E) A condition of drought must exist that poses a threat to public health and safety if not addressed immediately.

(4) Timing. The emergency must have been first discovered by the political subdivision no more than six months prior to the date the application is received by the board, unless the emergency is a condition of drought.

This 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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Division 2. Application Procedures

31 TAC §§363.712, 363.713, 363.715

The amendments and new section are proposed under the Texas Water Code, Chapter 6, §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

Statutory provisions affected by the amendments and new section are Chapter 15, Subchapter C and Chapter 17, Subchapter C, Texas Water Code.

§363.712. Environmental Review before Board Approval.

Board staff will use preliminary environmental data provided by the applicant, as specified in §363.711(b)(3) of this title (relating to Applications), and make a written report to the executive administrator on known or potentially significant social or environmental concerns. The executive administrator may recommend approval of the project to the board if, based on preliminary information, there appear to be no significant environmental, permitting, or social issues associated with the project. The loan agreement will provide for the terms and conditions for completion of the environmental review process which will be consistent with §363.16 of this title (relating to Predesign Funding) and with identified mitigation measures with the intent to ensure environmentally responsible and legally compliant project design and implementation.

§363.713. Board Consideration of Application.

[~~Unless special circumstances warrant an extension, a recommendation to approve or reject the loan request will be prepared for board consideration within three working days of submittal of a completed application.~~] The application will be scheduled on the agenda for board consideration at the earliest practical date and, if warranted, the board may hold an emergency board meeting.

§363.715. Notes and Loan Agreements.

(a) The board may provide financial assistance to political subdivisions by either purchasing bonds issued by the political subdivision or by purchasing a note and entering into a loan agreement with the political subdivision. If a political subdivision utilizes the note and loan agreement, the term of the loan shall not be more than one year.

(b) If a political subdivision executes a note and loan agreement with the board, the political subdivision is not required to engage the services of a bond counsel or a financial advisor.

This 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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Division 3. Closing and Release of Funds

31 TAC §363.721

The amendment is proposed under the Texas Water Code, Chapter 6, §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

Statutory provisions affected by the amendments are Chapter 15, Subchapter C and Chapter 17, Subchapter C, Texas Water Code.

§363.721. Loan Closing.

(a) Loan documents shall be executed at the time of closing and shall include the following:

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

(11) that the political subdivision issuing bonds, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the political subdivision's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis substantially in the manner required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the board were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the board and the beneficial owner of the political subdivision's obligations, if the board sells or otherwise transfers such obligations, and the beneficial owners of the board's bonds if the political subdivision is an obligated person with respect to such bonds under rule 15c2-12; and

(12) (No change.)

(b) Closing Requirements. A political subdivision entering into a note and loan agreement shall be required to execute the note and loan agreement as a condition of closing. A political subdivision issuing bonds shall be required to comply with the following closing requirements:

(1)-(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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Division 4. Construction and Post-Construction Phase

31 TAC §363.731

The amendment is proposed under the Texas Water Code, Chapter 6, §6.101, which authorizes the Board to adopt rules necessary to carry out the powers and duties of the Board.

Statutory provisions affected by the amendments are Chapter 15, Subchapter C and Chapter 17, Subchapter C, Texas Water Code.

§363.731. Inspection During Construction.

After the construction contract is awarded, the political subdivision shall provide for adequate inspection of the project by a registered professional engineer and require the engineer's assurance that the work is being performed in a satisfactory manner in accordance with the approved plans and specifications, other engineering design or permit documents, approved alterations, provisions for environmental mitigative measures, and in accordance with sound engineering principles and construction practices. The executive administrator is authorized to inspect the construction and materials of any project at any time, but such inspection shall never subject the State of Texas to any action for damages. The political subdivision shall take corrective action as necessary to complete the project in accordance with approved plans and specifications.

This 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 November 19, 1998.

TRD-9817730
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 21, 1999
For further information, please call: (512) 463-7981

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Chapter 365. Investment Rules

The Texas Water Development Board (the board) proposes amendments to 31 TAC §§365.2, 365.8, 365.11, 365.12, 365.18, 365.20 and 365.21, concerning Investment Rules. The amendments are proposed to comply with the Public Funds Investment Act (PFIA) - Chapter 2256 of the Texas Government Code and to address changes resulting from the board's annual review of its investment policies and strategies.

Section 365.2 is proposed for amendment to reflect the change in the investment officer's title as a result of agency restructuring and to number definitions in accordance with Texas Register requirements. Section 365.8 is proposed for amendment to clarify the internal auditor and finance committee's annual review of investment controls. Section 365.11 is proposed for amendment to require the submission of dealers' qualification information to the investment officer, and to correct a misspelling.

Section 365.12 is proposed for amendment to delete an inapplicable term, and to remove the internal auditor as a participant in the annual review of dealers. Section 365.18 is proposed for amendment to remove the internal auditor as a participant in the placement of investment controls. It is inappropriate to the internal auditor's position of independents to be involved in dealer reviews and investment controls. Section 365.20 is proposed for amendment to reflect changes to federal arbitrage regulations which now permit investment yields in excess of arbitrage yield restrictions. Section 365.21 is proposed for amendment to state the method used to determine market values as required by the PFIA.

Ms. Patricia Todd, Director of Accounting and Finance, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Ms. Todd also has determined that for each year of the first five years that the sections are in effect the public benefit anticipated as a result of enforcing the sections will be the board's compliance with the PFIA and clarity for both investment staff and security dealers. There will be no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the amended sections as proposed.

Comments on proposed sections will be accepted for 30 days following publication and may be submitted to Randy Galbreath, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231, 512/463-8479.

Subchapter A. General Rules

31 TAC §365.2, §365.8

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

Texas Government Code, Chapter 2256 are the statutory provisions affected by the proposed amendments.

§365.2. Definitions.

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

(1) Authority–The Texas Water Resources Finance Authority.

(2) Authorized dealers–Those dealers who have been approved to do business with the board and authority.

(3) Board–The Texas Water Development Board.

(4) Dealer–A business organization offering to engage in an investment transaction with the board or authority.

(5) Development fund manager–The development fund manager of the Texas Water Development Board or a designated representative.

(6) Executive administrator–The executive administrator of the Texas Water Development Board or a designated representative.

(7) HUB–Historically Underutilized Business which is a corporation formed for the purpose of making a profit in which at least 51% of all classes of the shares of stock or other equitable securities are owned by one or more persons who have been historically underutilized because of their identification as women or as member of certain minority groups, including Black Americans, Hispanic Americans, Asian Pacific Americans, and Native Americans who have suffered the effects of discriminatory practices or similar insidious circumstances over which they have no control.

(8) Internal auditor–The internal auditor employed by the Texas Water Development Board.

(9) Investment officer–The Audit and Funds Management Director [~~Manager~~] of the Texas Water Development Board or any other person authorized by the board or executive administrator to invest funds of the board or authority.

(10) Portfolio–The investments held by the Texas Water Development Board or the Texas Water Resources Finance Authority.

(11) Primary dealer–A dealer that provides a complete market in United States Treasury securities and that reports to the Federal Reserve Bank of New York.

(12) Qualified representative–A person who holds a position with a business organization, who is authorized to act on behalf of the business organization, and who is one of the following:

(A) for a business organization doing business that is regulated by or registered with a securities commission, a person who is registered under the rules of the National Association of Securities Dealers;

(B) for a state or federal bank, a savings bank, or a state or federal credit union, a member of the loan committee for the bank or branch of the bank or a person authorized by corporate resolution to act on behalf of and bind the banking institution; or

(C) for an investment pool, the person authorized by the elected official or board with authority to administer the activities of the investment pool to sign the written instrument on behalf of the investment pool.

(13) Secondary dealer–A dealer that specializes in various investment markets but is not monitored by the Federal Reserve Bank of New York.

(14) U.S. government agencies–The Federal Home Loan Bank, the Federal National Mortgage Association and the Government National Mortgage Association.

§365.8. Delegation of Authority.

Pursuant to the authority of the Texas Water Code, the Texas Government Code, and bond resolutions, the management responsibility for investing the portfolio is delegated to the investment officer who shall be responsible for all transactions undertaken and shall have a system of written controls established consistent with this chapter. The internal auditor's annual review of investment controls conducted pursuant to §365.18 of this title (relating to Internal Control) shall be presented to the Finance Committee. [~~Such written controls shall be approved by the Finance Committee of the board.~~] All investment transactions shall be conducted pursuant to this chapter and such written controls. The investment officer shall be responsible for all investment transactions and shall direct the activities of subordinate investment staff.

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

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TRD-9817729

Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 21, 1999
For further information, please call: (512) 463-7981

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Subchapter B. Selection of Authorized Dealers

31 TAC §§365.11, 365.12, 365.18, 365.20

The amendments are proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

Texas Government Code, Chapter 2256 are the statutory provisions affected by the proposed amendments.

§365.11. Authorized Dealers.

The investment officer will invest funds through the use of banks and broker/dealers which are approved as authorized dealers. A list of authorized dealers will be maintained by the investment officer. The finance committee will review, revise and adopt, at least annually, a list of qualified brokers that are authorized to engage in investment transactions with the board. All primary dealers and secondary dealers requesting qualifications as an authorized dealer must submit all of the following information, if applicable, to the investment officer [~~development fund manager~~]:

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

§365.12. Selection of Authorized Dealers.

(a)-(c) (No change.)

(d) An annual review of the financial condition and registrations of authorized dealers will be conducted by the [~~Internal Auditor and~~] investment officer.

(e)-(g) (No change.)

§365.18. Internal Control.

The internal auditor annually will review the investment functions and the internal investment controls. The review will be based upon policies and procedures which are put in place by [~~both~~] the investment officer [~~and the internal auditor~~]. In addition, all investment functions will be open for review by the State Auditor. The board shall review the investment policy and strategies listed in this chapter at least annually.

§365.20. Market Yield, Benchmark.

The board will take a buy and hold strategy in most instances. Based upon this strategy, the basis used to determine whether market yields are being achieved will be the six-month U.S. Treasury Bill, subject to compliance with federal tax and arbitrage regulations [~~provided that the six month yield is not greater than the arbitrage rate for specific bond sales~~].

This 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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General Counsel
Texas Water Development Board
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Subchapter C. Investment Procedures

31 TAC §365.21

The amendment is proposed under the authority of the Texas Water Code, §6.101 which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State.

Texas Government Code, Chapter 2256 are the statutory provisions affected by the proposed amendments.

§365.21. Reporting.

The investment officer will prepare and present to the board not less than quarterly, a report of investment transactions for all funds. The report, at a minimum, will contain all the requirements specified in Texas Government Code, Chapter 2256, §2256.023 of the Public Funds Investment Act. The report will include a summary for each fund which shows the strategy for each fund and which shows book value, market value, maturity date, yield, accrued interest, and purchase cost of each security. Market values will be obtained from a nationally recognized financial information service. The investment officer shall prepare a report on the Texas Government Code, Chapter 2256, Subchapter A and deliver the report to the board not later than the 180th day after the last day of each regular session of the legislature.

This 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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Suzanne Schwartz
General Counsel
Texas Water Development Board
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For further information, please call: (512) 463-7981

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Chapter 375. State Water Pollution Control Revolving Fund

Texas Water Development Board (board) proposes the repeal of 31 TAC Chapter 375, State Water Pollution Control Revolving Fund, §§375.1-375.4, 375.14-375.22, 375.31-375.38, 375.40, 375.51, 375.52, 375.61-375.63, 375.72, 375.74, 375.75, 375.81-375.86, 375.88, 375.101-375.103 and new §§375.1-375.4, 375.11-375.18, 375.31-375.42, 375.51-375.52, 375.61-375.62, 375.71-375.73, 375.81-375.87 and 375.101-375.105 for Subchapter A, and §§375.201, 375.211-375.214 and 375.221-375.222 for Subchapter B, comprising Chapter 375, Clean Water State Revolving Fund. New Chapter 375 addresses the creation, capitalization by federal grant and state match, purposes and administration of the Clean Water State Revolving Fund (CWSRF). The CWSRF will provide low interest loans to eligible applicants of the state pursuant to the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq.

and the Texas Water Code, §§15.601-15.609 and Chapter 17, Subchapters C, E, and F.

The board seeks to repeal Chapter 375 and propose new Chapter 375 in order to consolidate all rules governing the CWSRF under one chapter. Prior to this time, the CWSRF program that was financed primarily through state funds appeared in two subchapters of 31 TAC Chapter 363, Financial Assistance Programs. The CWSRF program that was financed primarily through federal funds appeared in 31 TAC Chapter 375. Although the language of many of the sections of both Chapters 363 and 375 remains unaltered, the reorganization of Chapter 375 was so extensive as to justify repeal of the chapter and proposal of the new chapter. Proposed Chapter 375 contains two subchapters, Subchapter A which provides the general criteria and methods for funding all CWSRF loans, and Subchapter B which provides for the federal requirements that are specific to the use of federal funds.

Sections 375.1-375.4, concerning introductory provisions, describe the scope of proposed Chapter 375, provide definitions of terms used in the chapter, address policy declarations of the board regarding the operation of the CWSRF, and state the date of applicability of the proposed rules.

Program requirements for the CWSRF are detailed in §§375.11-375.18. In compliance with the Federal Water Pollution Control Act, proposed §375.11 provides that public hearings will be held to consider adoption of the project priority lists and there is also a period for public review and comment before adoption and approval of the annual intended use plan. Proposed §375.12 outlines the purposes for which CWSRF funds may be used. Proposed §375.13 provides that one or more elements of "construction" may be funded. In compliance with federal guidelines, §375.14 provides that the project priority list will be the same as the list of projects in the annual intended use plan.

Proposed §375.15 describes the criteria and methods for distributing CWSRF funds among projects, including categorizing and ranking within categories, the projects for which financial assistance is sought. The section further allows for the designation of a funding line, based on the amount of total loan funds available, so that applicants may determine if they are likely to receive funding during each funding cycle. The section additionally sets out the method the board will employ in notifying applicants when unused funds become available. The section further addresses requirements for applicants to timely submit applications and enter into commitments for assistance.

Proposed §375.16 addresses the rating process that is used to rank principal projects and provides the criteria for determining a principal project as distinguished from additional projects. In compliance with the requirements of the Federal Water Pollution Control Act, proposed §375.17 provides for the intended use plan, which identifies projects by priority ranking which are anticipated to receive CWSRF funding assistance. The section additionally sets out a procedure for providing written notice and solicitation for project information from entities desiring to receive funding commitments during the next fiscal year. The section further specifies the type of project information that is required and provides that information must be submitted not later than the specified deadline. The section further provides for public review and comment prior to adoption. Proposed §375.18 provides for funds for the board to administer the CWSRF program through the use of a loan origination charge.

Proposed §§375.31-375.42 address the procedures and the application information that must be provided when seeking CWSRF funding assistance. Proposed §375.31 addresses preapplication conferences, at which time the representatives of an applicant meet with staff to receive information on the application process. These conferences promote the efficiency of the application process.

Proposed §375.32 states the required general information that must be submitted by an applicant, including names and addresses of representatives and consultants which will be providing information on the loan. Proposed §375.33 lists required legal information, including a resolution from the governing body seeking assistance. Proposed §375.34 addresses required fiscal information that must be provided, including total project costs, source of funds for repayment of the loan, and other financial liabilities of the applicant. The information required in the above three sections is necessary to a determination that the applicant has the authority to incur and ability to repay debt obligations.

In compliance with the federal regulations pursuant to the Federal Water Pollution Control Act, proposed §375.35 provides for the procedures that must be followed for projects in completing an environmental assessment and impact statement. The section details public participation requirements, guidelines for environmental assessments, and the process for making environmental findings.

Proposed §375.36 addresses engineering feasibility data and requires applicants to submit engineering feasibility data to justify the soundness of the project. Proposed §375.37 requires the preparation and adoption of water conservation measures pursuant to state law.

Proposed §375.38 sets out review criteria for approving loans and refinancings.

Proposed §375.39 provides an alternative method to receive loan commitments and close loans which complies with federal requirements and provides flexibility in delivering funds to loan applicants. Proposed §375.40 provides that for loans of $50 million or greater, the applicant must establish a loan closing date by resolution and adhere to that date or incur penalties.

Proposed §375.41 establishes a combination CWSRF loan and hardship grants program for rural communities to implement provisions of the Omnibus Consolidated Recessions and Appropriations Act of 1996. Proposed §375.42 describes the requirements for the capital improvement plan option. This option offers applicants an alternative method of securing funds through a two-step loan process by which the applicant receives a preliminary eligibility determination for a group of projects and later applies to the board for financial assistance. This option offers applicants additional flexibility in planning, designing and constructing projects.

Sections 375.51 and 375.52 address the process by which the board reviews and approves loans and sets lending rates. Proposed §375.51 provides that the executive administrator will present applications to the board for action. The section further details actions available to the board and provides for establishment of an effective loan commitment period. Proposed §375.52 describes the process for establishing lending rates and details the criteria for fixed and variable rate loans based upon the applicant's cost of funds in the public market.

Sections 375.61 and 375.62 relate to the engineering requirements for projects receiving CWSRF funding. Proposed §375.61 requires applicants to submit draft construction contract documents, including engineering plans and specifications, which meet the requirements of applicable state statutes. Proposed §375.62 authorizes the executive administrator to approve the contract documents in order to establish that the documents comply with applicable state statutes.

Sections 375.71-375.73 set out the requirements for release of loan funds. Proposed §375.71 details the documents that must be submitted and procedures that must be followed for closing a loan. Proposed §375.72 sets out the requirements that must be met prior to the transfer of funds to the applicant. The requirements of both sections provide evidence that the borrower has completed the fiscal, legal and engineering requirements necessary to receipt of public funds. Proposed §375.73 provides the borrower flexibility by authorizing the executive administrator to approve the transfer of funds by a borrower among projects which have been previously approved by the board.

Sections 375.81-375.87 address requirements applicants must meet during the construction phase of funded projects. Proposed §375.81 requires applicants to provide notice to and receive approvals from the executive administrator to ensure compliance with applicable state statutes for competitive bidding of projects and award of construction contracts.

Proposed §375.82 provides for construction phase inspection of projects by the applicant and the executive administrator to ensure that the project is being constructed in conformance with previously approved construction contracts and state law. Proposed §375.83 requires applicants to receive approval of all alterations to previously approved contract documents.

Proposed §375.84 addresses contractor bankruptcy and sets forth requirements for the applicant with respect to the bonding company and the bankruptcy proceeding. Proposed §375.85 requires that the applicant receive a set of as-built drawings of the project for the applicant's future use.

In compliance with the Texas Water Code, proposed §375.86 requires applicants to withhold retainage on a specified schedule. Proposed §375.87 facilitates the agency's ability to seek reimbursement of federal funds by requiring documentation from applicants of expenditures of funds in order to receive authorization to draw funds from the construction fund.

In compliance with the requirements of the Texas Water Code, Chapter 17, proposed §§375.101-375.105 address engineering and financial accountability by the applicant during the post building phase of the funded project. Proposed §375.101 describes the applicant's continued responsibility to ensure that the project is being properly operated and maintained, that specified records are maintained, and that all continuing requirements of the loan commitment are being met.

Proposed §375.102 and §375.103 require the applicant to maintain construction records and submit a final accounting of the project upon completion of construction and authorizes the executive administrator to conduct audits. The intent of these provisions is to ensure that funds were utilized in the manner and for the purposes authorized.

Proposed §375.104 and §375.105 require that upon certification by the applicant, the executive administrator issue a certificate of approval affirming that the project was constructed and funds utilized as required. The final release of retainage may then be authorized.

Proposed §375.201 addresses the scope of Chapter 375, Subchapter B, which addresses the requirements pertaining to the use of federal funds in the CWSRF program.

Sections 375.211-375.214 provide for special requirements for program funds awarded through a federal capitalization grant agreement. Proposed §375.211 and §375.212 describe the requirements binding upon the agency and the applicants for receipt of funds authorized by the Federal Water Pollution Control Act. Proposed §375.213 provides potential applicants with notice of the process of inviting and processing applications for funding. The section further provides for priority consideration in the event of a funds shortage and establishes the alternatives available to applicants whose projects cannot be funded with the lower interest rates offered under this subchapter. Proposed §375.214 details the process for environmental review and approvals necessary to comply with the Federal Water Pollution Control Act.

Sections 375.221-375.222 provide for special requirements for release of federal funds. Proposed §375.221 offers applicants flexibility in receiving funds through an alternate loan closing and release of funds process. Proposed §375.222 describes the procedure for setting the lower fixed and variable interest rates that are associated with the special federal requirements for use of federal funds.

Patricia Todd, Director of Accounting and Finance, has determined that for the first five year period the new chapter is in effect, there will be no fiscal impacts for state government as a result of administering the sections. Costs to the agency to implement the Minority and Women's Business Enterprises program have been previously reported as costs of administering the Drinking Water State Revolving Fund. The same full-time employee addressed in the Clean Water State Revolving Fund fiscal note will also administer the Clean Water State Revolving Fund. For local governments, any increase in costs as a result of compliance with the Minority and Women's Business Enterprise requirements associated with receipt of federal funds under Subchapter B, will be more than offset by the reduced interest rate offered under this chapter. There is no anticipated effect on small business. There are no anticipated economic costs to individuals.

Ms. Todd has further determined that for each year of the first five years that the sections are in effect, the public benefit anticipated as a result of administering the new chapter will be to bring certain provisions of the Clean Water State Revolving Fund program into compliance with federal requirements and to provide, through one chapter, easier access by the public of the rules that govern the agency's Clean Water State Revolving Fund program.

Comments on the proposed sections will be accepted for 30 days following publication and may be submitted to Gail Allan, Director of Northern Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas, 78711-3231.

Subchapter A. Introductory Provisions

31 TAC §§375.1-375.4

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of

the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the repeals are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.1. Scope of Rules.

§375.2. Definition of Terms.

§375.3. Policy Declarations.

§375.4. Date of Applicability of Rules.

This 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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Suzanne Schwartz
General Counsel
Texas Water Development Board
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Subchapter B. Program Requirements

31 TAC §§375.14-375.22

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the repeals are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.14. Public Hearings.

§375.15. Types of Assistance.

§375.16. Capitalization Grant Application.

§375.17. Capitalization Grant Requirements.

§375.18. Project Priority List.

§375.19. Distribution of Funds.

§375.20. Rating Process.

§375.21. Intended Use Plan.

§375.22. Administrative Cost Recovery.

This 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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Suzanne Schwartz
General Counsel
Texas Water Development Board
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Subchapter C. Application For Assistance

31 TAC §§375.31-375.38, 375.40

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the repeals are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.31. Preplanning and Preapplication Conferences.

§375.32. Required General Information.

§375.33. Required Fiscal Data.

§375.34. Required Legal Data.

§375.35. Required Environmental Review and Determinations.

§375.36. SRF Engineering Plan.

§375.37. Required Water Conservation Plan.

§375.38. Review of Applications by the Executive Administrator.

§375.40. Pre-Design Funding 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.

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General Counsel
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Subchapter D. Board Action on Application

31 TAC §375.51, §375.52

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out

the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the repeals are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.51. Formal Action by the Board.
§375.52. Lending 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.

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Suzanne Schwartz
General Counsel
Texas Water Development Board
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Subchapter E. Engineering Design

31 TAC §§375.61-375.63

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the repeals are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.61. Value Engineering.
§375.62. Contract Documents
§375.63. Approval of Contract Documents.

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

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Subchapter F. Prerequisites to Release of Funds

31 TAC §§375.72, 375.74, 375.75

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the repeals are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.72. Loan Closing.

§375.74. Release of Funds.

§375.75. Movement of Funds Between Approved Projects.

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

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Suzanne Schwartz
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Subchapter G. Building Phase

31 TAC §§375.81-375.86, 375.88

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the repeals are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.81. Awarding Construction Contracts.

§375.82. Inspection During Construction.

§375.83. Inspection of Materials.

§375.84. Alterations in Approved Contract Documents.

§375.85. Contractor Bankruptcy.

§375.86. Building Phase Submittals.

§375.88. Retainage.

This 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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Suzanne Schwartz
General Counsel

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Subchapter H. Post Building Phase

31 TAC §§375.101-375.103

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeals are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the repeals are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.101. Responsibilities of Applicant.
§375.102. Project Performance Certification.
§375.103. Final Accounting.

This 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 November 23, 1998.

TRD-9817884
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 21, 1999
For further information, please call: (512) 463-7981

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Chapter 375. Clean Water State Revolving Fund

Subchapter A. General Provisions

Division 1. Introductory Provisions

31 TAC §§375.1-375.4

The new sections are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the new sections are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.1. Scope of Rules.
This subchapter shall govern the board's program of financial assistance from the Clean Water State Revolving Fund (CWSRF).

§375.2. Definitions of Terms.
The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in the Texas Water Code, Chapter 15 and not defined here shall have the meanings provided by the chapter or subchapter as appropriate.

(1) Act - The Federal Water Pollution Control Act, as amended, 33 USC 1251 et. seq.

(2) Administrative cost recovery fund - An operating fund to finance the administration of the CWSRF program, to be held outside the state treasury and separate from the CWSRF program account.

(3) Administrative costs - All reasonable and necessary costs of administering any aspect of the CWSRF program, including the cost of servicing debt obligations of recipients of CWSRF financial assistance.

(4) Alternative technology - Proven wastewater treatment processes and techniques which provide for the reclaiming and reuse of water, productively recycle wastewater constituents or otherwise eliminate the discharge of pollutants, or recover energy. Specifically, alternative technology includes land application of effluent and sludge; aquifer recharge; aquaculture; direct reuse (nonpotable); horticulture; revegetation of disturbed land; containment ponds; sludge composting and drying prior to land application; self-sustaining incineration; methane recovery; individual and onsite systems; and small diameter pressure and vacuum sewers and small diameter gravity sewers carrying partially or fully treated wastewater.

(5) Applicant - A political subdivision or subdivisions which file an application with the board for financial assistance or associated actions.

(6) Application for assistance - All the information required for submittal in the following sections: §375.32 of this title (relating to Required General Information), §375.33 of this title (relating to Required Legal Information), §375.34 of this title (relating to Required Fiscal Information), §375.35 of this title (relating to Required Environmental Review and Determination), and §375.36 of this title (relating to Engineering Feasibility Data).

(7) Authorized representative - The signatory agent of the applicant authorized and directed by the applicant's governing body to make application for assistance and to sign documents required to undertake and complete the project, on behalf of the applicant.

(8) Board - The Texas Water Development Board.

(9) Bonds - All bonds, notes, certificates, book-entry obligations, and other obligations authorized to be issued by any political subdivision.

(10) Building - The erection, acquisition, alteration, remodeling, improvement or extension of treatment works.

(11) Capitalization grant - Federal grant assistance awarded to the state for capitalization of the Clean Water State Revolving Fund.

(12) Change order - The documents issued by the loan recipient, authorizing a change, alteration, or variance in previously approved engineering contract documents, including, but not limited to, additions or deletions of work to be performed pursuant to the contract or a change in costs for work performed pursuant to the contract.

(13) Closing - The time at which the requirements for loan closing have been completed under §375.71 of this title (relating to Loan Closing) and an exchange of debt for funds to either the applicant, an escrow agent bank, or a trust agent has occurred.

(14) Collector sewer - The common lateral sewers, within a publicly owned treatment system, which are primarily installed to receive wastewater directly from facilities which convey wastewater from individual systems, or from private property.

(15) Commission - The Texas Natural Resource Conservation Commission.

(16) Commitment - A legal obligation approved by the board, specifying the terms and conditions under which assistance may be provided.

(17) Construction - Any one or more of the following:

(A) preliminary planning to determine the feasibility of treatment works;

(B) engineering, architectural, environmental, legal, title, fiscal, or economic studies;

(C) the expense of any condemnation or other legal proceeding;

(D) surveys, designs, plans, working drawings, specifications, procedures; and

(E) erection, building, acquisition, alteration, remodeling, improvement or extension of treatment works or the inspection or supervision of any of the foregoing items.

(18) Construction fund - A dedicated source of funds, created and maintained by the applicant at an official depository, or a designated depository approved by the executive administrator, used solely for the purposes of construction of a project as approved by the board.

(19) Contract documents - The engineering description of the project including engineering drawings, maps, technical specifications, design reports, instructions and other contract conditions and forms that are in sufficient detail to allow contractors to bid on the work.

(20) Cost-effectiveness determination - A determination based on engineering, environmental, and financial analyses that a proposed project or component part will result in the minimum total monetary costs over time, but without overriding adverse social, economic, and environmental considerations and legal requirements.

(21) CWSRF - The state water pollution control revolving fund created pursuant to the Texas Water Code, Subchapter J, Chapter 15, herein referred to as the Clean Water State Revolving Fund.

(22) CWSRF program account - The program account is an account in the CWSRF created pursuant to a resolution of the board in issuing CWSRF bonds and is used, pursuant to such bond resolution(s), for the purpose of providing financial assistance to political subdivisions for construction of treatment works and, if needed, to pay rebate amounts to the federal government.

(23) Debt - All bonds, notes, certificates, book-entry obligations, and other obligations authorized to be issued by any political subdivision.

(24) Delivery - The time at which payment is made by the board to the loan recipient against the purchase price of the loan recipient's debt, and the board takes possession of the debt instruments evidencing the loan recipient's debt. Delivery may occur simultaneously with a release of funds, or without release of funds pursuant to an escrow agreement.

(25) Designated management agency, waste treatment management agency - A political subdivision of the state which is designated by the governor and approved by EPA to receive federal assistance pursuant to the Act, §208 and §303(e).

(26) Effluent limitation - Any restriction established by the state or the EPA administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discarded from a point source into waters of the state.

(27) Eligible applicant - A waste treatment management agency including any interstate agencies, or any city, commission, county, district, river authority, or other public body created by or pursuant to state law which has authority to dispose of sewage, industrial wastes, or other waste; or an authorized Indian tribal organization.

(28) Enforceable requirements of the Act - Those conditions and limitations of permits issued pursuant to the Act, §402 and §404, which, if violated, could result in issuance of a compliance order or initiation of a civil or criminal action under the Act, §309. Where a permit has not been issued, but issuance is anticipated, the term means any requirement which will be in the permit when issued. Where no permit is applicable, the term means any requirement which is necessary to meet applicable criteria for best practicable waste treatment technology.

(29) Engineering feasibility data - Those necessary plans and studies which directly relate to treatment works needed to comply with enforceable requirements of the Act and state statutes, and which consist of a systematic evaluation of alternatives that are feasible in light of the unique demographic, topographic, hydrologic, and institutional characteristics of the area and will demonstrate the selected alternative is cost-effective.

(30) Environmental assessment - A written analysis prepared by the applicant describing the potential environmental impacts of a proposed project, sufficient in scope to enable the executive administrator to make an environmental determination.

(31) Environmental determination - A finding by the executive administrator regarding the potential environmental impacts of a proposed project and describing what mitigative measures, if any, the applicant will be required to implement as a condition of financial assistance.

(32) Environmental information document - A written analysis prepared by the applicant describing the potential environmental impacts of a proposed project, sufficient in scope to enable the executive administrator to prepare an environmental assessment to allow an environmental determination to be made by the executive administrator.

(33) Environmental review - The process whereby an evaluation is undertaken by the board, consistent with the National Environmental Policy Act and other federal, state, and local laws and requirements, to determine whether a proposed project may have significant impacts on the environment and therefore require the preparation of an environmental impact statement, as detailed in §375.35 of this title (relating to Required Environmental Review and Determination).

(34) EPA - The United States Environmental Protection Agency.

(35) Escrow - The transfer of funds to a custodian of the funds which will act as the escrow agent or trust agent.

(36) Escrow agent - The third party appointed to hold the funds which are not eligible for release to the loan recipient.

(37) Escrow agent bank - The financial institution which has been appointed to hold the funds which are not eligible for release to the loan recipient.

(38) Estuary management plan - A plan for the conservation and management of an estuary of national significance as described in the Act, §320.

(39) Estuary management project - A project pursuant to an estuary management plan.

(40) Executive administrator - The executive administrator of the board or a designated representative.

(41) Financial assistance - Loans by the board from the CWSRF, which may be made in conjunction with grants from the Hardship Grants Program for Rural Communities.

(42) Fund - The state water pollution control revolving fund, created pursuant to the Texas Water Code, Subchapter J, Chapter 15, herein referred to as the CWSRF.

(43) Funding year - The particular federal fiscal year (October 1 - September 30) for which funds are made available to the CWSRF.

(44) Hardship Grants Program for Rural Communities - The program established by the federal Omnibus Consolidated Recessions and Appropriations Act of 1996 (Public Law 104-403).

(45) Infiltration - Water other than wastewater that enters a sewer system (including sewer service connections and foundation drains) from the ground through such means as defective pipes, pipe joints, connections, or manholes. Infiltration does not include, and is distinguished from, inflow.

(46) Inflow - Water other than wastewater that enters a sewer system (including sewer service connections) from sources such as, but not limited to, roof leaders, cellar drains, yard drains, area drains, drains from springs and swampy areas, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, cooling towers, storm waters, surface runoff, street wash waters, or drainage. Inflow does not include, and is distinguished from, infiltration.

(47) Innovative technology - Nonconventional methods of treatment such as rock reed, root zone, ponding, irrigation or other technologies which represent a significant advance in the state of the art.

(48) Intended use plan - A plan identifying the intended uses of the amount of funds available for loans in the CWSRF for each fiscal year as described in the Act, §606(c).

(49) Interceptor sewer - A sewer which is designed for one or more of the following purposes:

(A) to intercept wastewater from a final point in a collector sewer and convey such wastes directly to a treatment facility or another interceptor;

(B) to replace an existing wastewater treatment facility and transport the wastes to an adjoining collector sewer or interceptor sewer for conveyance to a treatment plant;

(C) to transport wastewater from one or more municipal collector sewers to another municipality or to a regional facility for treatment; and

(D) to intercept an existing major discharge of raw or inadequately treated wastewater for transport directly to another interceptor or to a treatment plant.

(50) Lending rate - Interest rate assessed to loan applicants for loans through the CWSRF.

(51) Market interest rate - The average interest rate given in current market dealings for this section of the country/state as determined by the board.

(52) Nonpoint source pollution plan - A plan for managing nonpoint source pollution as described in the Act, §319.

(53) Nonpoint source pollution project - A project pursuant to a nonpoint source pollution plan.

(54) Permit or waste discharge permit - The authority granted by the commission to establish the conditions under which waste may be discharged into or adjacent to waters in the state.

(55) Planning area - The existing and proposed wastewater service area consistent with the appropriate water quality management plan.

(56) Point source - Any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(57) Population - For purposes of §375.15 of this title (relating to Criteria and Methods for Distribution of Funds) and §375.16 of this title (relating to Rating Process), population will be based upon data that is acceptable to the executive administrator and is determined as follows:

(A) where the applicant is an incorporated city or town, the best available estimate of the current number of people which reside within the territorial boundaries of the applicant, or where greater, the number of people which receive wholesale or retail wastewater service from the applicant; or

(B) where the applicant is not an incorporated city or town, the best available estimate of the current number of people in the wastewater treatment service area to which the proposed project provides service.

(58) Principal project - A project or group of projects included in a proposal which are intended to address a specific system condition within a single wastewater treatment service area that can be rated according to §375.16 of this title (relating to Rating Process), the cost of correction of which represents greater than 50% of the cost of all projects included in the proposal.

(59) Priority list - A list of projects for which CWSRF assistance may be requested.

(60) Project - The scope of work describing a construction endeavor normally within a single wastewater treatment or collection service area which can be separately rated in accordance with §375.16 of this title (relating to Rating Process).

(61) Project completion - The date that operations of the treatment works are initiated or are capable of being initiated, as determined by the executive administrator.

(62) Project engineer - The engineer or engineering firm retained by the applicant to provide professional engineering services during the planning, design, and/or construction of a project.

(63) Regional facility - Wastewater collection and treatment, which incorporates multiple service areas into an area wide

service facility, thereby reducing the number of required facilities, or any system which serves an area that is other than a single county, city, special district, or other political subdivision of the state, the specified size of which is determined by any one or combination of population, number of governmental entities served, and/or service capacity. Regional wastewater treatment facilities may also include those identified in the approved state water quality management plan and the annual updates to that plan.

(64) Release - The time at which funds are made available to the loan recipient.

(65) State of Texas 303(d) List - The list prepared biennially by the commission as required by the Act, §303(d).

(66) Treatment works - Any devices and systems which are used in the storage, treatment, recycling, and reclamation of waste or which are necessary to recycle or reuse water at the most economical cost over the estimated life of the works, including intercepting sewers, outfall sewers, sewage collection systems, pumping, power, and other equipment and their appurtenances; extensions, improvements, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of, or used in connection with, the treatment process (including land used for the storage of treated water in land treatment systems prior to land application) or is used for ultimate disposal of residues resulting from such treatment; or facilities to provide for the collection, control, and disposal of waste.

(67) Trust agent - The party appointed by the applicant and approved by the executive administrator of the board to hold the funds which are not eligible for release to the loan recipient.

(68) Unserved areas - For purposes of the rating process, refers to populated areas of an existing developed community that are not served by a centralized collection system.

(69) Water conservation plan - A report outlining the methods and means by which water conservation may be achieved within a particular facilities planning area, as further defined in §375.37 of this title (relating to Required Water Conservation Plan).

(70) Water conservation program - A comprehensive description and schedule of the methods and means to implement and enforce a water conservation plan.

(71) Water quality management plan - A plan prepared and updated annually by the state and approved by the Environmental Protection Agency which determines the nature, extent, and causes of water quality problems in various areas of the state and identifies cost-effective and locally acceptable facility and nonpoint measures to meet and maintain water quality standards.

§375.3. Policy Declarations.

(a) General. The CWSRF is intended to be a perpetual fund to provide low interest loan assistance for the construction of waste treatment works, for implementing a management program for nonpoint source pollution under the Act, §319, and for developing and implementing a conservation and management plan under the National Estuary Program under the Act, §320.

(b) Regionalization. In accordance with the provisions of House Bill 2, 69th Legislature, 1985, the board will encourage local political subdivisions of the state to implement regional wastewater treatment facilities consistent with the Texas water plan and the water quality management plan.

(c) Water conservation. It is the policy of the board to promote the conservation of water in the state by requiring implementation of those practices, techniques, and technologies that will reduce the consumption of water, reduce the loss or waste of water, improve efficiency in the use of water, or increase the recycling and reuse of water so that a water supply is made available for future or alternative uses.

(d) Environmental protection. It is the policy of the board to preserve, protect, restore and enhance the waters of the state and to prevent, reduce and eliminate water pollution throughout the state. It is further the policy of the board to support the political subdivisions of the state and to provide financial aid with low interest loans for the prevention, reduction and elimination of water pollution.

(e) Management of financial resources. It is the policy of the board to structure financial assistance to applicants, including providing state matching funds in excess of that required by the Act when necessary and feasible, such that the board may maximize financial resources available to the state. It is further the policy of the board to satisfy the requirements of the Act and the requirements associated with any grants of federal funds.

(f) Projects expedited. It is the policy of the board to take measures as appropriate and necessary to expedite projects undertaken with the CWSRF. This may include, but would not be limited to, streamlining procedures for compliance with applicable federal requirements. The board will strive to ensure that CWSRF funding is efficiently and appropriately applied so that it meets the intent of federal requirements while attending to state goals for water quality management and the needs of the political subdivisions that the program is meant to serve.

(g) Force account. It is the policy of this board that all significant elements of the project be constructed with skilled laborers and mechanics obtained through the competitive bidding process. The board will not approve the use of force account in the major construction of the project, but may approve the use of force account for inspection and/or minor construction when the applicant demonstrates that it possesses the necessary competence required to accomplish such work and that the work can be accomplished more economically by the use of the force account method, or emergency circumstances dictate its use.

§375.4. Date of Applicability of Rules.

(a) This chapter shall apply to all applications for assistance for projects included in the intended use plan for fiscal year 2000 and all subsequent years. Applications for assistance for projects included in the intended use plan for fiscal year 1999 and prior years are governed by this chapter before repeal and Chapter 363, Subchapters A and B of this title (relating to General Provisions and State Water Pollution Control Revolving Fund).

(b) This chapter shall apply to all loans effective from the date of commitment.

This 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 November 23, 1998.

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Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 21, 1999

For further information, please call: (512) 463-7981

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Division 2. Program Requirements

31 TAC §§375.11-375.18

The new sections are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the new sections are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.11. Public Hearings.

The board shall hold public hearings to consider adoption of the priority list and amendments thereto and shall allow a period for public review and comment before adoption and approval of the annual intended use plan.

§375.12. Types of Assistance.

The fund may be used for the following purposes:

(1) to make loans on the condition that:

(A) such loans are made at or below market interest rates, including interest free loans at terms not to exceed 20 years;

(B) annual principal and interest payments will commence not later than one year after completion on any project and all loans will be fully amortized not later than 20 years after project completion; and

(C) the recipient of a loan will establish a dedicated source of revenue for repayment of loans;

(2) to buy or refinance the bonds of eligible applicants within the state at or below market rates, when such bonds were incurred after March 7, 1985;

(3) for the reasonable costs of administering the fund and conducting activities under the Act, Title VI;

(4) as a source of revenue or security for the payment of principal and interest on revenue or general obligation bonds issued by the state if the proceeds of sale of such bonds will be deposited in the fund; and

(5) to earn interest on fund accounts.

§375.13. Activities Funded.

The board may provide financial assistance under this chapter for one or more elements of construction, defined in this subchapter.

§375.14. Project Priority List.

The project priority list will be the same as the list of projects in the annual intended use plan prepared pursuant to §375.17 of this title (relating to Intended Use Plan).

§375.15. Criteria and Methods for Distribution of Funds.

(a) After the executive administrator determines the amount of funds available for projects for a fiscal year, the funds will be applied to the list of projects designated to receive funding in the intended use plan. The list will be divided into eight categories as follows:

(1) category A, which shall consist of projects proposed by applicants with existing populations of 3,000 or fewer;

(2) category B, which shall consist of projects proposed by applicants with existing populations from 3,001 to 10,000;

(3) category C, which shall consist of projects proposed by applicants with existing populations from 10,001 to 25,000;

(4) category D, which shall consist of projects proposed by applicants with existing populations from 25,001 to 100,000;

(5) category E, which shall consist of projects proposed by applicants with existing populations from 100,001 to 500,000;

(6) category F, which shall consist of projects proposed by applicants with existing populations of 500,001 or greater;

(7) category G, which shall consist of projects proposed by applicants for rural hardship communities; and

(8) category H, which shall consist of nonpoint source projects or estuary management projects.

(b) Projects for categories A-G shall be listed in priority ranking order with funds required and totaled by category. Projects in category H shall be listed in alphabetical order according to the name of the applicant with funds required and totaled for the category. Project costs will be based on cost estimates, acceptable to the executive administrator, contained in the intended use plan solicitation described in §375.17 of this title (relating to Intended Use Plan) used to establish the project list. Funds required by all projects in each category will then be totaled. Except for category G, a percentage of the total funds required by each category shall be computed based upon the ratio of funds required by each category to the funds required by all categories. The portion of the available funds shall be assigned to the categories based on this computed percentage, provided that no category will be assigned less than 7.0% of the total funds available unless the total needs of the category are less than 7.0%. The funds assigned to category G shall be equal to the amount of federal grants available for the fiscal year plus an equal amount of CWSRF loan funds.

(c) After population class percentages have been assigned and available funds distributed among the categories, a funding line shall be drawn within each category to indicate the amount of funds available to each category.

(d) After the funding line is drawn, if funds are available pursuant to Subchapter B of this title (relating to Provisions Pertaining to Use of Capitalization Grant Funds), the executive administrator shall notify in writing all applicants above the funding line of the availability of such funds for the fiscal year and shall invite the submittal of applications. Such funds shall be distributed in accordance with the provisions of Subchapter B.

(e) After the executive administrator determines that the funds made available pursuant to Subchapter B are sufficiently utilized to satisfy the federal requirements, the executive administrator shall notify in writing all remaining applicants above the funding line of the availability of funds for the fiscal year and shall invite the submittal of applications. Applicants will be allowed four months from the date of the notice of availability of funds or until August 31 of the fiscal year, whichever is sooner, to submit applications for assistance, and will be allowed two additional months to receive a loan commitment.

(f) If, at any time during the above-described period an applicant above the funding line submits written notification that it does not intend to submit an application, or if additional funds become available for assistance, the funding line within each category may be moved downward in priority order to accommodate additional

projects which would utilize the funds that would otherwise not be committed. The executive administrator will notify such additional applicants in writing and will invite the submittal of applications. Applicants receiving such notice will be allowed four months from the date of the notice or until August 31 of the fiscal year, whichever is sooner, to submit applications for assistance and will be allowed two additional months to receive a commitment.

(g) After the six-month period of availability of funds if all available funds are not committed, the executive administrator will return any incomplete applications and move all projects for which no applications or incomplete applications were submitted to the bottom of the ranked list within each category, where they will be placed in priority ranking order. The funding line will be redrawn within each category to utilize the funds remaining within the category.

(h) After the funding line is re-drawn, the executive administrator shall notify in writing all applicants above the funding line of the availability of funds for the fiscal year and shall invite the submittal of applications. Applicants will be allowed four months from the date of the notice or until August 31 of the fiscal year, whichever is sooner, submit applications for assistance and will be allowed two additional months to receive a commitment.

(i) If funds are available from categories A through H after the executive administrator is able to make a determination that all applicants in each category have had the opportunity to be funded, the remaining funds will be made available to the other categories. The remaining funds will be pooled with any funds left over from the other categories and made available to category A. If no applicants in category A are able to utilize the funds, then the funds will be made available to category B. If no applicants in category B are able to utilize the funds, then the funds will be made available to category C. If no applicants in category C are able to utilize the funds, then the funds will be made available to category D. If no applicants in category D are able to utilize the funds, then the funds will be made available to category E. If no applicants in category E are able to utilize the funds, then the funds will be made available to category F.

(j) Loan assistance will not exceed the cost estimate in the intended use plan without board approval. In the event the cost of a project exceeds the funds available, the applicant may seek additional funds from other appropriate board programs.

(k) Applications for assistance for category H, nonpoint source or estuary projects, will be funded as follows.

(1) Applications in category H will be funded on a first-come, first-served basis until the available funds have been exhausted.

(2) If, on the first business day of any given month in which funds are available, the total amount of funds required to fund all applications which are complete and ready for scheduling for board action exceeds the amount of funds available, the applications will be considered in the order of the submittal date of the complete application.

(3) If, during any given month for which funds are available, the amount of funds required to fund a particular application are insufficient to completely fund the application, the applicant may seek additional funds from other appropriate board programs.

(l) If, there is a shortage of funds, no single applicant may receive more than 30% of the total funds available for projects for a fiscal year.

§375.16. Rating Process.

(a) Policy. The rating process is designed to achieve optimum water quality management, consistent with public health and water quality goals, and to give consideration to the varying populations of the state's political subdivisions.

(b) Rating of principal projects. Proposals for inclusion of projects in an intended use plan will be rated based upon the principal project. Additional projects may be included in a proposal and may receive funding, so long as their costs represent 50% or less of the total project costs. The factors used to rate applications and the number of points assigned to each factor shall be as follows.

(1) Where the principal project is a wastewater treatment plant or collection system in which the facility's hydraulic capacity requires expansion or removal of extraneous flow, the project will receive priority points according to the following considerations. A project may receive points for only one of the considerations listed in this section at subparagraphs A-E of this paragraph, whichever results in the largest score.

(A) Where the wastewater treatment plant is at 90% or greater of its permitted capacity on an annual average flow basis as reported to the commission, or for plants which are permitted for less than one mgd, three consecutive months of the past 12 months as reported to the commission, the project will receive three points, provided that the project directly or indirectly improves the capacity problem at the facility.

(B) Where the wastewater treatment plant is at 75% or greater but less than 90% of its permitted capacity on an annual average flow basis as reported to the commission, or for plants which are permitted for less than one mgd, three consecutive months of the past 12 months as reported to the commission, the project will receive two points, provided that the project directly or indirectly improves the capacity problem at the facility.

(C) Where the wastewater treatment plant is at 65% or greater but less than 75% of its permitted capacity on an annual average flow basis as reported to the commission, or for plants less than one mgd, three consecutive months of the past 12 months as reported to the commission, the project will receive 1.5 points provided that the project directly or indirectly improves the capacity problem at the facility.

(D) Projects intended to remedy collection system overflows under a schedule imposed by a court order, EPA administrative order, or commission enforcement order will receive three points.

(E) Projects to expand an existing treatment facility, permitted for no discharge, where no self-reporting flow data is required to be reported to the commission will receive 1.5 points.

(2) Where the principal project is under a schedule imposed by a court order, EPA administrative order, or commission enforcement order, the project will receive one point.

(3) Where the principal project is required by permit to meet a higher level of treatment at a future date or where the principal project is a conversion to a no-discharge or partial reuse facility in order to avoid a higher level of treatment, the project will receive 1.5 points.

(4) Where the principal project will provide service to an unserved area, the project will receive 1.1 points. In addition, where the applicant provides a finding from a public health official that a nuisance dangerous to the public health and safety exists resulting from water supply and sanitation problems in the area to be served by the proposed project, the project will receive an additional three points.

(5) Where the principal project is to construct innovative or alternative treatment or collection systems, the project will receive one point.

(6) Where the principal project impacts stream segments designated as "high priority" or where a total maximum daily load (TMDL) analysis is underway or completed as identified in the current approved State of Texas 303(d) List and where the principal project will directly or indirectly mitigate the identified problem, the project will receive 4 points.

(7) Where the principal project impacts stream segments designated as "medium priority," as identified in the current approved State of Texas 303(d) List, and where the principal project will directly or indirectly mitigate the identified problem, the project will receive three points.

(8) Where the principal project impacts stream segments designated as "low priority," as identified in the current approved State of Texas 303(d) List, and where the principal project will directly or indirectly mitigate the identified problem, the project will receive two points.

(9) Where the principal project impacts stream segments designated as "threatened" as identified in the current approved State of Texas 303(d) List, and where the principal project will directly or indirectly mitigate the identified problem, the project will receive one point.

(10) Where the principal project will result in removal from service of one or more existing wastewater treatment plants, thus reducing the number of plant outfalls; or where the principal project will result in delivery of flow to, or receipt of flow at a regional facility, rather than create or continue use of a separate wastewater treatment facility, the project will receive one point.

(11) Where the principal project is a project which received a preliminary eligibility determination under §363.224 of this title (relating to Capital Improvements Plan Option) prior to the effective date of this chapter, received approval of plans and specifications prior to September 1, 1998, and will receive funding under the fiscal year 2000 intended use plan, the project shall receive one point.

(c) Rating score. The rating score will be the sum of the points assigned to the application under all criteria which are applicable to the application.

(d) Tie-breaker. In the event more than one project as listed in the intended use plan receives the same rating score, funding will first be made available for the project in which the sewage treatment plant is at the greatest percentage of its rated capacity as calculated in paragraph (1)(A) of this subsection for projects improving plant capacity. For any remaining ties funding will first be made available to the applicant with the lowest annual per capita income.

(e) Abandoned facilities. Where the existing treatment facilities will be abandoned and sewage diverted to a different location, the diversion line will be given the rating score of the treatment facilities to be abandoned.

§375.17. Intended Use Plan.

(a) Each fiscal year the board shall prepare an intended use plan to meet the requirements of the Act, §606(c), and to assist the board in its financial planning. The intended use plan will identify projects anticipated to receive assistance from that year's available funds. The list of projects by priority ranking included in the intended use plan may also serve as the project priority list required by the Act.

(b) The process for listing projects in the intended use plan will be as follows.

(1) Each year the executive administrator will provide written notice and solicit project information from entities desiring to receive funding commitments during the next fiscal year on the basis of that year's intended use plan. The notice will include forms to be used to submit information needed to rate the principal project and the deadline by which rating information must be submitted in order for projects to be rated and included in the intended use plan. The required project information will include:

(A) information needed to rate the project;

(B) a description of the proposed facilities;

(C) the status of any required permit application, including projected effluent limitations;

(D) the estimated total project cost;

(E) an estimated schedule for planning, design and construction of the proposed project;

(F) a statement as to whether the applicant is under enforcement by EPA or the commission; and

(G) such other information as may be requested by the executive administrator.

(2) The required information must be submitted not later than the deadline specified in the written notice to be included in the draft intended use plan. Rating information submitted after the deadline will not be accepted. Incomplete rating information forms may prevent projects from being rated for inclusion in the intended use plan.

(3) After a period of public review and comment, the intended use plan will be presented for adoption to the board at a regularly scheduled meeting.

§375.18. Administrative Cost Recovery.

(a) General. The board will assess charges for the purpose of recovering administrative costs of all recipients of CWSRF financial assistance who receive commitments after the effective date of this section.

(b) Payment method. Recipients of loan commitments made after the effective date of this section will utilize the payment method as provided in subsection (c) of this section.

(c) Loan origination charge. A loan origination charge will be assessed of the CWSRF loan amount, excluding the amount of the origination charge. The loan origination charge is a one-time charge that is due at the time of loan closing. The loan origination charge may be financed as a part of the CWSRF loan.

(d) Administrative cost recovery fund. Charges collected according to this section shall be deposited into the administrative cost recovery fund.

(e) Use of funds. Monies deposited into the administrative cost recovery fund shall be used only for administration of the CWSRF Program, unless transferred pursuant to subsection (f) of this section.

(f) Transfer of funds. Subject to subsection (e) of this section, the board may authorize transfer of funds from the administrative cost recovery fund into the CWSRF program account to be used for any purpose for which other funds in the CWSRF program account can be used.

(g) Investment of funds. Monies in the administrative cost recovery fund shall be invested in authorized investments as provided by board order, resolution, or rule. In the event of early payoff of a loan, all remaining servicing charges calculated in this subsection must be paid in full at the time of the payoff.

This 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 November 23, 1998.

TRD-9817882
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 21, 1999
For further information, please call: (512) 463-7981

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Division 3. Applications For Assistance

31 TAC §§375.31-375.42

The new sections are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the new sections are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.31. Preapplication Conferences.

An applicant requesting information on financial assistance will make an appointment with the staff of the board for a preapplication conference. At a minimum, the preapplication conference should be attended by a member of the governing body of the applicant, the consulting engineer, and the financial advisor. The primary purposes of the meeting are: to establish basic eligibility of the project and applicant for financial assistance; to acquaint the applicant with the general, legal, and fiscal requirements of an application for funding; and to assist the applicant in completing an application.

§375.32. Required General Information.

An application shall be in the form and numbers prescribed by the executive administrator. The applicant shall provide the following information on all applications to the board for financial assistance:

(1) names, titles, and addresses for the applicant;

(2) names, titles, and addresses for the authorized official, correspondent, or representative for the applicant and each participating political subdivision;

(3) names, titles, and addresses for the principal officers, including the managing official of the applicant and each participating political subdivision;

(4) names, titles, and addresses for the project engineer;

(5) names, titles, and addresses for the legal counsel for the applicant. In an application for financial assistance which envisions a contractual loan agreement or the purchase of the applicant's bonds by the board, the name and address of bond counsel is also required (if other than legal counsel) and the name and address of financial advisor or consultant;

(6) the authority of law under which the applicant was created;

(7) a brief description of the project including, but not limited to, the following:

(A) location;

(B) a comprehensive statement clearly demonstrating the project need and timing of need in sufficient detail to support and justify the project;

(C) the total estimated cost of the project; and

(D) source of the project's water supply;

(8) source of funds and other information on the basis of which the board can determine whether the state will recover its investment;

(9) evidence that an application has been filed to obtain appropriate permits or other authorization from the commission or any other state or federal agency; and

(10) required general information regarding any existing water conservation program, including but not limited to the following:

(A) education and information programs;

(B) plumbing code standards for water conservation in new construction;

(C) retrofit programs to improve water use efficiency in existing buildings;

(D) conservation-oriented water rate structures;

(E) universal metering and meter repair and replacement;

(F) leak detection and repair;

(G) drought contingency plans;

(H) ordinances and emergency procedures;

(I) water recycling and reuse; and

(J) water conserving landscaping.

§375.33. Required Legal Information.

In addition to any other information that may be required by the executive administrator or the board, the applicant shall provide:

(1) a resolution from its governing body which shall:

(A) request financial assistance and identify the amount of requested assistance;

(B) designate the authorized representative to act on behalf of the governing body; and

(C) authorize the representative to execute the application, appear before the board on behalf of the applicant, and submit such other documentation as may be required by the executive administrator or the board.

(2) a notarized affidavit from the authorized representative stating that:

(A) for a political subdivision, the decision to request financial assistance from the board was made in a public meeting held in accordance with the Open Meetings Act (Government Code, §551.001, et seq,);

(B) the information submitted in the application is true and correct according to best knowledge and belief of the representative;

(C) the applicant has no litigation or other proceedings pending or threatened against the applicant that would materially adversely affect the financial condition of the applicant or the ability of the applicant to issue debt; and

(D) the applicant will comply with all applicable federal laws, rules, and regulations as well as the laws of this state and the rules and regulations of the board.

(3) copies of any proposed or existing contracts for consultant financial advisory, engineering, and bond counsel services to be used by the applicant in applying for financial assistance or constructing the proposed project. Contracts for engineering services should include the scope of services, level of effort, costs, schedules, and other information necessary for adequate review by the executive administrator;

(4) a citation to the specific legal authority in the Texas Constitution and statutes pursuant to which the applicant is authorized to provide the service for which the applicant is receiving financial assistance as well as the legal documentation identifying and establishing the legal existence of the applicant as may be deemed necessary by the executive administrator;

(5) if the applicant provides or will provide water supply or wastewater collection and/or treatment service to another entity, the applicant shall submit the actual or proposed agreements, contracts or other legally binding instruments which establish this service relationship;

(6) a description of all real property interests (sites, easements, rights-of-way, or specific use permits) necessary for construction of the project including:

(A) a statement explaining the status and means of obtaining the property interests;

(B) certification that it has the necessary legal powers and authority to obtain the property interests; and

(C) a copy of any proposed or existing lease or other agreement transferring interests in any land acquired or to be acquired for the project;

(7) if financing of the project will require contractual loan agreement or the sale of bonds to the board payable either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts under which applicant's gross income is expected to accrue. Before a loan is closed, an applicant shall submit executed copies of such contracts to the executive administrator;

(8) if bonds to be sold to the board are revenue bonds secured by a subordinate lien, a copy of the authorizing instrument of the governing body in the issuance of the prior lien bonds shall be furnished; and

(9) if a bond election is required by law to authorize the issuance of bonds to finance the project, the executive administrator may require applicant to provide the election date and election results as to each proposition necessary for the issuance of the bonds to the board as part of the application.

§375.34. Required Fiscal Information.

The applicant shall submit a statement of the total project costs including the engineer's most current estimate of construction costs itemized as to major facilities, land and right-of-way costs, and engineering fees, as well as estimates of all legal fees, fees of financial advisors and/or consultants, contingencies, and interest during construction.

(1) The following information is to be furnished when the applicant proposes to enter into a contractual loan agreement or to sell bonds to finance the project, whether the purchasers are to be the board or others than the board:

(A) citation of statutory authority for issuance;

(B) type of bonds (i.e., general obligation, revenue, or combination). If revenues are to be pledged, state the source and nature of such revenue;

(C) amount of the issue;

(D) full name of issue(s);

(E) approximate date of issue(s);

(F) proposed maturities; and

(G) details of option for prior payments.

(2) The applicant shall submit the amount and source of any funds to be expended on the project.

(3) If the applicant is authorized by law to levy and collect ad valorem taxes, give the following information:

(A) If such right and power have been exercised, give the following information for each of the five preceding years:

(i) the assessed valuation of taxable property;

(ii) the ratio of assessed valuation to actual market value in a specified year;

(iii) the maximum tax rate permitted by law per $100 of assessed valuation;

(iv) the aggregate rate of all taxes levied and aggregate amount in dollars of taxes collected;

(v) the total amount in dollars of taxes collected; and

(vi) the distribution of tax rate as between interest and sinking fund and other purposes.

(B) If applicant is newly created, or if it has never exercised its taxing power, give the following information:

(i) the assessed valuation of taxable property if valuations have been established, and if not, the estimated total amount of the assessed valuation taxable property. Indicate whether the figure represents actual valuation or an estimate; and

(ii) the maximum tax rate permitted by law per $100 of assessed valuation.

(4) The applicant shall give details of any limitation governing amount of bonded or general obligation debt which applicant may incur.

(5) If applicant has bonds outstanding which are payable wholly or in part from ad valorem taxes, the following information shall be submitted:

(A) a complete description of each such issue of bonds, including title, date, interest rate, maturities, amount outstanding, and prepayment options;

(B) a consolidated schedule of future requirements of principal and interest extended so as to reflect total annual requirements; and

(C) a direct and overlapping debt statement.

(6) If the financing of the project will involve entering into a contractual loan agreement or sale of bonds or other securities payable wholly or in part from ad valorem taxes, the following information shall be submitted:

(A) a schedule of proposed future maturities of principal and interest of proposed bonds plus total maturities of any outstanding bonds from paragraph (5)(B) of this subsection; and

(B) the rate of interest assumed in computing future interest maturities on proposed bonds.

(7) If the project for which the CWSRF loan is desired is for the purpose of extending, enlarging or improving an existing system or facility, the following shall be submitted for each of the five preceding years to the extent available:

(A) a comparative operating statement;

(B) a schedule of water and sewer rates or service charges; and

(C) the number of customers or patrons of the system.

(8) The applicant shall provide a schedule of proposed rates required for financing the project under consideration.

(9) If applicant has bonds outstanding which are payable either wholly or in part from net revenues of a system or facility in connection with which the current project is planned, the following information shall be submitted:

(A) a complete description of each such issues of bonds, including title, date, interest rate, maturities, amount outstanding, and prepayment options; and

(B) a consolidated schedule of future requirements of principal and interest extended so as to reflect total annual requirements.

(10) If financing of the project will require entering into a loan agreement or require the sale of bonds or other securities payable either wholly or in part from net revenues of one or more facilities or systems, the following information shall be submitted:

(A) a schedule of proposed future bonds plus total maturities of any outstanding bonds referred to in subsection (9)(B) of this section; and

(B) the rate of interest assumed in computing future interest requirements on proposed bonds.

(11) The applicant shall provide a statement as to whether or not there has been a default in the payment of items of matured principal or interest and if so, give details.

(12) The applicant shall provide an annual audit of financial report prepared by an independent auditor as of the close of the preceding fiscal year, however, no audit is required if the applicant has no operation history.

(13) Where the project envisions either contractual loan agreement or the sale of revenue bonds, a schedule of the project engineer's estimate of future income and expense, showing the estimated amount of net revenue to accrue in each year during the life of any bonds to be issued.

§375.35. Required Environmental Review and Determination.

(a) Environmental assessments and impact statements.

(1) Relevance of impacts evidence. The board will consider environmental, social, and economic impacts evidence as relevant in any hearing or matter in which the board is directed by law to consider such evidence or to determine that any proposed action is or is not detrimental to the public interest or welfare.

(2) Filing of federal assessment or statement required. If an agency of the federal government prepares or requires an environmental assessment or an environmental impact statement to be prepared, then the applicant shall file with the executive administrator the assessment or the statement prepared or required by the federal government, and a copy of the federal agency's issued decision document or permit in lieu of an environmental assessment prepared in accordance with the guidelines set forth in subsection (b) of this section.

(3) Environmental assessment guidelines. If the federal government does not prepare or require an environmental assessment or an environmental impact statement, and the project is not excluded from formal environmental assessment in accordance with paragraph (4) of this subsection, then an environmental assessment shall be required of the applicant by the board and shall be prepared in accordance with the guidelines set forth in subsection (b) of this section.

(4) Exclusion from formal environmental assessment.

(A) Certain categories of projects have been shown over time not to entail significant impacts on the quality of the environment, and may be excluded from formal environmental assessment requirements. These are categories of projects which are directed toward minor rehabilitation, expansion or upgrade of existing facilities, functional replacement of equipment, or toward the construction of related facilities adjoining the existing facilities that do not substantially increase the volume or loading of pollutants. Examples include infiltration and inflow correction, rehabilitation of existing equipment and structures, and the construction of small structures on existing sites.

(B) Projects which can not be excluded from the formal environmental assessment process are those which entail:

(i) the construction of new collection lines;

(ii) a new discharge or relocation of an existing discharge;

(iii) a substantial increase in the volume or loading of pollutants;

(iv) providing capacity for a population 30% or greater than the existing population;

(v) known or expected impacts to cultural resources, threatened or endangered species, or other environmentally sensitive areas; or

(vi) the construction of facilities which are likely to cause significant public controversy.

(C) Applicants who feel that their projects should be excluded from the formal environmental assessment requirement should consult with the board's staff early in the planning process in order to get a decision regarding exclusion. If the executive administrator determines that a project should be excluded, he will provide a description of the project and notice of his tentative determination to state agencies having jurisdiction, including the Texas Antiquities

Committee and Texas Parks and Wildlife Department, in order to provide those agencies an opportunity to comment on the proposed project. If a proposed project is excluded from the formal environmental assessment requirement the executive administrator will base his environmental determination upon the information provided in the CWSRF engineering feasibility data.

(5) Executive administrator determination. The executive administrator shall make an environmental determination based upon the environmental information filed by the applicant in accordance with the guidelines set forth in paragraph (4) of this subsection or subsection (b) of this section, as appropriate, and giving full consideration to the views and comments of other agencies and affected persons. The executive administrator will document his determination and present it, with any appropriate provisions, to the board except as provided in subsection (b)(4)(A) of this section.

(6) Environmental assessment or impact statement supplemented. Nothing in this subsection shall be construed to prohibit supplementing an environmental assessment or impact statement with additional evidence. Recognizing that a project may be altered after an environmental determination on the project has been made, the executive administrator will provide, prior to approval, that the loan application, contract documents, and related documents will be examined for consistency with the environmental determination. If inconsistencies are found that may entail environmental impacts substantially different from those addressed during the environmental assessment supporting the earlier environmental determination on the project, the executive administrator will require that additional information be provided by the applicant, the environmental assessment process be repeated consistent with this section, and/or the project be modified to eliminate the potential for adverse impacts, as appropriate.

(b) Guidelines for the preparation and review of environmental assessments.

(1) Introduction. These guidelines are not intended to duplicate or replace effective guidelines of other agencies with which the applicant may be required to comply due to funding commitments or other statutory requirements for the planning, design, construction, or operation of a project. The board shall accept an environmental assessment or an environmental impact statement prepared under the guidelines of another agency as evidence that the potential environmental effects of a proposed project have been adequately assessed in lieu of an environmental assessment prepared in accordance with these guidelines, as long as the assessment or statement adequately describes the project for which the applicant is seeking financial assistance from the board. In most cases, an environmental assessment prepared in accordance with these guidelines will be sufficient to support board action on an application. However, for projects which are notably extensive in scope or entail potentially significant adverse environmental impacts, more detailed and intensive environmental studies may be required. The applicant should consult with the board staff early in the planning process in order to determine the scope of the environmental assessment required to support the application for financial assistance.

(2) The environmental assessment process. The environmental assessment process should provide for a complete, systematic and objective identification and evaluation of the potential environmental effects of a proposed project, and alternatives to it, such that appropriate design changes and/or mitigative measures may be prescribed and the environmental soundness of the project may be demonstrated. This process is documented by an environmental assessment, which is prepared by the applicant and serves as the basis of an environmental review by the board. An environmental assessment should be reasonably concise, yet sufficient in detail to fully address the scope of the project, its social, economic and environmental setting, and its potential beneficial and adverse impacts. The assessment should show that a thorough and interdisciplinary evaluation has been made, including the evaluation of feasible alternatives; that the concerns of interested agencies and the affected public have been considered; and, that the assessment has been relied upon in planning the proposed project. The environmental assessment and the CWSRF engineering feasibility data should be prepared concurrently (and at the discretion of the applicant may be bound together in a single report) and reflect a coordinated effort to select an environmentally sound project.

(A) A proposed project may have effects which are adverse and/or beneficial. They may be direct or primary, and short-term or long-term in duration, such as impacts commonly associated with project construction. Other impacts may be more indirect, or secondary, such as those commonly associated with development accommodated or encouraged by the project.

(i) Examples of significant adverse impacts are those which:

(I) degrade water quality;

(II) disturb or destroy historical or archeological sites;

(III) destroy protected plant and animal species and/or eliminate critical habitat;

(IV) disturb or destroy floodplains, wetlands, or other environmentally sensitive areas;

(V) create or aggravate flood problems;

(VI) deteriorate air quality;

(VII) create or aggravate public health hazards;

(VIII) disrupt natural or cultural scenic views; and

(IX) contribute to a series of related projects that involve individually minor but collectively significant adverse impacts.

(ii) Examples of significant beneficial impacts are those which:

(I) maintain or enhance of water quality;

(II) protect or enhance springs, lakes, bays, estuaries, and associated wetlands;

(III) encourage a rational balance between water demands and resource availability;

(IV) foster sound economic growth and orderly community development;

(V) eliminate public health hazards or other environmental quality problems;

(VI) promote or enhance the conservation of water, soil, forest, and coastal resources; and

(VII) encourage the efficient use and proper management of natural resources, or recovery and beneficial use of waste products.

(B) Proper application of the environmental assessment process can help identify special structural and non-structural

measures which may be taken during project design and/or construction to mitigate potentially significant adverse impacts or reduce them to acceptable levels. Examples of mitigative measures include:

(i) special precautionary measures to provide for public safety during facilities construction and/or operation;

(ii) special measures and/or facilities to reduce potential air quality problems or noise nuisances during and after project construction;

(iii) special measures to control erosion during and after project construction;

(iv) selection of alternative project locations to avoid archeological or historical sites, critical habitats, floodplains, wetlands, or other environmentally or culturally sensitive areas;

(v) special measures to protect or re-establish native vegetation to provide habitat for endemic species;

(vi) special measures to lessen adverse economic impacts; and

(vii) special land use controls or other measures to be implemented to lessen potential adverse secondary impacts of development upon environmentally sensitive areas.

(C) The following public participation requirements will apply.

(i) Prior to submission of an environmental assessment, the applicant will be required to publish notice of the availability of the environmental assessment in a newspaper of general circulation in the community to be served by the project. The notice must specify the location(s) where the assessment will be available for review and an address where written comments by the public may be sent. A minimum of 30 days from the date of publication must be provided as the period within which the public may review the assessment and submit comments. The final environmental assessment should include copies of all written comments and explain how comments were addressed.

(ii) If the executive administrator determines that a project is controversial, the applicant will be required to conduct a public hearing to receive public comments regarding the project. Notice of the hearing shall be published by the applicant in a newspaper of general circulation in the community to be served by the project at least 30 days prior to the hearing. The notice shall provide a description of the project; specify the location, date, and time of the hearing; specify the location(s) where the assessment will be available for review prior to the hearing; and provide an address where written comments by the public may be sent. The final environmental assessment should include a transcript of the public hearing, copies of all written comments received and an explanation of how the comments were addressed. The executive administrator shall not make an environmental determination regarding a project until adequate documentation of the public participation process has been received by the board.

(3) Specific guidelines for environmental assessments. The environmental assessment shall include, at a minimum:

(A) a brief, complete explanation of the purpose and need for the proposed project;

(B) a complete, concise description of the proposed project and its costs;

(C) a description of the social and natural environment of the planning area which would be affected directly or indirectly by the proposed project, as the area exists prior to the project, including, but not limited to:

(i) geological elements (topography, geology, caves, faults, soils);

(ii) hydrological elements (surface water bodies, ground water resources, aquifer recharge zones);

(iii) floodplains and wetlands;

(iv) climatic elements (precipitation, prevailing winds, air quality);

(v) biological elements (major plant and animal communities, protected species, critical habitats, natural areas, parks, forests, wildlife refuges);

(vi) historical or archeological resources;

(vii) social and economic conditions (population, financial condition, community needs); and

(viii) other programs and projects (highway, water supply, and water quality projects, regional and local planning);

(D) a description of the alternatives considered during the development of the proposed project and an explanation of the evaluation of alternatives and how monetary and environmental factors were considered in the selection of the proposed project;

(E) a description and evaluation of potential impacts which may result from the proposed project upon the social, economic and environmental resources of the affected area of the project, and an explanation of how each potentially adverse impact can be avoided, reduced to an acceptable level, or mitigated by structural and non-structural measures;

(F) an identification of beneficiaries and non-beneficiaries of the proposed project and an assessment of the public acceptability of the project, its costs, and its potential environmental impacts;

(G) a summary of comments obtained from and documentation of coordination with appropriate agencies (e.g., Texas Antiquities Committee, which considers potential impacts to historical and cultural resources; Texas Parks and Wildlife Department, which considers potential impacts to wetlands and threatened and endangered species; Texas Natural Resource Conservation Commission, which considers consistency with stream standards and water quality management planning) and the affected public, an explanation of the methods used to obtain this input, and a discussion of how specific concerns were considered in the evaluation of alternatives and the planning of the proposed project;

(H) a description of the potential adverse impacts which cannot be avoided should the project be implemented;

(I) a description of the future of the environment without the proposed project; and

(J) a description of the extent to which the project may involve tradeoffs between short term environmental losses and long term gains or vice versa.

(4) Review by the board.

(A) For projects using the pre-design funding option, board staff will use preliminary environmental data provided by the applicant, as specified in §375.39 of this title (relating to Pre-Design Funding Option) and make a written report to the executive administrator on known or potential significant social or

environmental concerns. Subsequently, these projects must have a favorable executive administrator's environmental determination which is based upon a full environmental review during planning, as provided under subparagraph (B) of this paragraph.

(B) Draft versions of the environmental assessment and associated planning documents should be submitted to the board in time to allow for an initial interdisciplinary review. Any deficiencies or problems will be presented to the applicant, who will resolve any and all issues and prepare and submit the final environmental assessment for consideration as part of the loan application. In cases where an environmental assessment or environmental impact statement prepared in accordance with the guidelines of another agency has been submitted in place of an environmental assessment as defined in these guidelines, the board's staff will review it for completeness and applicability. In cases where a decision has been made to exclude a project from the formal environmental assessment process, the board's staff will base its review on the information provided §375.36 of this title (relating to Engineering Feasibility Data). Based upon this review, the board's staff will make written recommendations regarding the environmental impacts of the project, including any special concerns and proposed mitigative measures. The executive administrator will make a determination regarding the significance of the environmental impacts of the project based upon these guidelines and giving full consideration to the views and comments of other agencies and affected persons. The executive administrator will document his determination and present it, with any necessary provisions, to the board. If the executive administrator determines that the assessment is not adequate or that issues remain which warrant further consideration, the applicant will be requested to resolve the issues or modify the project as necessary.

(C) When, after an environmental determination on a project has been presented to the board, the project has been altered to the extent that the environmental assessment process has been repeated, the executive administrator will amend the determination and, if appropriate, present it, with any necessary provisions, to the board.

§375.36. Engineering Feasibility Data.

(a) Submittal of engineering feasibility data. The applicant shall submit engineering feasibility data signed and sealed by a professional engineer registered in the State of Texas. The data, based on guidelines provided by the executive administrator, shall provide:

(1) description and purpose of the project;

(2) entities to be served and current and future population;

(3) the cost of the project;

(4) a description of innovative and conventional alternatives considered and reasons for the selection of the project proposed;

(5) sufficient information to evaluate the engineering feasibility; and

(6) maps and drawings as necessary to locate and describe the project area. The executive administrator may request additional information or data as necessary to evaluate the project.

(b) Nonpoint source applications. Applications for assistance for nonpoint source pollution control projects must be consistent with an approved nonpoint source management plan pursuant to the Act, §319.

(c) Approval of engineering feasibility data. The executive administrator will approve the engineering feasibility data after confirming that the items listed in subsection(a) of this section have been completed, the appropriate environmental determinations have been completed in accordance with §375.35 of this title (relating to Required Environmental Review and Determination) or §375.214 of this title (relating to Required Environmental Review and Determination), whichever is appropriate, and the loan recipient has agreed to incorporate all mitigating measures directed by the executive administrator.

(d) Changes to engineering feasibility data. If changes occur in the project after approval of the engineering feasibility data, the executive administrator may request additional engineering and/or environmental information in order to ascertain that the loan commitment and environmental determination continues to be appropriate.

§375.37. Required Water Conservation Plan.

(a) The applicant, if not eligible for an exemption, shall submit either with its application or separately under subsection (b) of this section two copies of a water conservation plan for approval. The executive administrator shall review all water conservation plans submitted as part of an application for financial assistance for a project, shall determine if the plans are adequate, and shall present information to the board on the water conservation plan when the application is considered by the board.

(b) An applicant may elect to submit the required water conservation plan after the board approves its application for assistance, but before any funds are released. In such case, the applicant shall submit the conservation plan to the executive administrator for review. The executive administrator shall make a preliminary determination as to whether the plan is adequate, and shall submit the plan to the board for consideration. The board will approve, disapprove, or approve with modifications the applicant's water conservation plan during an open meeting. The board may revise the amount and conditions of its financial commitment after considering the water conservation plan.

(c) The water conservation plan required under subsections (a) or (b) of this section shall include an evaluation of the applicant's water and wastewater system and shall set goals to be accomplished by water conservation measures. The plan shall include a long-term water conservation plan and an emergency water demand management plan. In addition to any elements deemed appropriate by the applicant, the long-term plan shall include the following:

(1) measures to determine and control unaccounted for water including universal metering of both customer and public uses, periodic meter testing and repair, and distribution system leak detection and repair;

(2) non-promotional retail water rate structures which do not promote the excessive use of water by retail customers; and

(3) a continuing program of education and information which provides water conservation information directly to each residential, industrial and commercial customer annually, includes at least one other type of annual educational water conservation activity, and provides water conservation literature to new customers when they apply for service.

(d) The board may not require an applicant to provide a water conservation plan if the board determines an emergency exists, the amount of financial assistance to be provided is $500,000 or less, or implementation of a water conservation program is not reasonably necessary to facilitate water conservation.

(1) An emergency exists when:

(A) a water system has failed, causing the health and safety of the citizens served to be endangered;

(B) sudden, unforeseen demands are placed on a water system (i.e., because of military operations or emergency population relocation);

(C) a disaster has been declared by the governor or president; or

(D) the Governor's Division of Emergency Management of the Texas Department of Public Safety has determined that an emergency exists.

(2) The board shall review an application for which an emergency is determined to exist six months after the board commits to financial assistance, and also at the time of any extensions of the loan commitment. If the board finds that the emergency no longer exists, it may then require submission of a water conservation plan satisfactory to the board, before making any further disbursements on the commitments.

(3) Submission of a plan is not necessary to facilitate water conservation if the applicant already has a program in effect that meets the requirements of this section.

(e) If the applicant will utilize the project financed by the board to furnish water services to another entity that in turn will furnish the water services to the ultimate consumer, the requirements for the water conservation plan may be met either through contractual agreements between the applicant and the other entity providing for establishment of a water conservation plan, which shall be included in the contract at the earliest of the original execution, renewal or substantial amendment of that contract, or by other appropriate measures.

(f) The long-term water conservation plan may also include other measures that the applicant deems appropriate. These may include, but are not limited to, measures such as:

(1) codes and ordinances which require the use of water-conserving technologies;

(2) measurement and control of excessive pressure in the distribution system;

(3) ordinances to promote efficiency and avoid waste;

(4) commercial and residential conservation audits for indoor and landscape water uses;

(5) plumbing fixture replacement and retrofit programs;

(6) recycling and reuse of reclaimed wastewater and/or gray water; and

(7) other measures as may be applicable.

(g) The emergency demand management plan shall include trigger conditions, demand management measures, initiation and termination procedures, means of implementation, and measures to educate and inform the public.

(h) The board will accept a water conservation plan determined by the commission to satisfy the requirements of 30 TAC Chapter 288 (relating to Water Conservation Plans, Guidelines, and Requirements).

§375.38. Review of Applications by the Executive Administrator.

(a) Review criteria for loans. The executive administrator will review the applications and request any modifications or additional information as may be required for consistency with: §375.32 of this title (relating to Required General Information); §375.33 of this title (relating to Required Legal Information); §375.34 of this title (relating to Required Fiscal Information); §375.35 of this title (relating to Required Environmental Review and Determination); §375.36 of this title (relating to Engineering Feasibility Data); and §375.39 of this title (relating to Pre-Design Funding Option). If at any time the executive administrator determines that requested modifications or information is not being provided expeditiously by the applicant or that the applicant is not proceeding expeditiously to seek a loan commitment the executive administrator shall, after notice to the applicant, return the application. The application will have to be resubmitted to receive consideration for financial assistance.

(b) Review criteria for refinancing. The executive administrator shall review an application for refinancing of construction costs and present it to the board only after confirming the following.

(1) All of the items in subsection (a) of this section have been confirmed.

(2) The contract documents have been approved in accordance with §375.62 of this title (relating to Approval of Contract Documents).

(3) The executed contract documents have been submitted and approved, if available.

(4) An inspection and, if necessary, appraisal of any completed work has been performed, the findings of which demonstrate that the project is consistent with the board's rules and all applicable laws.

(5) The engineering feasibility data and environmental review was completed in accordance with §375.36 of this title before initiation of construction.

(6) Any other information requested by the executive administrator has been provided.

§375.39. Pre-Design Funding Option.

(a) This loan application option will provide an applicant that meets all applicable board requirements an alternative to secure loan proceeds for planning, design or building costs associated with a project. Under this option, a loan may be closed and funds released to complete planning activities. If all required planning has been completed and approved, design funds may also be released at the time of closing and building funds will be escrowed. If planning requirements have not been satisfied, design and building funds will be escrowed and released in the sequence described in this section. After planning and environmental review, the board may require the applicant to make changes in order to receive the board's approval and proceed with the project. If the portion of a project associated with funds in escrow cannot proceed, the loan recipient shall use the escrowed funds to redeem bonds purchased by the board in inverse order of maturity. General procedures and requirements for pre-design funding are described in this section.

(b) The executive administrator may recommend to the board the use of this section if, based on available information, there appear to be no significant permitting, social, contractual, environmental, engineering, or financial issues associated with the project. An application for pre-design funding may be considered by the board despite a negative recommendation from the executive administrator.

(c) Applications for pre-design funding must include the following information:

(1) for loans including building cost, an engineering plan of study which will include at minimum: a description and purpose of the project; area maps or drawings as necessary to fully locate the project area(s); a proposed project schedule; estimated project costs and budget including sources of funds; current and future populations

and projected flows; alternatives considered; and a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project;

(2) contracts for engineering services;

(3) evidence that an approved water conservation plan as required under §375.37 of this title (relating to Required Water Conservation Plan) will be adopted prior to the release of loan funds;

(4) all information required in §375.32 of this title (relating to Required General Information), §375.33 of this title (relating to Required Legal Information), and §375.34 of this title (relating to Required Fiscal Information); and

(5) any additional information the executive administrator may request to complete evaluation of the application.

(d) After board commitment and completion of all closing and release prerequisites as specified in §375.71 of this title (relating to Loan Closing) and §375.72 of this title (relating to Release of Funds), funds will be released in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase, and after approval of a water conservation plan if still outstanding under §375.37 of this title;

(2) for design costs, after receipt of executed contracts for the design phase and upon approval of the engineering feasibility data as specified in §375.36 of this title (relating to Engineering Feasibility Data) and compliance with §375.35 of this title (relating to Required Environmental Review and Determination); and

(3) for building costs, after issuance of any applicable permits, and after bid documents are approved and executed construction documents are contingently awarded.

(e) Board staff will use preliminary environmental data provided by the applicant, as specified in subsection (c)(1) of this section and make a written report to the executive administrator on known or potential significant social or environmental concerns to allow the executive administrator to make a recommendation to the board on pre-design funding. Subsequently, these projects must have a favorable executive administrator's recommendation which is based upon a full environmental review during planning, as provided by §375.35 of this title.

(f) Prior to the board's approval of release of funds for design, the executive administrator shall summarize the project's environmental review and shall inform the board of any environmentally related special mitigative or precautionary measures recommended for the project. The board may elect to affirm or alter the conditions of the original commitment to the applicant or withdraw the commitment to the applicant.

§375.40. Applicant Resolution and Financing Agreement.

(a) At the time the board initiates the process for sizing a bond sale, an applicant needing funds shall submit a resolution requesting inclusion in the board's future bond sale. In order to be included in a board bond sale, an applicant must submit a resolution outlining its intent to utilize board financing and the timing at which the loan will be closed.

(b) An applicant requesting $50 million or more in bond proceeds or requesting a board bond sale be scheduled specifically to address an applicant's financing needs, shall execute a financing agreement, the form of which will be provided by the development fund manager at least 10 days prior to the pricing date of the board's bonds. In the event the financing agreement is not executed prior to the pricing date, the applicant's request for funds at that time will not be included in that bond sale. A financing agreement will include performance obligations, closing language, maturities and interest rates. The financing agreement will also provide for cancellation by the applicant, associated payments to the board to compensate for costs and loan origination risk and conditions under which the development fund manager may extend or cancel the agreements.

§375.41. Rural Hardship Grants.

(a) An applicant for a loan for a project to benefit a rural hardship community is eligible to receive a grant through the hardship grants program for rural communities for an amount not to exceed 50% of the costs associated with planning, design, and construction of treatment works and systems utilizing alternative technology.

(b) To be eligible for assistance under this section, the board must determine that the project will improve public health or reduce an environmental risk. An applicant for funding under this section must provide, in addition to all other required application material, documentation that, in the opinion of the executive administrator, is sufficient to allow the board to make a determination under this subsection.

(c) The executive administrator or his designated representative shall enter into agreements with applicants under this section for the purpose of setting forth the terms and conditions of the grants.

(d) The grants awarded under this section shall be administered according to this subchapter except for the following:

(1) grants are not subject to the administrative cost recovery provisions of §375.18 of this title (relating to Administrative Cost Recovery); and

(2) grants are not subject to the book entry closing or DTC requirement provisions of §375.71 of this title (relating to Loan Closing).

§375.42. Capital Improvements Plan Option.

(a) The capital improvements plan CWSRF loan processing option will provide applicants an alternative to secure loan proceeds for eligible projects under the applicant's capital improvements plan. This option is a two-step loan processing method. First, an applicant will provide applicable information to the board for preliminary eligibility determination under subsection (b) of this section. Second, an applicant will submit a financial application in order to apply for financing under subsection (d) of this section. Under the capital improvements plan option, a loan may be closed: after bids are approved and prior to construction commencing as specified in §375.71 of this title (relating to Loan Closing) and §375.72 of this title (relating to Release of Funds); or utilizing the pre-design funding option as specified in §375.39 of this title (relating to Pre-Design Funding Option). This capital improvements plan option may be used for the purpose of reimbursement of system revenues and/or refinancing of interim financing, including commercial paper expended for approved project(s). General procedures and requirements for processing a loan application under the capital improvements plan option are described in subsections (b), (c) and (d) of this section.

(b) An applicant will request a preliminary eligibility determination from the board on the project(s) described in the applicant's capital improvements plan or similar document addressing capital improvement planning.

(1) The board's action of preliminary eligibility determination will:

(A) authorize board staff to expend agency resources to review and approve project documents as described in subsection (c) of this section for the proposed capital improvements plan;

(B) establish that those portions of project(s) and costs approved in the preliminary eligibility determination are eligible for CWSRF financing provided that the requirements in subsection (c) of this section are met; and

(C) acknowledge the applicant's intention to construct the project(s) in the capital improvements plan and to seek financial assistance to finance, including refinancing all or part of, those project(s).

(2) The board's action of preliminary eligibility determination will provide no financial commitment by the board to the project(s) in the capital improvements plan.

(3) Requests for preliminary eligibility determination must include:

(A) a capital improvements plan or similar information which includes a description and purpose of the project(s), area maps or drawings which adequately locate the project area(s), a proposed project schedule, estimated project costs and sources of funds;

(B) a forecast of system cash flow, timing and approximate amount of financial assistance to be requested from the CWSRF, and a description of any intention to use the CWSRF loan proceeds to refinance existing interim debt obligations, including a description of the debt obligations, interfund transfers or internal methods of finance;

(C) a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project and any environmental information which may already be prepared pertaining to the proposed project(s) included in the capital improvement plan or documentation of environmental review of the proposed project(s) which may have been required by another state or federal agency;

(D) a resolution of the applicant's governing body requesting CWSRF preliminary eligibility determination from the board and stating that the applicant will comply with all board rules and requirements; and

(E) any additional information the executive administrator may request to complete eligibility evaluation of the capital improvements plan.

(c) Procedures between board preliminary eligibility determination and before financial commitment are as follows.

(1) Prior to the initiation of construction of each project included in the capital improvements plan which will be funded by the board, the applicant will obtain from the executive administrator approval of the engineering feasibility data as addressed in §375.36 of this title (relating to Engineering Feasibility Data), a favorable environmental determination as addressed in §375.35 of this title (relating to Required Environmental Review and Determination) or §375.214 of this title (relating to Required Environmental Review and Determination), whichever is applicable; approval of design plans and specifications as addressed in §375.62 of this title (relating to Approval of Contract Documents). Prior to the initiation of construction, applicant will additionally submit to the executive administrator bidding documents, including executed contracts for the project.

(2) The executive administrator will make periodic inspections of projects under §375.82 of this title (relating to Inspection During Construction).

(3) The executive administrator will advise the board concerning projects that involve major economic or administrative impacts to the applicant resulting from environmentally-related special mitigative or precautionary measures from an environmental assessment under §375.35 of this title or as conditions in the environmental determination required by §375.214 of this title as applicable.

(d) After the board's preliminary eligibility determination under subsection (b) of this section and after all requirements under subsection (c) of this section have been met, any of the project(s) included in the applicant's capital improvements plan may be considered for a commitment for financial assistance. An applicant must submit an application which includes the following:

(1) all applicable information required in §375.32 of this title (relating to Required General Information), §375.33 of this title (relating to Required Legal Information), and §375.34 of this title (relating to Required Fiscal Information);

(2) a water conservation plan required by §375.37 of this title (relating to Required Water Conservation Plan); and

(3) any additional information the executive administrator may request to complete evaluation of the financial application.

(e) After board commitment and after completion of all closing and release prerequisites specified in §375.39, §375.71, or §375.72 of this title, funds will be released.

(f) The executive administrator may recommend to the board the use of this section if, based on available information submitted under subsection (b), (c) or (d) of this section, there appear to be no significant permitting, social, environmental, engineering, or financial issues associated with the project. Any request for preliminary eligibility determination or financing under this option may be considered by the board despite a negative recommendation from the executive administrator.

(g) An applicant with outstanding commitments for financial assistance for projects previously approved by the board or with funds available from closed loans may utilize identified funds from the outstanding commitments or closed loans for costs approved in the preliminary eligibility determination when the requirements in subsection (c) of this section have been met. If the applicant uses this subsection, the board cannot guarantee that additional funds for projects or work previously approved by the board will be available. The applicant must submit a new request for additional financial assistance in the event funds from outstanding commitments or closed loans are utilized for projects in the preliminary eligibility determination and additional funding is required to complete the projects. The provisions of this subsection may not be used if the previously committed or closed loans are backed by project-specific revenues as opposed to system revenues or tax pledges of the applicant.

This 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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Suzanne Schwartz
General Counsel

Texas Water Development Board
Proposed date of adoption: January 21, 1999
For further information, please call: (512) 463-7981

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Division 4. Board Action on Applications

31 TAC §375.51, §375.52

The new sections are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the new sections are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.51. Formal Action by the Board.

(a) Presentation to board. The executive administrator shall present the application to the board after completing the review pursuant to §375.38 of this title (relating to Review of Applications by the Executive Administrator), and shall include comments concerning the best method of making financial assistance available. Upon the executive administrator's finding that the application is complete and in order for board review, the application shall be placed on the following month's agenda for board consideration. The applicant and other interested parties known to the board shall be notified of the time and place of such meeting. Evidence and arguments both for and against the granting of the application may be heard at such meeting.

(b) Action by board. At the conclusion of the meeting to consider the project, the board may resolve to approve, disapprove, amend, or continue consideration of the application. The board shall approve an application only if the board finds that in its opinion the revenue or taxes or both revenue and taxes pledged by the applicant will be sufficient to meet all obligations assumed by the applicant and that the application and assistance applied for meet the requirements of the federal act and state law.

(c) Commitment period. Loan approval action will include specification of a commitment period, after which time the commitment shall expire, unless extended by the board. The board may make any changes in the original commitment at the time of the extension.

§375.52. Lending Rates.

(a) Procedure for setting fixed interest rates.

(1) The development fund manager will set fixed rates for loans on a date that is:

(A) five business days prior to the adoption of the political subdivision's bond ordinance or resolution; and

(B) not more than 45 days before the anticipated closing of the loan from the board.

(2) After 45 days from the assignment of the interest rate on the loan, rates may be extended only with the development fund manager's approval.

(b) Fixed rates. The fixed interest rates for loans under this subchapter are set at rates 70 basis points below the fixed rate index rates for borrowers plus an additional reduction under paragraph (1) of this subsection, or if applicable, are set at the total basis points below the fixed rate index for borrowers derived under paragraph (2) of this subsection. Using individual coupon rates for each maturity of proposed debt based on the appropriate index's scale, the fixed rate index rates shall be established for each uninsured borrower based on the borrower's market cost of funds as they relate to the Delphis Hanover Corporation Range of Yield Curve Scales (Delphis) or the 90 index scale of the Delphis. For borrowers with either no rating or a rating less than investment grade, the 90 index scale of the Delphis will apply. The fixed rate index rates shall be established for each insured borrower based on the higher of the borrower's uninsured fixed rate index scale or the Delphis 96 index scale.

(1) Under §375.18 of this title (relating to Administrative Cost Recovery) an additional 25 basis points reduction will be used, for total fixed interest rates of 95 basis points below the fixed index rates for such borrowers.

(2) For borrowers filing applications on or after February 5, 1998 for loans with an average bond life in excess of 14 years or, at the discretion of the board for borrowers filing applications on or after February 5, 1998 for loans which have debt schedules less than 20 years and which produce a total fixed lending rate reduction in excess of a standard loan structure (defined as a debt service schedule in which the first year of the maturity schedule is interest only followed by 20 years of principal maturing on the basis of level debt service), the following procedures will be used in lieu of the provisions of paragraph (1) of this subsection to determine the fixed lending rate reduction.

(A) The interest rate component of level debt service will be determined by using the 13th year coupon rate of the appropriate index of the Delphis scales that corresponds to the 13th year of principal of the standard loan structure and that is measured from the first business day on the month the loan application will be presented to the board for approval.

(B) Level debt service will be calculated using the 13th year Delphis Scale coupon rate as described in subparagraph (A) of this paragraph and the par amount of the loan according to a standard loan structure. For a loan which has been proposed for a term of years equal to a standard loan structure, the dates specified in the loan application shall be used for interest and principal calculation. For a loan which has been proposed for a term of years less than a standard loan structure or longer than a standard loan structure, level debt service will be calculated beginning with the dated date and based upon the principal and interest dates specified in the application, and continuing for the term of a standard loan structure.

(C) A calculation will be made to determine how much a borrower's interest would be reduced if the loan had been made according to the total fixed lending rate reduction provided in paragraph (1) of this subsection and based upon the principal payments calculated in subparagraph (B) of this paragraph.

(D) The board will establish a total fixed lending rate reduction for the loan that will achieve the interest savings in subparagraph (C) of this paragraph based upon the principal schedule proposed by the borrower.

(c) Variable rates. The interest rate for variable rate loans under this chapter will be set at a rate equal to the actual interest cost paid by the board on its outstanding variable rate debt plus 31.5 basis points. Variable rate loans are required to be converted to long-term fixed rate loans within 90 days of project completion unless an extension is approved in writing by the development fund manager. Within the time limits set forward in this subdivision, borrowers may request to convert to a long-term fixed rate at any time, upon notification to the development fund manager and submittal of a resolution requesting such conversion. The fixed lending rate will

be calculated under the procedures and requirements of subsections (a) and (b) of this section.

(d) Adjustment of interest rate. The development fund manager may adjust a borrower's interest rate at any time prior to closing as a result of a change in the borrower's credit rating.

This 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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Division 5. Engineering Requirements

31 TAC §375.61, §375.62

The new sections are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the new sections are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.61. Contract Documents.

An applicant shall obtain executive administrator approval of contract documents, including engineering plans and specifications, prior to receiving bids and awarding the contract. The applicant shall submit three copies of contract documents; which shall be as detailed as would be required for submission to contractors bidding on the work, and which shall be consistent with the engineering feasibility data submitted with the application. The contract documents must contain the following:

(1) provisions assuring compliance with the board's rules and all relevant statutes;

(2) forms by which the performance and payment bonds will be provided;

(3) provisions requiring the contractor to obtain and maintain the appropriate insurance coverage;

(4) provisions providing for the applicant to retain a minimum of 5.0% of the progress payments otherwise due to the contractor until the building of the project is substantially complete and a reduction in the retainage is authorized by the executive administrator;

(5) a contractor's act of assurance form to be executed by the contractor which shall warrant compliance by the contractor with all laws of the State of Texas and all rules and published policies of the board;

(6) provisions giving authorized representatives of the board access to all such construction activities, books, records, documents and other evidence of the contractor for the purpose of inspection, audit and copying during normal business hours; and

(7) any additional conditions that may be requested by the executive administrator.

§375.62. Approval of Contract Documents.

(a) Approval. The executive administrator will approve the contract documents if they:

(1) conform to the requirements listed in this subsection;

(2) are consistent with all relevant statutes, including the Texas Water Code;

(3) pass a biddability, operability, and constructability review by the executive administrator; and

(4) are consistent with the engineering feasibility data and environmental determinations required by §375.35 of this title (relating to Required Environmental Review and Determination) and §375.36 of this title (relating to Engineering Feasibility Data).

(b) Advertisement for bids. The applicant shall obtain authorization from the executive administrator before advertising for bids on the project.

(c) Other approvals. The applicant shall obtain the approval of the plans and specifications from each state and federal agency having jurisdiction over the project. The executive administrator's approval of the contract documents does not relieve the applicant of any liabilities or responsibilities with respect to the design, construction, operation, or performance of the project.

This 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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Division 6. Prerequisites to Release of Funds

31 TAC §§375.71-375.73

The new sections are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the new sections are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.71. Loan Closing.

(a) Instruments needed for closing. The documents which shall be required at the time of closing shall include the following:

(1) evidence that requirements and regulations of all local, state and federal agencies having jurisdiction have been met prior to

release of building funds, including but not limited to permits and authorizations;

(2) certified copy of the ordinances or resolutions adopted by the governing body authorizing issuance of debt sold to the board which has received prior approval by the executive administrator and which shall have sections providing:

(A) that an escrow account, if applicable, shall be created which shall be separate from all other funds and that:

(i) the account shall be maintained at an escrow agent bank or maintained with the trust agent;

(ii) funds shall not be released from the escrow account without written approval by the executive administrator;

(iii) the escrow account bank statements or trust account statement will be provided on a monthly basis to the development fund manager's office; and

(iv) the escrow account will be adequately collateralized as determined by the executive administrator sufficient to protect the board's interest;

(B) that a construction fund shall be created which shall be separate from all other funds of the applicant;

(C) that a final accounting be made to the board of the total sources and authorized use of project funds and that any surplus loan funds be used in a manner as approved by the executive administrator;

(D) that an annual audit of the applicant, prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant be provided annually to the executive administrator;

(E) that the applicant shall fix and maintain rates and collect charges to provide adequate operation, maintenance and insurance coverage on the project in an amount sufficient to protect the board's interest;

(F) that the applicant will implement any water conservation program required by the board until all financial obligations to the state have been discharged;

(G) that the applicant shall maintain current, accurate and complete records and accounts necessary to demonstrate compliance with financial assistance related legal and contractual provisions;

(H) that the applicant covenants to abide by the board's rules and relevant statutes, including the Texas Water Code, Chapter 15, subchapter J; and

(I) that the applicant, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the applicant's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis substantially in the manner required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the board were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the board and the beneficial owner of the applicant's obligations, if the board sells or otherwise transfers such obligations, and the beneficial owners of the board's bonds if the applicant is an obligated person with respect to such bonds under rule 15c2-12;

(3) two copies of the applicant's water conservation program, including documentation of local adoption;

(4) unqualified approving opinions of the attorney general of Texas and a certification from the comptroller of public accounts that such debt has been registered in that office;

(5) unqualified approving opinion by a recognized bond attorney acceptable to the executive administrator;

(6) executed escrow agreement entered into by the applicant and an escrow agent bank or an executed trust agreement entered into by the applicant and the trust agent satisfactory to the executive administrator, in the event that construction funds are escrowed;

(7) evidence that the applicant shall maintain adequate insurance coverage on the project in an amount adequate to protect the board's interest;

(8) assurances that the applicant will comply with any special conditions specified by the board's environmental determination until all financial obligations to the state have been discharged; and

(9) other or additional data and information, if deemed necessary by the executive administrator.

(b) Certified transcript. At such time as available following the final release of funds the applicant shall submit a transcript of proceedings relating to the debt purchased by the board which shall contain those instruments normally furnished a purchaser of debt.

(c) Refinancing construction loans. If the project includes the refinancing of a loan, the applicant shall submit all of the items specified in subsection (a) of this section and any records, assurances, or appraisals concerning the construction of the project. Additionally, the project must pass the executive administrator's inspection of the project.

(d) Loan closing prior to completion of design. In the event financial assistance is needed by the applicant to complete design of a project without escrow of funds for building under §375.39 of this title (relating to Pre-Design Funding Option), the executive administrator will so advise the board. The board at its option may authorize the executive administrator to close the loan for planning and design without requiring the submittals in subsection (a)(1) and (6) of this section. However, the submittals in subsection (a)(1) of this section will be required prior to delivery of funds for building purposes. Applicants wishing to close prior to obtaining required commission permits will be required to present documentation that the required permits are expected to be issued.

(e) Loan closing for phased construction. The executive administrator may determine it appropriate to close only a portion of a loan for a phased construction project unless the applicant can demonstrate the need for phased construction and that closing the portion of the loan desired by the applicant is necessary to expedite construction.

(f) Closing requirements. The applicant shall be required to comply with the following closing requirements:

(1) all loans shall be closed in book-entry-only form;

(2) the applicant shall use a paying agent/registrar that is a Depository Trust Company (DTC) participant;

(3) the applicant shall be responsible for paying all DTC closing fees assessed to the applicant by the board's custodian bank directly to the board's custodian bank; and

(4) the applicant shall provide evidence to the board that one fully registered bond has been sent to the DTC or to the applicant's paying agent/registrar prior to closing.

§375.72. Release of Funds.

(a) Release of funds for planning, design and permits. Prior to the release of funds for planning, design, and permits, the political subdivision shall submit for approval to the executive administrator the following documents:

(1) a statement as to sufficiency of funds to complete the activity;

(2) certified copies of each contract under which revenues for repayment of the political subdivision's debt will accrue;

(3) executed consultant contracts relating to services provided for planning, design, and/or permits; and

(4) other such instruments or documents as the board or executive administrator may require.

(b) Pre-design funding. The funds needed for the total estimated cost of the engineering planning, and design cost if the engineering feasibility data required under §375.36 of this title (relating to Engineering Feasibility Data) has been approved, the cost of issuance associated with the loan, and any associated capitalized interest will be released to the loan recipient and the remaining funds will be escrowed to the escrow agent bank or to the trust agent until all applicable requirements in subsections (a) and (c) of this section and §375.39 of this title (relating to Pre-Design Funding Option) have been met.

(c) Release of funds for building purposes. Prior to the release of funds for building purposes, the political subdivision shall submit for approval to the executive administrator the following documents:

(1) a tabulation of all bids received and an explanation for any rejected bids or otherwise disqualified bidders;

(2) two executed original copies of each construction contract the effectiveness and validity of which is contingent upon the receipt of board funds;

(3) evidence that the necessary acquisitions of land, leases, easements and rights-of-way have been completed or that the applicant has the legal authority necessary to complete the acquisitions;

(4) a statement as to sufficiency of funds to complete the project;

(5) certified copies of each contract under which revenues to the project will accrue;

(6) evidence that the project is consistent with plans, if any, developed under the Act, §§205(j), 208, 303(e), 319 or 320 which apply to the project receiving the financial assistance;

(7) an updated schedule of projected monthly reimbursements for eligible project costs to be requested by the applicant throughout the project funding period. Any eligible project costs which will be paid by the applicant prior to receiving reimbursement must be identified separately in this schedule; and

(8) other such instruments or documents as the board or executive administrator may require.

(d) Release of funds for projects constructed through one or more construction contracts. For projects constructed through one or more construction contracts, the executive administrator may approve the release of funds for all or a portion of the estimated project cost, provided all requirements of subsection (c) of this section have been met for at least one of the construction contracts.

(e) Escrow of funds. The executive administrator may require the escrow of an amount of project funding related to contracts which have not met the requirements of subsection (c) of this section at the time of loan closing.

§375.73. Movement of Funds Between Approved Projects.

If approved by the executive administrator, a borrower may transfer remaining excess funds from one or more of the borrower's board-approved projects under this chapter to other of the borrower's board-approved projects under this chapter only if the project to which funds are being transferred has met all requirements imposed on projects by §375.212 of this title (relating to Capitalization Grant Requirements) and §375.35 of this title (relating to Required Environmental Review and Determination). Applicants must comply with any new requirements triggered by the transfer of funds.

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

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Division 7. Building Phase

31 TAC §§375.81-375.87

The new sections are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the new sections are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.81. Awarding Construction Contracts.

(a) The applicant shall be responsible for assuring that every appropriate procedure and incidental legal requirement is observed in advertising for bids and awarding the construction contract. Any submittals waived by §375.71 of this title (relating to Loan Closing) will be submitted to the executive administrator for approval prior to awarding any construction contracts and releasing funds for building purposes. The text of the construction contract shall not vary from the text of the executive administrator-approved pro forma draft submitted by the loan recipient.

(b) Prior to initiation of construction, the applicant shall conduct a preconstruction conference on each significant construction contract to address the contents of the executed contract documents with the project engineer, prime contractor, and other appropriate parties in attendance. The executive administrator shall be given at least five days advance notice of the date, time, and location for the preconstruction conference.

§375.82. Inspection During Construction.

After the construction contract is awarded, the applicant shall provide for adequate inspection of the project by a registered professional

engineer and require the engineer's assurance that the work is being performed in a satisfactory manner in accordance with the approved plans and specifications, other engineering design or permit documents, approved alterations, and in accordance with sound engineering principles and construction practices. The executive administrator is authorized to inspect the construction and materials of any project at any time, but such inspection shall never subject the State of Texas to any action for damages. The executive administrator shall bring to the attention of the applicant any deviations from the approved contract documents. The applicant and the project engineer shall immediately initiate necessary corrective action.

§375.83. Alterations in Approved Contract Documents.

If after the executive administrator approves engineering contract documents it becomes apparent that changes in such contract documents are necessary or appropriate, a change order and justification therefore shall be submitted for approval, well in advance of the building alteration when possible. The executive administrator may approve and authorize a change, alteration, or variance in previously approved engineering contract documents, including, but not limited to, additions or deletions of work to be performed pursuant to the contract, if such change, alteration, or variance does not change, vary, or alter the basic purpose or effect of a project, is not a substantial or material alteration in the contract documents, and does not increase the loan commitment of the board for the project. Any change, alteration, or variance in the previously approved contract documents which involves an alteration in the basic purpose or effect of a project, substantially or materially alters the previously approved contract documents of the project, or which involves an increase in the loan commitment of the board for the project, must be approved and authorized by the board. If there is an immediate danger to life or property, tentative approval of change orders may be secured from the executive administrator via telephone and confirmed in writing. A request for a change order should contain sufficient information, with plans or drawings and cost estimates, to enable the executive administrator to review the proposal. Engineering computations shall be included if structural changes are involved. After approval of the proposed alterations, copies of the approved change order shall be forwarded to the project engineer. If commission approval of plans for a wastewater treatment plant or other facility has been required, commission approval also must be obtained before any substantial or material alteration is made in those plans.

§375.84. Contractor Bankruptcy.

In the event of a contractor bankruptcy, any agreements entered into with the bonding company, (other than the bonding company serving as general contractor or fully bonding another contractor acting as their agent), must be submitted for approval of the executive administrator. The applicant shall be responsible for assuring that every appropriate procedure and all legal requirements are observed in advertising for bids and re-awarding a construction contract.

§375.85. Building Phase Submittals.

After a project is completed, the applicant shall receive from the contractor a complete set of as-built drawings of the project.

§375.86. Retainage.

(a) Retainage withheld. Progress payments to the prime contractor should be for no more than 95% of the actual work completed at the time of the payment request.

(b) Partial release of retainage. If a project is substantially complete, a partial release of the 5.0% retainage may be made by the applicant with the approval of the executive administrator.

(c) Final release of retainage. After completion of construction and issuance of a certificate of approval by the development fund manager, the final release of remaining retainage may be made.

§375.87. Disbursements and Outlay Reports.

Disbursements from the construction fund established by the applicant will require approval by the executive administrator. Certified requests for payment shall be submitted to the executive administrator monthly. Upon approval by the executive administrator, funds may be disbursed for authorized project costs. At the discretion of the executive administrator, applicants whose projects are not funded with federal grant funds will not be required to comply with this section but will be required to submit outlay reports with appropriate documentation on forms acceptable to the executive administrator.

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

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Division 8. Post Building Phase

31 TAC §§375.101-375.105

The new sections are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the new sections are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.101. Responsibilities of Applicant.

After the satisfactory completion of the project, the applicant shall be held accountable by the board for the continued validity of all representations and assurances made to the board. Continuing cooperation with the board is required. To facilitate such cooperation and to enable the board to protect the state's investment and the public interest, the following provisions shall be observed.

(1) The executive administrator is authorized to inspect the project and the records of operation and maintenance of the project at any time. If it is found that the project is being improperly or inadequately operated and maintained to the extent that the project purposes are not being properly fulfilled or that integrity of the state's investment is being endangered, the executive administrator shall require the applicants to take corrective action.

(2) The executive administrator may request certified copies of all minutes, operating budgets, monthly operating statements, contracts, leases, deeds, audit reports, and other documents concerning the operation and maintenance of the project in addition to the requirements of the covenants of the bond indenture. The financial assistance provided by the board is based on the project's economic feasibility, and the board shares the applicant's desire to

maintain this feasibility in the project's operation and maintenance at all times. The executive administrator shall periodically inspect, analyze, and monitor the project's revenues, operation, and any other information the board requires in order to perform its duties and to protect the public interest.

(3) The applicant shall maintain debt service fund accounts and all other fund accounts related to the CWSRF debt in accordance with standards set forth by the Governmental Accounting Standards Board.

(4) Applicants shall maintain an approved water conservation program in effect until all financial obligations to the state have been discharged and shall report annually to the executive administrator on the implementation and status of required water conservation programs for three years after the date of loan closing. If the executive administrator determines that the water conservation program is not in compliance with the approved water conservation plan, the political subdivisions shall continue to supply annual reports beyond the three years until the executive administrator determines that deficiencies in the plan have been resolved. Annual reports prepared for the commission providing the information required by this subparagraph may be provided to the board to fulfill the board's reporting requirements.

(5) Applicants which were required to implement mitigative measures as a result of the environmental review process shall continue to comply with those measures.

(6) Should any information obtained by the executive administrator indicate noncompliance with any agreements, the executive administrator shall require the political subdivision to take timely corrective action. Failure to correct problems may be cause for referral to the Attorney General.

§375.102. Final Accounting.

Upon completion of the project and after the applicant submits the final funds requisition, a final accounting will be made to the executive administrator. The applicant will retain all CWSRF construction records for three full state fiscal years following the submission of the final funds requisition.

§375.103. Audits.

The executive administrator is authorized to conduct engineering and financial audits of every project which is financed in whole or in part by board financial assistance. Audits may be conducted on site if necessary and board staff shall be provided access to all project records necessary to complete such audit. The political subdivision shall take actions to correct any items found to be in noncompliance with agreements relating to board financial assistance.

§375.104. Certificate of Approval.

Upon certification from the political subdivision and project engineer that the project was completed in accordance with approved plans and specifications, the development fund manager shall issue a certificate of approval that the work to be done under the contract has been completed and performed in a satisfactory manner and in accordance with sound engineering principles and practices.

§375.105. Final Release of Retainage.

After issuance of a certificate of approval, the final release of retainage may be made.

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

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Subchapter B. Provisions Pertaining to Use of Capitalization Grant Funds

Division 1. Introductory Provisions

31 TAC §375.201

The new section is proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the new section is Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.201. Scope of Subchapter.

The sections of Subchapter B shall pertain to applications for financial assistance from the Clean Water State Revolving Fund that are needed to satisfy the federal requirements for the state's receipt of federal capitalization grant funds. Unless in conflict with the provisions of this subchapter, the provisions of Subchapter A of this title (relating to General Provisions) shall also apply to applications for financial assistance under this subchapter.

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

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Division 2. Program Requirements

31 TAC §§375.211-375.214

The new sections are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the new sections are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.211. Capitalization Grant Application.

After the board approves the intended use plan and priority list, the executive administrator shall submit these items with an application for the capitalization grant for that fiscal year to the EPA.

§375.212. Capitalization Grant Requirements.

(a) All projects which receive assistance from the fund and will be constructed in whole or part with funds directly made available by capitalization grants shall satisfy the following federal requirements:

(1) National Environmental Policy Act of 1969, PL 91-190;

(2) Archeological and Historic Preservation Act of 1974, PL 93-291;

(3) Clean Air Act, 42 USC 7506(c);

(4) Coastal Barrier Resources Act, 16 USC 3501 et seq;

(5) Coastal Zone Management Act of 1972, PL 92-583, as amended;

(6) Endangered Species Act, 16 USC 1531, et seq;

(7) Executive Order 11593, Protection and Enhancement of the Cultural Environment;

(8) Executive Order 11988, Floodplain Management;

(9) Executive Order 11990, Protection of Wetlands;

(10) Farmland Protection Policy Act, 7 USC 4201 et seq;

(11) Fish and Wildlife Coordination Act, PL 85-624, as amended;

(12) National Historic Preservation Act of 1966, PL 89-665, as amended;

(13) Safe Drinking Water Act, §1424(e), PL 92-523, as amended;

(14) Wild and Scenic Rivers Act, PL 90-542, as amended;

(15) Demonstration Cities and Metropolitan Development Act of 1966, PL 89-754, as amended;

(16) Clean Air Act, §306 and Clean Water Act, §508, including Executive Order 11738, Administration of the Clean Air Act and the Federal Water Pollution Control Act with Respect to Federal Contracts, Grants, or Loans;

(17) Age Discrimination Act, PL 94-135;

(18) Civil Rights Act of 1964, PL 88-352;

(19) PL 92-500, §13; Prohibition against sex discrimination under the Federal Water Pollution Control Act;

(20) Executive Order 11246, Equal Employment Opportunity;

(21) Executive Orders 11625 and 12138, Women's and Minority Business Enterprise;

(22) Rehabilitation Act of 1973, PL 93-112 (including Executive Orders 11914 and 11250);

(23) Uniform Relocation and Real Property Acquisition Policies Act of 1970, PL 91-646;

(24) Executive Order 12549, Debarment and Suspension;

(25) The Wilderness Act, 16 USC 1131 et seq.; and

(26) Environmental Justice, Executive Order 12898.

(b) Requirements for minority business enterprise/women's business enterprise/small business enterprise/small business enterprise in a rural area.

(1) Definitions. For the purposes of this subsection the following definitions shall apply.

(A) Construction - Notwithstanding the provisions of §375.2 of this title (relating to Definition of Terms), any contract or agreement to provide the building, erection, alteration, remodeling, improvement or extension of a CWSRF funded project.

(B) Contract - A written agreement between a CWSRF recipient and another party and any lower tier agreement for equipment, supplies, or construction necessary to complete the project. Includes personal and professional services , agreements with consultants, and purchase orders.

(C) Equipment - Tangible, nonexpendable personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

(D) MBE - A minority business enterprise, a business concern that is:

(i) at least 51% owned by one or more minority individuals who are U. S. Citizens, or in the case of a publicly owned business, at least 51% of the stock is owned by one or more minority individuals who are U. S. Citizens; and

(ii) whose daily business operations are managed and directed by one or more of the minority owners. Minority individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans or other groups whose members have been found to be disadvantaged by the Small Business Act or by the Secretary of Commerce under Executive Order 11625, §5.

(E) Prime contract - Any contract, agreement or other action entered into by a CWSRF applicant to procure construction, services, equipment or supplies.

(F) SBE - A small business enterprise, a business concern, including its affiliate, that is independently owned and operated, not dominant in the field of operation in which it operates, and that is qualified as a small business by the Small Business Administration.

(G) SBRA - A small business enterprise in a rural area, a small business concern that is located and conducts its principal operations in a non-metropolitan county as delineated by the Small Business Administration.

(H) Services - A contractor's time and efforts which do not involve delivery of a specific end item other than documents (e.g. reports, design drawings, specifications, etc.).

(I) Subcontract - Any contract, agreement or other action to procure construction, services, equipment or supplies between a prime contractor and any other business to supply such goods or services for a CWSRF financial assistance action.

(J) Supplies - All tangible personal property other than equipment.

(K) WBE - A women's business enterprise, a business concern that is:

(i) at least 51% owned by one or more women, or in the case of a publicly owned business, at least 51% of the stock is owned by one or more women; and

(ii) whose daily business operations are managed and directed by one or more of the women owners.

(2) Affirmative action steps. Those steps necessary by the applicant and the prime contractor to ensure that MBEs , WBEs, SBEs and SBRAs are utilized when possible including:

(A) placing qualified MBEs, WBEs, SBEs and SBRAs on solicitation lists;

(B) assuring that MBEs, WBEs, SBEs and SBRAs are solicited whenever they are potential sources;

(C) dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by MBEs, WBEs, SBEs and SBRAs;

(D) establishing delivery schedules, where the requirement permits, which encourage participation by MBEs, WBEs, SBEs and SBRAs;

(E) using the services and assistance of the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(F) requiring the prime contractor, if subcontracts are to be let, to take the affirmative action steps listed in subparagraphs (A) – (E) of this paragraph.

(3) Requirements for applicants.

(A) Pursuant to EPA policy and legal requirements, a goal oriented system has been established to promote MBE and WBE participation on all projects receiving funds from the CWSRF. In addition, it is the intent that SBEs and SBRAs be afforded the maximum practicable opportunity to participate in the CWSRF financial assistance program.

(B) Prior to receiving a loan commitment the applicant will submit an affirmative action plan on forms provided by the board. The plan shall be signed by the authorized representative of the applicant and shall contain estimates and/or actual amounts of MBE and WBE participation in the categories of construction, services, equipment, or supplies. Copies of any existing or proposed MBE and WBE contracts should be attached.

(C) In all procurements, the applicant will undertake a good faith effort to attract and utilize MBE, WBE, SBE and SBRA participation. This must include, but not be limited to taking the six affirmative action steps.

(D) In all procurements, the applicant will include provisions in prime contracts requiring the prime contractors to submit an affirmative action plan, and to undertake a good faith effort to attract and utilize MBEs, WBEs, SBEs and SBRAs, through subcontracts. This must include but not be limited to taking the affirmative action steps described in paragraphs (2)(A)-(E) of this subsection.

(E) As a condition to the release of funds or at any other time contracts or subcontracts are entered into, the applicant will report MBE and WBE participation and will provide documentation of good faith efforts on forms provided by board staff.

(F) The applicant and the prime contractor(s) will maintain all records documenting required good faith efforts.

§375.213. Distribution of Funds.

(a) Notice of availability of funds. Because this subchapter imposes requirements greater than those in Subchapter A of this chapter (relating to General Provisions), the board generally provides lower interest rates for projects funded under Subchapter B of this chapter (relating to Provisions Pertaining to Use of Capitalization Grant Funds). The board will limit funding under this subchapter only to that dollar amount of projects reasonably necessary to meet federal requirements. The executive administrator, upon determining that it is necessary to seek projects to be funded under the requirements of this subchapter, will provide notice of availability of funds at a lower interest rate in the annual intended use plan prepared in accordance with this chapter. The executive administrator will also provide notice by direct mail to political subdivisions with projects listed above the funding line in the annual intended use plan. The notice shall invite applications for the lower interest rate funds and shall specify the approximate dollar amount of projects that the board intends to fund through this chapter.

(b) Refundings. The board will not provide funding under this chapter for refunding projects for which a loan has already been closed.

(c) Method for distribution of funds. Applications from applicants receiving a notice under subsection (a) of this section will be presented for board action on a first- come, first-served basis unless a fund shortage exists.

(d) Funds shortage. A fund shortage is considered to exist when on the first business day of the month of the board meeting the cumulative amount of funds previously committed pursuant to subsection (a) of this section, plus the amount of funds required to fund all applications which are complete and ready for scheduling for board action exceeds the amount of funds identified as available for such funding in the notice under subsection (a) of this section. Applications are considered to be complete and ready for board action if they meet the requirements of §375.32 of this title (relating to Required General Information), §375.33 of this title (relating to Required Legal Information), and §375.34 of this title (relating to Required Fiscal Information) and either both §375.35 of this title (relating to Required Environmental Review and Determination) and §375.36 of this title (relating to Engineering Feasibility Data) of this title or §375.39 of this title (relating to Pre-Design Funding Option).

(e) Scheduling of applications. Applications which are ready for scheduling for board action at the time a fund shortage occurs will be presented for board action under this chapter as follows:

(1) first, applications for treatment works in the order of their priority ranking in accordance with §375.16 of this title (relating to Rating Process); and

(2) next, if additional funds are available, to applications for implementing management programs for nonpoint source pollution under the Act, §319, and applications for developing and implementing conservation and management plans under the National Estuary Program under the Act, §320, in the order of the receipt of completed applications.

(f) Utilization of available funds. Funds will be made available to applicants under the provisions of subsections (c)-(e) of this section in the order specified until available funds identified in subsection (a) of this section, have been utilized. If funds are available under this subchapter for only part of an application, the remainder of the project may be funded under the CWSRF interest rate associated with loans under Subchapter A. Applications for projects for which no funds are available under this subchapter will be considered under Subchapter A, unless the applicant indicates it does not want to proceed under such chapter.

§375.214. Required Environmental Review and Determination.

(a) General. The applicant's preparation of the environmental information and the executive administrator's review and issuance of a determination forms an integral part of the planning process required of any potential applicant to the fund. There are three

levels of environmental information required, varying according to the nature and scope of the project and the environment in which it is proposed. Correspondingly, the appropriate level of review will be conducted by the board and formal determinations documenting the review are issued. The categorical exclusion (CE) is directed toward those applicants proposing only minor rehabilitation or functional replacement of existing equipment. Although the environmental information required is small, the proposed project must fit a narrow range of criteria defined in paragraph (1)(A) of this subsection. The CE must be revoked and an environmental information document (EID) must be prepared if the project is subsequently modified so as to exceed the limits of the criteria. The majority of applicants will prepare an EID, developed in accordance with guidance available from the board. In addition to a greater amount of information to be supplied by the applicant, a public hearing must be held on the proposed project and the determination, a finding of no significant impact (FNSI), is also subject to public comment for a period no less than 30 days following its issuance. All applicants whose proposed projects do not meet the criteria for either a CE or environmental impact statement (EIS) must prepare an EID. Although there are other criteria involved, as described in paragraph (1)(C) of this subsection and subsection (d)(3) of this section, an EIS is usually required of those projects that are so major in scope or involve such environmentally sensitive areas (i.e., floodplains, endangered species habitat, etc.) that the proposed project may have significant adverse social or environmental impacts. An EIS requires close coordination and involvement of the board and other agencies in its preparation and results in a record of decision (ROD). The board's staff shall endeavor to provide guidance as to the appropriate level of environmental information to applicants during the pre-planning process. All applicants are urged, however, to review the criteria and contact the board's staff, particularly if there is doubt as to the level of environmental information that is appropriate to the proposed project. Based on the environmental information and as required by the provisions of the Act, §602(b)(6) and §375.212 of this title (relating to Capitalization Grant Requirements), the executive administrator will conduct an independent and interdisciplinary environmental review consistent with the National Environmental Policy Act (NEPA) of all projects funded through the CWSRF. This review will further insure that the proposed project will comply with the applicable local, state, and federal laws and board rules relating to the protection and enhancement of the environment. Based upon the staff's review, the executive administrator will make formal determinations regarding the potential social and environmental impacts of the proposed project. As necessary, the determinations will include mitigative provisions recommended to be applied as a condition of receiving financial assistance. Funds will not be released for building until a final environmental determination has been made. Proposed projects using the pre-design funding option will follow the environmental review procedures described under paragraph (2)(C) of this subsection.

(1) Basic environmental determinations. There are three basic environmental determinations that will apply to projects proposed to be implemented with assistance from the fund. These are: a determination to categorically exclude a proposed project from a formal environmental review, a FNSI based upon a formal environmental review supported by an EID, and a determination to provide or not provide financial assistance based upon a ROD following the preparation of an EIS. The appropriate determination will be based on the following criteria.

(A) The CE determination applies to categories of projects that have been shown over time not to entail significant impacts on the quality of the human environment.

(i) Proposed projects which meet the following criteria may be categorically excluded from formal environmental review requirements.

(I) The proposed project is directed solely toward minor rehabilitation of existing facilities, functional replacement of equipment, or toward the construction of related facilities adjoining the existing facilities that do not affect the degree of treatment or the capacity of the works. Examples include infiltration and inflow correction, rehabilitation of existing equipment and structures, and the construction of small structures on existing sites.

(II) The proposed project is in a community of less than 10,000 population and is for minor expansions or upgrading of existing treatment works or on-site disposal systems are proposed.

(ii) CE's will not be granted for proposed projects that entail:

(I) the construction of new collection lines;

(II) a new discharge or relocation of an existing discharge;

(III) a substantial increase in the volume or loading of pollutants;

(IV) providing capacity for a population 30% or greater than the existing population;

(V) known or expected impacts to cultural resources, threatened or endangered species, or other environmentally sensitive areas; or

(VI) the construction of facilities which will not be, or apparently will not be, cost-effective or are likely to cause significant public controversy.

(B) The FNSI will be based upon an environmental review by the staff supported by an EID prepared by the applicant in conformance with guidance developed by the executive administrator. Based upon its review, the staff will prepare an environmental assessment (EA) resulting in the issuance of either a FNSI or a public notice that the preparation of an EIS will be required. All applicants whose projects do not meet the criteria for either a CE or EIS will be required to prepare an EID. The executive administrator's issuance of a FNSI will be based upon an EA documenting that the potential environmental impacts will not be significant or that they may be mitigated without extraordinary measures.

(C) The ROD may only be based upon an EIS prepared in conformance with the format and guidelines described in subsection (b)(3) of this section. An EIS will be required when the executive administrator determines any of the following:

(i) the proposed project will significantly affect the pattern and type of land use or growth and distribution of the population;

(ii) the effects of a proposed project's construction or operation will conflict with local or state laws or policies;

(iii) the proposed project may have significant adverse impacts upon:

(I) wetlands;

(II) floodplains;

(III) threatened and endangered species or their habitats; and

(IV) cultural resources including parklands, preserves, other public lands, or areas of recognized scenic, recreational, agricultural, archeological, or historic value;

(iv) the proposed project will displace population or significantly alter the characteristics of existing residential areas;

(v) the proposed project may directly or indirectly (e.g., through induced development) have significant adverse effect upon local ambient air quality, local noise levels, surface and ground water quantity or quality, fish, shellfish, wildlife or their natural habitats;

(vi) the proposed project may generate significant public controversy; or

(vii) the treated effluent will be discharged into a body of water where the present classification is being challenged as too low to protect present or recent uses, and the effluent will not be of sufficient quality to meet the requirements of those uses.

(2) Other determinations that are required of the board.

(A) Recognizing that a project may be altered at some time after an environmental determination on the proposed project has been issued, the executive administrator will provide that, prior to approval of the alterations, the contract documents, loan application, or related documents will be examined for consistency with the environmental determination. If minor inconsistencies are found and the amended project will not entail adverse environmental impacts different from those previously identified, the project may be allowed to proceed without additional formal environmental review. When substantive inconsistencies are found or new adverse environmental impacts may result, the executive administrator will revoke a CE and require the preparation of an EID or an EIS, consistent with the criteria of subsection (a)(1) of this section, or require the preparation of amendments to an EID or supplements to an EIS, as appropriate. Based upon the staff's review of the amended project, the executive administrator will:

(i) reaffirm the original environmental determination through the issuance of a public notice or statement of finding;

(ii) issue a FNSI when a CE has been revoked, or issue a public notice that the preparation of an EIS will be required;

(iii) issue an amendment to a FNSI, or revoke a FNSI and issue a public notice that the preparation of an EIS will be required; or

(iv) issue a supplement to a ROD, or revoke the ROD and issue a public notice that financial assistance will not be provided.

(B) When five or more years have elapsed between the last environmental determination and the submittal of an application to the fund, the executive administrator will re-evaluate the proposed project, environmental conditions and public views, and prior to presentation of the application to the board, proceed in accordance with subparagraph (A) of this paragraph.

(C) For projects using the pre-design funding option, board staff will use preliminary environmental data provided by the applicant, as specified in §375.39 of this title (relating to Pre-Design Funding Option), and make a written report to the executive administrator on known or potential significant social or environmental concerns before an application for pre-design funding is taken to the board. Prior to release of funds for design, these projects must have approval by the board after the appropriate level of environmental review has been conducted during planning, as provided under this section.

(3) Other determinations that are available to the board.

(A) The executive administrator may adopt previous environmental determinations issued by the EPA and other federal agencies whose determinations may be considered to be current and applicable under the environmental review requirements of this section. In so doing, the executive administrator will insure that all mitigative measures specified in the previous determinations are applied as conditions of the loan agreement and that such adoption will be consistent with the requirements of these rules. The executive administrator will adopt the previous determination by means of a statement of findings, when the proposed project and its previous determination are to be adopted without substantial modifications, or in a FNSI which will explain modifications to the proposed project, potential environmental impacts identified during an environmental review, and any mitigative measures proposed in addition to those included in the federal environmental determination to be adopted.

(B) In order to better inform the public, the executive administrator may issue a statement of findings to interested agencies and public groups describing the outcome of a mitigative condition required by an environmental determination.

(b) Required environmental information. A minimum of three copies of all information required in this subsection shall be submitted to the executive administrator.

(1) Applicants seeking a CE for their proposed projects will provide the executive administrator with sufficient documentation to demonstrate compliance with the criteria of subsection (a)(1)(A) of this section. At a minimum, this will consist of:

(A) a brief, complete description of the proposed project and its costs;

(B) a statement indicating that the project is cost-effective and that the applicant is financially capable of constructing, operating and maintaining the facilities; and

(C) a plan map or maps of the proposed project showing:

(i) the location of all construction areas,

(ii) the planning area boundaries, and

(iii) any known environmentally sensitive areas.

(2) An EID must be submitted by those applicants whose proposed projects do not meet the criteria for a CE and for which the executive administrator has made a preliminary determination that an EIS will not be required. The executive administrator will provide guidance on both the format and contents of the EID to potential applicants prior to initiation of planning.

(A) At a minimum, the contents of an EID will include:

(i) the purpose and need for the project;

(ii) the environmental setting of the proposed project and the future of the environment without the project;

(iii) the alternatives to the project as proposed and their potential environmental impacts;

(iv) a description of the proposed project;

(v) the potential environmental impacts of the project as proposed including those which cannot be avoided;

(vi) the relationship between the short term uses of man's environment and the maintenance and enhancement of long term productivity;

(vii) any irreversible and irretrievable commitments of resources to the proposed project;

(viii) a description of public participation activities conducted, issues raised, and changes to the project which may be made as a result of the public participation process; and

(ix) documentation of required public participation activities and coordination with appropriate governmental agencies.

(B) Prior to the applicant's adoption of the engineering feasibility data, the applicant will hold a public hearing on the proposed project and the EID, and provide the executive administrator with a verbatim transcript of the hearing. The executive administrator will provide guidance to the applicant regarding the contents of the hearing notice and of the hearing. The hearing will be advertised at least 30 days in advance in a local newspaper of general circulation. Notice of the public hearing and availability of the documents also will be sent at least 30 days in advance of the public hearing to all local, state, and federal agencies and public and private parties that may have an interest in the proposed project. Included with the transcript will be a list of all attenders, any written testimony, and the applicant's responses to the issues raised.

(C) The applicant will provide copies of the EID to all federal, state, and local agencies and others with an interest in the proposed project. The executive administrator will provide guidance to the applicant regarding coordination requirements.

(3) The format of an EIS will encourage sound analysis and clear presentation of alternatives, including the no action alternative and the preferred alternative, and their environmental, economic, and social impacts. The following format must be followed by the applicant unless the executive administrator determines there are compelling reasons to do otherwise:

(A) a cover sheet identifying the applicant, the proposed project(s), the program through which financial assistance is requested, and the date of publication;

(B) an executive summary consisting of a 10 to 15 page precis of the critical issues of the EIS in sufficient detail that the reader may become familiar with the proposed project and its cumulative effects. The summary will include:

(i) a description of the existing problem;

(ii) a description of each alternative;

(iii) a listing of each alternative's potential environmental impacts, mitigative measures and any areas of controversy; and

(iv) any major conclusions;

(C) the body of the EIS, which will contain the following information:

(i) a complete and clear description of the purpose and need for the proposed project and objectives;

(ii) a balanced description of each alternative considered by the applicant. The descriptions will include the size and location of the facilities and pipelines, land requirements, operation and maintenance requirements, and construction schedules. The alternative of no action will be discussed and the applicant's preferred alternative(s) will be identified. Alternatives that were eliminated from detailed examination will be presented with the reasons for their elimination;

(iii) a description of the alternatives available to the board including:

(I) providing financial assistance to the proposed project;

(II) requiring that the proposed project be modified prior to providing financial assistance to reduce adverse environmental impacts, or providing assistance with conditions requiring the implementation of mitigative measures; and

(III) providing no financial assistance;

(iv) a description of the alternatives available to other local, state, and federal agencies which may have the ability to issue or deny a permit, provide financial assistance, or otherwise effect or have an interest in any of the alternatives; and

(v) a description of the affected environment and environmental consequences of each alternative. The affected environment on which the evaluation of each alternative will be based includes, as a partial listing, hydrology, geology, air quality, noise, biology, socioeconomics, land use, and cultural resources of the planning area. The executive administrator will provide guidance, as necessary, to the applicant regarding the evaluation of the affected environment. The discussion will present the total impacts of each alternative in a manner that will facilitate comparison. The effects of the no action alternative must be included to serve as a baseline for comparison of the adverse and beneficial impacts of the other alternatives. A description of the existing environment will be included in the no action section to provide background information. The detail in which the affected environment is described will be commensurate with the complexity of the situation and the significance of the anticipated impacts.

(4) The draft EIS will be provided to all local, state and federal agencies and public groups with an interest in the proposed project and be made available to the public for review. The final EIS will include all objections and suggestions made before and during the draft EIS review process, along with the issues of public concern expressed by individuals or interested groups. The final EIS must include discussions of any such comments pertinent to the project or the EIS. All commentors will be identified. If a comment has led to a change in either the project or the EIS, the reason should be given. The board's staff will always endeavor to resolve any conflicts that may have arisen, particularly among permitting agencies, prior to the issuance of the final EIS. In all cases, the comment period will be no less than 45 days.

(5) Material incorporated into an EIS by reference will be organized to the extent possible into a supplemental information document and be made available for public review upon request. No material may be incorporated by reference unless it is reasonably available for inspection by interested persons within the comment periods specified in subsection (b)(4) of this section.

(6) Preparation of the EIS will be done, at the discretion of the executive administrator: directly by its own staff; by consultants to the board; or by a consultant, contracted by the applicant subject to approval by the executive administrator. In the latter two cases, the consultants will be required to execute a disclosure statement prepared by the executive administrator signifying they have no financial or other conflicting interest in the outcome of the project. When an EIS is prepared by contractors, either in the service of the applicant or the board, the executive administrator will independently evaluate the

EIS prior to issuance of the ROD and take responsibility for its scope and contents. The board staff who undertake this evaluation will be identified under the list of preparers along with those of the contractor and any other parties responsible for the content of the EIS.

(7) The following public participation requirements are the minimum allowable to the applicant and the board.

(A) Upon making the determination that an EIS will be required of a proposed project, the executive administrator will publish in the Texas Register and distribute a notice of intent to prepare an EIS.

(B) As soon as possible after the notice of intent has been issued, the executive administrator will convene a meeting of the affected federal, state, and local agencies, the applicant, and other interested parties to determine the scope of the EIS. A notice of this scoping meeting may be incorporated into the notice of intent or prepared and issued separately. In no case will the notification period be less than 45 days. As part of the scoping meeting the board will, at a minimum:

(i) determine the significance of issues and the scope of those significant issues to be analyzed in depth in the EIS;

(ii) identify the preliminary range of alternatives to be considered;

(iii) identify potential cooperating agencies and determine the information or analyses that may be needed from cooperating agencies or other parties;

(iv) discuss the method for EIS preparation and the public participation strategy;

(v) identify consultation requirements of other laws and regulations; and

(vi) determine the relationship between the preparation of the EIS and the completion of the engineering feasibility data and any necessary arrangements for coordination of the preparation of both documents.

(C) Following the scoping process, the executive administrator will begin the identification and evaluation of all potentially viable alternatives to adequately address the range of issues developed in the scoping. A summary of this, including a list of the significant issues identified, will be provided to the applicant and other interested parties.

(D) The draft EIS will be the subject of a formal public hearing and any other public participation activities determined to be appropriate during the scoping process. Both the draft EIS and final EIS will be distributed and made available for public review in a fashion consistent with the requirements of subsection (b)(2)(B) of this section except that the advertisement period for the public hearing and comment periods for the draft EIS and final EIS will be no less than 45 days. The executive administrator will publish, in the Texas Register and a newspaper(s) of general circulation in the project area, a notice of availability of the EIS giving locations at which it will be available for public review at least 45 days prior to making any environmental determination.

(c) Environmental review.

(1) When the executive administrator has determined that an applicant's proposed project may be excluded from a formal environmental review or has determined that a CE is to be rescinded, the executive administrator will prepare a public notice of the determination and the availability of supporting documentation for public inspection. The notice will be published in a local newspaper of community-wide circulation by the applicant. The executive administrator, concurrent with the publication, will distribute the notice to all interested parties.

(2) An environmental review of the proposed project, supported by the applicant's EID, will be conducted by the executive administrator to determine whether any significant impacts are anticipated and whether any changes may be made in the proposed project to eliminate significant adverse impacts. As part of this review, the executive administrator may require the applicant to submit additional information or undertake additional public participation and coordination to support the environmental determination. Based on the environmental review, the executive administrator will prepare an EA, describing:

(A) the purpose and need for the proposed project;

(B) the proposed project, including its costs;

(C) the alternatives considered and the reasons for their rejection or acceptance;

(D) the existing environment;

(E) any potential adverse impacts and mitigative measures; and

(F) any proposed conditions to the provision of financial assistance and any means provided for the monitoring of compliance with the conditions.

(3) Based upon this EA, the executive administrator will issue a FNSI or issue a notice of intent to prepare an EIS. The FNSI will include a brief description of the proposed project, its costs, any mitigative measures proposed for the applicant as a condition of its receipt of financial assistance, and a statement to the effect that comments supporting or disagreeing with the FNSI may be submitted for consideration by the board. The EA will be attached to the FNSI when mitigative measures are specified by conditions of the financial assistance. The FNSI will be distributed to all parties, governmental entities, and agencies that may have an interest in the proposed project. No action regarding approval of the engineering feasibility data will be taken by the executive administrator for at least 30 days after the issuance of the FNSI. Additionally, except for projects utilizing the pre-design option under §375.39 of this title (relating to Pre-Design Funding Option), no funds for building will be released for at least 30 days after the issuance of the FNSI. For projects utilizing the pre-design option, approval of the release of funds for planning will be made prior to the issuance of the FNSI, but no approval for release of funds for design or building will be made until at least 30 days after the issuance of the FNSI.

(4) Except for projects utilizing pre-design funding under §375.39 of this title (relating to Pre-Design Funding Option), the executive administrator will prepare a concise public ROD following the public hearing on the draft EIS and the comment period on the final EIS and before the decision to approve the CWSRF engineering plan or to provide or deny financial assistance to the proposed project. The ROD will describe those mitigative measures to be taken which will make the selected alternative environmentally acceptable. For projects utilizing the pre-design funding option under §375.39 of this title (relating to Pre-Design Funding Option), the ROD shall be made prior to the board's approval of the release of funds for design.

(d) Application of other laws and authorities. In addition to the requirements of state law and rules, the Act, and the NEPA, the board must, as required by the initial guidance for the state water pollution control revolving fund and the capitalization grant

agreement, insure that each project proposed to receive CWSRF financial assistance complies with the following federal laws and authorities respecting the human environment: the Archeological and Historic Preservation Act of 1974, Public Law 93-191; the Historic Sites Act; the Clean Air Act, 42 United States Code 7506(c); the Coastal Barrier Resources Act, 16 United States Code 3501 et seq., the Coastal Zone Management Act of 1972, Public Law 92-583, as amended; the Endangered Species Act, 16 United States Code 1531 et seq.; Executive Order 11953, Protection and Enhancement of the Cultural Environment; Executive Order 11988, Floodplain Management; the Flood Disaster Protection Act of 1973, Public Law 93-234; Executive Order 11990, Protection of Wetlands; the Farmland Protection Policy Act, 7 United States Code 4201 et seq.; the Fish and Wildlife Coordination Act, Public Law 85-624, as amended; the National Historic Preservation Act of 1966, Public Law 89-665, as amended; the Safe Drinking Water Act, §1424(e), Public Law 92-523, as amended; and the Wild and Scenic Rivers Act, Public Law 90-542, as amended. Because particular federal and/or state agencies are charged with the enforcement of or permitting under many of these laws and authorities, the executive administrator will provide guidance to applicants to the fund regarding consultation requirements and will encourage proper coordination of project planning with the appropriate agencies. Because of their complexity and critical importance to the board's administration of the fund, the board has adopted the following sections to effect proper compliance with the requirements of the Flood Disaster Protection Act of 1973, the Coastal Barrier Resources Act, and Executive Order 11988, Floodplain Management.

(1) The board will not provide financial assistance from the CWSRF for any project element that is proposed to be constructed in a floodplain when the applicant's community is sanctioned by the Federal Emergency Management Agency (FEMA) in its administration of the National Flood Insurance Program, pursuant to the requirements of the Flood Disaster Protection Act of 1973, Public Law 93-234.

(2) The board will not provide financial assistance from the fund to any entity proposing construction in or extension or expansion of sewerage service into any area within the Coastal Barrier Resources System other than those permitted by the Coastal Barrier Resources Act, 16 United States Code 3501 et seq.

(3) Pursuant to the requirements of Executive Order 11988, the board will avoid direct and indirect support of development in floodplains wherever there is a practicable alternative. Therefore, both to preserve the significant natural functions and values of floodplains and to protect human health and safety.

(A) The board may provide financial assistance from the fund for the transportation or treatment of wastewater generated in a floodplain only when the proposed project will provide service to:

(i) areas of existing development in a floodplain;

(ii) facilities such as marinas which, by their nature, must be located in floodplains;

(iii) areas of projected growth if an EID demonstrates that the proposed development will be consistent with FEMA's floodplain management criteria for flood prone areas (40 Code of Federal Regulations 60.3) and will have no significant impacts on natural functions and values of floodplains; and

(iv) areas of projected growth if an EIS demonstrates that there is no practicable alternative to such growth, that such growth will be consistent with the floodplain management criteria cited in clause (iii) of this subparagraph and that the benefits of such growth outweigh its costs to the natural functions and values of the effected floodplains or risks to human health and safety.

(B) When regional systems are proposed, the board will require the regional authority and the member entities to demonstrate compliance with these rules.

(C) For the purposes of this subsection, the following definitions will apply:

(i) Areas of existing development. All or part of the project planning area which, at the time of the board's issuance of its environmental determination, is:

(I) occupied by existing structures or facilities;

(II) substantially surrounded by existing structures and facilities and which serves no significant independent natural floodplain function; or

(III) characterized by substantial investment in public infrastructure (e.g., roads and utilities are available to individual users) but which is only partially occupied by structures or facilities.

(ii) Floodplain or 100-year floodplain. Those lowland, relatively flat areas usually adjoining inland or coastal waters that have a 1.0% or greater chance of flooding in any given year. In determining these areas, the applicant will use flood insurance rate maps or flood hazard boundary maps approved by FEMA. Where these maps are unavailable, the applicant should produce its own map(s) delineating the 100-year floodplain and showing 100-year flood elevations. Such maps should be prepared in accordance with FEMA's Guidelines and Specifications for Study Contractors.

(iii) Functions and values. Natural functions and values of the floodplain include:

(I) maintenance of water quality;

(II) transport, storage, and absorption of floodwaters;

(III) groundwater recharge;

(IV) flow of debris;

(V) wildlife habitat;

(VI) cultural and historical resource repository;

(VII) agricultural resources; and

(VIII) aesthetic resources.

(D) The board will, as appropriate and consistent with the requirements of these rules and Executive Order 11988, Floodplain Management, require assurances or include conditions to the provision of CWSRF financial assistance to insure compliance with these rules.

This 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 November 23, 1998.

TRD-9817874
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 21, 1999

For further information, please call: (512) 463-7981

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Division 3. Prerequisites to Release of Funds

31 TAC §375.221, §375.222

The new sections are proposed under the authority of the Texas Water Code, §§6.101 which provide the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State and, specifically, the Clean Water SRF program.

The statutory provisions affected by the new sections are Texas Water Code, Chapter 15, Subchapter J, and Chapter 17, Subchapters C, E, and F.

§375.221. Pre-Design Funding Option.

(a) This loan application option will provide an applicant that meets all applicable board requirements an alternative to secure loan proceeds for planning, design or building costs associated with a project. Under this option, a loan may be closed and funds released to complete planning activities. If all required planning has been completed and approved, design funds may also be released at the time of closing and building funds will be escrowed. If planning requirements have not been satisfied, design and building funds will be escrowed and released in the sequence described in this section. After planning and environmental review, the board may require the applicant to make changes in order to receive the board's approval and proceed with the project. If the portion of a project associated with funds in escrow cannot proceed, the loan recipient shall use the escrowed funds to redeem bonds purchased by the board in inverse order of maturity. General procedures and requirements for pre-design funding are described in this section.

(b) The executive administrator may recommend to the board the use of this section if, based on available information, there appear to be no significant permitting, social, environmental, engineering, or financial issues associated with the project. An application for pre-design funding may be considered by the board despite a negative recommendation from the executive administrator.

(c) Applications for pre-design funding must include the following information:

(1) for loans including building cost, an engineering plan of study which will include at minimum: a description and purpose of the project; area maps or drawings as necessary to fully locate the project area(s); a proposed project schedule; estimated project costs and budget including sources of funds; current and future populations and projected flows; alternatives considered; and a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project;

(2) contracts for engineering services;

(3) evidence that an approved water conservation plan as required under §375.37 of this title (relating to Required Water Conservation Plan) will be adopted prior to the release of loan funds or the applicant's election to submit the water conservation plan under §375.37(b) of this title;

(4) all information required in §§375.32, 375.33, and 375.34 of this title (relating to Required General Information, Required Legal Information, and Required Fiscal Information); and

(5) any additional information the executive administrator may request to complete evaluation of the application.

(d) Recipients of funds for pre-design funding under this subchapter must close their loans under §375.71 of this title (relating to Loan Closing) within six months of the date the board commits funds, unless extended by the board.

(e) After board commitment and completion of all closing and release prerequisites as specified in §375.71 of this title and §375.72 of this title (relating to Release of Funds), funds will be released in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase, and after approval of a water conservation plan if still outstanding under §375.37(b) of this title;

(2) for design costs, after receipt of executed contracts for the design phase and upon approval of the engineering feasibility data as specified in §375.36 of this title (relating to the Engineering Feasibility Data) and compliance with §375.214 of this title (relating to Required Environmental Review and Determination) and after board approval under subsection (e) of this section; and

(3) for building costs, after issuance of any applicable permits, and after bid documents are approved and executed construction documents are contingently awarded.

(f) Board staff will use preliminary environmental data provided by the applicant, as specified in subsection (c)(1) of this section and make a written report to the executive administrator on known or potential significant social or environmental concerns to allow the executive administrator to make a recommendation to the board on pre-design funding. Prior to release of funds for design, these projects must have the board's approval based upon an environmental review conducted during planning under the standards of §375.214 of this title as applicable.

(g) Prior to the board's approval of release of funds for design, the executive administrator shall summarize the project's environmental review and shall inform the board of any environmentally related special mitigative or precautionary measures recommended for the project. The board may elect to affirm or alter the conditions of the original commitment to the applicant or withdraw the commitment to the applicant.

§375.222. Lending Rates.

(a) Procedure for setting fixed interest rates.

(1) The development fund manager will set fixed rates for loans on a date that is:

(A) five business days prior to the adoption of the political subdivision's bond ordinance or resolution; and

(B) not more than 45 days before the anticipated closing of the loan from the board.

(2) After 45 days from the assignment of the interest rate on the loan, rates may be extended only with the development fund manager's approval.

(b) Fixed rates. The fixed interest rates for CWSRF loans under this chapter are set at rates 120 basis points below the fixed rate index rates for borrowers plus an additional reduction under paragraph (1) of this subsection, or if applicable, are set at the total basis points below the fixed rate index for borrowers derived under paragraph (2) of this subsection. The fixed rate index rates shall be established for each uninsured borrower based on the borrower's market cost of

funds as they relate to the Delphis Hanover Corporation Range of Yield Curve Scales (Delphis) or the 90 index scale of the Delphis for borrowers with either no rating or a rating less than investment grade, using individual coupon rates for each maturity of proposed debt based on the appropriate index's scale. The fixed rate index rates shall be established for each insured borrower based on the higher of the borrower's uninsured fixed rate index scale or the Delphis 96 index scale.

(1) Under §375.18(c) of this title (relating to Administrative Cost Recovery) an additional 25 basis points reduction will be used, for total fixed interest rates of 145 basis points below the fixed index rates for such borrower.

(2) For borrowers filing applications on or after September 21, 1997 for loans with an average bond life in excess of 14 years or, at the discretion of the board for borrowers filing applications on or after September 21, 1997 for loans which have debt schedules less than 20 years and which produce a total fixed lending rate reduction in excess of a standard loan structure (defined as a debt service schedule in which the first year of the maturity schedule is interest only followed by 20 years of principal maturing on the basis of level debt service), the following procedures will be used in lieu of the provisions of paragraph (1) of this subsection to determine the total fixed lending rate reduction.

(A) The interest rate component of level debt service will be determined by using the 13th year coupon rate of the appropriate index of the Delphis scales that corresponds to the 13th year of principal of the standard loan structure and that is measured from the first business day on the month the loan application will be presented to the board for approval.

(B) Level debt service will be calculated using the 13th year Delphis Scale coupon rate as described in subparagraph (A) of this paragraph and the par amount of the loan according to a standard loan structure. For a loan which has been proposed for a term of years equal to a standard loan structure, the dates specified in the loan application shall be used for interest and principal calculation. For a loan which has been proposed for a term of years less than a standard loan structure or longer than a standard loan structure, level debt service will be calculated beginning with the dated date and based upon the principal and interest dates specified in the application, and continuing for the term of a standard loan structure.

(C) A calculation will be made to determine how much a borrower's interest would be reduced if the loan had been made according to the total fixed lending rate reduction provided in paragraph (1) of this subsection and based upon the principal payments calculated in subparagraph (B) of this paragraph.

(D) The board will establish a total fixed lending rate reduction for the loan that will achieve the interest savings in subparagraph (C) of this paragraph based upon the principal schedule proposed by the borrower.

(c) Variable rates. The interest rate for CWSRF variable rate loans under this chapter will be set at a rate equal to the actual interest cost paid by the board on its outstanding variable rate debt plus 31.5 basis points. Variable rate loans are required to be converted to long-term fixed rate loans within 90 days of project completion unless an extension is approved in writing by the development fund manager. Within the time limits set forward in this subdivision, borrowers may request to convert to a long-term fixed rate at any time, upon notification to the development fund manager and submittal of a resolution requesting such conversion. The fixed lending rate will be calculated under the procedures and requirements of subsections (a) and (b) of this section.

(d) Adjustment of rate. The development fund manager may adjust a borrower's interest rate at any time prior to closing as a result of a change in the borrower's credit rating.

This 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 November 23, 1998.

TRD-9817873
Suzanne Schwartz
General Counsel
Texas Water Development Board
Proposed date of adoption: January 21, 1999
For further information, please call: (512) 463-7981

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TITLE 34. PUBLIC FINANCE

Part I. Comptroller of Public Accounts

Chapter 5. Funds Management (Fiscal Affairs)

Subchapter L. Claims Processing-Duplicate Warrant

34 TAC §5.140

The Comptroller of Public Accounts proposes amendments to §5.140, concerning replacement warrants. The purposes of the amendments are as follows.

The primary purpose is to authorize the comptroller to require a state agency to submit either a payment cancellation voucher to the comptroller or the information on the voucher directly to the uniform statewide accounting system (USAS) when requesting the issuance of a replacement warrant. Technically, the comptroller will be performing the cancellation of an original warrant if the payment cancellation voucher for that warrant is submitted to the comptroller. Otherwise, the agency submitting the information on the voucher will be performing the cancellation.

There would be one exception to this authorization. The Texas Department of Human Services (DHS) would still be required to submit to the comptroller a payment cancellation voucher concerning a financial assistance warrant governed by the Human Resources Code, §31.038. The comptroller would not have the option of requiring DHS to submit the information on the voucher directly to USAS. This is because §31.038 authorizes only the comptroller to cancel financial assistance warrants. The section does not authorize DHS to cancel those warrants.

The other purpose of the amendments is to make several non-substantive and technical changes to §5.140. Definitions of commonly-used terms are being added to the section. Non-substantive changes to terms used in the section are being made to enhance readability and clarity. And language is being added to make it clear that the section does not apply to warrants or checks issued by state agencies from local funds.

Mike Reissig, chief revenue estimator, has determined that for the first five-year period the amendment will be in effect there will be no foreseeable implications relating to costs or revenues of the state or local governments.

Mr. Reissig also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of adopting the amendment will be in providing more accurate information about the authorization and processing of replacement warrants. There is no significant anticipated economic cost to individuals who are required to comply with the proposed amendment.

Comments on the proposal may be addressed to Kenny McLesky, Manager of Claims Division, P.O. Box 13528, Austin, Texas, 78711. If a person wants to ensure that the comptroller considers and responds to a comment made about this proposal, then the person must ensure that the comptroller receives the comment not later than the 30th day after the issue date of the *Texas Register* in which this proposal appears. If the 30th day is a state or national holiday, Saturday, or Sunday, then the first workday after the 30th day is the deadline.

The amendments are proposed under the Government Code, §403.054(h), which requires the Comptroller to adopt rules regarding the issuance of replacement warrants.

The amendments implement the Government Code, §403.054.

§5.140. Replacement Warrants.

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

(1) Comptroller–The comptroller of public accounts of the State of Texas.

(2) Include–A term of enlargement and not of limitation or exclusive enumeration. The use of the term does not create a presumption that components not expressed are excluded.

(3) May not–A prohibition. The term does not mean "might not" or its equivalents.

(4) [~~(1)~~] Payee–A person [~~or entity~~] to whom a warrant is made payable.

(5) [~~(2)~~] Payment cancellation voucher [~~Cancellation Voucher~~]–The paper [~~A~~] form prescribed by the comptroller that a state agency completes [~~Comptroller used~~] when requesting cancellation of [~~to cancel~~] a warrant.

(6) Person–Includes an individual, a corporation, an organization, a government or governmental subdivision or agency, a business trust, an estate, a trust, a partnership, an association, and any other legal entity.

(7) [~~(3)~~] Replacement warrant–A warrant issued to replace an original warrant.

(8) Uniform statewide accounting system–Includes the uniform statewide payroll/personnel system.

(b) Request for issuance. A person [~~or entity~~] may request issuance of a replacement warrant if the person [~~or entity~~] is the payee of the original warrant. The request must be directed to the state agency on whose behalf the original warrant was issued and must be accompanied by any statements or documentation required by the agency. Upon receipt of the request, the agency must determine whether:

(1) the original warrant was lost, destroyed, or stolen;

(2) the person did not receive the original warrant [~~was not received by the person or entity~~]; or

(3) the person's [~~or entity's~~] endorsement on the original warrant was forged.

(c) Issuance by comptroller. The comptroller may issue a replacement warrant only if:

(1) the comptroller receives proper notification of the existence of [~~state agency on whose behalf the original warrant was issued properly notifies the comptroller that~~] at least one of the conditions listed in subsection (b) of this section [~~exists~~] concerning the original warrant; [~~and~~]

(2) the state agency on whose behalf the original warrant was issued provides the notification; and

(3) [~~(2)~~] subsection (f) of this section does not prohibit issuance of the replacement warrant.

(d) Issuance by other agency. A state agency other than the comptroller may issue a replacement warrant if:

(1) the comptroller has delegated to the agency under the Government Code, §403.060 the authority to issue original and replacement warrants;

(2) the replacement warrant would replace an original warrant previously issued by the agency;

(3) at least one of the conditions listed in subsection (b) of this section exists concerning the original warrant; and

(4) subsection (f) of this section does not prohibit issuance of the replacement warrant.

(e) Notice.

(1) This paragraph applies to all warrants except the financial assistance warrants governed by the Human Resources Code, §31.038. Notification to the comptroller under subsection (c)(1) of this section is proper only if the agency:

(A) properly completes a payment cancellation voucher; [~~and~~]

(B) complies with the comptroller's requirement to either submit the [~~submits a payment cancellation~~] voucher[~~.~~] to the comptroller or retain the voucher in the agency's files for audit by the comptroller; and [~~Once the warrant is canceled, the agency may submit a request for the issuance of a replacement warrant through procedures outlined by the Comptroller's Office.~~]

(C) submits the information on the voucher directly to the uniform statewide accounting system in accordance with the comptroller's requirements, if the voucher is retained in the agency's files.

(2) This paragraph applies only to the financial assistance warrants governed by the Human Resources Code, §31.038. Notification to the comptroller under subsection (c)(1) of this section is proper only if the Texas Department of Human Services properly completes and submits a payment cancellation voucher to the comptroller.

(3) After a warrant is canceled, the state agency that requested its cancellation may request issuance of a replacement warrant in accordance with the procedures adopted by the comptroller.

(f) (No change.)

(g) Limitations and exceptions.

(1) A replacement warrant must reflect the same fiscal year as the original warrant and may not be paid unless presented to the comptroller or a financial institution before the expiration of two years after the close of the fiscal year in which the original warrant was issued.

(2) Except as provided by this paragraph, the Texas Workforce Commission shall comply with this section when issuing a replacement warrant [~~Replacement warrants issued by the Texas Workforce Commission shall be issued in accordance with this section~~]. The deadline for issuance of the warrant is the deadline specified in [~~replacement warrants by the Texas Workforce Commission shall be governed by~~] the Labor Code, Chapter 210, Subchapter B.

(3) This section applies to the cancellation of a warrant or check or the issuance of a replacement warrant or check by a state agency other than the comptroller only if the agency issued the original warrant or check under authority delegated to the agency by the comptroller under the Government Code, §403.060. This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's authority to adopt.

This 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 November 23, 1998.

TRD-9817929
Martin Cherry
Chief, General Law
Comptroller of Public Accounts
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 463–4062

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

Part I. Texas Department of Public Safety

Chapter 23. Vehicle Inspection

Subchapter G. Vehicle Emissions Inspection and Maintenance Program

37 TAC §23.91, §23.92

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Department of Public Safety or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Department of Public Safety proposes the repeal of §23.91 and §23.92, concerning vehicle inspection. The department is proposing repeal of these sections due to the recent adoption of §23.93 relating to Vehicle Emissions Inspection and Maintenance Program which replaced those sections and contains more stringent emission requirements.

Tom Haas, Chief of Finance, has determined that for the first five years the repeals are in effect there will be no fiscal implications as a result of state or local governments as a result of enforcing or administering the repeals.

Mr. Haas also has determined that for each year of the first five years the repeals are in effect the public benefit anticipated as a result of enforcing the repeals will be improved air quality by the reduction of emissions of hydrocarbons, carbon monoxide and other pollutants from mobile sources. There is no anticipated economic cost to persons who are required to comply with the proposed repeals. There is no anticipated cost to small or large businesses.

Comments on the repeal may be submitted to Mary Ann Courter, Chief of Legal Services, Texas Department of Public Safety, Box 4087, Austin, Texas 78773-0140, (512) 424-2890.

The repeals are proposed pursuant to Health and Safety Code, Chapter 382, §382.037, §382.038, and §382.0371, and Texas Transportation Code, Chapter 502 and Chapter 548 which provide the Public Safety Commission with the authority to establish a Motor Vehicle Emissions Inspection and Maintenance Program for vehicles in counties that do not meet National Ambient Air Quality Standards.

The repeals affect the Health and Safety Code, Chapter 382, and Texas Transportation Code, Chapter 502 and 548.

§23.91. Parameter Vehicle Emission Inspection and Maintenance Program.

§23.92. Vehicle Idle Emissions Inspection and Maintenance Program.

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

Filed with the Office of the Secretary of State, on November 17, 1998.

TRD-9817643
Dudley M. Thomas
Director
Texas Department of Public Safety
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 424–2890

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Part XIII. Texas Commission on Fire Protection

Chapter 423. Fire Suppression

Subchapter B. Minimum Standards for Aircraft Rescue Firefighting Personnel

37 TAC §423.203

The Texas Commission on Fire Protection proposes amendments to §423.203, concerning minimum standards for basic aircraft rescue fire fighting personnel certification. The amendments to §423.203 add language that requires skills testing for persons seeking certification as aircraft rescue fire fighting personnel.

Mr. Anthony C. Calagna, Fire Fighter Advisory Committee Chairman, has determined that for the first five year period the amended section is in effect there will be no fiscal implications for state government. The fiscal implication for local government will vary from $40-$200 per trainee depending on the source of training.

Mr. Calagna also has determined that for each of the first five years the proposed amendments are in effect the public benefit anticipated as a result of enforcing the amended sections will be that the public is assured that persons responding as aircraft rescue fire fighting personnel are properly trained and evaluated in the skills necessary to safely and effectively perform their duties.

There are no additional costs of compliance for small or large businesses required to comply with the proposed amendment. Individuals seeking certification from the commission may experience a cost of $40-$200 if the employing entity does not pay for the training.

The commission has determined that the proposed amendments relating to minimum standards for basic aircraft rescue fire fighting personnel certification will have no impact on private real property interests and no takings impact assessment is required pursuant to the Government Code, §2007.043(b) and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines. There is no local employment impact resulting from the change.

Comments on the proposal may be submitted to: Gary L. Warren Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mail to info@tcfp.state.tx.us.

The amendment is proposed under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022, which provides the commission with the authority to establish minimum training standards for fire protection personnel in advanced or specialized fire protection personnel positions.

Texas Government Code, §419.022 is affected by the proposed amendment.

§423.203. Minimum Standards for Basic Aircraft Rescue Fire Fighting Personnel Certification.

(a) (No change.)

(b) In order to obtain basic aircraft rescue fire fighting personnel certification the individual must:

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

(3) successfully pass a written commission examination pertaining to aircraft rescue fire fighting conducted according to the rules set forth in Chapter 439 of this title (relating to Examinations for Certification);and [.]

(4) meet the requirements for performance skills in Chapter 439 of this title relating to Performance Skill Evaluation with the following exceptions:

(A) All performance skills listed in the curriculum must be tested for competency during the course.

(B) The number of opportunities to successfully complete particular performance skill objectives evaluated is at the discretion of the training officer or coordinator. Retests must be conducted prior to the completion of the course.

(C) All skills must be demonstrated before a commission approved field examiner.

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

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

Filed with the Office of the Secretary of State on November 19, 1998.

TRD-9817707
T.R. Thompson
General Counsel
Texas Commission on Fire Protection
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 918-7189

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Chapter 437. Fees

37 TAC §437.17

The Texas Commission on Fire Protection proposes new §437.17, concerning fees for records review. The new section allows the commission to charge a fee for review of training records for individuals seeking certification for out-of-state or military training. It also allows the commission to charge a fee for review of training records from the State Firemen's and Fire Marshals' Association of Texas or other in-state volunteer records.

Mr. Anthony C. Calagna, Fire Fighter Advisory Committee Chairman, has determined that for the first five year period the new section is in effect there will be an increase to the Texas Commission on Fire Protection of approximately $2000 per year. If a local government chooses to pay the review fee for out-of- state applicants an expense of $35 per applicant will be incurred.

Mr. Calagna has also determined that for each of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section will be more efficient use of agency resources in that a records review fee will discourage requests from all but serious applicants for testing.

There are no additional costs of compliance for small or large businesses. Additional costs for individuals will be $35.00 for out-of-state applicants and $10.00 per person for individuals with volunteer training in Texas who do not hold at least an advanced certificate from the State Firemen's and Fire Marshals' Association.

The commission has determined that the proposed new section relating to fees will have no impact on private real property interests and no takings impact assessment is required pursuant to the Government Code, §2007.043(b) and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines.

There is no local employment impact resulting from the change.

Comments on the proposal may be submitted to: Gary L. Warren Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mail to info@tcfp.state.tx.us.

The new section is proposed under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to adopt rules for the administration of its powers and duties; and §419.026, which provides the commission with authority to establish fees for certification and examinations.

Texas Government Code, §419.026 is affected by the proposed new section.

§437.17. Fees–Records Review.

(a) A non-refundable fee of $35 shall be charged for each out-of- state and/or military training records review conducted by the commission for the purpose of determining equivalency to the appropriate commission basic training program or to establish eligibility to test. Applicants submitting training records for review shall receive a written analysis from the commission.

(b) A non-refundable fee of $10 shall be charged for State Firemen's and Fire Marshals' Association of Texas or in-state volunteer records review conducted by the commission for the purpose of determining equivalency to the appropriate commission basic training program or to establish eligibility to test. Applicants submitting training records for review shall receive a written analysis from the commission.

(c) The fee provided for in this section shall not apply to an individual who holds an International Fire Service Accreditation Congress certificate(s) required to qualify for an examination or an individual who holds an advanced certificate from the State Firemen's and Fire Marshals' Association of Texas.

This 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 November 19, 1998.

TRD-9817708
T.R. Thompson
General Counsel
Texas Commission on Fire Protection
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 918-7189

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Chapter 439. Examinations for Certification

37 TAC §439.13

The Texas Commission on Fire Protection proposes amendments to §439.13, concerning testing for proof of proficiency. The amendment to §439.13 allows an individual who has been out of the fire service and whose certificate has expired for more than one year to be exempted from the performance skills portion of the proficiency examination provided the individual can document twenty hours of continuing education for each year since the expiration of the certificate, up to a maximum of one hundred hours.

Mr. Anthony C. Calagna, Fire Fighter Advisory Committee Chairman, has determined that for the first five year period the amended section is in effect there will be no fiscal implication for state government. Local governments may see a savings of $15- $50 in examination fees if an individual qualifies for the skills exemption.

Mr. Calagna also has determined that for each of the first five years the proposed amendments are in effect the public benefit anticipated as a result of enforcing the amended sections will be the elimination of the requirement of skills evaluation deemed unnecessary where an individual has maintained skills by documenting continuing education.

There are no additional costs of compliance for small or large businesses required to comply with this amendment. Individuals who elect to seek the continuing education exemption may experience a cost of $125-$625, depending on the source of continuing education courses.

The commission has determined that the proposed amendments relating to testing for proof of proficiency will have no impact on private real property interests and no takings impact assessment is required pursuant to the Government Code, §2007.043(b) and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines. There is no local employment impact resulting from the change.

Comments on the proposal may be submitted to: Gary L. Warren Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768-2286 or e-mail to info@tcfp.state.tx.us.

The amendment is proposed under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.032(b), concerning basic certification examinations.

Texas Government Code, §419.032(b) is affected by the proposed amendment.

§439.13. Testing for Proof of Proficiency.

(a) (No change.)

(b) The individual may obtain a new certificate or certificates in the discipline or disciplines which was previously held by passing a commission proficiency examination pertaining to the discipline or disciplines which was previously held and becoming certified within the time specified for that discipline or disciplines. The proficiency examination must be passed prior to assignment to fire protection [~~suppression~~] duties. If performance skills are part of the proficiency examination [~~and it has been less than four years since the previously held certificate expired~~], the individual may be exempted from that portion of the examination if the individual can document twenty hours of continuing education for each year since the expiration of the certificate or a maximum of five years. The continuing education must be in subjects contained in the basic curriculum for the discipline. At least one-half of the continuing education must be hands-on performance skills. The training must be conducted as specified in Chapter 441 of this title (relating to Continuing Education).

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

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

Filed with the Office of the Secretary of State on November 19, 1998.

TRD-9817709
T.R. Thompson
General Counsel
Texas Commission on Fire Protection
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 918-7189

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Chapter 443. Certification Curriculum Manual

37 TAC §443.5

The Texas Commission on Fire Protection proposes amendments to §443.5 concerning the effective date of new curricula or changes to curricula required by law or rule. The amendment to §443.5 allows the commission to specify a date for adoption of changes to the curriculum manual, other than January 1.

Mr. Anthony C. Calagna, Fire Fighter Advisory Committee Chairman, has determined that for the first five year period the amended section is in effect there will be an additional expense to state government of approximately $5,000 for printing and postage if a curriculum is updated at a specific time other than at the beginning of the year. There will be no fiscal implication for local government.

Mr. Calagna also has determined that for each of the first five years the proposed amendments are in effect the public benefit anticipated as a result of enforcing the amended section will be that firefighters will be trained and tested in accordance with the most current National Fire Protection Association standards and associated reference materials. There are no additional costs of compliance for small or large businesses or individuals required to comply with this chapter. The commission has determined that the proposed amendments relating to the effective date of new curricula or changes to curricula required by law or rule will have no impact on private real property interests and no takings impact assessment is required pursuant to the Government Code, §2007.043(b) and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines. There is no local employment impact resulting from the change.

Comments on the proposal may be submitted to: Gary L. Warren Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e-mail to info@tcfp.state.tx.us.

The amendment is proposed under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.022, which provides the commission with authority to establish minimum training standards for fire protection personnel.

Texas Government Code, §419.022 is affected by the proposed amendment.

§443.5. Effective Date of New Curricula or Changes to Curricula Required by Law or Rule.

(a) New curricula will become effective on January 1 of the year following final approval by the commission or on the date specified by the commission.

(b) Changes to curricula will become effective on January 1 of the year following final approval by the commission or on the date specified by the commission.

(c) Changes to curricula which involve reference materials will become effective on January 1 of the year following final approval by the commission or on the date specified by the commission, as recommended by the Fire Fighter Advisory Committee, depending on the impact [of] the change will have on the curricula.

(d) (No change.)

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

Filed with the Office of the Secretary of State on November 19, 1998.

TRD-9817710
T.R. Thompson
General Counsel
Texas Commission on Fire Protection
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 918-7189

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Chapter 449. Head of a Fire Department

37 TAC §449.1

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

The Texas Commission on Fire Protection proposes the repeal of §449.1 concerning head of a fire department. The subject matter of the repealed sections will be replaced by a proposed new section dealing with the same subject matter.

Mr. Anthony C. Calagna, Fire Fighter Advisory Committee Chairman, has determined that for the first five year period the repeal is in effect there will be no fiscal implications for state government. Local governments may incur testing and training costs if the department hires an individual not certified.

Mr. Calagna also has determined that for each of the first five years the repeal is in effect the public benefit anticipated as a result of enforcing the repeal will be that the public is assured that persons appointed as a department head for a fire department are properly trained, tested, and possess experience deemed necessary for the position. There are no additional costs of compliance for large or small businesses or individuals required to comply with the repeal.

Comments on the proposal may be submitted to: Gary L. Warren Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e-mail to info@tcfp.state.tx.us.

The repeal is proposed under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.032(f), which provides that the commission shall adopt rules for the purpose of this subsection relating to the appointment of a person to the position of head of the fire department.

Texas Government Code, §419.032(f) is affected by the proposed repeal.

§449.1. Minimum Standards for the Head of a Fire Department

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

Filed with the Office of the Secretary of State, on November 19, 1998.

TRD-9817711
T. R. Thompson
General Counsel
Texas Commission on Fire Protection
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 918–7189

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The Texas Commission on Fire Protection proposes new §449.1 concerning minimum standards for the head of a fire department. Certification as head of a department requires completion of all requirements for certification as fire protection personnel in any discipline with an approved curriculum including testing and training and five years of experience. Alternatively, an individual with ten years of out-of-state experience in a structural fire protection personnel position or ten years of volunteer fire fighter experience may qualify for a basic certification examination. The new rule does not require current emergency care attendant certification for head of department certification and does not require performance skills evaluation for certification as head of a department. In addition, the new rule requires experience in fire suppression for departments providing fire suppression duties and experience in fire prevention activities for a department providing fire prevention only. Certification as head of the department in any one discipline does not authorize an individual to perform duties in any discipline other than the one in which certification is obtained.

Mr. Anthony C. Calagna, Fire Fighter Advisory Committee Chairman, has determined that for the first five year period the new sections are in effect there will be no fiscal implications for state government. Local governments may incur testing and training costs if the department hires an individual not certified.

Mr. Calagna also has determined that for each of the first five years the new sections are in effect the public benefit anticipated as a result of enforcing the new sections will be that the public is assured that persons appointed as a department head for a fire department are properly trained, tested, and possess experience deemed necessary for the positions.The commission has determined that the proposed new sections relating to minimum standards for the head of a fire department will have no impact on private real property interests and no takings impact assessment is required pursuant to the Government Code, §2007.043(b) and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines. There are no additional costs of compliance for small or large businesses required to comply with the new chapter. Individuals may incur training and testing costs if the person is not currently certified. There is no local employment impact resulting from the change.

Comments on the proposal may be submitted to: Gary L. Warren Sr., Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas, 78768-2286 or e-mail to info@tcfp.state.tx.us.

The new section is proposed under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.032(f), which provides that the commission shall adopt rules for the purpose of this subsection relating to the appointment of a person to the position of head of the fire department.

Texas Government Code, §419.032(f) is affected by the new section.

§449.1 Minimum Standards for the Head of a Fire Department

(a) An individual who is employed as the head of a fire department, on or after March 1, 1999, must be certified by the commission, within one year of appointment. During the period of temporary appointment the individual must comply with the continuing education requirement specified in Chapter 441 of this title (relating to Continuing Education).

(b) In order to be certified as a head of a fire department providing fire suppression, an individual shall:

(1) hold a certification as a fire protection personnel in any discipline that has a commission approved curriculum that requires structural fire protection personnel certification and five years experience in a full-time fire suppression position; or

(2) provide documentation in the form of a sworn affidavit of ten years experience as an employee of a local governmental entity in a full-time structural fire protection personnel position in a jurisdiction other than Texas; and

(A) document completion of continuing education, that meets the requirements of Chapter 441, for each year the individual has been out of the fire service up to a maximum of five (5) years; and

(B) successfully pass a written commission examination based on the basic structural fire protection personnel curriculum as specified in Chapter 439 of this title (relating to Examinations for Certification); or

(3) provide documentation in the form of a sworn affidavit of ten years of experience as a certified part-time fire protection employee; or

(4) provide documentation in the form of a sworn affidavit of ten years experience as an active volunteer fire fighter in one or more volunteer fire departments that meet the requirements of subsection (c) of this section and successfully pass a written commission examination based on the basic structural fire protection personnel curriculum as specified in Chapter 439 of this title (relating to Examinations for Certification).

(c) The ten years of volunteer service must include documentation of attendance at 40% of the drills for each year and attendance of at least 25% of a department's emergencies in a calendar year while a member of a volunteer fire department or departments with 10 or more active members that conducts a minimum of 48 hours of drills in a calendar year.

(d) Individuals certified as the head of a fire department meeting the requirements of subsection (b)(2) and (b)(4) will receive a certification as head of a fire department providing fire suppression, and must meet the continuing education requirement as provided for in Chapter 441 of this title (relating to Continuing Education).

(e) For disciplines requiring emergency care attendant certification from the Texas Department of Health, the requirement may be satisfied by documentation of equivalent training or certification in lieu of current certification by the Texas Department of Health.

(f) Except as provided for under subsection (b) of this section, an individual who is not certified as structural fire protection personnel shall not engage in fire fighting activities including incident command, direction of fire fighting activities or other emergency activities typically associated with fire fighting duties, i.e. rescue, confined space and hazardous materials response.

(g) In order to be certified as the head of a fire department providing fire prevention activities only, an individual shall:

(1) hold a certification as a fire inspector, fire investigator, or arson investigator and have five years of full-time experience in fire prevention activities; or

(2) provide documentation in the form of a sworn affidavit of ten years experience with a local governmental entity in a full-time, part-time or volunteer fire inspector, fire investigator, or arson investigator position with ten years of experience in fire prevention activities; and

(A) document completion of continuing education, that meets the requirements of Chapter 441, for each year the individual has been out of the fire service up to a maximum of five (5) years; and

(B) successfully pass a written commission examination based on the basic inspector or investigator curriculum as specified in Chapter 439 of this title (relating to Examinations for Certification).

(3) Individuals certified as the head of a fire department meeting the requirements of subsection (g)(2), but are not certified in another discipline, will receive a certification as head of a fire department providing fire prevention, and must meet the continuing education requirement as provided for in Chapter 441 of this title (relating to Continuing Education).

(h) Holding the head of a fire department certification does not qualify an individual for any other certification.

(i) Nothing contained in this chapter shall be construed to supercede Chapter 143, Local Government Code, in regard to appointment of a head of a fire department.

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

Filed with the Office of the Secretary of State, on November 19, 1998.

TRD-9817712
T. R. Thompson
General Counsel
Texas Commission on Fire Protection
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 918–7189

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Chapter 461. General Administration

37 TAC §461.4

The Texas Commission on Fire Protection proposes amendments to §461.4 concerning the general administration of the Fire Department Emergency Program. The amendment changes the definition of Texas Fire Incident Reporting System to reflect a legislative change that transferred administration of the program from the commission to the Texas Department of Insurance.

Mr. Deloss Edwards, Funds Allocation Advisory Committee Chairman, has determined that for the first five year period the amended section is in effect there will be no fiscal implications for state or local governments.

Mr. Edwards also has determined that for each of the first five years the proposed amendments are in effect the public benefit anticipated as a result of enforcing the amended section will be that commission rules are conformed to legislative changes that transferred administration of the Texas Fire Incident Reporting System from the commission to the Texas Department of Insurance. No additional cost of compliance for small or large businesses or individuals required to comply with the proposed amendment. The commission has determined that the proposed amendments relating to the general administration of the Fire Department Emergency Program will have no impact on private real property interests and no takings impact assessment is required pursuant to the Government Code, §2007.043(b) and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines. There is no local employment impact resulting from the change.

Comments on the proposal may be submitted to: Gary L. Warren Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas, 78768-2286 or e-mail to info@tcfp.state.tx.us.

The amendments are proposed under Texas Government Code, §419.008 which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; and Texas Government Code §419.051-§419.064, which provides the commission authority to administer the Fire Department Emergency Program.

Texas Government Code, §419.051-§419.064 is affected by the proposed amendment.

§461.4. Definitions.

The following words and terms, when usedin this part, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Commission–The Texas Commission on Fire Protection.

(2) Commission ID number - The identification number assigned to fire departments by the Standards and Education Division of the Commission on Fire Protection.

(3) FAAC–The Funds Allocation Advisory Committee.

(4) FDEP–The Fire Department Emergency Program.

(5) ISO–The Insurance Service Organization.

(6) Municipal fire department–A fire department which has its primary fire station located within an incorporated city.

(7) NFPA–The National Fire Protection Association.

(8) National Fire Academy–The federally funded training facility in Emmitsburg, Maryland.

(9) TEXFIRS–The Texas Fire Incident Reporting System administered by the Texas Department of Insurance [~~Commission on Fire Protection~~].

(10) UL–The Underwriters Laboratory.

This 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 November 19, 1998.

TRD-9817713
T. R. Thompson
General Counsel
Texas Commission on Fire Protection
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 918–7189

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Chapter 463. Application Criteria

37 TAC §§463.3, 463.4, 463.5

The Texas Commission on Fire Protection proposes amendments to §§463.3, 463.4, 463.6 concerning application criteria for the Fire Department Emergency Program. The amendments to §463.3 delete information previously required on applications for financial assistance that was considered unnecessary. The amendments to §463.4 removes income levels and number of certification programs from the competitive needs criteria. The amendment to §463.6 requires participation in a training certification program approved by the Commission on Fire Protection as a condition for financial assistance.

Mr. Deloss Edwards, Funds Allocation Advisory Committee Chairman, has determined that for the first five year period the amended sections are in effect there will be no fiscal implications for state or local governments.

Mr. Edwards also has determined that for each of the first five years the proposed amendments are in effect the public benefit anticipated as a result of enforcing the amended sections will be that application process for loans and grants is simplified and criteria deemed unnecessary by the commission are eliminated. There are no additional costs of compliance for small or large businesses or individuals required to comply with the proposed amendment. The commission has determined that the proposed amendments relating to application criteria will have no impact on private real property interests and no takings impact assessment is required pursuant to the Government Code, §2007.043(b) and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines. There is no local employment impact resulting from the change.

Comments on the proposal may be submitted to: Gary L. Warren Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e-mail to info@tcfp.state.tx.us.

The amendments are proposed under Texas Government Code, §419.008 which provides the Texas Commission on Fire Protection with authority to establish rules for the administration of its powers and duties; and Texas Government Code §419.051-§419.064, which provides the commission authority to administer the Fire Department Emergency Program.

Texas Government Code, §419.059 and §419.060 are affected by the proposed amendment.

§463.3. Application Form.

(a) In addition to statutory requirements, the following information will be collected from every applicant to identify the organization and to compile comparative selection criteria established in §463.4 of this title (relating to Competitive Needs Criteria) and loan eligibility in §463.5 of this title (relating to Criteria for Eligibility for Loans):

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

(5) [~~commission ID number (if applicable);~~]

[~~(6) TEXFIRS ID number (if applicable);~~]

[~~(7) State Fireman's and Fire Marshals' Association number (if applicable);~~]

[~~(8)~~] federal identification number (if applicable);

(6) [~~(9)~~] corporate charter number of the fire department (if applicable);

[~~(10) comptroller payee identification number (if applicable);~~]

(7) [~~(11)~~] number of volunteer and/or paid personnel;

(8) [~~(12)~~] service area in square miles;

(9) [~~(13)~~] population within service area;

(10) [~~(14)~~] types of services provided;

(11) [~~(15)~~] numbers of: fire stations; training facilities; apparatus; personal protective clothing (and whether or not is National Fire Protection Association (NFPA) approved); and self-contained breathing apparatus (and whether or not NFPA approved);

(12) [~~(16)~~] examples of how approval of request would be in the public interest;

(13) [~~(17)~~] if applying for scholarships, description of the proposed education and training and the agency(s) approved curricula;

(14) [~~(18)~~] a description of facilities requested (if applicable);

(15) [~~(19)~~] a description of equipment requested (if applicable);

(16) [~~(20)~~] applicant's annual income by tax base, reimbursement, donations, fundraisers, and other categories;

(17) [~~(21)~~] existing debt information;

(18) [~~(22)~~] information about matching funds;

(19) [~~(23)~~] total budget breakdown by major category;

(20) [~~(24)~~] resources for unexpected costs associated with request;

(21) [~~(25)~~] credit references;

(22) [~~(26)~~] description of current training programs;

(23) [~~(27)~~] certification programs participated in by applicant;

(24) [~~(28)~~] applicants fire notification procedures;

(25) [~~(29)~~] three-year response activity for structure, vehicle, ground cover, and other fires and EMS and rescue response and assists;

(26) [~~(30)~~] TEXFIRS reporting activity;

(27) [~~(31)~~] mutual aid activity.

(b) (No change.)

§463.4. Competitive Needs Criteria.

(a) (No change.)

(b) All applications for assistance will be competitively evaluated based on a comparison of the applications being considered for funding during a given meeting using one or more of the following criteria:

(1) [~~average weekly wage in the applicants' area based upon most recent Texas Almanac data. Priority will be given to those with the lowest area income levels;~~]

[~~(2)~~] ratio of fire response to fire apparatus. Priority will be given to those with highest ratios;

(2) [~~(3)~~] ratio of matching funds offered by applicant to amount of assistance requested. Priority will be given to those with highest ratios;

(3) [~~(4)~~] ratio of taxing authority contributions for fire service to fire response activity;

[~~(5) number of fire certification programs participated in;~~]

(4) [~~(6)~~] ratio of existing debt to income. Priority will be given to those with the highest ratio;

(5) [~~(7)~~] amount of approved protective clothing and equipment compared to number of personnel and fire responses.

§463.6. Contract Information.

(a) A loan, grant, or scholarship awarded by the commission shall be issued upon the condition that applicant observes and complies with all Fire Department Emergency Program (FDEP) rules and regulations. The department or organization must also participate in a training certification program approved by the Texas Commission on Fire Protection [~~commission or the Texas Department of Insurance~~].

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

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

Filed with the Office of the Secretary of State, on November 19, 1998.

TRD-9817714
T. R. Thompson
General Counsel
Texas Commission on Fire Protection
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 918–7189

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Chapter 495. Regulation of Nongovernmental Departments

Subchapter A. Voluntary Regulation of Nongovernmental Departments

37 TAC §495.1

The Texas Commission on Fire Protection proposes amendments to §495.1 concerning regulation of nongovernmental departments. The amendment to §495.1 adds language to allow for the acceptance of a public protection classification assigned by the Insurance Services Office as an alternative to a key rate assigned by the Texas Department of Insurance, in order to seek voluntary regulation of the department.

Mr. Anthony C. Calagna, Fire Fighter Advisory Committee Chairman, has determined that for the first five year period the amended section is in effect there will be no fiscal implications for state or local governments.

Mr. Calagna also has determined that for each of the first five years the proposed amendments are in effect the public benefit anticipated as a result of enforcing the amended sections will be commission rules are conformed to changes made by the Texas Department of Insurance that replace key rate classification with the Insurance Services Office public protection classifications. There are no additional costs of compliance for small or large businesses or individuals required to comply with this chapter. The commission has determined that the proposed amendments relating to voluntary regulation of nongovernmental departments will have no impact on private real property interests and no takings impact assessment is required pursuant to the Government Code, §2007.043(b) and §2.18 of the Attorney General's Private Real Property Rights Preservation Act Guidelines. There is no local employment impact resulting from the change.

Comments on the proposal may be submitted to: Gary L. Warren Sr., Executive Director, Texas Commission on Fire Protection, P. O. Box 2286, Austin, Texas 78768-2286 or e-mail to info@tcfp.state.tx.us.

The amendments are proposed under Texas Government Code, §419.008, which provides the Texas Commission on Fire Protection with authority to propose rules for the administration of its powers and duties; and Texas Government Code, §419.085, which provides the commission with authority to provide rules and procedures for mandatory regulation of nongovernmental organizations and personnel.

Texas Government Code, §419.085 will be affected by the proposed amendment.

§495.1. Application Procedures.

A nongovernmental entity may apply to the commission for voluntary regulation pursuant to the Texas Government Code, §419.085. A nongovernmental entity seeking voluntary regulation shall inform the commission in writing of its request and must provide the following documentation:

(1) a letter from the Texas Department of Insurance verifying that the area protected constitutes a rating territory with a protected key rate assigned by the Texas Department of Insurance or a public protection classification of one through eight assigned by Insurance Services Organization;

(2)-(4) (No change.)

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

Filed with the Office of the Secretary of State, on November 19, 1998.

TRD-9817715
T. R. Thompson
General Counsel
Texas Commission on Fire Protection
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 918-7189

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

Part I. Texas Department of Human Services

Chapter 12. Special Nutrition Programs

Subchapter A. Child and Adult Care Food Program

40 TAC §§12.2, 12.5, 12.7, 12.8, 12.17, 12.23, 12.24

The Texas Department of Human Services (DHS) proposes amendments to §§12.2, 12.5, 12.7, 12.8, 12.17, 12.23, and 12.24, concerning definitions of program terms, application for program benefits - contractors, budget, financial management, start-up and expansion funds, overpayments, and sanctions and penalties, in its Special Nutrition Programs chapter. The purpose of the amendments to §§12.2, 12.5, 12.7, 12.8, 12.17, and 12.23 is to allow use of Child and Adult Care Food Program (CACFP) funds to assist potential day care home providers to become licensed or registered by the Texas Department of Protective and Regulatory Services. The amendments provide that certain costs for assisting a potential day care home provider who is unlicensed or unregistered to become licensed or registered so that they are eligible to participate in the CACFP are an allowable use of program funds, including administrative reimbursements, start-up funds, and expansion funds. The purpose of the amendment to §12.24 is to establish tolerance levels, not to exceed 10% in any area, in the administrative sanctions policy for the program reviews of CACFP family day care home sponsoring organizations.

Eric M. Bost, commissioner, has determined that for the first five-year period the proposed sections will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Bost also has determined that for each year of the first five years the sections are in effect the public benefit anticipated as a result of enforcing the sections will be an expansion in the number of day care homes eligible to participate in the CACFP and a reduction in the amount of funds disallowed during administrative reviews due to minor program violations. The amendments to §§12.2, 12.5, 12.7, 12.8, 12.17, and 12.23 will have no effect on small businesses because the change is optional at the discretion of the contractor. The amendment to §12.24 will have no effect on small businesses because it is less restrictive on the contractor. There is no anticipated economic cost to persons who are required to comply with the proposed sections.

Questions about the content of the proposal may be directed to Keith N. Churchill at (512) 467-5837 in DHS's Special Nutrition Programs. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-059, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

The amendments are proposed under the Human Resources Code, Title 2, Chapters 22 and 33, which provides the department with the authority to administer public and nutritional assistance programs.

The amendments implement §§22.001-22.030 and 33.001-33.024 of the Human Resources Code.

§12.2. Definitions of Program Terms.

Terms used in the administration and operation of the Child and Adult Care Food Program (CACFP) in Texas are defined in 7 Code of Federal Regulations §226.2 and 7 Code of Federal Regulations Parts 3015 and 3016, and appropriate Office of Management and Budget Circulars, except as defined in paragraphs (1)-(5) of this section:

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

(3) Expansion funds - funds made available to a contractor that has sponsored the participation of day care homes for at least one year at the time of application for expansion funds to expand the participation of the CACFP in day care homes located in low-income and/or rural areas , and to assist potential day care home providers who are unlicensed or unregistered to become licensed or registered.

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

§12.5. Application for Program Benefits - Contractors.

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

(f) To be eligible for start-up funds or expansion funds, contractors that sponsor day care homes must submit an application. DHS approves or denies applications for start-up and expansion funds according to 7 Code of Federal Regulations §§226.6, 226.12, 226.15, 226.16, and 226.23.

(1) Start-up funds are available only to sponsors of day care homes or contractors that are attempting to add day care homes to their operation , and to assist potential day care home providers who are unlicensed or unregistered to become licensed or registered.

(2) Expansion funds are available only to contractors that have sponsored day care homes for at least one year at the time of application and may be used only to expand program operations in low-income and/or rural areas, and to assist potential day care home providers who are unlicensed or unregistered to become licensed or registered. DHS considers the anticipated amount of expansion funds and alternate sources of funds when evaluating an applicant sponsor's plan for expansion. Contractors that are eligible to receive expansion funds may receive expansion funds only once in any 12-month period and one time only for an expansion effort in any geographic area. Applications for expansion funds must include:

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

§12.7. Budget.

(a)-(g) (No change.)

(h) Contractors that apply for start-up or expansion funds must submit a budget that demonstrates how the funds will be used. Start-up and expansion funds may be used only for start-up or expansion activities , and to assist potential day care home providers who are unlicensed or unregistered to become licensed or registered.

§12.8. Financial Management.

(a)-(c) (No change.)

(d) Sponsoring organizations of family day care homes are prohibited from paying or otherwise compensating any individual, employee, contractor, or day care home provider, based on the number of homes recruited, or changes in program participation as measured by an increase or decrease in meals, children, or providers. The above prohibited cash and noncash compensation includes, but is not limited to salaries, hourly wages, payments for a specific work function (piece work), incentive payments, bonuses, and paid leave charged as a cost to the Child and Adult Care Food Program (CACFP).

(e) Contractors may use CACFP funds, including administrative reimbursements and start-up and expansion funds for allowable costs, as prescribed by DHS, to assist eligible unlicensed or unregistered potential day care home providers to become licensed or registered for the purpose of participating in the CACFP. Contractors may not use CACFP funds to assist a potential day care home provider who has previously received CACFP funds to assist with becoming licensed or registered.

§12.17. Start-up and Expansion Funds.

(a) (No change.)

(b) DHS issues expansion funds to day home sponsoring organizations to expand program participation to licensed or registered

day care homes and to assist potential day care home providers who are unlicensed or unregistered to become licensed or registered according to the following formula: multiply the number of day care homes the sponsoring organization intends to recruit (up to 50) X the monthly rate per home for 1 to 50 homes in effect at the time of the application for expansion funds [~~$63~~] X 2 months. [~~The maximum amount available to a sponsoring organization is $6,300.~~]

(c) Day home sponsoring organizations must use start-up funds to develop or expand a food service program in day homes and initiate a successful program operation. Applicants who receive [~~receiving~~] start-up funds, including start-up funds provided to assist potential day care home providers who are unlicensed or unregistered to become licensed or registered, and who fail to initiate a program operation within the time frame of the start-up funds agreement must return to DHS all start-up payments issued.

(d) (No change.)

§12.23. Overpayments.

(a) The Texas Department of Human Services (DHS) handles overpayment of claims for reimbursement, advance payments, [~~and~~] start-up, and expansion fund payments according to 7 Code of Federal Regulations §§226.6-226.8, 226.10, 226.12-226.14, and §69.303 of this title (relating to Recoupment of Improper Payments).

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

§12.24. Sanctions and Penalties.

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

(e) DHS imposes sanctions against contractors that sponsor day care homes who fail to comply with program requirements for monitoring, and who fail to train providers when program violations related to monitoring or training of providers identified during an administrative review exceed a tolerance level established by DHS, which does not exceed 10% of the providers sampled. Exception: DHS imposes sanctions against contractors who sponsor day care homes for any identified program violation pertaining to the failure to observe a meal during a monitoring visit and the failure to complete all items identified by DHS as mandatory on the required day care home monitor review form. DHS imposes sanctions according to the following procedure:

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

(f) (No change.)

(g) DHS imposes sanctions against contractors that sponsor day care homes who fail to disburse program funds to providers in accordance with program requirements when program violations related to the disbursement of program funds to providers identified during an administrative review exceed a tolerance level established by DHS, which does not exceed 10% of the providers sampled. DHS imposes sanctions according to the following procedure:

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

(h)-(l) (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 November 20, 1998.

TRD-9817850
Glenn Scott
General Counsel
Texas Department of Human Services

Earliest possible date of adoption: February 1, 1999
For further information, please call: (512) 438–3765

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Chapter 79. Legal Services

Subchapter E. Advisory Committee

40 TAC §79.404

The Texas Department of Human Services (DHS) proposes an amendment to §79.404, concerning committees established by the board, in its Legal Services chapter. The purpose of the amendment is to change the name and composition of the Child and Adult Care Food Program (CACFP) advisory committee to represent all child and adult nutrition programs administered by DHS's Special Nutrition Programs (SNP).

Eric M. Bost, commissioner, has determined that for the first five-year period the proposed section will be in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the section.

Mr. Bost also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be an expansion in the types of child and adult nutrition programs that are able to provide advice and consultation to DHS with regard to the programs administered by SNP. There will be no effect on small businesses because the amendment only affects state administrative management procedures. There is no anticipated economic cost to persons who are required to comply with the proposed section.

Questions about the content of the proposal may be directed to Keith N. Churchill at (512) 467-5837 in DHS's Special Nutrition Programs. Written comments on the proposal may be submitted to Supervisor, Rules and Handbooks Unit-060, Texas Department of Human Services E-205, P.O. Box 149030, Austin, Texas 78714-9030, within 30 days of publication in the *Texas Register*.

The amendment is proposed under the Human Resources Code, Title 2, Chapters 22 and 33, which provides the department with the authority to administer public and nutritional assistance programs.

The amendment implements §§22.001-22.030 and 33.001-33.024 of the Human Resources Code.

§79.404. Committees Established by the Board.

(a)-(c) (No change.)

(d) Special Nutrition Programs (SNP) [~~Child and Adult Care Food Program (CACFP)~~] Advisory Committee.

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

(3) Structure.

(A) The committee membership has a representative balance of SNP [~~family day home~~] sponsors, contractors, and recipient agencies; providers; [~~, directors of adult day care centers and child day care centers,~~] concerned citizens; [~~,~~] and parents and relatives of children who participate in programs administered by SNP [~~the CACFP~~].

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

(4) (No change.)

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

Filed with the Office of the Secretary of State, on November 20, 1998.

TRD-9817851
Glenn Scott
General Counsel
Texas Department of Human Services
Earliest possible date of adoption: February 1, 1999
For further information, please call: (512) 438–3765

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Part IV. Texas Commission for the Blind

Chapter 159. Administrative Rules and Procedures

Subchapter B. Fair Hearing Procedures for Resolution of Client Dissatisfaction

40 TAC §159.21

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

The Texas Commission for the Blind proposes the repeal of §159.21 pertaining to appeals process, reviews, and hearings. The repeal is necessary to allow for the adoption of new and improved rules for appeals within the Blind and Visually Impaired Children's Program, which are being simultaneously proposed within Chapter 161 of this title.

Ernest Pereyra, Deputy Director of Administration and Finance, has determined that for the first five years the rule is in effect there will be no fiscal implications for state or local government as a result of the repeal.

Mr. Pereyra has also determined that for each year of the first five years the rule as proposed is in effect the public benefits anticipated as a result of enforcing the rule will be the elimination of rules that no longer conform to federal and state requirements. There will be no effect on small businesses. There is no anticipated economic cost to individuals who are required to comply with the rule.

Questions about the content of this proposal may be directed to Jean Crecelius at (512) 459-2611. Written comments on the proposal may be submitted to Policy and Rules Coordinator, P. O. Box 12866, Austin, Texas 78711, within 30 days from the date of this publication.

The repeal is proposed under Human Resources Code, Title 5, Chapter 91, §91.011(g), which authorizes the commission to adopt rules prescribing the policies and procedures followed by the commission in the administration of its programs.

The repeal affects Human Resources Code, Title 5, §91.028, Services for Visually Handicapped Children.

§159.21. Appeals Process, Reviews, and 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 November 16, 1998.

TRD-9817629
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 459–2611

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Chapter 161. Appeals and Hearing Procedures

Subchapter B. Blind and Visually Impaired Children's Program

40 TAC §§161.60–161.68

The Texas Commission for the Blind proposes new §§161.60 -161.68, pertaining to appeals and hearing procedures. The new rules contain the appeal procedures available to parents whose children have applied for or are receiving services from the agency's Blind and Visually Impaired Children's Program. The rules specify the determinations that may be appealed, the method for requesting an informal review of the determination, the method for requesting a formal hearing to contest the determination, the procedures that will be followed in both types of appeal, and the timeframes in which decisions will be made.

Ernest Pereyra, Deputy Director of Administration and Finace, has determined that for the first five years the rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Pereyra has also determined that for each year of the first five years the rules as proposed are in effect the public benefits anticipated as a result of enforcing the rules will be a rulebase that affords applicants and consumers an opportunity for an impartial review of agency determinations. There will be no effect on small businesses. There is no anticipated economic cost to individuals who are required to comply with the rule.

Questions about the content of this proposal may be directed to Jean Crecelius at (512) 459-2611. Written comments on the proposal may be submitted to Policy and Rules Coordinator, P. O. Box 12866, Austin, Texas 78711, within 30 days from the date of this publication.

The new sections are proposed under Human Resources Code, Title 5, Chapter 91, §91.011(g), which authorizes the commission to adopt rules prescribing the policies and procedures followed by the commission in the administration of its programs.

The new sections affect Human Resources Code, Title 5, §91.028, Services for Visually Handicapped Children.

§161.60. Statutory Authority and Scope.

(a) The procedures established within this subchapter are promulgated pursuant to the responsibility of the Commission's governing board to make rules respecting the administration of programs of the Commission as set out in Texas Human Resources Code, §91.011.

(b) The procedures in this subchapter are available to parents who wish to contest a determination made by the Commission during administration of the Blind and Visually Impaired Children's Program concerning the:

(1) child's eligibility for services;

(2) parent's financial participation in the cost of services;

(3) denial of services; or

(4) termination of services.

(c) The term "parent" in this subchapter, whether in the singular or plural, shall mean the child's natural or adoptive parent, or the spouse of the child's natural or adoptive parent, or the child's guardian, surrogate parent, or the spouse of the guardian or surrogate parent, or a person or spouse of the person who is acting as the child's parent.

(d) A parent may appeal Commission determinations through informal or formal procedures, or both. The parent's decision to seek resolution through informal procedures shall not prevent or delay the parent's access to formal resolution procedures.

§161.61. Requests for Informal Review.

(a) A child's parent may request to meet informally for the purpose of appealing a determination of the Commission concerning the child of such parent.

(b) The request for an informal review must be in writing.

(c) A request for informal review shall not be considered by the Commission to be a petition for formal hearing pursuant to this subchapter.

(d) The request for informal review must contain substantially the following:

(1) a statement describing the decision about which there is dissatisfaction, including the date or dates, as far as can be determined by the parent, on which the determination occurred;

(2) the basis on which the parent contends that the determination was improper or unjust; and

(3) the requested remedy.

(e) An informal review request shall be considered filed on the day the request is received by the caseworker or alternatively, if the caseworker is not available, on the date the complaint is delivered to the Commission office responsible for services to the child, or when deposited in the United States Mail with postage prepaid, in a wrapper addressed to the Commission at the office responsible for services to the child, whichever date is later.

§161.62. Informal Review Procedures.

(a) Within 30 days of the filing of a request for informal review, or a later date if requested by the parent, the caseworker and the supervising regional director shall meet with the parent to review the complaint.

(b) Informal reviews shall be scheduled during regular Commission working hours at a district or local office closest to the parent unless an alternative site and hour is requested in advance by the parent.

(c) The informal review is not a formal hearing; therefore, rules of evidence do not apply. However, the parent shall have the opportunity to refute the basis of the contested determination, to offer verbal and written testimony in his or her behalf, and to question program supervisors about the determination.

(d) The Commission shall make available to the parent any documents contained in the files of the Commission for the purpose of providing evidence for consideration in the informal review process and shall make available any personnel of the Commission who may have information pertinent to the matter or matters as to which the informal review process is conducted.

(e) Upon receiving reasonable notice from the parent, the Commission shall provide an interpreter or reader, or both, to assist during the meeting.

§161.63. Informal Review Findings.

(a) Within ten working days after the conclusion of the informal review the regional director shall issue a decision to the parent. The decision shall contain a recommended remedy, if applicable, which shall be based on the regional director's findings with regard to whether the determination:

(1) conformed with applicable laws, Commission rules, and policies of the Blind and Visually Impaired Children's Program, and

(2) is appropriate for the individual circumstances of the child and parent.

(b) The regional director shall inform the parent of the informal decision in writing. Upon request by the parent, the regional director shall provide the information in the alternative reading medium specified by the parent. In instances of an adverse decision, the letter shall contain the method and procedures by which the parent may petition for a formal hearing.

(c) If the issue is resolved through the informal review to the satisfaction of the parent, the Commission shall consider the matter settled. Any subsequent dissatisfaction with determinations related to the child shall constitute a new matter to be considered and shall require filing of notices in the same manner as described in §161.61 title (relating to Requests for Informal Review).

§161.64. Withdrawal or Cancellation of Request for Informal Review.

(a) The parent may withdraw or cancel a request for an informal review at any step of the review process. Unless the parent files a petition for a formal hearing on the same issue, the determination resulting from the informal review shall be final.

(b) If the parent files a petition for a formal hearing on the same issue before the informal review process is completed, the informal review process shall be terminated.

§161.65. Request for Formal Hearing.

(a) A parent may request a formal hearing by notifying the child's caseworker in writing.

(b) A request for a formal hearing shall be considered timely if it is received by the Commission within a reasonable period of time, not to exceed 60 days from the date the parent was mailed notice of the caseworker's determination to the parent's last known address, or 30 days from the date the parent was mailed notice of the regional director's decision if an informal review was held.

(c) Although no prescribed form is required to file a request, preprinted forms for this purpose shall be maintained in every Commission office and are available upon request.

(d) The request for formal hearing must contain substantially the following:

(1) a statement that the parent is requesting a formal hearing pursuant to these rules;

(2) a statement indicating consent by the parent for the release of such information as is necessary for the conduct of a formal hearing;

(3) a statement describing the contested action, including the date or dates, as far as known to the parent, on which the alleged action occurred;

(4) the basis on which the parent charges that the alleged action taken was improper or unjust; and

(5) the requested remedy.

(e) A formal hearing request that fails to substantially comply with the requirements of subsection (d) of this section shall be returned to the requestor with a letter stating the reason for rejection. Rejection shall not jeopardize the timeliness of filing an amended request if the original request was made in compliance with subsection (b) of this section.

(f) A formal hearing request shall be considered filed on the day the request is received by the caseworker or alternatively, if the caseworker is not available, on the date the complaint is delivered to the Commission office responsible for services to the child; or when deposited in the United States Mail with postage prepaid, in a wrapper addressed to the Commission at the office responsible for services to the child, whichever date is later.

(g) Upon receiving a request for a formal hearing, the caseworker shall mail the parent an acknowledgment, a form requesting the parent's consent for the release of such information as is necessary for the conduct of a hearing, and information specified in §161.66(b) of this title (relating to Formal Hearing Procedures).

(h) The Commission shall make available to the parent any documents contained in the files of the Commission for the purpose of providing evidence for consideration in the formal hearing process.

(i) Upon receiving reasonable notice from the parent, the Commission shall provide an interpreter or reader, or both, to assist during the hearing.

§161.66. Formal Hearing Procedures.

(a) The Commission uses the services of the State Office of Administrative Hearings (SOAH) to conduct formal hearings related to this subchapter.

(b) Hearings shall be conducted in accordance with:

(1) state procedures for hearing contested hearings contained in 1 TAC, §155.1, et seq.

(2) applicable sections of the Texas Government Code, Chapter 2001; and

(3) this subchapter.

(c) The information contained in subsection (b) of this section shall be provided to the parent upon receipt of a request for a formal hearing.

(d) A parent may be represented by legal or other counsel during a formal hearing.

§161.67. Review of Proposal for Decision.

(a) Upon receipt of SOAH's proposal for decision, the executive director shall review the proposal for decision and the hearing record.

(b) Within 15 days of receipt, the executive director shall issue a final decision. The decision shall be based on a review of the hearing officer's findings of fact, conclusions of law, and agency policy.

(c) The executive director shall notify the parent of a final decision by letter. In instances of an adverse decision, the letter shall inform the parent of the method by which the complainant may appeal the final decision.

(d) The parent may file a motion for rehearing of an adverse decision of the executive director and must file a motion for rehearing in order to appeal an adverse decision to the district court. The motion for rehearing must be filed in accordance with Texas Government Code, §2001.145, et seq.

(e) A parent desiring to appeal to the District Court shall, upon request, be provided copies of the sections of the Texas Government Code pertinent to the motion for rehearing and appeals to the District Court.

§161.68. Appeal of Final Decision.

A final decision adverse to the consumer may be appealed to the State District Court in Travis County in accordance with Texas Government Code, §2001.171, et seq.

This 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 November 16, 1998.

TRD-9817628
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 459–2611

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Chapter 173. Donations

40 TAC §173.1, §173.2

The Texas Commission for the Blind proposes amendments to §173.1 and §173.2, pertaining to donations. These actions are the result of the agency's review of the rule pursuant to the Appropriation Act of 1997, HB 1, Article IX, Section 167. The commission is updating the rules with the agency's revised name and making one grammatical change.

Ernest Pereyra, Deputy Director of Administration and Finance, has determined that for the first five years the rules are in effect there will be no fiscal implications for state or local government.

Mr. Pereyra has also determined that for each year of the first five years the rules as proposed are in effect the public benefits anticipated as a result of the rules will be a clear public understanding of the agency's authority to accept donations and the relationship between the agency and donors. There will be no effect on small businesses. There is no anticipated economic cost to individuals as a result of the repeal.

Questions about the content of this proposal may be directed to Jean Crecelius at (512) 459-2611 and written comments on the proposal may be submitted to Policy and Rules Coordinator, P. O. Box 12866, Austin, Texas 78711, within 30 days from the date of this publication.

The amendments are proposed under Human Resources Code, Title 5, Chapter 91, §91.011, which authorizes the commission

to adopt rules prescribing the policies and procedures followed by the commission in the administration of its programs.

The proposal affects Human Resources Code, Title 5, Chapter 19, §91.012, specifically (d)(4) of the section.

§173.1. Purpose.

The purpose of these sections is to establish rules for acceptance of private donations and to establish standards of conduct to govern the relationships between officers and employees of the Texas [~~State~~] Commission for the Blind and private donors.

§173.2. Definitions.

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

(1) Commission–the Texas [~~State~~] Commission for the Blind.

(2) Employee-A regular, acting, or exempt, full- or part-time employee of the commission.

(3) Officer-A member of the commission's governing board.

(4) Private donor-One or more individuals or organizations that offer to give or give nonpublic financial assistance to the commission.

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

Filed with the Office of the Secretary of State, on November 16, 1998.

TRD-9817642
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 459–2611

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Chapter 173. Donations

The Texas Commission for the Blind proposes the repeal of §§173.3-173.73 and simultaneously proposes new §§173.3-173.7. These actions are the result of the agency's review of the rules pursuant to the Appropriation Act of 1997, HB 1, Article IX, Section 167. The Commission is updating the rules to reflect changes in law and Commission practices. The rules have also been improved in style and content. The sections contain the Commission's rules on soliciting donations, investing funds received as donations, transferring donations received by the Commission to other parties, and accepting donations for restricted or unrestricted purposes.

Ernest Pereyra, Deputy Director of Administration and Finance, has determined that for the first five years the rules are in effect there will be no fiscal implications for state or local government.

Mr. Pereyra has also determined that for each year of the first five years the rules as proposed are in effect the public benefits anticipated as a result of the rules will be a clear public understanding of the agency's authority to accept donations and the relationship between the agency and donors. There will be no effect on small businesses. There is no anticipated economic cost to individuals as a result of the rules as proposed.

Questions about the content of this proposal may be directed to Jean Crecelius at (512) 459-2611 and written comments on the proposal may be submitted to Policy and Rules Coordinator, P. O. Box 12866, Austin, Texas 78711, within 30 days from the date of this publication.

40 TAC §§173.3–173.7

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

The repeals are proposed under Human Resources Code, Title 5, Chapter 91, §91.011, which authorizes the commission to adopt rules prescribing the policies and procedures followed by the commission in the administration of its programs.

The proposal affects Human Resources Code, Title 5, Chapter 19, §91.012, specifically (d)(4) of the section.

§173.3. General Authority to Accept Donations.

§173.4. Solicitation.

§173.5. Investing.

§173.6. Restricted/Unrestricted.

§173.7. Transfer.

This 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 November 16, 1998.

TRD-9817640
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 459–2611

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40 TAC §173.3-173.7

The rules are proposed under Human Resources Code, Title 5, Chapter 91, §91.011, which authorizes the commission to adopt rules prescribing the policies and procedures followed by the commission in the administration of its programs.

The proposal affects Human Resources Code, Title 5, Chapter 19, §91.012, specifically (d)(4) of the section.

§173.3. Acceptance of Donations.

(a) Donations in the amount of $500 or more shall be considered by the Commission's governing board for acceptance according to Government Code, Chapter 575. Donations in the amount of $499 or less shall be accepted upon determination of the Commission's executive director that the donation is for purposes consistent with Human Resources Code, Chapter 91.

(b) Donations of real property (real estate) shall be accepted by the Commission only upon authorization of the legislature.

(c) Donations to the Commission may be for any amount and for specified or unspecified purposes.

§173.4. Solicitation.

The solicitation of donations by the Commission shall be limited to purposes consistent with Human Resources Code, Chapter 91.

§173.5. Investing.

All donations shall be deposited into the state treasury for investment and the Commission shall expend same in accordance with the provisions of state law.

§175.6. Restricted/Unrestricted.

(a) Conditional or restrictive donations for purposes specified by the donor may be accepted if the conditions are consistent with the approved purposes of the Commission and consistent with state laws and these rules. Upon acceptance, restrictive donations shall be used only for purposes specified by the donor.

(b) Unconditional donations shall be used to carry out the approved purposes of the Commission, consistent with state laws and these rules.

§175.7. Transfer.

No donations shall be transferred by the Commission to a private or public development fund or foundation unless the Commission has received written permission for the transfer from the donor or the donor's representative, if applicable.

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

Filed with the Office of the Secretary of State, on November 16, 1998.

TRD-9817641
Terrell I. Murphy
Executive Director
Texas Commission for the Blind
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 459–2611

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Part VI. Texas Commission for the Deaf and Hard of Hearing

Chapter 182. Specialized Telecommunications Device Assistance Program

Subchapter A. Definitions

40 TAC §182.4

The Texas Commission for the Deaf and Hard of Hearing proposes amendment to §182.4, Determination of Basic Device. The amendment is proposed to provide a broader definition of basic equipment for which limited options are available.

David W. Myers, Executive Director, has determined that for each year of the first five years the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Mr. Myers also has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of this amendment will be a better understanding of how the devices that will be available will be determined under the Specialized Telecommunications Device Assistance Program. There will be no effect on small businesses. There is no anticipated economic hardship to persons required to comply with the amendment as proposed.

Comments on this proposed amendment may be submitted to Billy Collins, Texas Commission for the Deaf and Hard of Hearing, P.O. Box 12904, Austin, Texas 78711-2904.

The amendment is proposed under the Human Resources Code, §81.006(b) (3), which provides the Texas Commission for the Deaf and Hard of Hearing with the authority to adopt rules for administration and programs.

No other statute, code or article is affected by this proposed amendment.

§182.4. Determination of Basic Device

In determining basic devices available for voucher exchange, the following criteria shall be applied.

(1) The device must be for the purpose of telephone access in the home or business;

(2) The device must mainly apply to telephone access functions and not daily living functions; and

(3) The device must serve to facilitate interactive communication that is functionally equivalent to that afforded by a basic telephone.

(4) Due to the limited technology available, devices for individuals who are speech impaired will be evaluated on an individual basis.

This 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 November 16, 1998.

TRD-9817605
David Myers
Executive Director
Texas Commission for the Deaf and Hard of Hearing
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 407–3250

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TITLE 43. TRANSPORTATION

Part I. Texas Department of Transportation

Chapter 15. Transportation Planning and Programming

Subchapter E. Federal, State, and Local Participation

43 TAC §§15.50–15.52, 15.54, 15.55

The Texas Department of Transportation proposes amendments to §§15.50-15.52 and §§15.54-15.55, concerning federal, state, and local participation.

EXPLANATION OF PROPOSED AMENDMENTS

Transportation Code, §222.053(b) authorizes the Texas Transportation Commission to require, request, or accept from a political subdivision matching or other local funds, rights of way, utility adjustments, additional participation, planning, or any local incentives to make the most efficient use of its highway fund-

ing. Pursuant to this authority, the commission has adopted §§15.50-15.56, to specify the roles of federal, state, and local entities in the development of highway improvement projects.

Less than half of the identified highway improvement needs of the state are currently being met. Cost participation is required of local governments in order to make the most efficient use of scarce state highway funding. Funding may also be limited at the local level. The Transportation Equity Act for the 21st Century (TEA-21) will provide an increased amount of federal funding for transportation needs in the state. Maximizing the use of this additional federal funding will allow scarce state and local funds to be used more efficiently, and will allow those projects determined to be the most critical to be developed expeditiously.

Article III, §50 of the Texas Constitution generally prohibits state agencies from extending the credit of the state. Accordingly, the department requires local governments to pay all estimated costs for which the local government is responsible prior to those costs being incurred, rather than have the department pay those costs and be reimbursed by the local government.

Section 15.52 currently requires the department to monitor project costs, and to collect any additional participation required of a local government at any point during a project when it becomes apparent that local payments are insufficient to cover identified contract costs. Attorney General opinions, interpreting the constitutional provisions, have held that an extension of the credit of the state may be provided if made for a public purpose, and sufficient controls exist to ensure the public purpose is carried out and the constitutional requirements are met. Collecting additional local participation after project completion would allow these projects to be developed more efficiently.

Transportation Code, §224.033 authorizes the commission to enter into an agreement with a county for the improvement by the county of the state highway system. Transportation Code, §221.002 authorizes the commission and the governing body of a municipality to agree to establish the respective liabilities and responsibilities of each in the provision of a designated state highway in the municipality. Title 23, Code of Federal Regulations, Part 635 authorizes the department to allow local governments to award and manage federal-aid highway improvement contracts if all federal requirements are met. The amendments authorizing a local government to award and manage certain highway improvement contracts are necessary to ensure that all applicable federal and state laws, regulations, and guidelines are complied with by the local government.

Part 635 also authorizes highway improvements to be performed by state or local forces ("force account"), rather than through competitive bidding, when it is demonstrated that the force account method is more cost effective. The amendments are necessary to ensure that approval of force account work made under the federal regulations will also be in compliance with department requirements, and to prescribe requirements for department approval of force account work that are consistent with federal regulations.

The amendments are also necessary to update department policy concerning the funding of highway improvement projects and to clarify the role of local governments in the development of highway improvement projects to be used as the basis of an agreement between the department and the local government.

Section 15.50 is amended to clarify that federal, state, and local responsibilities for cost participation in highway improvement projects are described in Subchapter E of Chapter 15.

Section 15.51 is amended to define additional terms used in that subchapter, including district office, eligible utilities, executive director, incremental payments, metropolitan highway, Phase 1 Trunk System Corridor, and the Texas Trunk System. Amendments clarifying several existing definitions have also been made, and terms no longer used have been deleted.

Section 15.52 is amended to eliminate the requirement for the department to seek additional funds, other than payments specified in the funding agreement, from a local government prior to completion of a project. To clarify the involvement of local governments in project development activities, this section is also amended to: (1) define when the department may authorize a local government to provide minor improvements to the state highway system and define a minor improvement; and (2) define when the department may authorize a local government to award and manage a construction contract eligible for state or federal reimbursement.

Section 15.54 is amended to clarify that construction costs funded by the Texas Transportation Commission require compliance with federal and state laws and regulations in carrying out the highway improvements. Additionally, §15.54(d)(3)(E) is being amended to give the commission freedom to consider other matters that may be unique to the situation when approving a waiver to cost conditions for frontage road construction. Various minor grammatical amendments have also been made to clarify the existing provisions of this section.

To allow the department to maximize the use of increased federal funding available under TEA-21, section 15.55(c), Figure 1 is amended to revise numerous participation ratios to allow the department the flexibility to request federal reimbursement for more right of way and preliminary engineering activities, as well as construction, thus reducing the required state and local participation required for some types of projects, and allowing those funds to be used for other projects. Numerous footnotes have also been deleted to provide the department the flexibility to utilize federal funds other than those under the control of metropolitan planning organizations. To provide for the expeditious and systematic development of high priority projects, this section has also been amended to provide for development of Phase 1 Trunk System Corridors and certain Safety Program projects without requiring any local participation.

Other specific changes to Section 15.55(c), Figure 1 include: (1) elimination of sub-headings under the Interstate Highway System category as these are defined in the Unified Transportation Program (UTP) and do not need to be repeated here; (2) elimination of ratios requiring more than 10% local participation for right of way and eligible utility costs for projects on the Urban Road System; (3) participation ratios for Continuous Lighting Systems have been revised to reflect the numerous possibilities currently available and the requirements for each; (4) local participation for right of way and eligible utility costs has been eliminated for the On-State Highway System Safety Program to allow the department to more efficiently and expeditiously address safety concerns on the State Highway System; and (5) local participation has been reduced from 100% to 10% for the Off-State Highway System Safety Program as these costs are minimal and to further utilize federal funding.

FISCAL NOTE

Frank J. Smith, Director, Finance Division, has determined that for the first five-year period the amended sections are in effect, there will be fiscal implications for state or local governments as a result of enforcing or administering the amended sections. The amendments will expend more state funds for acquisition of right of way and payment of eligible utility costs for Phase 1 Trunk System Corridors and Safety Program projects. Those additional costs have been estimated at $150,000 for each year of the five-year period. There is a corresponding decrease in costs for local governments. It is also anticipated that there will be additional fiscal implications for state and local governments through the amendments to the cost participation ratios. Those costs cannot be quantified as the amount will depend on the number and types of projects that are developed. There are no anticipated costs for persons required to comply with the amended sections as proposed.

Robert L. Wilson, Director, Design Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amended sections.

PUBLIC BENEFIT

Mr. Wilson also has determined that for each year of the first five years the amended sections are in effect the public benefit anticipated as a result of enforcing or administering the amended sections will be to maximize the use of scarce state and local transportation funding, and to ensure that high priority projects are developed as expeditiously as possible, without delays due to the inability of a local government to participate in right of way and eligible utility costs, thereby improving the efficiency of the state's transportation system, and maximizing the safety of the traveling public. There will be no effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed amendments. The public hearing will be held at 1:30 p.m. on December 16, 1998, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 1:00 p.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. A person who disrupts a public hearing must leave the hearing room if ordered to do so by the presiding officer. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or braille, are requested to contact Eloise Lundgren, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, 512/463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments may be submitted to Robert L. Wilson, Director, Design Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments will be 5:00 p.m. on January 5, 1999.

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation.

No statutes, articles, or codes are affected by the proposed amendments.

§15.50. Purpose.

This subchapter [~~undesignated head~~] describes federal, state, and local responsibilities for cost participation in highway improvement projects.

§15.51. Definitions.

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

[~~(1) Added capacity - An increase in the carrying capacity of a segment of the state highway system, including the addition of new travel lanes (other than high occupancy vehicle lanes or auxiliary lanes).~~]

(1) [~~(2)~~] Commission - The Texas Transportation Commission.

(2) [~~(3)~~] Congestion Mitigation and Air Quality Improvement Program (CMAQ) - A federal program, established and administered in accordance with 23 United States Code §104 and federal regulations, which provides federal funds for a project in a non-attainment area that contributes to the attainment of a natural ambient air quality standard or will have certified benefits to air quality.

(3) [~~(4)~~] Construction cost - All direct and indirect costs identified by the department's cost accounting system to a highway improvement project, other than for right of way acquisition, preliminary engineering, and construction engineering.

(4) [~~(5)~~] Construction engineering cost/expenses - Engineering or project administration costs and expenses incurred, including indirect costs and expenses identified by the department's cost accounting system, on a highway improvement project after contract award.

(5) [~~(6)~~] Department - The Texas Department of Transportation.

(6) District office - One of the 25 geographical areas, managed by a district engineer, in which the department conducts its primary work activities.

(7) Economically disadvantaged county - As determined from data provided to the department by the Texas Comptroller of

Public Accounts at the beginning of each fiscal year, a county that has, in comparison to other counties in the state:

(A) below average per capita taxable property value;

(B) below average per capita income; and

(C) above average unemployment.

(8) Eligible utilities - Costs of utility adjustments, required by a highway improvement project, that are eligible, in accordance with federal and state law, for reimbursement by the department.

(9) Executive director - The executive director of the department, or a designee not below the level of deputy executive director or assistant executive director.

(10) [~~(8)~~] Farm and Ranch to Market (FM/RM) System Route - A road on the system of roads [~~system of roads~~] designated by the commission under Transportation Code, §201.104.

(11) [~~(9)~~] Federal funds - Financial assistance provided by the federal government for highway improvement projects.

(12) [~~(10)~~] Highway improvement project - A project which provides for the design, construction, improvement, or enhancement of a public road, including bridges, culverts, or other necessary structures related to public roads, either on or off the state highway system.

(13) Incremental payments - A local government's payment of its funding share in a manner other than the standard payment provision provided in §15.52(6)(A) of this title (relating to Agreements), including an initial payment made in accordance with that section, followed by payment of the remaining amount at a time established in the funding agreement, or periodic payments made in accordance with the schedule established in the funding agreement.

[~~(11) Interstate Maintenance Program (IM) - A federal program which provides federal funding to reconstruct, rehabilitate, or maintain a portion of the Interstate Highway System; criteria for eligible projects in this program are set forth in federal law and regulations.~~]

(14) [~~(12)~~] Local government - Any county, city, other political subdivision of this state, or special district that has the authority to finance a highway improvement project.

(15) [~~(13)~~] Local participation - Minimum financial [~~Financial~~] assistance provided by a local government to participate in costs associated with highway improvement projects.

(16) [~~(14)~~] Matching funds/participation ratio - Those portions of funds required or chargeable for the contribution toward a highway improvement project's cost by a local government [~~entity~~].

(17) Metropolitan highway - A local road or street which compliments the state highway system, as designated by the commission.

(18) [~~(15)~~] Metropolitan planning organization (MPO) - An organization designated in certain urbanized areas to carry out the transportation planning process as required by 23 United States Code §134.

(19) [~~(16)~~] National Highway System (NHS) - A part of the National Intermodal Transportation System consisting of the National System of Interstate and Defense Highways and those principal arterial roads which are essential for interstate and regional commerce and travel, national defense, intermodal transfer facilities, and international commerce and border crossings as designated by the United States Congress by criteria set forth in federal law.

(20) [~~(17)~~] National System of Interstate and Defense Highways (Interstate Highway System) - A system of roads and bridges that constitute a part of the National Highway System designated by the United States Congress as essential for interstate and regional commerce and travel, national defense, intermodal transfer facilities, and international commerce and border crossings.

[~~(18) New construction (I) - Activities authorized for the completion of the designated Interstate Highway System.~~]

[~~(19) New route - Activities related to an existing roadway or new location not previously designated on the state highway system.~~]

(21) [~~(20)~~] Off-State Highway System Bridge Program - A federally mandated program by which federal funds are made available to replace or rehabilitate bridges under the jurisdiction of a local government and not on the state highway system, administered in accordance with criteria set forth under federal law and regulations and state law, safety standards, design standards, and construction standards.

(22) [~~(21)~~] Off-state highway system routes - Those routes not designated on the state highway system which are the responsibility of local governments.

(23) [~~(22)~~] Off-State Highway System Safety Program - A federally mandated program by which federal funds are made available for safety improvements to facilities under the jurisdiction of a local government and not on the state highway system, administered in accordance with criteria set forth under federal law and regulations and state law, safety standards, design standards, and construction standards.

(24) [~~(23)~~] On-State Highway System Bridge Program - A federally mandated program by which federal funds are made available to replace or rehabilitate bridges on the state highway system in accordance with criteria set forth under federal law and regulations and state law, safety standards, design standards, and construction standards.

(25) [~~(24)~~] On-State Highway System Safety Program - A federally mandated program by which federal funds are made available for safety improvements on the state highway system in accordance with criteria set forth under federal law and regulations and state law, safety standards, design standards, and construction standards.

(26) Phase 1 Trunk System Corridor - Corridors of the Texas Trunk System prioritized for project development by the commission.

(27) [~~(25)~~] Preliminary engineering cost/expenses - Costs and expenses incurred, including indirect costs and expenses identified by the department's cost accounting system, on a highway improvement project before contract award.

(28) [~~(26)~~] Principal Arterial Street System (PASS) Program - A commission approved program to improve urban arterial streets designated on the state highway [~~this~~] system to relieve major traffic corridors and enhance total system operations in urban areas over 200,000 in population.

(29) [~~(27)~~] Reconstruction - The primary activities involving the rebuilding of a segment of highway along the existing route as well as those associated with the acquisition of rights of way where necessary to upgrade to current standards.

(30) [~~(28)~~] Rehabilitation - The primary activities to restore, or re-establish in good condition, a segment of highway (not

including the construction of additional travel lanes, other than high occupancy vehicle lanes or auxiliary lanes).

(31) [~~(29)~~] Reservoir agency - A public or private agency that has the authority to construct, maintain, or operate a reservoir facility.

(32) [~~(30)~~] Right of way costs - All direct and indirect costs identified by the department's cost accounting system for the acquisition of land or an interest in land necessary for the development of a highway improvement project (including access rights to abutting properties and usually including eligible utility relocation/adjustment costs).

(33) [~~(31)~~] Right of way procurement - That process identified with the acquisition of real property, access rights, mineral rights, and easements permitted in accordance with state law for the construction of approved highway improvement projects.

(34) [~~(32)~~] State funds - Money received by the department, other than federal funds or local participation, to be expended for highway improvement projects.

(35) [~~(33)~~] State highway system - The system of highways in the state included in a comprehensive plan prepared by the department's executive director under the direction and with the approval of the commission in accordance with Transportation Code, §201.103.

(36) [~~(34)~~] State highway system routes - Those state numbered routes designated as a part of the state highway system.

(37) [~~(35)~~] State Park Road Program - A program by which state funds are utilized to construct roads [~~to or~~] within or adjacent to public facilities administered by the Texas Parks and Wildlife Department.

(38) [~~(36)~~] Surface Transportation Program (STP) - A federal-aid program where states may obligate federal funds to projects related to certain public roads, in accordance with the criteria established in federal law and regulations.

(39) Texas Trunk System - A rural highway network as defined in §15.41 of this title (relating to Definitions).

(40) [~~(37)~~] Transportation Enhancement Program - A federally mandated program identified in §11.200 et seq. of this title (relating to Statewide Transportation Enhancement Program), providing federal funding for activities that enhance the intermodal transportation systems and facilities within the state for the enjoyment of the users of those systems.

[~~(38) Transportation Improvement Program (TIP) - A transportation program cooperatively developed with metropolitan planning organizations which includes improvement projects proposed for federal funding in accordance with the criteria set forth in federal law and federal regulations.~~]

(41) [~~(39)~~] United States (U.S.) System Route - Those routes designated on the state highway system as U.S. highways and eligible for federal-aid funds as set forth in federal law and regulations.

(42) [~~(40)~~] Urban Road System - A commission designated system of routes that consist of the continuation of Farm to Market Roads in urban areas over 50,000 in population.

(43) [~~(41)~~] Urban Streets Program - A state program of projects, designated by the commission, on certain urban streets developed and constructed in accordance with state law and safety, design, and construction standards.

(44) [~~(42)~~] Urbanized area - As defined in 23 United States Code §101, an area with a population of 50,000 or more designated by the United States Bureau of Census, within boundaries to be fixed by responsible state and local officials in cooperation with each other, and subject to the approval of the United States Secretary of Transportation.

(45) [~~(43)~~] Utility relocation/adjustment costs - Costs of work related to the adjustment, relocation, and removal of utility facilities accomplished in accordance with §21.21 of this title (relating to State Participation in Relocation, Adjustment, and/or Removal) and §§21.31 et seq. of this title (relating to Utility Accommodation).

§15.52. Agreements.

When a local government or reservoir agency is responsible for providing financial assistance for a highway improvement project, the department and the local government or reservoir agency shall enter into an agreement before any work is performed. The agreement will include, but not be limited to, the following provisions of this section.

(1) Right of entry. If the local government or reservoir agency is the owner of the project site, it shall permit the department or its authorized representative access to occupy the site to perform all activities required to execute the work.

(2) Right of way and/or utility relocation/adjustments. The local government will provide all necessary right of way and utility relocation/adjustments, whether publicly or privately owned, in accordance with §15.55 of this title (relating to Construction Cost Participation). When specified, the reservoir agency will provide all necessary right of way and utility/relocation adjustments, whether publicly or privately owned. Existing utilities will be relocated and/or adjusted with respect to location and type of installation in accordance with the requirements of the department as specified in §21.21 of this title (relating to State Participation in Relocation, Adjustment, and/or Removal) and §21.31 et seq. of this title (relating to Utility Accommodation).

(3) Funding arrangement. The agreement will specify the type of funding share arrangement agreed upon by the department and the local government. The funding share arrangement shall include any adjustments required by §15.55 of this title (relating to Construction Cost Participation). The funding arrangement agreed upon by the department and the reservoir agency will be as specified under §15.54(f) of this title (relating to Construction).

(A) Standard. The local government is responsible for all, or a specified percentage as shown in Appendix A of §15.55 of this title (relating to Construction Cost Participation), of the direct costs incurred by the department for preliminary engineering, construction engineering, construction, and right of way as well as the direct cost for any work included which is ineligible for federal or state participation. When specified, the reservoir agency is responsible for all of the direct costs incurred by the department for preliminary engineering, construction engineering, construction, and right of way as well as the direct cost for any work included which is ineligible for federal or state participation.

(B) Alternate. A fixed price funding arrangement may be used if requested by the local government and approved by the executive director[~~, deputy executive director, or assistant executive director of the department~~].

(i) Definition. Under this arrangement, a local government is responsible for a firm fixed price which is a lump sum price not subject to adjustment except:

(I) in the event of changed site conditions;

(II) if work requested by the local government is ineligible for federal participation; or

(III) as mutually agreed upon by the department and the local government.

(ii) Conditions. The department may enter into a firm fixed price agreement only:

(I) for projects that include state participation, as shown in Appendix A of §15.55 of this title (relating to Construction Cost Participation); and

~~*[(II)* if incremental payments are not requested; and]~~

(II) [~~(III)~~] if the fixed price is based on the estimated cost of [~~for~~] the work for which the funds are received.

(iii) Approval. In approving a request for an alternate funding arrangement, the executive director[~~, deputy executive director, or assistant executive director of the department~~] will consider:

(I) requests by the local government to include work which is ineligible for federal or state participation;

(II) need for expeditious project completion;

(III) type of work proposed and the ability to accurately estimate its cost; and

(IV) any other considerations relating to the benefit of the state, the traveling public, and the operations of the department.

(4) Interest. The department will not pay interest on funds provided by the local government or the reservoir agency. Funds provided by the local government or the reservoir agency will be deposited into, and retained in, the state treasury.

(5) Amendments. In the case of significantly changed site conditions or other mutually agreed upon changes in the scope of work authorized in the agreement, the department and the local government or reservoir agency will amend the funding agreement, setting forth the reason for the change and establishing the revised participation to be provided by the local government or reservoir agency.

(6) Payment provision. The agreement will establish the conditions for payment by the local government or reservoir agency, including, but not limited to, the method of payment and the time of payment.

(A) Standard. Following execution of the agreement, the local government or reservoir agency will pay, as a minimum, its funding share for the estimated cost of preliminary engineering for the project. Prior to the department's scheduled date for contract letting, the local government or reservoir agency will remit to the department an amount equal to the remainder of the local government's or reservoir agency's funding share for the project.

(i) When the standard funding arrangement is used, after [~~if it is found that the amount received is insufficient to pay the local government's or reservoir agency's funding share, then the department shall notify the local government or reservoir agency which shall transmit the required amount to the department. After~~] the project is completed the final cost will be determined by the department, based on its standard accounting procedures. If it is found that the amount received is insufficient to pay the local government's or reservoir agency's funding share, then the department shall notify the local government or reservoir agency which shall transmit the required amount to the department. If it is found that the amount received is in excess of the local government's or reservoir agency's funding share, the [~~, and any~~] excess funds paid by the local government or reservoir agency shall be returned.

(ii) When a fixed price funding arrangement is used, the lump sum price is not subject to adjustment except as provided for in paragraph (3)(B) of this section (relating to Agreements).

(B) Alternate. Incremental payments may be made if requested by the local government and approved by the executive director [~~, deputy executive director, or assistant executive director of the department. If it is found that the amount received is insufficient to pay the local government's funding share, then the department shall notify the local government which shall transmit the required amount to the department~~]. When the standard funding arrangement is used, after [~~After~~] the project is completed, the final cost will be determined by the department based on its standard accounting procedures. If it is found that the amount received is insufficient to pay the local government's funding share, then the department shall notify the local government which shall transmit the required amount to the department. If it is found that the amount received is in excess of the local government's funding share, the [~~, and any~~] excess funds paid by the local government shall be returned. When a fixed price funding arrangement is used, the lump sum price is not subject to adjustment except as provided for in paragraph (3)(B) of this section (relating to Agreements).

(i) Conditions. The department may approve incremental payments only if:

(I) the incremental payments sought are based on the estimated cost for the work for which the funds are received and payment is made in accordance with the schedule established in the funding agreement; and

(II) the local government does not have a delinquent obligation to the department, as defined in §5.10 of this title (relating to Collection of Debts).

(ii) Approval. In approving a request for incremental payments, the executive director[~~, deputy executive director, or assistant executive director of the department~~] will consider:

(I) inability [~~ability~~] of the local government to pay its total funding share prior to the department's scheduled date for contract letting, [~~such ability to be~~] based upon population level, bonded indebtedness, tax base, and tax rate;

(II) past payment performance;

(III) need for expeditious project completion;

(IV) whether the project is located in a local government that consists of all or a portion of an economically disadvantaged county; and

(V) any other considerations relating to the benefit of the state, the [~~traveling~~] public, and the operations of the department.

(7) Termination. If the local government or reservoir agency withdraws from the project after the agreement is executed, it shall be responsible for all direct and indirect project costs incurred by the department for the items of work in which the local government or reservoir agency is participating.

(8) Responsibilities of the parties. The agreement shall identify the responsibilities of each party, including, but not limited

to, preparing or providing construction plans, advertising for bids, awarding a construction contract, and construction supervision.

(A) Local performance of construction work.

(i) Request. If requested by a county or municipality and approved by the executive director or designee, an agreement with the commissioners court of a county or the governing body of a municipality may provide for minor improvement of the state highway system by county or municipal employees under direct county or municipal control, where minor improvements are to include:

(I) projects on a metropolitan highway not maintained by the department and not contained in the off-state highway system bridge program; or

(II) projects or activities appurtenant to a state highway and including drainage facilities, surveying, traffic counts, driveway construction, landscaping, signs, lighting, guardrails and other items incidental to the roadway itself on facilities for which the department is responsible for maintenance.

(ii) Approval. The executive director or designee may authorize a county or municipality to perform minor improvement of the state highway system, if the county or municipality commits in the agreement to comply with all federal, state and department requirements and agrees to forfeit any claim to federal and/or state reimbursement if they fail to comply. In approving a request from a county or municipality for minor improvement of the state highway system, the executive director or designee will consider:

(I) previous experience of the county or municipality in performing the type of work proposed;

(II) need for expeditious project completion;

(III) cost effectiveness of the proposal as compared to awarding the project through the competitive bidding process; and

(IV) any other considerations relating to the benefit of the state, the traveling public, and the operations of the department.

(B) Local letting and management of construction projects.

(i) Request. A local government may submit a written request to the department to assume the responsibility for letting, construction, and construction management of a specific project.

(ii) Approval. The executive director may authorize a local government to award and manage a construction contract if:

(I) the improvement is for a project not on the state highway system or is for a project on a metropolitan highway not maintained by the department;

(II) the project is not in the off-state highway system bridge program;

(III) the department lacks the expertise or resources necessary to award a construction contract in an efficient and timely manner;

(IV) the local government is found to be capable of awarding and managing the construction contract in a timely manner consistent with federal, state and department regulations; and

(V) the local government commits in the agreement to comply with all federal, state and department requirements and agrees to forfeit any claim to federal and/or state reimbursement if they fail to comply.

(C) Acknowledgment. The local government or reservoir agency must acknowledge in the agreement that while not an agent, servant, nor employee of the state, it is responsible for its own acts and deeds and for those of its agents or employees during the performance of the work authorized in the contract.

§15.54. Construction.

(a) Purpose. This section describes the conditions under which state, federal and local financing of construction costs are to be shared.

(b) Funding. Construction costs may be funded by the commission at the entire expense of the department, with local participation, and/or with federal participation, as described in §15.55 of this title (relating to Construction Cost Participation), and in accordance with criteria set forth by federal and state law and regulations. The local government shall also be responsible for the total cost of any work included which is ineligible for federal or state participation as specified in §15.52 of this title (relating to Agreements).

(c) Sidewalks. The department will also provide for sidewalk construction, accomplished in accordance with the requirements of the Americans with Disabilities Act and other applicable state and federal laws, on [~~the~~] designated state highway system routes:

(1) when replacing an existing sidewalk;

(2) where highway construction severs an existing sidewalk system (the state will make connections within highway right of way to restore sidewalk system continuity); or

(3) where pedestrian traffic is causing or is expected to cause a safety conflict.

(d) Control of Access on Freeway Mainlanes.

(1) For facilities with full control of access, such as interstate highways or freeways developed by commission designation pursuant to Transportation Code, Chapter 203, access to the main travel lanes is fully controlled through designation, purchase of access rights, or provision of frontage roads.

(2) The department will include frontage roads in the planning stage of highways with full access control when:

(A) it is necessary to unlandlock the remainder of a parcel of land which has a value equal to or nearly equal to the cost of the frontage road;

(B) the appraised damages, resulting from the absence of frontage roads at the time of planning, would exceed the cost of the frontage roads; or

(C) it is necessary to restore circulation of local traffic due to local roads or streets being severed or seriously impaired by the construction of the controlled access highway, and an economic analysis shows the benefits derived more than offset the costs of constructing and maintaining the frontage roads.

(3) In those instances where requests for additional frontage roads are received during or subsequent to the planning stage or after the freeway has been constructed, they may be considered and placed in order of the priority of highway needs.

(A) When right of way and utility adjustment costs are shared with a local government on a standard participation basis applicable to the highway designation, the department may assume

100% responsibility for additional frontage road construction as follows:

(i) on relatively short sections of frontage roads where through lane traffic is experiencing high accident rates due to local access and where such construction can be expected to substantially improve safety; or

(ii) in heavily traveled urban corridors where gaps occur in the existing frontage road systems, and closing these frontage road gaps will restore system continuity and provide a cost-effective method of enhancing traffic operations in the corridor.

(B) The department may assist a requesting local government in the construction of additional frontage roads as follows:

(i) where a usable section of frontage road that will be of benefit to the traveling public is to be developed (usable section being defined as an addition or extension from a cross road separation to cross road separation or connecting to a public roadway or major traffic generator);

(ii) where such frontage road construction is judged to not adversely impact existing traffic operations or safety;

(iii) where the department is responsible for design and construction of the added frontage roads; and

(iv) except as provided in subparagraph (E) of this paragraph, and as adjusted under §15.55 of this title (relating to Construction Cost Participation), when the requesting local government furnishes 100% of needed right of way and utility adjustment costs and 50% of the cost of construction, including preliminary and construction engineering.

(C) The department may approve additional frontage road construction, which is 100% funded by the requesting local government as follows:

(i) if the frontage road construction primarily provides new or improved access to abutting property and does not necessarily provide a usable section as defined in subparagraph (B)(i) of this paragraph (a [~~This~~] type of addition that would provide limited benefits to the general traveling public [~~.~~]); and

(ii) except as provided in subparagraph (E) of this paragraph, where the department is responsible for designing and constructing the frontage road and the requesting local government is responsible for 100% of the construction, right of way, and utility adjustment costs including preliminary and construction engineering.

(D) Where right of way costs are 100% the responsibility of the requesting local government, relocation assistance benefits will also be 100% the responsibility of the local government and must be accomplished in compliance with department policies and procedures.

(E) The department may waive any one or more of the cost conditions stated in subparagraphs (B)(iv) and (C)(ii) of this paragraph, provided that the waiver is first approved by written order of the commission. In approving a waiver, the commission will base its decision on consideration of the population level, bonded indebtedness, tax base, and tax rate of the local government involved, or other conditions the commission deems pertinent.

(4) For additional frontage roads requested subsequent to the planning stage or after the freeway has been constructed, control of access as originally conceived for the facility may be modified to allow access to the proposed frontage road only to the extent as may be permitted by safety considerations and in keeping with department policies and procedures. The sale or disposal of access rights shall be accomplished in accordance with §§21.101-21.104 of this title (relating to Disposal of Real Estate Interests).

(5) Access driveway facilities shall be for securing access to abutting property. Costs and provision thereof shall be in accordance with the criteria and responsibilities established in §§11.50-11.53 of this title (relating to Access Driveways to State Highways).

(e) Drainage Construction Costs.

(1) In general, it shall be the duty and responsibility of the department to construct, at its expense, a drainage system within state highway right of way, including outfalls, to accommodate the storm water which originates within and reaches state highway right of way from naturally contributing drainage areas.

(2) Where a drainage channel, man-made, natural, or a combination of both, is in existence prior to the acquisition of highway right of way, including right of way for widening the highway, it shall be the duty and responsibility of the state to provide for the construction of the necessary structures and/or channels to adjust or relocate the existing drainage channel in such a manner that the operation of the drainage channel will not be injured. The construction expense required shall be considered a construction item. The acquisition of any land required to accomplish this work shall be considered a right of way item, with cost participation to be in accordance with §15.55 of this title (relating to Construction Cost Participation).

(3) Where an existing highway crosses an existing drainage channel, and a political unit or subdivision with statutory responsibility for drainage develops a drainage channel to improve its operation, both upstream and downstream from the highway, and after the state establishes that the drainage plan is logical and beneficial to the state highway system, and there is no storm water being diverted to the highway location from an area which, prior to the drainage plan, did not contribute to the channel upstream of the highway, and after construction on the drainage channel has begun or there is sufficient evidence to insure that the drainage plan will be implemented, the department, at its expense, shall adjust the structure and/or channels within the existing highway right of way as necessary to accommodate the approved drainage plan.

(4) Where a state highway is in existence, and there is a desire of others to cross the existing highway at a place where there is not an existing crossing for drainage, then those desiring to cross the highway must provide for the entire cost of the construction and maintenance of the facility which will serve their purpose while at the same time adequately serving the highway traffic. The design, construction, operation, and maintenance procedures for the facility within state highway right of way must be acceptable to the department.

(5) In the event the local government involved expresses a desire to join the department in the drainage system in order to divert drainage into the system, the local government shall pay for the entire cost of collecting and carrying the diverted water to the state's system and shall contribute its proportional share of the cost of the system and outfall based on the cubic feet per second of additional water diverted to it when compared to the total cubic feet per second of water to be carried by the system. The local government requesting the drainage diversion shall indemnify the state against or otherwise acknowledge its responsibility for damages or claims for damages resulting from such diversion.

(f) Highway adjustments for reservoir construction.

(1) Where existing highways and roads provide a satisfactory traffic facility in the opinion of the department and no immediate rehabilitation or reconstruction is contemplated, it shall be the responsibility of the reservoir agency, at its expense, to replace the existing road facility disturbed by reservoir construction in accordance with the current design standards of the department, based upon the road classification and traffic needs.

(2) Where no highway or road facility is in existence but where a route has been designated for construction across a proposed reservoir area, the department will bear the cost of constructing a satisfactory facility across the proposed reservoir, on a line and grade for normal conditions of topography and stream flow, and any additional expense as may be necessary to construct the highway or road facility to line and grade to comply with the requirements of the proposed reservoir shall be borne by the reservoir agency.

(3) In soil conservation and flood control projects involving the construction of flood retarding structures where a highway or road operated by the department will be inundated at less than calculated 50-year frequencies by the construction of a floodwater retarding structure, it will be expected that the soil conservation service or one of its cooperating agencies will provide funds as necessary to raise or relocate the road above the water surface elevation which might be expected at 50-year intervals. In those cases where a highway or road operated by the department will not be inundated by floods of less than 50-year calculated frequency, it will be the purpose of the department to underwrite this hazard for the general welfare of the state and continue to operate the road at its existing elevation until such time as interruption and inconvenience to highway travel may necessitate raising the grade.

(g) Irrigation crossings.

(1) Where an irrigation facility is in existence prior to the acquisition of highway right of way, including right of way for widening, and the highway project will interfere with such a facility, the following provisions [~~revisions~~] shall govern.

(A) If, at the place of interference, the irrigation facility consists primarily of an irrigation canal which crosses the entire width of the proposed right of way, this shall be considered a crossing and it shall be the duty and responsibility of the department to construct and maintain an adequate structure and to make the necessary adjustments or relocations of minor laterals and pumps, etc., associated with the crossing, in such a manner that the operation of the irrigation facility will not be injured. The construction work at a crossing will be considered a construction item with the expense to be borne by the department. The acquisition of any land required to accomplish the adjustments and/or relocation shall be a right of way consideration.

(B) Any irrigation facility encountered which does not cross the right of way and consists primarily of a longitudinal canal and/or associated irrigation appurtenances such as pumps, gates, etc., which must be removed and relocated shall be considered a right of way item.

(C) In those cases where both crossing and longitudinal adjustments or relocation of irrigation facilities are encountered, each segment shall be classified in accordance with subparagraph (A) and (B) of this paragraph.

(2) Where a highway is in existence, and there is a desire of others to cross the existing highway with an irrigation facility at a highway point where there is not an existing crossing facility, then those desiring to cross the highway must provide for the entire cost of the construction and maintenance of the irrigation facility which will serve their purpose while at the same time adequately serve the highway traffic. The design, construction, operation, and maintenance procedures for the facility within highway right of way must be acceptable to the department.

(h) Continuous and safety lighting systems and traffic signals. For the installation, maintenance, and operation of continuous and safety lighting systems and traffic signals, the local government shall be responsible for providing matching funds as shown in Appendix A of §15.55 of this title (relating to Construction Cost Participation), except as adjusted under that section. Such installation, maintenance, and operation shall be accomplished in accordance with §25.5 of this title (relating to Installation, Operation, and Maintenance of Traffic Signals) and §25.11 of this title (relating to Continuous and Safety Lighting Systems).

§15.55. Construction Cost Participation.

(a) Required cost participation. The commission may require, request, or accept from a local government matching or other funds, rights-of-way, utility adjustments, additional participation, planning, documents, or any other local incentives.

(b) Exception. In evaluating a proposal for a highway improvement project in a local government that consists of all or a portion of an economically disadvantaged county, the commission shall, for those projects in which the commission is authorized by law to provide state cost participation, adjust the minimum local matching funds requirement after evaluating a local government's effort and ability to meet the requirement.

(1) Request for adjustment. The city council, county commissioners court, district board, or similar governing body of a local government that consists of all or a portion of an economically disadvantaged county shall submit a request for adjustment to the local district office of the department. The request will include, at a minimum:

(A) the proposed project scope;

(B) the estimated total project cost;

(C) a breakdown of the anticipated total cost by category (e.g., right-of-way, utility adjustment, plan preparation, construction);

(D) the proposed participation rate;

(E) the nature of any in-kind resources to be provided by the local government;

(F) the rationale for adjusting the minimum local matching funds requirement; and

(G) any other information considered necessary to support a request.

(2) Evaluation. In evaluating a request for an adjustment to the local matching funds requirement, and a local government's effort and ability to meet the requirement, the commission will consider a local government's:

(A) population level;

(B) bonded indebtedness;

(C) tax base;

(D) tax rate;

(E) extent of in-kind resources available; and

(F) economic development sales tax.

(c) The following Appendix A to this section establishes federal, state, and local cost participation ratios for highway improvement projects, subject to the availability of funds to the department. Figure 1: 43 TAC §15.55(c).

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

Filed with the Office of the Secretary of State, on November 23, 1998.

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Bob Jackson
Deputy General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463–8630

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Chapter 21. Right of Way

Subchapter I. Regulation of signs Along Interstate and Primary Highways

The Texas Department of Transportation proposes amendments to §§21.141, 21.142, 21.144-21.154, 21.157-21.160, the repeal of §21.155 and §21.156, and new §§21.143, 21.155, 21.156, and 21.161, 21.162, concerning the regulation of signs along interstate and primary systems.

EXPLANATION OF PROPOSED AMENDMENTS, REPEALED AND NEW SECTIONS Transportation Code, Chapter 391, (the "Act") concerning highway beautification on interstate and primary systems, provides the commission and the department with the authority to regulate the erection and maintenance of outdoor advertising signs along interstate and primary systems.

Senate Bill 446, 75th Legislature, 1997, amended Transportation Code, Chapter 391, by adding §391.005 to exempt campaign signs, provided they meet certain criteria, from regulation.

Title 23, Code of Federal Regulations (CFR), Part 750 requires the state to adopt certain criteria for continuing nonconforming signs, establish exemptions for on-premise signs, recognize zoning enacted by municipalities, and certify municipalities to control signs instead of the state.

The amendments to §21.141 change the reference from sections to subchapter.

The amendments to §21.142 revise the definition of "Act" to reflect that the codification of the statute eliminated the name of the act. The term "commercial or industrial activities" is changed to clarify what types of activities may not be considered to establish an unzoned commercial area. The term "freeway" has been modified to clarify the point in time when more restrictive spacing for a freeway should be applied. The amendment proposes that a road becomes a freeway at the point when a construction contract has been let and the access rights have been obtained. This will decrease the number of signs permitted in nonconforming locations. A new definition is added for the term "interchange," defining the point in time when spacing from an interchange is applied. By using the point in time when a construction contract has been let, the department can minimize the number of nonconforming signs. The term "outdoor advertising or sign" is amended to include logos and symbols. A new definition was added for the term "right of way" to clarify the reference in §21.148(3) that prohibits signs in the right of way and to include property which is jointly used by the department and a utility or a railroad. The term "unzoned commercial or industrial area" is amended to require that business activities must be visible from the main traveled way and that two business activities must be adjacent. The definition also provides what would disqualify the activities from being adjacent. Two activities may occupy one building as long as there is sufficient separation of the two activities. The term "zoned commercial or industrial area" was amended to comply with Title 23 CFR §750.708, by specifically adding a prohibition against the recognition of spot and strip zoning. Other definitions were amended or added to conform to federal regulations and to clarify terms used in this subchapter. This section has also been amended to number the definitions in accordance with Texas Register style.

New §21.143 complies with the provisions of 23 CFR §750.707. The section: establishes the conditions applicable to maintaining a nonconforming sign; describes the actions that may be undertaken without a new permit under normal maintenance or reasonable repair and maintenance; and establishes criteria which constitute substantial change to a sign, thus requiring a new permit.

The amendments to §21.144 clarify how measurements from parks, rest areas and scenic areas should be taken; and how the height of a sign should be measured.

Section 21.145 was amended to delete the requirement that a sign must be removed within five years of the date it became nonconforming because to do so would require payment to the sign owner. The amendments also provide that a permit may be canceled if one of the businesses supporting an unzoned commercial area was solely established to obtain a sign to reduce fraud.

The amendments to §21.146 are minor changes that make the section easier to read.

The amendments to §21.147 revise the directional sign exemption for farm and ranch signs to add language that the facilities must raise livestock or grow crops. This will reduce abuse of this exemption. Additionally, an exemption was added for campaign signs as required by Transportation Code, §391.005. An exemption for directional signs for certain attractions and activities was added to reflect the department's policy of not subjecting directional signs to licensing and permitting requirements. Criteria for on-premise signs have been added to comply with 23 CFR §750.709 which requires the establishment of criteria to determine whether an on-premise sign qualifies for an exemption.

The amendments to §21.148: reflect the language in Transportation Code, §544.006, concerning the prohibition of certain signs which interfere with traffic control devices; clarify that signs in joint use areas with a railroad are legal nonconforming if they were in existence prior to March 3, 1986; and clarify that prohibited signs include signs that are not otherwise exempt, do not have a permit issued pursuant to §21.150, and are operated without a license issued pursuant to §21.149.

The amendments to §21.149: clarify that licenses are not transferable; specify renewal periods; provide that a license will not be eligible for renewal if the license holder ceases to be authorized to do business in Texas; and remove the requirements

that license renewals be notarized and proof of continuing bond coverage be provided annually. These changes reduce unnecessary paperwork associated with license renewals.

Existing §21.149 provides that the department may revoke a license if a check or money order is not honored, but then must offer a hearing on the revocation. The amendments consider the license or license renewal void because if a check is not honored, the applicant should have no standing for a hearing.

Section 21.149 is further amended to provide: minor changes to make the subsection easier to read and comply with Texas Register form; and for the temporary suspension of additional permits or the transfer of existing permits when the director of right of way receives a bond cancellation notice. The section: deletes a provision that a license revocation is abated until the revocation is affirmed by order of the commission, so that the director of right of way can suspend the issuance of new permits or the transfer of existing permits; provides the consequence of an expired or revoked license to permits issued under that license; and provides that notice from the department of a bond cancellation, revocation, or suspension is presumed to be received five days after mailing. A presumption of notice will allow the department to proceed when a license holder has not notified the department of a forwarding address or fails to check his or her mail.

The amendments to §21.150: require a signature from the landowner consenting to the erection of a billboard; clarify that the initial permission is assumed to continue unless withdrawn; and deletes language that provides that an indication must be included on the permit application that the site owner has consented to the erection of a sign because the additional permission is not necessary. The section also clarifies requirements regarding permit plates and staking a proposed location, which will make it easier for the department to identify existing and proposed sign sites when reviewing a sign permit application or conducting an inventory. The section requires permits to be considered on a first-come, first-served basis, to standardize handling of permits. The chart in existing subsection (d)(2) concerning refunds and prorations is deleted because it is obsolete since all refunds have been made. The amendments to §21.150 further authorize the director of right of way to approve a transfer from a lapsed license to a valid license when legal documents can be provided to show that the sign was sold. This will eliminate the consequence of losing a sign when the seller of a sign dies or leaves the country prior to signing a transfer form, but after signing a bill of sale. The amendments provide: that a permit with an unresolved permit violation is not eligible for transfer; and a transaction is void if a check or money order is dishonored upon presentment. Currently, the department may cancel a permit, with notice and an opportunity for a hearing. If a check is not honored, the transaction should be void and the applicant should not be entitled to a hearing. The amendments also provide that a notice of cancellation from the department is presumed to be received five days after mailing in order to allow the department to proceed when a license holder has not notified the department of a forwarding address or fails to check his or her mail. The amendments establish that a permit automatically expires if it is not renewed, the license expires or is revoked, or the sign is acquired by the state. In these cases, no cancellation of the permit is necessary and it is not necessary to provide notice and an opportunity for a hearing.

The amendments provide: the reasons why a permit may be canceled; and a notice may be posted on the sign to provide notice to a sign owner that the sign has become subject to control under the Act, when the owner of a sign cannot be identified by information on the sign. This posting will resolve the problem of notifying owners that signs on the National Highway System must be permitted.

Section 21.151 is amended to reflect the reorganization of the department and to update department titles. The term "geographical jurisdiction" was changed to "corporate limits." At the time this policy was originally adopted, municipalities had no authority under the Local Government Code to extend their sign ordinances into their extraterritorial jurisdiction ("ETJ"). Title 23 CFR §750.706, does not permit a state to accept a municipality's control for purposes of meeting the requirements of the federal law, in the municipality's ETJ if there is no zoning in the ETJ. In Texas, state law does not allow a municipality to adopt a zoning ordinance within its ETJ. The term "geographical jurisdiction" needed to be replaced to avoid the misconception that a municipality can control signs in its ETJ, in lieu of state control. When a municipality controls signs in its ETJ pursuant to a local ordinance, the state's control under Transportation Code, Chapter 391, does not supersede the municipality's control. Both entities have jurisdiction.

The amendments establish procedures for a municipality to become certified. All the municipalities that are certified to control signs pursuant to the federal program were certified in the early 70's, and recently the department has received several inquiries for certification from municipalities wishing to become certified.

The amendments authorize the department to conduct reviews of certified municipalities for the purpose of ensuring that the minimum requirements of the federal law for an effective control program are being met. Title 23 CFR §750.706(c)(4) provides that the state should periodically check to assure that the local authorities are enforcing their sign ordinance, and 23 CFR §750.706(c)(5) provides that the state is ultimately responsible for control in these certified municipalities. A municipality may be decertified for not enforcing its sign ordinance. At least three municipalities have been "decertified" since the inception of the Act. The amendments provide a procedure to follow for decertification.

The amendments to §21.152 require sign owners to submit a plan of extension before the department will approve the size and construction. This is necessary to prevent large, flimsy cutouts from blowing off signs and damaging property. Signs that are built smaller than the size shown on the permit must obtain a new permit to enlarge the sign at a later date.

Section 21.153 was amended to clarify how distances from public parks and the right of way line should be measured.

New §21.154 allows the use of changing technology by lifting the prohibition of intermittent messages of any nature, and specifying that LED or video screens would not be permitted. Advancing technology has prompted numerous requests for tri-vision or changeable message signs. The Federal Highway Administration has recently determined that these changeable message signs do not contravene the terms of the federal-state agreements which do not specifically prohibit the use of signs with flashing, intermittent, or moving lights. However, according to FHWA, LED and video screens are inconsistent with these agreements. The agreement with Texas, entered into in 1972, prohibits flashing or moving lights, but does not preclude the use of moving parts.

The section provides for the use of tri-vision, changeable message signs, as long as the messages change within two seconds and stay stationery for at least ten seconds. The limitation on the frequency of the change was based on the concern that there could be an undue distraction to the public if the message changes too frequently. Similar limitations have been imposed in other states. The use of reflective materials is authorized as long as the reflective materials do not create the illusion of moving lights or cause an undue distraction to the traveling public. Neon may be used on sign faces as long as the lights do not move or flash or create the illusion of moving or flashing lights.

Section 21.155 and §21.156 are simultaneously being proposed for repeal and replaced with new §21.155 and §21.156 in a revised and amended form.

New §21.155 provides: the criteria for directional signs contained in 23 CFR §750.154, to eliminate the need to refer to the federal regulations; and the department's selection method, criteria, and registration for directional signs for privately owned activities and attractions. Registration will ensure that the directional signs qualify for the exemption.

New §21.156 specifies criteria for destruction, abandonment, and discontinuance of signs in accordance with 23 CFR §750.707(d)(6). The section provides a process and criteria for the department to follow in determining whether a sign has sustained substantial damage. The sign may not be rebuilt during the appeal process and may not be repaired without a new permit. The existing section has a 50% damage threshold. If a sign cannot be repaired if it sustains damage in excess of 50% of the cost of erecting a new sign of the same type at the same location. The proposed section has a 60% threshold. This change will make the section more consistent with the municipal ordinances adopted by certified municipalities pursuant to Local Government Code, §216.013(e). If more than one-half of the poles on a multiple-pole sign are broken or damaged to the point where they cannot be reused, the sign must be discontinued. The section establishes that a sign: may not display obsolete or no advertising matter for 365 days; is considered abandoned if the sign has fallen into disrepair, or become overgrown by trees or other vegetation; and is considered abandoned when the permit renewal fees have not been paid for a period of six months. The section provides: the actions that the department would consider when canceling a permit for abandonment, including that a small temporary sign nailed to the sign does not constitute advertising; that the payment of property taxes, the retention of the sign as a balance sheet asset, or other evidence that the sign is not abandoned will not be considered when establishing whether the sign permit should be canceled; and the department may issue another permit in a conforming location when an existing sign has been abandoned at the location. Minor amendments were made to §21.157 and §21.158 to provide cross-references and to clarify how measurements would be made.

Amendments to §21.159 clarify that the issuance of a permit or license does not create a property right.

The amendments to §21.160 prioritize the locations where a sign may be relocated. The existing section provides that a sign may not be relocated beyond 3,000 feet under the less restrictive spacing and zoning criteria. The proposed section will allow a sign to be relocated anywhere in the district under less restrictive criteria. Often a sign cannot be relocated to the remainder or to another location in the vicinity of the original sign site, either because of insufficient business activity, spacing problems, or because of a local ordinance which does not allow for the relocation of signs. It has become increasingly difficult, due to stricter local sign controls and fewer conforming locations, to relocate signs that are displaced due to highway construction. These amendments make it easier to relocate displaced signs to locations conforming to the minimal requirements set out in the federal-state agreement. The amendments clarify that relocated signs must be reestablished with the same configuration and construction as the original signs and provide a procedure for bisecting signs. The requirement that a written agreement with a landowner waiving and releasing any claim for damages resulting from the relocation of the sign was deleted because the department does not obtain such a waiver of damages from any other type of leasehold owner in the acquisition process. The amendments provide procedures to amend a permit for a bisection of a sign due to a right of way acquisition.

New §21.161 establishes the department's policy concerning tree cutting and violation of access rights for maintenance of signs. It is illegal in Texas to remove vegetation from the right of way to make a sign more visible or to maintain a sign from the state's right of way. These activities have become an increasing problem and may result in cancellation of the permit.

New §21.162 provides an appeal mechanism for permit denials that are not covered by the department's contested case provisions. Currently there is not a formal appeal process to challenge the basis for a permit denial and several sign companies have expressed an interest in such a process.

FISCAL NOTE

Frank J. Smith, Director, Finance Division, has certified that for the first five-year period the amendments, new sections, and repeals are in effect, there will be no fiscal implications for state government as a result of enforcing or administering the proposed sections. The savings associated with making it easier to relocate signs displaced as a result of highway projects may not be quantified as those costs and revenues will depend on the number of signs which may be relocated. There will be a minimal administrative impact on local governments that choose to submit a request for certification. There are no anticipated costs for persons required to comply with the sections as proposed.

A. James Henry, III, Interim Director, Right of Way Division, has determined that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed sections.

PUBLIC BENEFIT

Mr. Henry also has determined that for each year of the first five years the amendments, repeals and new sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments, repeals, and new sections will be to more effectively regulate the erection and maintenance of signs along interstate and primary systems and to ensure those signs are erected in compliance with Transportation Code, Chapter 391, thereby maximizing the welfare and safety of the traveling public. There is no anticipated effect on small businesses.

PUBLIC HEARING

Pursuant to the Administrative Procedure Act, Government Code, Chapter 2001, the Texas Department of Transportation will conduct a public hearing to receive comments concerning the proposed repeal, amendments, and new sections. The public hearing will be held at 9:00 a.m. on December 15, 1998, in the first floor hearing room of the Dewitt C. Greer State Highway Building, 125 East 11th Street, Austin, Texas and will be conducted in accordance with the procedures specified in 43 TAC §1.5. Those desiring to make comments or presentations may register starting at 8:30 a.m. Any interested persons may appear and offer comments, either orally or in writing; however, questioning of those making presentations will be reserved exclusively to the presiding officer as may be necessary to ensure a complete record. While any person with pertinent comments will be granted an opportunity to present them during the course of the hearing, the presiding officer reserves the right to restrict testimony in terms of time and repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views and identical or similar comments through a representative member when possible. Comments on the proposed text should include appropriate citations to sections, subsections, paragraphs, etc. for proper reference. Any suggestions or requests for alternative language or other revisions to the proposed text should be submitted in written form. Presentations must remain pertinent to the issues being discussed. A person may not assign a portion of his or her time to another speaker. A person who disrupts a public hearing must leave the hearing room if ordered to do so by the presiding officer. Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services such as interpreters for persons who are deaf or hearing impaired, readers, large print or braille, are requested to contact Eloise Lundgren, Director, Public Information Office, 125 East 11th Street, Austin, Texas 78701-2483, (512) 463-8588 at least two working days prior to the hearing so that appropriate services can be provided.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments, repeals and new sections may be submitted to A. James Henry, III., Interim Director, Right of Way Division, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments will be 5:00 p.m. on January 5, 1999.

43 TAC §§21.141, 21.142, 21.144–21.154, 21.157–21.160

STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation and, more specifically, Transportation Code, Chapter 391, which authorizes the commission to adopt rules to regulate the erection or maintenance of signs along interstate and federal primary systems.

No other statutes, articles, or codes are affected by the proposed amendments.

§21.141. Purpose.

This subchapter is [~~These sections are~~] established to regulate the orderly and effective display of outdoor advertising along a regulated [~~the interstate highway system and the federal-aid primary~~] highway [~~system~~] within the State of Texas.

§21.142. Definitions.

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

(1) Act - [~~The Highway Beautification provisions of the Texas Litter Abatement Act, codified as~~] Transportation Code, Chapter 391, concerning beautification of a regulated highway.

(2) Commercial or industrial activities - Those activities customarily permitted only in zoned commercial or industrial areas except that none of the following shall be considered commercial or industrial [~~activities~~]:

(A) outdoor advertising structures;

(B) agricultural, forestry, ranching, grazing, farming, and related activities, including, but not limited to, temporary wayside fresh produce stands;

(C) activities not:

(i) housed in a permanent building or structure, or a mobile home or trailer that the applicant can prove is considered part of the real property and taxed accordingly;

(ii) having an indoor restroom, telephone, running [~~functioning~~] water, [~~and sewage connections and~~] functioning electrical connections, and adequate heating; or

(iii) having permanent flooring other than material such as dirt, gravel, or sand;

(D) activities not visible from the traffic lanes of the main traveled way;

(E) activities conducted in a building primarily used as a residence;

(F) railroad right of way [~~right-of-way~~];

(G) activities that [~~no part of which~~] are not within 200 feet from the edge of the right of way [~~right-of-way~~];

(H) activities conducted only seasonally [~~or which are not conducted an average of at least 30 hours per week or at least five days per week~~];

(I) activities conducted in a building having less than 300 square feet of floor space devoted to the [~~such~~] activities;

(J) activities that do not have at least one employee attendant who is at the activity site, performing work, and available to customers an average of at least 30 hours per week or at least five days per week [~~not conducted by human beings~~];

(K) activities which have not been open for [~~existed~~] at least 90 days;

(L) recreational facilities such as campgrounds, golf courses, tennis courts, baseball or football fields or stadiums, wild animal parks, zoos, or racetracks, except for any portions of those facilities such as offices and clubhouses which otherwise meet the criteria in this subsection;

(M) apartment houses or condominiums;

(N) areas occupied by preschools, schools, or other buildings primarily used for educational purposes, whether public or private;

(O) quarries or borrow pits, except for any portion of those facilities which is occupied by a permanent office located at the site which otherwise meets the criteria in this subsection; and

(P) cemeteries, or churches, synagogues, mosques, or other places primarily used for worship.

(3) Commission - The Texas Transportation Commission.

(4) Conforming sign - A sign which is lawfully in place and complies with size, lighting, and spacing requirements and any other lawful regulations pertaining thereto.

(5) Department - The Texas Department of Transportation.

(6) Director - The director of the Right of Way Division of the department.

(7) District engineer - The chief administrative officer in charge of a district of the department.

(8) Erect - To construct, build, raise, assemble, place, affix, attach, embed, create, paint, draw, or in any other way bring into being or establish [~~, except when performed incidental to the change of an advertising message or to normal maintenance or repair of an existing sign~~].

(9) Freeway - A divided highway with frontage roads or full control of access. An existing road that is a freeway under construction will be considered a freeway when the construction contract has been let, regardless of whether the mainlanes are open to the public.

(10) Interchange - An intersection or junction of roadways involving one or more grade separations, including the additional area used or needed for connecting roadways or frontage roads to move traffic from one roadway to another. An interchange under construction will be considered an interchange when the construction contract has been let, regardless of whether it is open to the public.

(11) Interstate highway system - That portion of the national system of interstate and defense highways located within the State of Texas which now or hereafter may be so designated officially by the commission [~~Texas Transportation Commission~~] and approved pursuant to 23 United States Code §103.

(12) License - An outdoor advertising license issued by the department pursuant to the provisions of the Transportation Code, Chapter 391, Subchapter C.

(13) Main-traveled way - The traveled way of a highway that carries through traffic. In the case of a divided highway, the traveled way of each of the separate roadways for traffic in opposite directions is a main-traveled way. It does not include such facilities as frontage roads, turning roadways, or parking areas.

[Main traveled way - The through traffic lanes exclusive of frontage roads, auxiliary lanes, and ramps.]

(14) National Highway System - That portion of connected main highways located within the State of Texas which now or hereafter may be so designated officially by the commission and approved pursuant to 23 United States Code §103.

(15) Nonconforming sign - A lawfully erected sign that [~~which was lawfully erected, but which~~] does not comply with the provisions of a law or rule promulgated [~~passed~~] at a later date, or which later fails to comply with a law or rule due to changed conditions.

(16) Nonprofit sign - A sign erected and maintained by a nonprofit organization in a municipality or the extraterritorial jurisdiction of a municipality if the sign advertises or promotes only the municipality or another political subdivision whose jurisdiction is in whole or in part concurrent with the municipality.

(17) Normal maintenance - The process of keeping a sign in good repair in accordance with and subject to the limitations contained in §21.143 of this title (relating to Maintenance and Continuance).[~~When a sign is being converted from a multiple pole structure to a monopole structure or is being repaired at a cost in excess of 50% of the cost of erecting a new sign of the same type at the same location, each such action constitutes replacement rather than normal maintenance and a sign permit will be required if the structure is an off-premise sign. No sign may be enlarged more than 10% of the size shown on the permit without first obtaining a permit authorizing such enlargement, but no enlarged sign may have an area greater than 672 square feet. Lighting may not be added to any sign nor may more intense lighting be added to any sign without first obtaining a permit authorizing such addition. No person shall erect, repair, or maintain a sign while such person or the equipment being used is on any highway right of way.~~]

(18) Outdoor advertising or sign - An outdoor sign, display, light, device, figure, painting, drawing, message, plaque, placard, poster, billboard, logo or symbol, or other thing which is designed, intended, or used to advertise or inform, if any part of the advertising or information contents is visible from any place on the main-traveled [~~main traveled~~] way of a regulated [~~the interstate or federal-aid primary~~] highway [~~systems~~].

(19) Permit - The authorization granted for either the erection and/or [~~or~~] maintenance [~~or both~~], of an outdoor advertising sign as provided in the Act, §391.068.

(20) Person - An individual, association, partnership, limited partnership, trust, corporation, or other legal entity.

(21) Primary system or federal-aid primary system - That portion of connected main highways which were designated by the commission as the federal-aid primary system in existence on June 1, 1991 and any highway which is not on that [~~such~~] system but which is on the National Highway System.

(22) Public park - A public park, forest, playground, nature preserve, or scenic area so designated by the department or other governmental agency.

(23) Regulated highway - A highway on the interstate highway system or primary system.

(24) Removed - The dismantling and removal of a substantial portion of the parts and materials of a sign or sign structure from the view of the motoring public.

(25) Rest area - An area of public land designated by the department as a rest area, comfort station, picnic area, or roadside park.

(26) Right of way - An interest in real property that has been designated as a part of the state highway system.

(27) Sign face - The part of the sign that contains the message or informative contents and is distinguished from other parts of the sign and other sign faces by borders or decorative trim. It does not include lighting fixtures, aprons, and catwalks unless they display part of the message or informative contents of the sign.

(28) Sign structure - All of the interrelated parts and materials, such as beams, poles, braces, apron, catwalk, and stringers, that are used, designed to be used, or are intended to be used to support or display a sign face.

(29) Traveled way - That portion of the roadway used for the movement of vehicles, exclusive of shoulders [and auxiliary lanes].

(30) Unzoned commercial or industrial area -

(A) An area along the highway right of way [right-of-way] which has not been zoned under authority of law, which is not predominantly used for residential purposes, and which is within 800 feet, measured along the edge of the highway right of way [right-of-way], of, and on the same side of the highway as, the principal part of at least two adjacent recognized commercial or industrial activities [within 200 feet of the highway right-of-way]. To be considered an unzoned commercial or industrial area, the following requirements must be met.

(i) The main building, where each respective business activity is conducted, must be within 200 feet of the highway right of way and must be visible from the main-traveled way.

(ii) To be considered adjacent, there must be no separation of the regularly used buildings, parking lots, storage or processing areas of the two activities by vacant lots, undeveloped areas over 50 feet wide, roads, or streets.

(iii) Two activities may occupy one building as long as each has 300 square feet of floor space dedicated to that activity and otherwise meets the definition of a commercial or industrial activity. There must be separation of the two activities by a dividing wall, separate ownership, or other distinctive characteristics. A separate product line offered by one business will not be considered two activities.

(B) An unzoned industrial commercial or industrial [Such an] area is more specifically identified as follows.[:]

(i) The [the] area to be considered, based upon the qualifying activities, is [one, the dimensions of which are a total of] 1,600 feet (800 feet on each side) plus the actual or projected frontage of the commercial or industrial activities, measured along the highway right of way [right-of-way] by a depth of 660 feet in accordance with §21.144(b) of this title (relating to Measurements).[;]

(ii) The [the] area shall be located on the same side of the highway as the principal part of the qualifying activities.[;]

(iii) The [the] area must be considered as a whole prior to the application of the test for predominantly residential.[;]

(iv) An [an] area shall be considered to be predominantly residential if more than 50% of the area is being used for residential purposes. Roads and streets with residential property on both sides shall be considered as being used for residential purposes. Other roads and streets will be considered nonresidential.

(31) Visible - Capable of being seen, whether legible or not, without visual aid by a person with normal visual acuity.

(32) Zoned commercial or industrial area - An area designated, through a comprehensive zoning action, for general commercial or industrial use [by ordinance or other official act of the State of Texas or] by a [any] political subdivision with [thereof to which] legal authority to zone [has been delegated by state law]. The following areas are not zoned areas:

(A) areas that permit limited commercial or industrial activities incident to other primary land uses;

(B) areas designated for and created primarily to permit outdoor advertising structures along a regulated highway;

(C) unrestricted areas; and

(D) small parcels or narrow strips of land that cannot be put to ordinary commercial or industrial use and are designated for a use classification different from and less restrictive than that of the surrounding area.

§21.144. Measurements.

(a) The depth of an unzoned commercial or industrial area shall be measured from the nearest edge of the highway right of way [right-of-way] perpendicular to the centerline of the main-traveled [main traveled] way of the highway.

(b) In determining the length of an unzoned commercial or industrial area [proximity of commercial or industrial activities], all measurements should be from the outer edges of the regularly used buildings, parking lots, storage, or processing areas of the commercial or industrial activities and shall be along or parallel to the edge of the pavement of the highway. If the business activities do not front the highway, the projected frontage will be measured from the outer edges of the regularly used buildings, parking lots, storage, or processing areas to a point perpendicular to the centerline of the main-traveled way. Measurements shall not be made from the property lines of the activities unless the [said] property lines coincide with the regularly used buildings, parking lots, storage, or processing areas.

(c) Measurements performed under §21.153 of this title (relating to Spacing of Signs) from the boundary of public parks and rest areas shall be measured along the right of way line from the outer edges of the park boundary abutting the right of way.

(d) A sign height measurement performed under §21.158 of this title (relating to Height Restrictions) shall be measured from the grade level of the roadway from where the sign is to be viewed. The measurement should be made from the grade level of the centerline of the main-traveled way at the point along the highway perpendicular to the sign location, regardless of whether the sign can be viewed from that point.

§21.145. Cessation of Activities.

(a) When a commercial or industrial activity ceases and a sign other than an exempt sign is no longer located within 800 feet of at least two adjacent recognized commercial or industrial activities located on the same side of the highway, any signs which were conforming only because of the [such] two adjacent activities shall become nonconforming. [and shall be removed not later than five years following the cessation of the operation of such commercial or industrial activity].

(b) If the department has evidence that an activity supporting an unzoned commercial or industrial area was created primarily or exclusively to qualify an area as an unzoned commercial or industrial area, and that no business has been conducted at the activity site within one year, the department may cancel the permit pursuant to §21.150(j) of this title (relating to Permits).

§21.146. Signs Controlled.

(a) No outdoor advertising sign which is visible from the main-traveled [main traveled] way of a regulated highway [which is a part of the interstate or federal-aid primary systems] may be erected or maintained along a regulated [an interstate or federal-aid primary] highway except in accordance with this subchapter [these sections] unless the [such] sign was in place prior to the time the location along such highway first became subject to control under the highway beautification laws. A permit must be obtained and renewed annually in order to maintain any sign, including a sign in existence prior to the [such] time [as] the highway along which it is located became subject to the Act.

(b) Unless the sign is exempt under these sections, no person may erect a sign along a regulated [an interstate or federal-aid primary] highway without a permit in either of the following areas:

(1) within 660 feet of the nearest edge of the highway right of way [right-of-way] if the advertising is visible from the main-traveled [main traveled] way of the [such a] highway, or

(2) more than 660 feet from the nearest edge of the highway right of way outside an urban area, if the advertising is [located more than 660 feet from the nearest edge of the highway right of way, is] visible from the main-traveled [main traveled] way of the [such a] highway and was erected for the purpose of having its message seen from the main traveled way of a regulated [either an interstate or federal-aid primary] highway.

§21.147. Exempt Signs.

(a) Exemptions. The following types of signs are exempt from this subchapter [these sections] except as otherwise provided in this subchapter [herein]:

(1) on-premise signs that meet the criteria set forth in subsection (b) of this section; [(1) signs advertising the sale or lease of the property upon which they are located;]

[(2) signs principally advertising activities conducted on the property upon which they are located]

(2) [(3)] signs that have [located on property within the prescribed limits,] the purpose of protecting [which is the protection of] life or property, including those which provide information about underground utility lines;

(3) [(4)] official signs erected by public officers or public agencies within their territorial or zoning jurisdiction [and] pursuant to and in accordance with their authorization contained in law;

(4) [(5)] signs required by the Texas Railroad Commission at the principal entrance to or on each oil or gas producing property, well, tank or measuring facility to identify or to locate the [such] property; the [such] signs shall be no larger in size than is necessary to comply with the Texas Railroad Commission regulations and will have no advertising message other than the name or logo of the company and the necessary directions;

(5) [(6)] service club and religious notices relating to meetings of nonprofit service clubs, [or] charitable associations, or religious services if the [, which] signs do not exceed eight square feet in area;

(6) [(7)] public service signs located on school bus stop shelters, that [which signs]:

(A) identify the donor, sponsor, or contributor of the shelter [said shelters];

(B) contain public service messages occupying [, which shall occupy] not less than 50% of the area of the sign;

(C) contain no other message;

(D) are [located on school bus shelters which are] authorized or approved by city, county, or state law, regulation, or ordinance, and at places approved by the city, county, or state agency controlling the highway involved; and

(E) do [may] not exceed 32 square feet in area; not more than one sign on each shelter shall face in any one direction;

(7) [(8)] signs not [of not] more than 32 square feet showing [which show] only the name of a ranch where livestock is raised or a farm where crops are grown and directions to the ranch or farm [same];

(8) [(9)] signs erected on or before October 22, 1965, which the commission, with the approval of the Secretary of the United States Department of Transportation, determines to be landmark signs of such historic or artistic significance that preservation would be consistent with the purposes of the Highway Beautification Act of 1965, 23 United States Code §131;

(9) signs erected solely for and relating to a public election if the sign:

(A) is on private property;

(B) is erected no earlier than the 90th day before the date of the election and is removed no later than the 10th day after the election date;

(C) is constructed of lightweight material;

(D) has a surface area no larger than 50 square feet; and

(E) contains no commercial endorsement; and

(10) directional signs meeting the requirements of §21.155 of this title (relating to Directional Signs).

(b) On-premise sign criteria. A permit is not necessary if a sign meets the following requirements.

(1) Purpose test.

(A) On-premise business. The department considers an on-premise sign to be a sign that refers to a commercial activity or business located on the same property if the sign:

(i) consists solely of the name of the establishment;

(ii) identifies the establishment's principal product or services; or

(iii) advertises the sale or lease of the property on which the sign is located.

(B) Off-premise business. A sign is considered off-premise outdoor advertising if it:

(i) brings rental income to the property owner;

(ii) has over 50% of the area of its sign face dedicated to brand name or trade name advertising;

(iii) has over 50% of the area of its sign face dedicated to a product or service that is only incidental to the principal activity;

(iv) is an outdoor advertising device that advertises activities not conducted on the premises as well as activities conducted on the premises; or

(v) is a sale or lease sign that advertises any product or service not located upon and related to the business of selling or leasing the land on which the sign is located.

(2) Premise test.

(A) An on-premise sign must be located on the same property as the activity or property advertised.

(B) The property where the sign is located and the property where the activity is conducted must be under common ownership and on the same contiguous tract unless the sign is a part

of a commercial development and multiple businesses share one sign structure.

(C) The following types of property will not be considered to be a part of the same contiguous tract:

(i) land separated from the activity by a road, highway or other activity contiguous to the land actually used by a commercial facility;

(ii) land devoted to a separate purpose unrelated to the advertised activity;

(iii) land held by easement or other lesser property interest than the premises where the advertised activity is located; and

(iv) a sign site located on a narrow strip contiguous to the advertised activity, including any configurations of land that cannot be put to any reasonable use related to the activity other than for signing purposes.

§21.148. Prohibited Signs.

The following types of outdoor advertising signs shall not be erected or maintained along, or be visible from, the main-traveled [~~main traveled~~] way of a regulated highway unless otherwise authorized by law [~~which is a part of the interstate or federal-aid primary systems~~]:

(1) signs that [~~which~~] imitate or resemble any official traffic-control [~~traffic sign, signal or~~] device, railroad sign, or signal;

(2) signs that [~~which~~] are erected or maintained upon trees or painted or drawn upon rocks or other natural features;

(3) signs that are [~~no sign shall be~~] erected or maintained within the right of way [~~right-of-way~~] of a public roadway or [~~any interstate or federal-aid primary highway nor~~] within what would be the right of way [~~right-of-way~~] if the right of way [~~right-of-way~~] boundary lines were projected across an area of railroad right of way [~~right-of-way~~], utility right of way [~~right-of-way~~], or road right of way [~~right-of-way~~] not owned by the State or any political subdivision [~~thereof~~]. (However, legally erected and permitted signs may be maintained as non-conforming signs in areas used jointly by the department and a railroad or utility company if they were erected prior to March 3, 1986.);

(4) signs that attempt to direct the movement of traffic, unless authorized by the department;

(5) signs that hide from view or hinder the effectiveness of an official traffic-control device or railroad sign or signal;

(6) a flashing electric sign within 1,000 feet of an intersection, even if the sign is otherwise exempt from regulation under this subchapter; and

(7) signs erected or maintained without a permit issued in accordance with §21.150 of this title (relating to Permits) or operated without a license issued in accordance with §21.149 of this title (relating to Licenses), which are not otherwise exempt under §21.147 of this title (relating to Exempt Signs).

§21.149. Licenses.

(a) Application and issuance.

(1) Except as provided in §21.147 of this title (relating to Exempt Signs), and except as provided in subsection (h) [~~(f)~~] of this section, a person [~~sign owner or sign lessee~~] may not erect or maintain a sign as outlined in [~~governed by~~] §21.146 of this title (relating to Signs Controlled), until the person [~~owner or lessee~~] has obtained a license covering the county in which the sign is to be erected or maintained. Licenses are issued by the director and are valid for one year [~~of right of way~~]. An applicant for a license must file an application in a form prescribed by the department, which shall include, but not be limited to:

(A) the complete legal name, mailing address, and telephone number of the applicant;

(B) designation of the county or counties in which the signs are to be erected and maintained; [~~(B)the area to be authorized by the license; and~~]

(C) the applicant's social security number if the applicant is applying as an individual;

(D) the applicant's charter number if the applicant is applying as a business entity, if applicable; and

(E)[~~(C)~~] [~~such~~] additional information [~~as~~] the department deems necessary.

(2) The application must be signed, notarized, [~~under oath by the applicant~~] and filed with the director [~~of right of way~~] in Austin and shall be accompanied by:

(A) a fully executed [~~an~~] outdoor advertisers surety bond:

(i) in the amount of $2,500 for each county in which signs are be erected and maintained up to a maximum [~~total amount~~] of $10,000 for four or more counties;

(ii) payable to the commission to reimburse it for removal costs of a sign the license holder [~~licensee~~] unlawfully erects or maintains;

(iii) in a form prescribed by the department, executed by a surety company authorized to transact the business of surety insurance in Texas, and the [~~such~~] form shall include, but not be limited to:

(I) the complete legal name, mailing address, and telephone number of the applicant and the surety company;

(II) the bond number assigned by the surety company;

(III) the amount of coverage provided by the surety company;

(IV) the effective and execution dates [~~date~~] of the bond; and

(V) [~~such~~] additional information [~~as~~] the department deems necessary;

(B) a duly certified power of attorney from the surety company authorizing the surety company representative to execute the bond on the effective date of the bond; and

(C) the license fee prescribed by subsection (c) of this section.

(3) An outdoor advertising license may not be issued to or [~~be~~] held by a corporation or a limited partnership unless the corporation or limited partnership is authorized by the secretary of state to conduct business in the State of Texas.

(4) An outdoor advertising license is not transferable and is valid only for the named license holder.

(b) License renewals [~~Renewals~~].

(1) An outdoor advertising license [~~issued or~~] renewed under this section:

(A) shall be valid for a period of one year;

(B) must be renewed no later than January 1 [,] of each succeeding year [~~January 1, 1992,~~] if it was issued prior to January 1, 1991; and

(C) must be renewed no later than the anniversary date of [~~one year from~~] the date of issue if issued after January 1, 1991.

(2) To renew an outdoor advertising license under this subsection, a license holder [~~licensee~~] must file an application in a form prescribed by the department, which shall include, but not be limited to:

(A) the complete legal name, mailing address, and telephone number of the license holder [~~licensee~~];

(B) number of the license being renewed; and

(C) [~~such~~] additional information [~~as~~] the department deems necessary, including proof of continuous bond coverage.

(3) The application must be signed [~~under oath~~] by the license holder [~~licensee~~] and filed with the director [~~of right of way~~] in Austin, and shall be accompanied by[~~:~~]

[~~(A)~~] the renewal fee as prescribed by subsection (c) of this section.[~~;~~]

[~~(B)~~] [~~one of the following bond requirements:~~]

[~~(i)~~ ~~a fully executed certification from the surety company that the bond on file with the department is in force; or~~]

[~~(ii)~~ ~~an outdoor advertisers surety bond in a form prescribed by the department, executed by a surety company authorized to transact the business of surety insurance in Texas, payable to the commission to reimburse it for removal costs of a sign the licensee unlawfully erects or maintains, and such form shall include, but not be limited to:~~]

[~~(I)~~ ~~the complete name, mailing address, and telephone number of the licensee;~~]

[~~(II)~~ ~~the bond number assigned by the surety company;~~]

[~~(III)~~ ~~the amount of coverage provided by the surety company, and which amount provides the coverage required by law to support the license held by the licensee;~~]

[~~(IV)~~ ~~an effective date that insures the continuous bond coverage required by law;~~]

[~~(V)~~ ~~such additional information as the department deems necessary; and~~]

[~~(C)~~ ~~a duly certified power of attorney from the surety company authorizing the surety company representative to execute or certify the bond on the effective date of the bond or certification.~~]

(4) The license will not be eligible for renewal if the license holder ceases to be authorized to do business in Texas by the Office of the Secretary of State.

(c) Fees.

(1) For each outdoor advertising license issued under [~~pursuant to~~] this section:

(A) the initial [~~original~~] fee is $125; and

(B) the annual renewal fee is $60.

(2) A fee prescribed in this subsection is payable by check, [~~or~~] cashier's check, or money order made payable to the Texas Highway Beautification Fund, and is nonrefundable.

(3) If the check or money order submitted in payment of the license or the license renewal fee is dishonored upon presentment by the department, the license or renewal will be void from inception.

(d) Temporary Suspension. In the event the director is notified by a surety company that a bond is being canceled, the director will notify the license holder that a new bond must be obtained and filed with the director within 30 days of receipt of the notice or prior to the bond cancellation date, whichever occurs later. Notice shall be presumed to be received five days after mailing. From the time the director receives notice of the bond cancellation until continuing bond coverage is provided, the director will suspend the issuance of additional permits and the transfer of existing permits.

(e) [~~(d)~~] Permanent revocation [~~Revocation~~] or suspension. The director [~~of right of way~~] may suspend the issuance of additional permits or the transfer of existing permits, or revoke a license if:

(1) a valid outdoor advertisers surety bond is not provided within the time specified by the department in accordance with subsection (d) of this section [~~continuously maintained during that period~~]; or

(2) the license holder [~~licensee~~] violates one or more applicable provisions of this subchapter [~~undesignated head~~] or the Act. [~~Transportation Code, Chapter 391; or~~]

[~~(3) the check or money order submitted in payment of the license or the license renewal fee is dishonored upon presentment by the department.~~]

(f) [~~(e)~~] Notice and appeal. When actions for permanent revocation or suspension [~~or revocation~~] are taken by the director [~~of right of way~~], notice will be sent by certified mail to the [~~last known~~] address of record provided by the license holder, [~~licensee by certified mail~~]. Notice shall be presumed to be received five days after mailing.

(1) The notice shall clearly state:

(A) the reasons for the action;

(B) the effective date; and

(C) the right of the license holder [~~licensee~~] to request an administrative hearing.

(2) A request for an administrative hearing under this subsection must be made in writing to the director [~~of right of way~~] in Austin within 10 days of the receipt of the [~~such~~] notice.

(3) If timely requested, an administrative hearing shall be conducted in accordance with §1.21 et seq. [~~§§1.21–1.63~~] of this title (relating to Contested Case Procedure)[~~, and shall serve to abate the revocation unless and until that revocation is affirmed by order of the commission~~].

(g) [~~(f)~~] Exception for nonprofit signs. A nonprofit organization may erect or maintain a nonprofit sign without obtaining an outdoor advertising license. A permit must be obtained for any sign erected or maintained pursuant to this exception, in accordance with §21.150 of this title (relating to Permits).

(h) License expiration/revocation. In the event a license expires without renewal or is revoked pursuant to subsection (e) of this section, any permits issued pursuant to that license also expire.

§21.150. Permits.

(a) Eligibility. Except as provided in subsection (l) [(k)] of this section, a permit under this section may only be issued to a person [sign owner] holding a valid license issued pursuant to §21.149 of this title (relating to Licenses).

(b) Application and issuance.

(1) Except as provided in §21.151 of this title (relating to Local Control) a person [sign owner] who desires a permit to erect or maintain a sign along a regulated highway [as required in §21.146 of this title (relating to Signs Controlled)] must file an application in a form prescribed by the department, which shall include, but not be limited to:

(A) the complete name and address of the applicant;

(B) the proposed location and description of the sign;

(C) the complete legal name and address of the site owner;

[(D) indication that the site owner has consented to the erection of the sign];

(D) [(E)] verification of the applicant's nonprofit status if the sign is a nonprofit sign; and

(E)[(F)] [such] additional information [as] the department deems necessary.

(2) No permit may be approved unless the applicant has obtained written permission from the owner of the designated site. The department may provide a space on the permit application for this signature or the applicant may provide a copy of the written lease for the site or a consent statement in a form prescribed by the department. The signature must be the signature of the property owner or the owner's duly authorized representative. The owner's permission operates as permission for the life of the permit, unless the owner provides a written statement that permission for the maintenance of the sign has been withdrawn and documentation showing that the lease allowing the sign has been terminated in accordance with the terms of the lease agreement or through a court order. If the sign owner disputes the lease termination in court with the owner, the department will not cancel the permit until a court order is provided.

(3) [(2)] The application must be signed under oath by the sign owner and filed with the district engineer in whose district the sign is to be erected or maintained, and shall be accompanied by the prescribed fee or fees.

(4) [(3)] An application will not be approved unless the sign for which the permit is requested meets all applicable requirements of the sections under this subchapter, or was lawfully in existence when the sign became subject to the department's jurisdiction.

(5) [(4)] If approved, a copy of the application, endorsed by the district engineer, or [his or her] designee, and a Texas sign permit plate will be issued to the applicant. Not later than 30 days after erection of the permitted sign, or after the issuance of a permit if the sign is lawfully in existence when the highway along which it is located becomes subject to control by the department, the sign owner shall cause the permit plate to be securely attached to that portion of the sign structure nearest the highway and visible from the main-traveled [main traveled] way. If the permit plate becomes illegible, the department may require that a replacement plate be obtained in accordance with subsection (f) of this section. The plate must be attached and may not be removed from the sign described in the application.

(6) The proposed location for a new sign must be identified by the applicant on the ground by stakes or paint with at least two feet of the stake visible above the ground. The stakes must be set at the end points of each sign face. Staking the site is considered part of the application. Stakes must not be moved or removed until the application is denied, or if approved, until the sign has been erected.

(c) Priority. Permits will be considered on a first-come, first-serve basis. If an application is returned because of errors or incomplete information, other applications received for the same or conflicting sites between the time a denied application is returned to the applicant and the time it is resubmitted, will be considered before the resubmitted application.

(d) [(c)] Renewals.

(1) Subject to the terms and location stated in the permit application, a permit issued or renewed under this section shall be valid for a period of one year, provided that the sign is erected and maintained in accordance with the applicable sections under this subchapter. The permitted sign must be erected within one year from the date the original permit is issued in order for a sign permit to be eligible for renewal.

(2) A permit issued by the department prior to September 6, 1985, must be renewed no later than October 1, of each succeeding year [1991].

(3) An annual permit issued subsequent to September 5, 1985, must be renewed on or before the anniversary date of the date of issuance [prior to the expiration date of that permit].

(4) If a sign continues to meet all applicable requirements, a permit holder may renew a permit by filing [To renew a permit under this subsection a permit holder must file with the district engineer] a written request in a form prescribed by the department and [, together with] the prescribed renewal fee at the district office serving the county where the sign is located [; and further provided that the sign continues to meet all applicable requirements].

[(d) Refunds and prorations.]

[(1) All payments not in accordance with the fees described in subsection (g) of this section which were received after September 5, 1985, and before September 1, 1991, for renewals of permits issued by the department prior to September 6, 1985, will be refunded. This refund does not release the current owner of an advertising sign from complying with the renewal provisions prescribed in subsection (c) of this section.]

[(2) All payments for renewals of annual permits due subsequent to September 1, 1990, that were in excess of the fees described in subsection (g) of this section, will be prorated to provide credit for subsequent renewals of the applicable permit. The credit shall be equal to the product of the amount which is in excess of the fee which would be assessed under subsection (g) of this section, multiplied by a fraction, the numerator of which is equal to the number of days from September 1, 1991, remaining for which the permit is valid, and the denominator of which is equal to 365 days; provided, however, this amount will be refunded if requested by the permit holder for the permit or the amount will be refunded if deemed appropriate by the department. The credit is calculated by using the following formula.]

[Figure 1: 43 TAC §21.150(d)(2)]

(e) Transfer.

(1) A permit may only be [assigned or] transferred with the written approval of the district engineer. At the time of the

transfer, both the transferor and the transferee must hold a valid outdoor advertising license issued pursuant to §21.149 of this title (relating to Licenses), except as provided in subparagraphs (3)-(5) [~~(3)and (4)~~] of this subsection.

(2) A permit holder [~~The holder of a permit or permits~~] who desires to transfer one or more permits must file [~~with the district engineer~~] a written request in a form prescribed by the department and [~~together with~~] the prescribed transfer fee at the district office serving the county where the sign is located. The transferor and transferee will each be issued a copy of the approved permit transfer form.

(3) A permit issued under subsection (l) [~~(k)~~] of this section may be transferred to a nonprofit organization that does not hold a valid outdoor advertising license issued under §21.149 of this title (relating to Licenses) if the permit is transferred for the purpose of maintaining a nonprofit sign.

(4) A permit issued under subsection (l) [~~(k)~~] of this section may be transferred for a purpose other than maintaining a nonprofit sign if the transferee holds a valid outdoor advertising license at the time of the transfer.

(5) The director will approve the transfer of one or more sign permits from a lapsed outdoor advertising license to a valid outdoor advertising license, with or without the signature of the transferor, if:

(A) legal documents showing the sale of the sign are provided; and

(B) documents are provided that indicate the transferor is dead or cannot be located.

(6) A permit that has an unresolved permit violation, will not be transferred. An unresolved permit violation means that a permit cancellation is impending or a cancellation has been abated pursuant to subsection (k) of this section pending the outcome of a hearing.

(f) Replacement. In the event a permit plate is lost or stolen, is missing from the sign structure, or becomes illegible, the sign owner must submit to the district engineer a request for a replacement plate in a form prescribed by the department, together with the prescribed replacement plate fee.

(g) Fees.

(1) Except as provided in paragraphs (2) and (3) of this subsection, for a permit issued pursuant to this section:

(A) the original fee is $96 [~~for each sign~~];

(B) the annual renewal fee is $40;

(C) the transfer fee [~~for one or more permits transferred in a single transaction~~] is $25 per permit up to a maximum [~~or a total~~] of $2,500 for a single transaction [~~, whichever is less~~]; and

(D) the replacement plate fee is $25.

(2) For a nonprofit sign permit:

(A) the original fee is $10 for each sign;

(B) the annual renewal fee is $10 for each sign; and

(C) the transfer fee is waived for the transfer of a permit issued under subsection (l) [~~(k)~~] of this section if the permit is transferred under subsection (e)(3) of this section. Any other permit transfer is subject to the provisions of paragraph (1) of this subsection.

(3) The initial permit fee is $50 for [~~For~~] a sign lawfully in existence which becomes subject to the Act [~~the initial fee shall be $50~~].

(4) A fee prescribed in this subsection is payable by check, cashier's check, or money order, and is nonrefundable.

(5) If a check or money order submitted for fees described in this section is dishonored upon presentment by the department, the permit, renewal, or transfer will be void from inception.

(h) Expiration. A permit automatically expires if:

(1) it is not renewed by the permit holder;

(2) the license under which it was issued expires or is revoked by the department pursuant to §21.149 of this title (relating to Licenses); or

(3) the sign is acquired by the state.

(i) Cancellation. The director may cancel a permit if the sign:

(1) is removed;

(2) is not maintained in accordance with applicable sections under this subchapter or the Act;

(3) is damaged beyond the repair threshold contained in §21.156 of title (relating to Discontinuance of Signs);

(4) is abandoned, as determined by §21.156;

(5) is not built in the location described on the permit application or in accordance with the description of the structure on the permit application;

(6) is built by an applicant who uses false or materially misleading information on the permit application;

(7) is located on property owned by a person who withdraws, in writing, the permission granted pursuant to §21.150(b)(2) of this title (relating to Permits);

(8) is located in an area in which the activity has ceased in accordance with §21.145(b) of this title (relating to Cessation of Activities);

(9) is erected, repaired, or maintained in violation of §21.161 of this title (relating to Destruction of Trees/Violation of Control of Access);

(10) has been made more visible by the permit holder clearing vegetation from the highway right of way in violation of §21.161 of this title; or

(11) does not have permit plates properly attached under §21.150(b) and (f) of this title (relating to Permits).

[~~(h) Expiration or cancellation. The director of right of way may cancel a permit issued pursuant to this section if the sign subject to the permit is acquired by the state, is removed, or is not maintained in accordance with applicable sections under this subchapter or Transportation Code, Chapter 391.~~]

(j) [~~(i)~~] Removal. If a permit expires without renewal, is canceled without reinstatement, or if a sign other than an exempt sign is erected or maintained without a permit, the owner of the involved sign and sign structure shall, upon written notification by the district engineer, remove the sign [~~effect their removal~~] at no cost to the state.

(k) [~~(j)~~] Notice and appeal. Upon determination that a permit should be canceled, the director [~~of right of way~~] shall mail by certified mail a notice of cancellation to the [~~last known~~] address

of the record license holder [~~permit holder by certified mail~~]. Notice shall be presumed to be received five days after mailing.

(1) The notice shall clearly state:

(A) the reason [~~reasons~~] for the cancellation;

(B) the effective date of the cancellation; and

(C) the right of the permit holder to request an administrative hearing on the question of the cancellation.

(2) A request for an administrative hearing under this subsection must be made in writing to the director [~~of right of way~~] within 10 days of the receipt of the notice of cancellation.

(3) If timely requested, an administrative hearing shall be conducted in accordance with §§1.21 et seq. [~~§§1.21-1.63~~] of this title (relating to Contested Case Procedure), and shall serve to abate the cancellation unless and until that cancellation is affirmed by order of the commission.

(l) [~~(k)~~] Nonprofit signs.

(1) A nonprofit organization may obtain a permit under this section to erect or maintain a nonprofit sign.

(2) In order to qualify for a permit issued under this subsection, a sign must comply with all applicable requirements under this subchapter from which it is not specifically exempted.

(3) An application for a permit under this section must include, in detail, the content of the message to be displayed on the sign. Prior to changing the message [~~on any sign permitted under this section~~], the permit holder must obtain the approval of the district engineer in whose district the sign is maintained.

(4) If at any time the sign ceases to be a nonprofit sign, the permit will be subject to cancellation pursuant to subsection (i) [~~(h)~~] of this section.

(5) If the holder of a permit issued under this subsection loses its nonprofit status or wishes to advertise or promote something other than the municipality or political subdivision, an outdoor advertising license must be obtained pursuant to §21.149 of this title (relating to Licenses), the permit must be converted to a permit for a sign other than a nonprofit sign, and the holder must pay the original permit and annual renewal fees [~~fee~~] set forth in subsection (g)[~~(1) and annual renewal fees set forth in subsection (g)(2)~~] of this section.

(6) A nonprofit organization that holds a valid permit for a nonconforming sign that would otherwise qualify for a permit under this subsection may convert its permit to one issued under this subsection.

(m) [~~(l)~~] Conversion of rural road permits and registrations. The department will convert a registration issued under §21.431 of this title (relating to Registration of Existing Off-Premise Signs) or a permit issued under §21.441 of this title (relating to Permit for Erection of Off-Premise Sign) to a permit under this section if a highway previously regulated [~~controlled~~] in accordance with Transportation Code, Chapter 394 becomes subject to control under the Act. A holder of a permit or registration converted under this subsection will not be required to pay an original permit fee under subsection (g) [~~(c)(1)~~] of this section; however, the permit must be renewed annually under subsection (d) [~~(c)(2)~~] of this section, on the date the renewal of the permit or registration issued under §21.431 or §21.441 would have been due. In the event a sign owner has prepaid registration fees, the outstanding prepayment will be credited to the sign owner's annual renewal fee. The department will issue permit plates to a holder of a permit or a registration converted under this subsection at no charge. In the event replacement plates are needed after the initial issuance, fees will be charged in accordance with this section.

(n) New highway or change in highway designation. Owners of signs that become subject to the Act because of the construction of a new highway or the change in designation of an existing highway must apply to the department for a permit and must obtain an outdoor advertiser's license pursuant to §21.149 of this title (relating to Licenses) within 30 days after being notified by the department that the sign has become subject to the Act. If the owner of the sign cannot be identified from information on the sign, notice may be given by prominently posting notice on the sign for a period of 30 days.

§21.151. Local Control.

(a) Eligibility to certify. Where a political subdivision of the state exercises control over outdoor advertising signs, a permit issued by that [~~such~~] political subdivision shall be accepted in lieu of a permit issued by the department, [~~State Department of Highways and Public Transportation~~] provided the political subdivision has certified to the department that the political subdivision [~~it~~] has established and will enforce within its corporate limits [~~geographical jurisdiction~~] standards and criteria for size, lighting, and spacing of outdoor advertising signs consistent with the purposes of the Highway Beautification Act of 1965, 23 United States Code §131, and with customary use. The size, lighting, and spacing requirements of the political subdivision may be more or less restrictive than the criteria contained in this subchapter. This certification shall not apply within the extraterritorial jurisdiction of a political subdivision.

(b) Fees and time. The [~~Such~~] political subdivision may set and retain the [~~amount of the~~] fees [~~to be~~] charged for permits issued by it [~~and may retain such fees~~]. A [~~Such~~] political subdivision [~~subdivisions~~] may also establish the length of time a permit will [~~such permits are to~~] remain in effect [~~and the dates on which same are to be renewed~~].

(c) Certification process. The director, after consulting with the Federal Highway Administration, shall determine whether a political subdivision has an adequate sign and zoning ordinance in compliance with subsection (a) of this section. In order to be considered, the political subdivision must submit the following information to the director:

(1) a copy of its sign ordinance;

(2) a copy of its zoning ordinance;

(3) information about the number of personnel who will be dedicated to the program and what type of records will be kept; and

(4) an enforcement plan.

(d) Department review. The department may meet with a political subdivision to ensure that it is enforcing the standards and criteria in accordance with subsection (a) of this section. In addition, the political subdivision shall provide the applicable district office with:

(1) a copy of any amendments to its sign and zoning ordinances when the amendments are proposed and adopted; and

(2) a copy of any changes to its corporate limits.

(e) Decertification process. The director may decertify a political subdivision if it does not have an effective control program, in the opinion of the director. The director may consider whether:

(1) the political subdivision maintains an accurate sign inventory and requires the removal of illegal signs; and

(2) the local sign ordinance contains standards and criteria for signs in accordance with subsection (a) of this section.

(f) Reinstatement. A political subdivision may be reinstated upon showing a new plan that meets the requirements of subsection (c) of this section.

§21.152. Size of Off-Premise Outdoor Advertising Signs.

(a) An off-premise sign face may not exceed [~~be erected which has an area exceeding~~] 672 square feet, with a maximum height of 25 feet and a maximum length of 60 feet, inclusive of border and trim, but excluding the sign structure [~~base, apron, supports, and other structural members~~]. Temporary protrusions, also known as cutouts, may not [~~to~~] exceed 20% of the [~~permitted sign~~] area indicated on the sign permit. Temporary protrusions [~~,~~] may be added to an off-premise sign, provided that no off-premise sign to which one or more temporary protrusions or cutouts have been added shall have an area greater than 807 square feet, with a maximum height of 25 feet and a maximum length of 60 feet, inclusive of temporary protrusions or cutouts, border, and trim, but excluding the sign structure [~~base, apron, supports, and other structural members~~].

(b) The maximum size limitations shall apply to each side of a sign structure or structures visible to approaching traffic.

(c) The area shall be measured by the smallest square, rectangle, triangle, circle, or combination thereof which will encompass the entire sign.

(d) Signs may be placed back-to-back, side-by-side, stacked, or in "V" type construction with not more than two faces presented in each direction. The [~~displays to each facing and such~~] sign structure or structures shall be considered one sign. Two sign faces facing one direction may be presented as one face by covering both faces and the area between the faces with an advertisement, as long as the size limitations of subsection (a) of this section are not exceeded.

(e) Signs which exceed 336 square feet in area, including cutouts, may not be stacked or placed side-by-side.

(f) A permit holder must submit for approval a drawing of the proposed extension or cutout with dimensions prior to construction or the addition of an extension or cutout.

(g) A sign face may be permanently enlarged by 10% of the size shown on the permit without a new permit, if the enlargement does not cause the face to exceed the maximum size limitations set forth in subsection (a) of this section. If a sign is built with a smaller face than the size shown on the permit or if the face is reduced in size after it is built, a new permit will be required to increase the size of the face beyond the allowed 10% at a later date.

§21.153. Spacing of Signs.

(a) Signs may not be located in [~~such~~] a manner that creates [~~as to create~~] a safety hazard, including:

(1) causing [~~. They shall not be so located as to be likely to cause~~] a driver to be unduly distracted in any way;

(2) obscuring [~~or so as to obscure~~] or otherwise interfering [~~interfere~~] with the effectiveness of an official traffic sign, signal or device, or

(3) obstructing or interfering [~~obstruct or interfere~~] with the driver's view of approaching, merging or intersecting traffic [~~, whether the intersection be of two or more highways or the intersection of a highway with a railroad~~].

(b) Signs may not be located within 1,500 feet of a [~~any~~] public park that is adjacent to a regulated highway. This prohibition shall apply:

(1) on either side of the highway on a nonfreeway primary system; and

(2) on the side of the highway adjacent to the public park on an interstate or freeway primary system [~~, public forest, public playground, nature preserve, or scenic area so designated as such by the department or other governmental agency having and exercising such authority, which is adjacent to the highway~~].

(c) The following spacing limitations apply to signs that will be erected [~~Signs may not be located adjacent to or within 1,000 feet of interchanges, intersections at grade and rest areas along interstate and freeway federal-aid primary highways~~] outside incorporated municipalities along a regulated highway. Signs may not be erected:

(1) in areas adjacent to or within 1,000 feet of interchanges, intersections at grade, or rest areas; or

(2) [~~or which will tend to obscure or otherwise interfere with the driver's view of approaching, merging, or intersecting traffic. Where there are ramps between the main traveled way of interstate and freeway federal-aid primary highways and adjacent frontage roads, no new signs may be erected outside incorporated municipalities~~] in areas adjacent to or within 1,000 feet of [~~said~~] ramps or [~~,~~]their acceleration and deceleration lanes [~~and within 1,000 feet thereof.~~] (Such distances shall be measured along the highway from the nearest point of beginning or ending of pavement widening at the exit from, or entrance to, the main-traveled [~~main traveled~~] way.)

(d) Signs may not be erected [~~along the interstate and freeway federal-aid primary systems~~] closer than 1,500 feet apart on the same side of a regulated highway.

(e) Signs [~~may not be~~] erected outside of incorporated municipalities along the nonfreeway [~~federal-aid~~] primary [~~highway~~] system may not be closer than 750 feet apart [~~located outside of incorporated cities, towns, or villages closer than 750 feet apart~~] on the same side of the highway.

(f) Signs [~~may not be~~] erected in incorporated municipalities along the nonfreeway [~~federal-aid~~] primary [~~highway~~] system may not be [~~in incorporated cities, towns, and villages~~] closer than 300 feet apart on the same side of the highway.

(g) The spacing between signs shall not apply to signs separated by buildings, natural surroundings, or other obstructions which cause only one sign located within the specified spacing to be visible at any one time.

(h) No sign, other than an exempt sign, may be erected within five feet of any highway right of way [~~right-of-way~~] line. This distance shall be measured from the end of the sign face nearest the right of way.

(i) The spacing rules in this section do not apply to on-premise or directional or other official signs, as provided in the Act, §391.031(b)[~~(1)~~], nor shall measurements be made from these [~~such~~] signs.

§21.154. Lighting and Movement of Signs.

(a) Lighting. Signs may be illuminated except for [~~, subject to the following restrictions:~~]

~~(1)~~ signs that ~~[which]~~ contain, include, or are illuminated by:

(1) any flashing, intermittent, or moving light or lights, including any type of screen using animated or scrolling displays, such as an LED (light emitting diode) screen or any other type of video display, even if the message is stationary ~~[or intermittent message of any nature are prohibited]~~, except those giving only public service information such as time, date, temperature, weather, or similar information;

(2) lights that ~~[which]~~ are:

(A) not effectively shielded so as to prevent beams or rays of light from being directed at any portion of the traveled ways of a regulated highway; ~~[an interstate or federal-aid primary highways]~~ and

(B) ~~[which are]~~ of such intensity or brilliance as to cause glare or ~~[to impair the]~~ vision impairment of the driver of any motor vehicle, or which otherwise interfere with any driver's operation of a motor vehicle ~~[are prohibited]~~; and

(3) lights that interfere ~~[no sign shall be so illuminated that it interferes]~~ with the effectiveness of, or obscure ~~[obscures,]~~ an official traffic sign, device, or signal.

(b) Moving parts. A sign may have rotating slats, so long as the message changes within two seconds and stays stationary for at least 10 seconds. The slats must all turn in the same direction and at the same rate of speed. Reflective material, neon lighting, or internal illumination may not be placed on the slats. A cutout on a sign may be animated if it:

(1) is not lighted or enhanced by reflective material so as to create the illusion of flashing or moving lights; or

(2) does not otherwise create a safety hazard to the traveling public.

(c) Reflective materials. Reflective paint and reflective disks may be used on a sign face unless they are determined by the department to:

(1) create the illusion of flashing or moving lights; or

(2) cause an undue distraction to the traveling public.

(d) Non-flashing neon lights may be used on sign faces, unless:

(1) the sign permit specifies an unilluminated structure; or

(2) the lights are determined by the department to cause an undue distraction to the traveling public.

§21.157. Wind Load Pressure.

~~[No sign, other than an exempt sign, shall be erected that does not meet the wind load pressure requirements as set out in the table which follows this paragraph.]~~ Permit applications for new signs and permit renewals as required by §21.150 (c) ~~[(e)]~~ of this title (relating to Permits) ~~[for signs which will have or have a height, in feet above ground, as measured above the average level of the ground adjacent to the proposed structure, of six feet, or more,]~~ must include a certification ~~[be accompanied by a certificate]~~ signed by the applicant ~~[owner of the sign to the effect]~~ that the proposed or existing sign will withstand wind load pressures in pounds per square foot as set out in the following table.

Figure 1: 43 TAC §21.157.

§21.158. Height Restrictions.

A sign may not be erected that exceeds an overall height of 42 1/2 feet, measured in accordance with §21.144 of this title (relating to Measurements), from the highest point of the sign to the grade level of the roadway from which the sign is to be viewed. A roof sign having a tight or solid surface may not at any point exceed 24 feet above the roof level. Open roof signs in which the uniform open area is not less than 40% of the total gross area may be erected to a height of 40 feet above the roof level. The lowest point of a projecting sign must be at least 14 feet above grade.

§21.159. Property Right Not Created.

Issuance of a permit or license shall not be deemed to create a contract or property right in the permit holder or license holder ~~[permittee]~~.

§21.160. Relocation.

(a) Purpose. This section provides for the relocation of certain signs along regulated highways ~~[the interstate highway system and the federal aid primary highway system]~~ within the State of Texas that would otherwise be precluded under this subchapter ~~[undesignated head concerning the control of outdoor advertising signs]~~. All requirements under this subchapter ~~[undesignated head, concerning control of outdoor advertising signs,]~~ are to be complied with to the extent that they are not in conflict with the provisions of this section.

~~(b) Unzoned commercial or industrial area. For the purposes of implementing this section an unzoned commercial or industrial area shall mean an area along the highway right-of-way which has not been zoned under authority of law, which is not predominantly used for residential purposes, and which is within 800 feet, measured along the edge of the highway right-of-way, of, and on the same side of the highway as, the principal part of one or more recognized commercial or industrial activities within 200 feet of the highway right-of-way. The area to be considered, based upon the qualifying activities, shall be:~~

~~(1) composed of a total of 1,600 feet (800 feet on each side) plus the actual or projected frontage of the commercial or industrial activities, measured along the highway right-of-way by a depth of 660 feet;~~

~~(2) located on the same side of the highway as the principal part of the qualifying activities; and~~

~~(3) considered to be predominantly residential if, taken as a whole, more than 50% of the area is being used for residential purposes. (Roads and streets with residential property on both sides shall be considered as being used for residential purposes. Other roads and streets will be considered nonresidential.)~~

(b) ~~[(c)]~~ Permit. When ~~[Where]~~ a sign within the proposed highway right of way ~~[right-of-way]~~ is to be relocated to accommodate a regulated ~~[acquired for an interstate or federal-aid primary]~~ highway project ~~[and cannot be relocated under the requirements of this undesignated head concerning the control of outdoor advertising signs to an adjacent site on the same side of the highway]~~, the district engineer of the department within whose jurisdiction the sign is located may issue a permit under the conditions ~~[as]~~ set forth in subsections (c) and (d) ~~[(d) and (f)]~~ of this section.

(c) ~~[(d)]~~ Requirements.

(1) A new sign permit application shall be submitted but will not require payment of a permit fee.

(2) Sign relocation shall be in accordance with all local codes, ordinances, and applicable laws.

(3) The district engineer shall initially determine that the [such] permit is necessary to avoid excessive project costs and/or a delay in the completion of the project.

(4) The existing sign to be relocated must be an off-premise sign legally erected and maintained.

(5) The sign must be situated after its relocation according to the following priority:

(A) upon the remainder of the same tract or parcel of land upon which it was situated before its relocation, if any; [or]

(B) if there is no remainder or if the remainder is not of sufficient size or suitable configuration for the relocation of the sign, then upon the property abutting the proposed highway right of way at the original sign location or upon property abutting the insufficient remainder, if available;

(C) on property adjacent to the locations named in subparagraphs (A) or (B) of this paragraph;

(D) to another location within 50 miles of the original sign location, within the same department-designated district; or

(E) to another location within 50 miles of the original sign location, within another district of the department, with the approval of the district engineer where the sign is to be relocated.

(6) If possible, the [The] sign is to be placed in the same relative position as to line of sight [and not to exceed 3,000 feet to either side of the perpendicular placement as the original sign was situated in relation to the highway].

(7) The relocated sign must be within a zoned or unzoned commercial area except that the area must include only one recognized commercial or industrial activity.

(8) [(7)]The [Except as provided in paragraph (10) of this subsection, the] relocated sign location must meet the following spacing criteria. [may not be:]

(A) The sign may not be placed where it is [located as to be] likely to cause a driver to be unduly distracted in any way or where it will [so as to] obscure or otherwise interfere with the effectiveness of an official traffic sign, signal, or device, or obstruct or interfere with the driver's view of approaching, merging, or intersecting traffic, whether the intersection be of two or more highways or the intersection of a highway with a railroad. [;]

(B) The sign may not be placed [located] within 500 feet of a [any] public park: [, public forest, public playground, or scenic area designated as such by the department or other governmental agency having and exercising such authority, which is] adjacent to the highway. [;]

(C) If the sign is to be placed outside an incorporated municipality along a regulated highway, the sign may not be located in areas adjacent to or within 500 feet of:

(i) interchanges, intersections at grade and rest areas; or [along interstate and freeway federal-aid primary highways outside incorporated municipalities, or which will tend to obscure or otherwise interfere with the driver's view of approaching, merging, or intersecting traffic. (Where there are ramps between the main traveled way of interstate and freeway federal-aid primary highways and adjacent frontage roads, no new signs may be erected outside incorporated municipalities in areas adjacent to said]

(ii) ramps, their acceleration and deceleration lanes [and within 500 feet thereof.] (Such distances shall be measured along the highway from the nearest point of beginning or ending of pavement widening at the exit from, or entrance to, the main traveled way.)[;]

(D) The sign may not be erected along the interstate and freeway [federal-aid] primary [highway] systems closer than 500 feet apart on the same side of the highway. [;]

(E) The sign may not be erected along the nonfreeway [federal-aid] primary [highway] system located outside of municipalities [incorporated cities, towns, or villages] closer than 300 feet apart on the same side of the highway. [;]

(F) The sign may not be erected along the nonfreeway [federal-aid] primary [highway] system in municipalities [incorporated cities, towns, or villages] closer than 100 feet apart on the same side of the highway. [; and]

(G) The sign may not be erected within five feet of any highway right of way [right-of-way] line.

(9) [(8)] The size, configuration, and construction of the relocated sign must conform to the following provisions.

(A) The maximum area for any one sign face shall be 1,200 square feet, with a maximum height of 25 feet and a maximum length of 60 feet[, inclusive of border and trim, but excluding the base, apron, supports, and other structural members].

(B) The maximum size limitations shall apply to each [side of a] sign face [structure or structures] visible to approaching traffic.

(C) The area shall be measured by the smallest square, rectangle, triangle, circle, or combination thereof which will encompass the entire sign.

(D) Sign faces [Signs] may be placed back-to-back, side-by-side, stacked, or in "V" type construction with not more than two displays to each facing. The [and such] sign structure and faces [or structures] shall be considered one sign.

(E) A sign face that [which] exceeds 350 square feet in area may not be stacked or placed side-by-side.

(F) In no event shall the size of the sign face, the number of sign faces, or lighting, if any, of the relocated sign exceed the size, number of faces, or lighting, if any, of the existing sign.

(G) The relocated sign will be constructed with the same number of poles and of the same type of materials as the existing sign.

(H) The relocated sign must not exceed the maximum height set forth in §21.158 of this title (relating to Height Restrictions).

(10) [(9)] The sign replacement site is to be approved by the district engineer [of the department] or his designee [his designated representative] prior to the removal of the existing sign. A permit may be issued pursuant to this section if a sign is designated by the owner as personal property and the sign owner receives relocation benefits, or if the sign is designated by the owner as realty, valued and purchased according to the department's sign valuation schedules, and retained by the sign owner. Relocation under this section is not available to a sign purchased through an eminent domain proceeding. Relocation benefits will be paid in accordance with Subchapter G of this chapter.

(11) [(10)] The spacing requirements as provided in paragraph (8) [(7)] of this subsection do not apply to:

(A) signs separated by buildings, natural surroundings, or other obstructions which cause only one sign located within the specified spacing to be visible at any one time; and

(B) on-premise or directional or official signs, as cited in [~~the Texas Litter Abatement Act,~~] Transportation Code, [~~Chapter 391,~~] §391.031(b) [~~(1)~~], nor shall measurements be made from these [~~such~~] signs.

(d) [~~(e)~~] Cessation of activities. When a commercial or industrial activity ceases and a sign other than an exempt sign is no longer located within 800 feet of at least one recognized commercial or industrial activity located on the same side of the highway, the sign will be considered nonconforming [~~must be removed not later than five years following cessation of the operation of such commercial or industrial activity~~].

(e) [~~(f)~~] Waiver of damages.

~~(1) If the relocation is under subsection (d)(5)(A) of this section, the person or persons who own the tract or parcel of land upon which the sign was situated must enter into a written agreement with the acquiring agency waiving and releasing any claim for damages against the acquiring agency and the state for the temporary or permanent taking of the real property that is based in any manner upon the relocation of the sign to accommodate the highway improvement project. This provision shall not be construed to preclude the payment of compensation to the real property owner for the acquisition of the real property or any other interest therein, but the use of the tract as an off-premise sign site shall not be considered in the determination of the compensation paid therefor.~~]

~~(2) If the relocation is under subsection (d)(5)(A) or (B) of this section,~~] The [~~the~~] sign owner must enter into a written agreement with the acquiring agency waiving and releasing any claim for damages against the acquiring agency and the state for any temporary or permanent taking of the sign in consideration of the payment by the acquiring agency of a mutually agreed specified amount of money calculated to cover the cost to the sign owner of the relocation of the sign.

(f) Bisection. An existing permit may be amended by the district office (serving the county where the sign is located) to authorize:

(1) a monopole sign face overhanging the proposed right of way to be shifted to the remainder;

(2) a multipole structure located partially in the proposed right of way to have the poles in the right of way moved to the remainder and the face shifted to the relocated poles; or

(3) the sign to be bisected and the face size reduced.

This 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 November 23, 1998.

TRD-9817925
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 463–8630

♦ ♦ ♦

43 TAC §§21.143, 21.155–21.156

STATUTORY AUTHORITY

The new sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation and, more specifically, Transportation Code, Chapter 391, which authorizes the commission to adopt rules to regulate the erection or maintenance of signs along interstate and federal primary systems.

No other statutes, articles, or codes are affected by the proposed new sections.

§21.143. Maintenance and Continuance.

(a) Continuance of nonconforming signs. In order for a nonconforming sign to be maintained and continued:

(1) the sign must:

(A) have existed at the time the conditions changed to make the sign nonconforming;

(B) have been lawful on the date it became subject to control by the department; and

(C) remain substantially the same as it was on the date it became subject to the department's control;

(2) the permit holder's sign:

(A) may not be relocated even if the sign is sold, leased, or otherwise transferred, without affecting its status, unless the relocation is a result of a right of way acquisition requiring relocation to a conforming area pursuant to §21.160 of this title (relating to Relocation);

(B) may not be destroyed, abandoned, or discontinued under §21.156 of this title (relating to Discontinuance of Signs); and

(C) may not be removed for any reason, including repair.

(b) Normal or reasonable repair and maintenance. Subject to the limitations in subsection (c) of this section, the following are considered to be normal or reasonable maintenance activities that do not need a new permit:

(1) replacement of nuts and bolts; nailing, riveting or welding; cleaning and painting; and manipulation to level or plumb the device;

(2) replacement of parts, as long as the basic design or structure of the sign is not altered and materials of the same type are used;

(3) replacement of poles, as long as no more than one-half of the poles are replaced in any 12 month period; and

(4) changing the advertising message, including changing faces, as long as similar materials are used to replace the face.

(c) Substantial change.

(1) Substantial changes that require a new permit are:

(A) adding lights to an unilluminated sign or adding more intense lighting to an illuminated sign whether or not the lights are attached to the sign structure;

(B) changing the size of the sign beyond what is allowed pursuant to §21.152 of this title (relating to Size of Off-Premise Outdoor Advertising Signs);

(C) changing the number of poles in the sign structure, unless the number of poles in a multiple pole structure is reduced to accommodate a reduction in the size of the original sign, provided that the original sign is not removed and replaced with another sign;

(D) changing the materials used in the construction of the sign, such as replacing wooden materials with metal materials;

(E) adding electronic components, such as a changeable message or rotating slat face;

(F) adding faces or changing the sign configuration, such as changing from a "V" configuration to a stacked configuration;

(G) changing the height of the sign from the height designated on the original permit;

(H) moving the sign or sign face in any way unless the movement is made in accordance with §21.160 of this title (relating to Relocation);

(I) replacing more than one-half of the poles in a multiple pole sign in any 12-month period; or

(J) making repairs that exceed 60% of the cost to erect a new sign of the same type at the same location.

(2) A new permit will not be issued for a nonconforming sign.

§21.155. Directional Signs.

(a) Applicability. A directional sign may be erected and maintained without a license and permit issued pursuant to §§21.149-21.150 of this title (relating to Licenses and Permits).

(b) Registration. Prior to erecting a directional sign, the owner must file an application on a form prescribed by the department, showing the location, message content, construction, and dimensions of the sign. There will be no fee associated with this registration.

(c) Message content. The message on directional signs shall be limited to the identification of the attraction or activity and directional information useful to the traveler in locating the attraction or activity, such as mileage, route numbers, or exit numbers. Descriptive words or phrases, and pictorial or photographic representations of the activity or its environs are prohibited.

(d) Selection method and criteria.

(1) Privately owned activities or attractions eligible for directional signing are limited to:

(A) natural phenomena;

(B) scenic attractions;

(C) historic, educational, cultural, scientific, and religious sites; and

(D) outdoor recreational areas.

(2) Privately owned attractions or activities must be of national or regional interest to the traveling public. Examples of these sites may be found in the National Register of Historic Places, the National Registry of Natural Landmarks published by the U.S. Department of Interior, and the "Texas State Travel Guide" published by the State of Texas. Each district engineer is authorized to determine whether a particular sign advertises an activity or attraction which is nationally or regionally known and of outstanding interest to the traveling public.

(e) Prohibited signs. The following directional signs are prohibited:

(1) signs advertising activities that are illegal under federal or state law or regulation in effect at the location of those signs or activities;

(2) signs located in such a manner as to obscure or otherwise interfere with the effectiveness of an official traffic sign, signal, or device, or obstruct or interfere with the driver's view of approaching, merging, or intersecting traffic;

(3) signs erected or maintained upon trees or painted or drawn upon rocks or other natural features;

(4) obsolete signs;

(5) signs that are structurally unsafe or in disrepair;

(6) signs that move or have animated or moving parts; and

(7) signs located in rest areas, parklands, or scenic areas.

(f) Size.

(1) No sign shall exceed a maximum of:

(A) 150 square feet;

(B) 20 feet in height; or

(C) 20 feet in length.

(2) All dimensions include border and trim, but exclude supports.

(g) Lighting. A sign may be illuminated except for a sign that:

(1) contains, includes, or is illuminated by any flashing, intermittent, or moving light or lights;

(2) does not effectively shield beams or rays of light from being directed at any portion of the traveled way of an interstate or primary highway;

(3) is of such intensity or brilliance that it:

(A) causes glare or impairs the vision of the driver of any motor vehicle; or

(B) interferes with a driver's operation of a motor vehicle; or

(4) is so illuminated as to interfere with the effectiveness of or obscure an official traffic sign, device, or signal.

(h) Spacing.

(1) A directional sign may not be located within 2,000 feet of an interchange or intersection at grade along the interstate system or other primary system. The measurement is made from the nearest point of the beginning, ending, or pavement widening at the exit from or entrance to the main-traveled way.

(2) A directional sign may not be located within 2,000 feet of a rest area, park, or scenic area.

(3) Two directional signs facing the same direction of travel may not be spaced less than one mile apart.

(4) No more than three directional signs pertaining to the same activity and facing the same direction of travel may be erected along a single route approaching the activity.

(5) A sign located adjacent to the interstate system must be within 75 air miles of the activity.

(6) A sign located adjacent to the primary system must be within 50 air miles of the activity.

§21.156. Discontinuance of Signs.

(a) Damage.

(1) In the event a sign is partially destroyed by wind or other natural forces including tornadoes, hurricanes, or other occurrences outside the control of the permit holder, the department will determine whether the sign can be repaired without a new permit.

(A) The department may require the permit holder to submit an estimate of the proposed work, including an itemized list of the materials to be used and the manner in which the work will be done. The department may allow the sign to be repaired without issuing a new permit if the department determines that the repairs would constitute normal or reasonable repair and maintenance in accordance with §21.143 of this section (relating to Maintenance and Continuance) if the damage to the sign is not substantial. The department will cancel the existing permit if it determines the damage to the sign is substantial.

(B) After the permit is canceled in accordance with §21.150(j) of this title (relating to Permits), the remaining sign structure must be dismantled and removed without cost to the department unless a new permit can be issued in accordance with this subchapter. The department will not issue a new permit to repair or rebuild the sign if the sign location is nonconforming.

(C) If a decision to cancel a permit is appealed, then the sign may not be repaired during the appeal process.

(2) The damage will be considered substantial if:

(A) the cost to repair the sign would exceed 60% of the cost to replace it with a sign of the same basic construction at the same location; or

(B) the repairs cannot be made in accordance with §21.143(b) of this title (relating to Maintenance and Continuance).

(b) Abandonment.

(1) The department may consider a sign abandoned and cancel the permit or refuse to renew the permit if:

(A) a structure is without advertising matter or displays obsolete advertising matter for a period of 365 consecutive days;

(B) the sign has fallen into disrepair or become overgrown by trees or other vegetation; or

(C) the permit renewal fees have not been paid in accordance with this subchapter, after demand by the department.

(2) Small temporary signs such as garage sale signs or campaign signs attached to the structure do not constitute advertising matter which would toll the 365 days.

(3) The payment of property taxes or retention of the sign as a balance sheet asset will not be considered in determining whether the sign permit should be canceled.

(4) An abandoned sign in a nonconforming sign location may not be repermitted. If the location of the abandoned sign is conforming, it may be repermitted to anyone who submits an application that meets the requirements of this subchapter.

§21.161. Destruction of Trees/Violation of Control of Access.

(a) Trees and vegetation. It is a violation of this subchapter to destroy trees and vegetation on the right of way for any purpose. The department will not issue a permit for a sign that will be obscured by existing vegetation or landscaping along the highway right of way.

(b) Control of access. The department will not issue a permit for a sign unless it can be erected or maintained from private property.

(c) Cancellation of permit. The department will cancel a permit for the erection of outdoor advertising if the owner, or someone acting on behalf of the owner, does not comply with state law or regulations. The department may further seek all other relief made available by law to recover damages and costs to enforce this provision.

§21.162. Appeal Process for Permit Denials.

(a) An applicant may file a petition with the executive director to appeal a denied permit.

(b) The petition should contain:

(1) a statement of facts as to why the denial is believed to be in error; and

(2) supporting documentation such as drawings, surveys, or photographs.

(c) The executive director or designee will make a final determination. If the petition is denied, the department will send a written decision to the applicant stating the reason for denial.

This 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 November 25, 1998.

TRD-9817988
Bob Jackson
Deputy General Counsel
Texas Department of Transportation
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 463–8630

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43 TAC §21.155, §21.156

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

STATUTORY AUTHORITY

The repealed sections are proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the Texas Department of Transportation and, more specifically, Transportation Code, Chapter 391, which authorizes the commission to adopt rules to regulate the erection or maintenance of signs along interstate and federal primary systems.

No other statutes, articles, or codes are affected by the proposed repealed sections.

§21.155. Directional Signs

§21.156. Discontinuance of Signs

This 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 November 23, 1998.

TRD-9817926
Bob Jackson
Deputy General Counsel

Texas Department of Transportation
Earliest possible date of adoption: January 3, 1999
For further information, please call: (512) 463–8630

♦ ♦ ♦

Name: David Stewart
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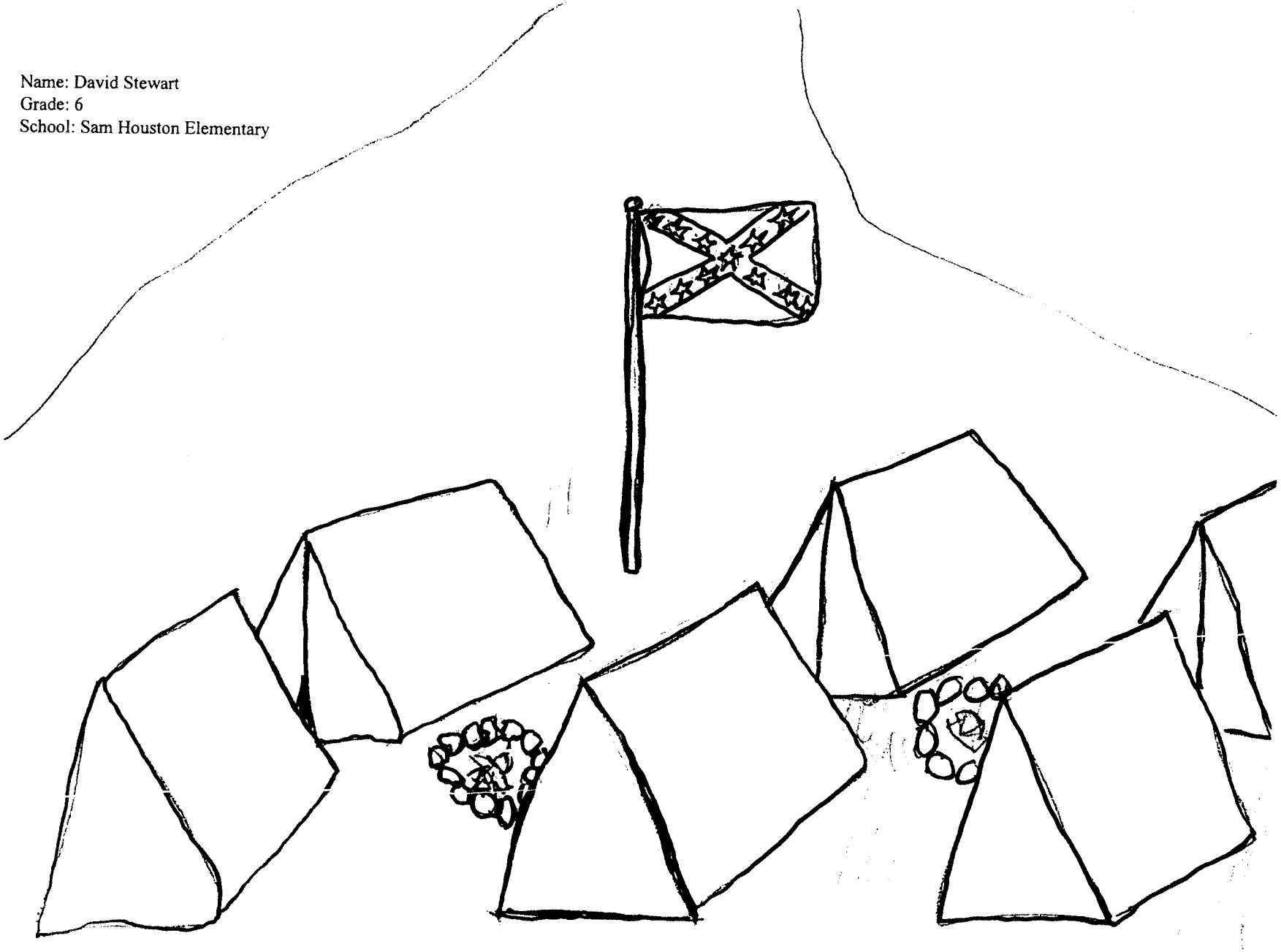


WITHDRAWN RULES

An agency may withdraw a proposed action or the remaining effectiveness of an emergency action by filing a notice of withdrawal with the *Texas Register*. The notice is effective immediately upon filing or 20 days after filing as specified by the agency withdrawing the action. If a proposal is not adopted or withdrawn within six months of the date of publication in the *Texas Register*, it will automatically be withdrawn by the office of the Texas Register and a notice of the withdrawal will appear in the *Texas Register*.

TITLE 19. EDUCATION

Part II. Texas Education Agency

Chapter 74. Curriculum Requirements

Subchapter B. Graduation Requirements

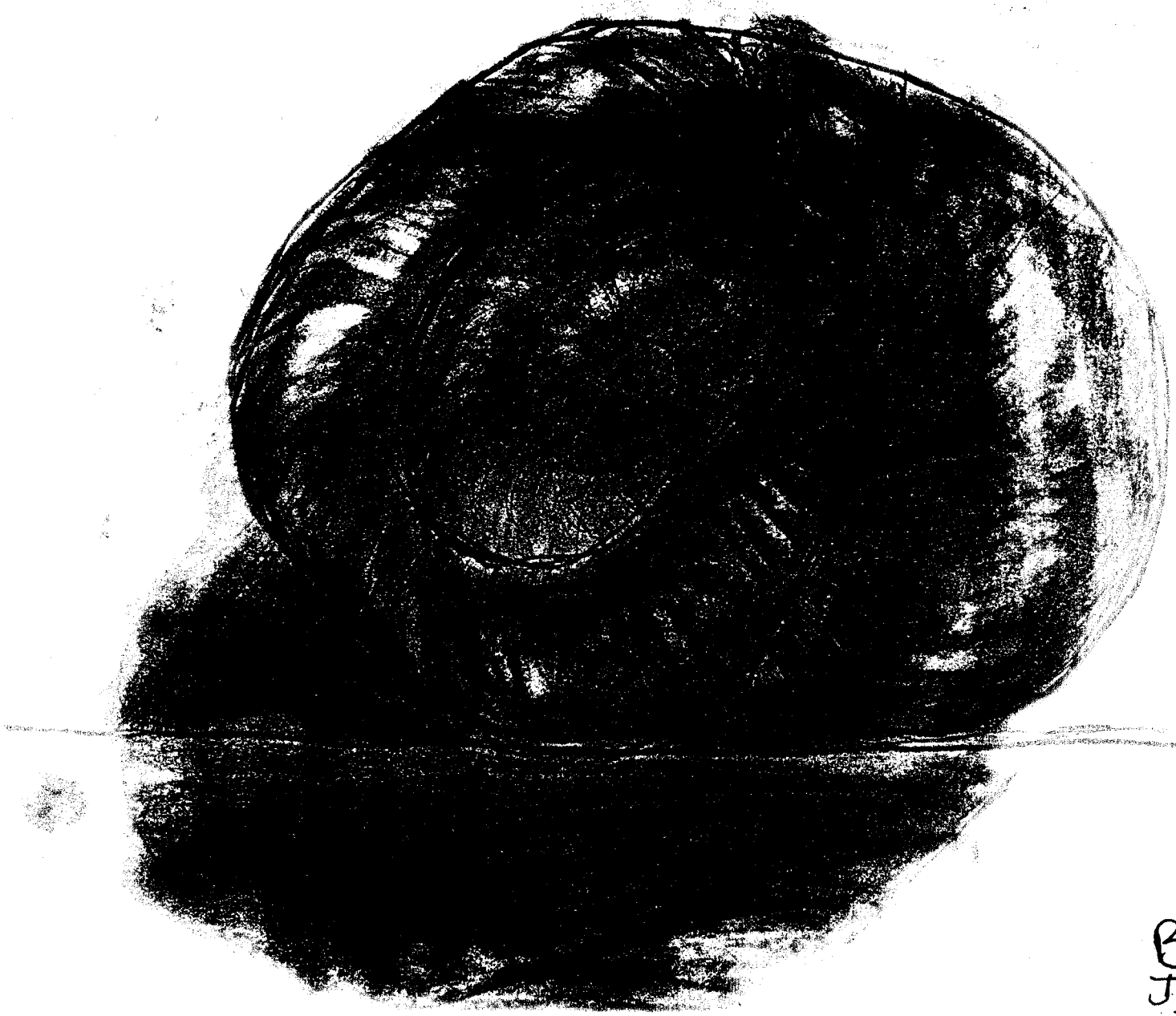
19 TAC §§74.11, 74.12, 74.13

The Texas Education Agency has withdrawn from consideration for permanent adoption the amendment to §§74.11, 74.12, 74.13, which appeared in the October 2, 1998, issue of the *Texas Register* (23 TexReg 9887).

Filed with the Office of the Secretary of State on November 23, 1998.

TRD-9817894
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Effective date: November 23, 1998
For further information, please call: (512) 463–9701

♦ ♦ ♦



Name: Beatrice Hernandez
Grade: 5
School: Gillett Intermediate

Beatrice Hernandez
January 27, 1997

ADOPTED RULES

An agency may take final action on a section 30 days after a proposal has been published in the *Texas Register*. The section becomes effective 20 days after the agency files the correct document with the *Texas Register*, unless a later date is specified or unless a federal statute or regulation requires implementation of the action on shorter notice.

If an agency adopts the section without any changes to the proposed text, only the preamble of the notice and statement of legal authority will be published. If an agency adopts the section with changes to the proposed text, the proposal will be republished with the changes.

TITLE 1. ADMINISTRATION

Part XII. Advisory Commission on State Emergency Communications

Chapter 251. Regional Plans-Standards

1 TAC §251.1

The Advisory Commission on State Emergency Communications (ACSEC) adopts an amendment to §251.1, concerning Regional Plans for 9-1-1 Service, without changes to the proposed text as published in the October 16, 1998, issue of the *Texas Register* (23 TexReg 10590). The text will be republished for clarification. When the proposal was published, there were sections that were renumbered and relettered, however, the text was not shown.

Section 251.1 defines the standards for regional plans. The amendment is necessary to reflect consistency with federal mandates pertaining to direct access to telephone emergency service under the American with Disabilities Act. The Department of Justice' Technical Assistance Manual provides comprehensive direction on what constitutes compliance under Title II of the Act. Included within this document is the requirement to have Telecommunications Device for the Deaf (TDD/TTY) equipment at each answering position of a Public Safety Answering Point. The amendment requires that each call taking position must be equipped with such equipment.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the authority of the Texas Health and Safety Code, Chapter 771, §§771.051, 771.055, 771.056, 771.059, 771.071 and 771.072, which provide the Advisory Commission on State Emergency Communications the authority to administer the implementation of statewide 9-1-1 service, to develop minimum performance standards for equipment and operation of 9-1-1 service to be followed in developing regional plans, and to allocate money to prepare and operate regional plans.

§251.1. Regional Plans for 9-1-1 Service.

(a) All 9-1-1 service plans must be submitted to the Advisory Commission on State Emergency Communications (the commission) by a regional council of government (RCOG) as specified by the Health and Safety Code, Chapter 771.056.

(b) All 9-1-1 service plans submitted for approval must address the entire geographic area within the boundaries of an RCOG. The plan must identify all public safety agencies as participating or nonparticipating. All counties with a population greater than 120,000, according to the latest federal census, must have 9-1-1 service by September 1, 1995. In counties with less than 120,000 in population, resolutions supporting the plan must be included for all participating cities and counties. Because the definition of public agency in the Health and Safety Code, Chapter 771.001(6), creates a possibility of overlapping jurisdictions, the city or county government of that area should submit the resolution to support the plan.

(c) A regional plan may be amended according to procedure established by the Advisory Commission on State Emergency Communications.

(d) All plans submitted for approval must include a complete description of the proposed system and its operation.

(e) All plans for 9-1-1 service must include at least the following.

(1) Automatic Number Identification (ANI) of all single party telephone lines.

(2) There must be at least one primary public safety answering point (P-PSAP) with the ability to extend, transfer, or relay 9-1-1 calls to the appropriate public safety agencies. The P-PSAP must be in service 24 hours per day, every day. If there is more than one public safety answering point (PSAP), the system may be arranged for two or more PSAPs to share the 24-hour duty requirement.

(3) In compliance with the ADA, each call taking position must be equipped with a TDD/TTY or TDD/TTY compatible equipment.

(4) A P-PSAP should be equipped with a standby power supply for the telephone equipment, or it must be equipped with circuit transfer equipment that will connect each incoming circuit to a telephone set that does not require external power to operate.

(5) A P-PSAP must have the forced disconnect feature that will allow the PSAP attendants to clear incoming circuits of calls when necessary.

(6) A P-PSAP must have a minimum of two each of all crucial service items such as incoming telephone circuits (two from each telephone central office or tandem), telephone sets, ANI incoming circuits, and ANI display units.

(7) There must be at least two trunks between each telephone central office and the 9-1-1 tandem office if a tandem is used.

(8) In addition to the 9-1-1 service number, all public safety agencies must maintain a published seven-digit telephone number that can accept emergency calls.

(9) If a telephone switching office is equipped to provide 9-1-1 service, all lines must receive a positive response when 9-1-1 is dialed. The following is considered a positive response.

(A) An audible ringing tone when the call is connected to a circuit to a PSAP.

(B) In offices using direct trunking to a PSAP, the PSAP attendant must be able to extend, transfer, or relay emergency calls for all telephone lines served by that office.

(C) If selective routing, class marking, or an equivalent method of routing of calls is used, calls from telephone lines used by customers in an area not using 9-1-1 as an emergency number must be routed to a recorded announcement that directs the customer to call their local public safety agency.

(D) All calls directed to a PSAP by selective routing must be extended, transferred, or relayed to the proper public safety agencies.

(10) All 9-1-1 service systems must accept emergency calls from wireless telephone systems operating within the 9-1-1 service area as 9-1-1 calls (e.g., no seven or ten digit screening numbers). All 9-1-1 service systems must immediately request from service providers in the geographic area that a wireless caller's ANI and the location of the base station or cell site receiving a 9-1-1 call be provided through the use of Pseudo ANI and ANI by no later than the 18-month deadline specified by the Federal Communications Commission in 47 CFR §20.18(d). The terms ANI and Pseudo ANI have the same meanings as in 47 CFR §20.18. All 9-1-1 service systems must be capable of receiving the data elements associated with this service by no later than the 18-month deadline specified in 47 CFR §20.18(d).

(f) The plan must include a description of how the service is to be administered as required by the Health and Safety Code, Chapter 771.055(b).

(g) The plan must include a description of how money allocated to the RCOG under the Health and Safety Code, Chapter 771, is to be allocated within the region as required by the Health and Safety Code, Chapter 771.055(c).

(h) The plan must include detailed descriptions of the cost of equipment and the operating expenses for the proposed 9-1-1 service that are to be funded by fees or surcharges collected in accordance with the Health and Safety Code, Chapter 771, Subchapter 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 November 23, 1998.

TRD-9817866
James D. Goerke
Executive Director
Advisory Commission on State Emergency Communications
Effective date: December 13, 1998
Proposal publication date: October 16, 1998
For further information, please call: (512) 305–6933

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1 TAC §251.4

The Advisory Commission on State Emergency Communications (ACSEC) adopts an amendment to §251.4, concerning Guidelines for the Provisioning of Accessibility Equipment, without changes to the proposed text as published in the October 16, 1998, issue of the *Texas Register* (23 TexReg 10591) and will not be republished.

The amendment is necessary to reflect consistency with federal mandates pertaining to direct access to telephone emergency service under the Americans with Disabilities Act. The Department of Justice's Technical Assistance Manual provides comprehensive direction on what constitutes compliance under Title II of the Act. In addition, through case law, it has been determined that the installation of TDD Call Diverters are inconsistent with the mandate to provide direct access. The amendment deletes references to Call Diverters and provides for funding of TDD Detectors through the plan amendment process.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the authority of the Texas Health and Safety Code, Chapter 771, §§771.051, 771.055, 771.056, 771.057, 771.071 and 771.072, which provide the Advisory Commission on State Emergency Communications with the authority to develop standards for the establishment and operation of 9-1-1 service.

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

Filed with the Office of the Secretary of State on November 23, 1998.

TRD-9817865
James D. Goerke
Executive Director
Advisory Commission on State Emergency Communications
Effective date: December 13, 1998
Proposal publication date: October 16, 1998
For further information, please call: (512) 305–6933

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TITLE 7. BANKING AND SECURITIES

Part VII. State Securities Board

Chapter 105. Rules of Practice in Contested Cases

7 TAC §§105.2, 105.5–105.8, 105.12–105.14, 105.16–105.19

The State Securities Board adopts amendments to §§105.2, 105.5-105.8,105.12-105.14, and 105.16-105.19, concerning rules of practice in contested cases. The rules were adopted without changes to the proposed text as published in the August 21, 1998, issue of the *Texas Register* (23 TexReg 8599) and will not be republished.

The amendments conform the Agency's procedural rules to practice following recent rulemaking by the State Office of Administrative Hearings and make clarifications.

The amendments remove provisions rendered ineffective by the new rules of the State Office of Administrative Hearings.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the author-

ity 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.

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 November 16, 1998.

TRD-9817616
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: December 6, 1998
Proposal publication date: August 21, 1998
For further information, please call: (512) 305–8300

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7 TAC §§105.3, 105.9–105.11

The State Securities Board adopts the repeal of §§105.3, and 105.9-105.11, concerning rules of practice in contested cases. The repeals was adopted without changes to the proposed text as published in the August 21, 1998, issue of the *Texas Register* (23 TexReg 8602) and will not be republished.

The adoption of the repeals eliminates rules that have been superseded by recent rulemaking by the State Office of Administrative Hearings.

The adoption avoids confusion by eliminating unnecessary provisions.

No comments were received regarding adoption of the repeals.

The repeals are 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.

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 November 16, 1998.

TRD-9817617
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: December 6, 1998
Proposal publication date: August 21, 1998
For further information, please call: (512) 305–8300

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7 TAC §105.9

The State Securities Board adopts new rule §105.9, concerning rules of practice in contested cases. The rule was adopted without changes to the proposed text as published in the August 21, 1998, issue of the *Texas Register* (23 TexReg 8602) and will not be republished.

The new rule formalizes an existing policy utilized in contested cases originating from the Agency.

The rule informs participants in a contested case of the need to provide a copy of all documents filed at or by the State Office of Administrative Hearings (SOAH) to the Securities Commissioner's representative at the same time the document becomes part of the case file at SOAH.

No comments were received regarding adoption of the new rule.

The new rule 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.

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 November 16, 1998.

TRD-9817618
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: December 6, 1998
Proposal publication date: August 21, 1998
For further information, please call: (512) 305–8300

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Chapter 113. Registration of Securities

7 TAC §§113.1, 113.3–113.6, 113.8, 113.9, 113.11–113.13

The State Securities Board adopts amendments to §§113.1, 113.3-113.6, 113.8, 113.9, and 113.11-113.13, concerning registration of securities. The rules were adopted without changes to the proposed text as published in the August 21, 1998, issue of the *Texas Register* (23 TexReg 8603) and will not be republished.

The amendments eliminate portions of rules that address the same subject matter or conflict with the securities registration guidelines adopted by the North American Securities Administrators Association, Inc., which were concurrently adopted as new sections §§113.14-113.25 of this chapter; add the Accredited Investor Exemption, §139.19, to the list of exemptions in §113.5(c)(i) permitting advertising; and make nonsubstantive changes to conform the rules to current formatting standards.

The amendments provide a substantial degree of consistency with uniform guidelines for the registration of securities applied by other state securities regulators and are applicable to all registered securities offerings.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Civil Statutes, Article 581-28-1. Section 28-1 provides the Board with the author-

ity 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.

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 November 16, 1998.

TRD-9817619
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: December 6, 1998
Proposal publication date: August 21, 1998
For further information, please call: (512) 305–8300

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7 TAC §§113.14–113.25

The State Securities Board adopts new rules §§113.14-113.25, concerning registration of securities. The rules were adopted without changes to the proposed text as published in the August 21, 1998, issue of the *Texas Register* (23 TexReg 8607) and will not be republished.

The rules reflect various guidelines, applicable to all registered securities offerings, that have been adopted by the North American Securities Administrators Association, Inc.

The new rules provide a substantial degree of consistency with uniform guidelines for registration of securities that are utilized by other state securities regulators.

One comment letter was received on the proposal. That letter, from the law firm of Thompson and Knight, was in favor of the rules. The Board agreed and adopted the rules as they were proposed.

The new rules are 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.

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 November 16, 1998.

TRD-9817620
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: December 6, 1998
Proposal publication date: August 21, 1998
For further information, please call: (512) 305–8300

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Chapter 115. Dealers and Salesmen

7 TAC §115.1

The State Securities Board adopts an amendment to §115.1, concerning post registration reporting requirements for dealers, investment advisers, and their agents, without changes to the proposed text as published in the September 11, 1998, issue of the *Texas Register* (23 TexReg 9192) and will not be republished.

The amendments made no substantive changes to the existing reporting requirements. It simply reorganized the presentation of the material for clarity.

Dealers, investment advisers, and their agents will be better apprised of the occurrences triggering an obligation to make a timely report to the Securities Commissioner regarding such events.

One comment letter was received regarding adoption of the amendment. The commenter expressed concern that the amendment was beyond the statutory authority of the agency and inconsistent with state and federal law. The staff responded that the rule was interpreted to require post-registration reporting of items consistent with Form BD, a uniform form utilized by the agency for registration of dealers, so there is no additional reporting requirement imposed by the rule in practice. Inspections conducted by agency staff have shown that the regulated industry is often unaware of the continuing reporting requirements contained in Form BD and, accordingly, many unintentional violations of the duty to update the Form BD have been found. The provisions of this rule serve as an additional reminder to the regulated of these post- registration reporting requirements. Research by agency counsel has indicated that the provisions are within the authority of the Board to enact and are not inconsistent with state or federal law. The Board disagreed with the commenter and made no changes to the rule as proposed. However, the Board noted that the agency is participating in discussions with the North American Securities Administrators Association, Inc., the National Association of Securities Dealers, the Securities and Exchange Commission, and other regulators to update Form BD and to develop uniform reporting standards for regulated persons. In light of possible developments from these discussions, the Board may revisit the reporting requirements contained in the rule at a later date.

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.

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 November 16, 1998.

TRD-9817621
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: December 6, 1998

Proposal publication date: September 11, 1998
For further information, please call: (512) 305–8300

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7 TAC §115.3

The State Securities Board adopts an amendment to §115.3, concerning dealer examinations. The rule was adopted without changes to the proposed text as published in the September 11, 1998, issue of the *Texas Register* (23 TexReg 9193) and will not be republished.

The rule requires the Series 72 examination from new applicants for registration to deal exclusively in government securities. The rule provides that persons already holding such a restricted registration on or before September 1, 1998, will be "grandfathered" in and will not be required to pass the Series 72 examination.

By requiring an examination, the adoption should increase competency of persons obtaining this category of restricted registration.

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.

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 November 16, 1998.

TRD-9817622
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: December 6, 1998
Proposal publication date: September 11, 1998
For further information, please call: (512) 305–8300

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Chapter 139. Exemptions by Rule of Order

7 TAC §139.19

The State Securities Board adopts an amendment to §139.19, concerning the accredited investor exemption. The rule was adopted without changes to the proposed text as published in the August 21, 1998, issue of the *Texas Register* (23 TexReg 8617) and will not be republished.

The rule was amended to identify the uniform form required to be filed in coordination with the exemption.

The rule requires the filer to submit the Model Accredited Investor Exemption Uniform Notice of Transaction form, within 15 days after the first sale in this state of securities subject to the exemption from securities registration.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Civil Statutes, Articles 581-28-1 and 5.T. 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 5.T provides that the Board may prescribe new exemptions by rule.

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

Filed with the Office of the Secretary of State on November 16, 1998.

TRD-9817623
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Effective date: December 6, 1998
Proposal publication date: August 21, 1998
For further information, please call: (512) 305–8300

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TITLE 16. ECONOMIC REGULATION

Part I. Railroad Commission of Texas

Chapter 3. Oil and Gas Division

16 TAC §3.107

The Railroad Commission of Texas adopts new §3.107 concerning the Texas Experimental Research and Recovery Activity Program (TERRA) with changes to the version published in the July 31, 1998, issue of the *Texas Register* (23 TexReg 7683). The new rule implements statutory provisions in Texas Natural Resources Code, Chapter 93, enacted by the 74th Legislature and effective January 1, 1996, for placement of oil or gas wells in the TERRA program. The TERRA program is a completely voluntary program that was implemented to preserve mechanically sound, non- polluting wellbores to be available for research and testing by the oil and gas industry and educational institutions. Most wells that are plugged are still physically productive but are not economically productive. With a change in the price of oil or gas or the introduction of new technologies, they could become economically productive once again. The new rule also provides standards for estimating the cost of plugging TERRA wells.

The TERRA program has three components: (1) the transfer of wells by an oil and gas operator or from the state-funded plugging program into TERRA; (2) the issuance of a license for research or for the testing of a TERRA well; and (3) the release of a well from TERRA to an operator to be placed back in production or to be plugged.

To transfer a well into TERRA, an operator will first obtain a TERRA application package from the Railroad Commission district office or request a package from the office in Austin. After reviewing the package and performing the required well testing, the operator then will determine if the well is a candidate

for the TERRA program. Once this determination is made and final approval is received by the TERRA staff, a fee of 75% of the estimated plugging cost is paid and the well is placed into TERRA. Wells in the state-funded plugging program will be selected as candidates by priority. Each selected well has to pass the same requirements as industry wells before acceptance and transfer into the TERRA program.

While a well is in TERRA, it may be licensed for research purposes such as gathering data, performing production tests, and developing and testing enhanced or advanced recovery techniques. These projects will ultimately enable mineral interest owners to realize any commercial potential that may be found in the wellbore as technology and circumstances change.

Release of a well from the TERRA program may occur if circumstances or technology change to make the well productive again or for its plugging. An operator may remove a well from TERRA by paying a fee equal to the estimated plugging cost if the well has been in the program for less than one year. If the well has been in TERRA for more than a year, the fee amount can be up to twice the estimated plugging cost. If the party removing the well from TERRA is the same party that placed the well in the program, the party will receive credit in the amount of the initial entrance fee. A well will be removed from the program and plugged with TERRA funds at any time if it becomes a threat to the environment. Hydrocarbons produced from a well after being released from the TERRA program having been in it two years or more are exempt from the state severance taxes.

The commission received one comment on the proposed new rule. The Texas Independent Producers and Royalty Owners Association (TIPRO) commented that it had carefully reviewed the proposed rule and had no objection to the adoption of the rule as published. The rule is adopted with some nonsubstantive changes.

The new rule is adopted under Texas Government Code, §2001.004(1), which requires the commission to adopt rules of practice stating the nature of all available formal and informal procedures, and Texas Natural Resources Code, Chapter 93, which creates the TERRA program and authorizes the commission to adopt all necessary rules for its implementation.

The Texas Government Code, §2001.004(1), and the Texas Natural Resources Code, Chapter 93, are affected by the new rule.

Issued in Austin, Texas, on November 17, 1998.

§3.107. Texas Experimental Research and Recovery Activity (TERRA).

(a) In enacting the Texas Experimental Research and Recovery Activity ("TERRA") Act (Acts 1995, 74th Legislature, Chapter 989, effective January 1, 1996; codified at Texas Natural Resources Code, Chapter 93), the legislature found that:

(1) current oil and gas production practices will leave unrecovered much of the hydrocarbons originally in place under public and private land and that the economic activity flowing from the recovery of a significant portion of those hydrocarbons would be of great benefit to the future well-being of the people of this state;

(2) the incentives and opportunities provided by the TERRA act, codified at Texas Natural Resources Code, Chapter 93, will enhance and encourage development of new technologies needed to identify and recover those hydrocarbons. The development of those technologies within the state would be of benefit to the state's economy;

(3) mechanically sound, nonpolluting wells that would otherwise be plugged and abandoned are a valuable asset useful in the development of previously overlooked hydrocarbon deposits and new recovery technologies that may lead to a return of the wells to commercial production. Mineral interest owners should be encouraged voluntarily to preserve and use wells toward those ends by agreement with the state under the act; and

(4) the activities provided by this act serve a governmental purpose and benefit the people of this state.

(b) The purposes of the TERRA program are to:

(1) acquire and hold an inventory of mechanically sound and nonpolluting wellbores to be licensed by the commission for use in gathering data, performing production tests, and developing and testing enhanced or advanced recovery techniques;

(2) enable mineral interest owners to realize any commercial potential that may be found in the wellbores as technology and circumstances change; and

(3) protect the environment by ensuring that TERRA wellbores posing a pollution threat or determined to be without economic value are properly plugged in accordance with state law and rules of the commission.

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

(1) Hydrocarbons–Any oil, gas, condensate, or other liquid hydrocarbons produced from a well.

(2) License holder–A person licensed by the commission to use a TERRA wellbore.

(3) Mineral interest owner–An owner of a present possessory mineral interest or vested mineral interest that may become present and possessory.

(4) Present possessory mineral interest–A mineral interest that includes the present right to use the land surface for exploration and production of minerals.

(5) Production test–A test to determine whether a recovery technique will yield production in paying quantities.

(6) Responsible person–A license holder or a person required by law, commission rules, or order to control or clean up wastes associated with oilfield operations.

(7) Surface owner–An owner of an interest in the surface or top estate.

(8) TERRA–Texas Experimental Research and Recovery Activity.

(9) TERRA agreement–A written agreement between a present possessory mineral interest owner and the commission in which the present possessory mineral interest owner:

(A) grants the commission an easement for wellbore access;

(B) designates the commission as the agent of the present possessory mineral interest owner for the purposes of well maintenance and usage licensing; and

(C) allows use of wellsite equipment for the purposes set forth in subsection (b) of this section.

(10) Tract–The land area covered by either an oil lease or a gas proration unit established under commission rules.

(11) Wellbore–A hole in the ground drilled in connection with the exploration, development, or production of oil, gas, or geothermal resources, including any tubular goods cemented in the well.

(12) Wellsite equipment–Any production-related equipment or materials specific to a wellbore, including but not limited to motors, pumps, pumpjacks, fluid storage tanks, separators, compressors, wellheads, casing, tubing, and rods.

(d) The procedures to place a wellbore in the TERRA program are as follows:

(1) A mineral interest owner may apply to place a wellbore in the TERRA program by completing and filing the TERRA application (Form W-8(a)) and attendant TERRA agreement and easement forms approved by the commission. The mineral interest owner thereby designates the commission as its agent and grants to the commission an easement for the sole purpose of maintaining and licensing a wellbore. The commission may also place wells scheduled for plugging with state funds into the TERRA program without first obtaining TERRA agreements, provided, however, that all required agreements are secured from the owners of the mineral interests prior to the issuance of any TERRA license. An application to place a wellbore in TERRA may be accepted by the commission if:

(A) The TERRA agreement and easement is executed by the owner or owners of at least 50% of the present possessory mineral interest in all horizons penetrated by the wellbore;

(B) The well and wellsite are in compliance with commission rules;

(C) The wellbore is free of obstructions to the top most plug depth or total depth, whichever is applicable, and is of sound mechanical integrity.

(2) At the time of application the applicant shall conduct a fluid level test and wireline gauge ring run. If the wellbore is at least 25 years old and has been inactive at least 10 years, a mechanical integrity test (MIT) must be conducted in accordance with the procedures specified on commission form H-15. The MIT shall be substituted for the fluid level test. The commission may require an MIT on any well listed in a TERRA application. In lieu of current tests, the commission may accept a successful MIT test conducted within the previous five years, or two consecutive successful fluid level tests, the most recent of which must have been conducted within the previous year, provided the results are on file with the commission. Any current test conducted to satisfy these conditions requires:

(A) 24-hour prior notice to the commission's district office in the district in which the well is located;

(B) a commission witness in attendance;

(C) the test results properly documented on an applicable form;

(D) all tubing and rods have been removed from the well and all annuli not circulated to ground surface with cement are plumbed to the ground surface and equipped with two-inch operable valves;

(E) the applicant to file with his application copies of all wellbore records in his possession together with such records of the last operator of record;

(F) the applicant to file with his application documentation demonstrating that the wellsite equipment and leasehold are free of any outstanding charges, liens, or obligations; and

(G) the applicant to deposit with his application an amount equal to 75% of the current estimated plugging cost as calculated from the TERRA Estimated Plugging Cost Tables published by the commission.

(3) The commission may consider factors for the approval or disapproval of a TERRA application, including but not limited to the following factors:

(A) geographical location of wellsite or wellbore;

(B) wellsite or wellbore accessibility; and

(C) historical production problems inherent to the area.

(4) The commission shall notify the applicant by written notice within 10 days of the date the application is received in the commission's Austin, Texas office, stating;

(A) the application is complete and is accepted for filing; or

(B) the application is incomplete and more information is needed; or

(C) the application has been denied according to criteria as described in subsection (d)(3).

(e) While a well is in the TERRA program, the commission shall assume all well plugging duties for the well and, with the exception of the compliance requirements of a valid TERRA license holder, all pollution prevention and control responsibilities. The commission shall conduct annual inspections and appropriate tests to ensure the continuing integrity of the wellbore. The commission shall retain the necessary records to prove compliance with this requirement.

(f) No person or entity shall conduct operations for the purposes of data collection, production testing, or research and recovery technique development on a TERRA wellbore without first obtaining a TERRA license, as described in this section, prior to the initiation of operations. The license holder shall conduct only those operations specifically approved and addressed in a valid license. All persons or entities applying for such a license shall possess a valid commission organization report of good standing and comply with all commission rules pertaining to pollution prevention and control.

(g) A separate license application shall be submitted to the commission's Austin office for each oil lease or gas wellbore. The application shall be on a fully completed Form W-8(b) and shall include the lesser of $50 per well or $500 per tract. At the discretion of the commission, additional information and/or material may be required of the applicant.

(1) Upon approval of the application, the commission shall issue a license setting forth the items listed in §93.034(d) of the Natural Resources Code. The license will not be granted unless the applicant is in full compliance with all applicable commission rules. The license holder shall be considered the responsible person for the licensed wellbores for the duration of the license and until such time as any violations of commission rules or orders committed by the license holder during the term of the license are corrected.

(2) The commission shall hold a hearing on a proposed use in accordance with commission rules, such as §3.37 (relating to statewide spacing rule) and §3.38 (relating to well densities). Such a hearing shall be conducted as a contested case pursuant to commission rules.

(3) Applications to renew existing licenses shall be filed at the commission's Austin office at least 15 days before the expiration date of the current license. Renewal application shall be filed on Form W-8 (b) and shall be accompanied by the fees required in §93.033 of the Texas Natural Resources Code for licenses.

(4) All licenses shall expire 60 days from the date of approval unless properly renewed. Unless awaiting renewal application approval, all operations governed by the license shall terminate upon license expiration.

(5) After notice and opportunity for hearing, the commission may revoke the license of any license holder who violates any provisions of the license or a commission rule or order. The commission may seek administrative penalties and reimbursement of any costs incurred as a result of actions initiated to gain compliance.

(6) Prior to production under a TERRA license, the license holder shall conduct a potential test on any licensed wellbores and submit a letter of request and completed well status report form for oil or gas, whichever is applicable, to the commission's Austin office within 15 days of test completion. Potential tests conducted to satisfy this requirement shall be initiated within 48 hours of initial production and conducted in accordance with standard commission test procedures.

(7) A license holder may use, or may remove and safeguard, wellsite equipment in which it does not have a legal interest. Any person who is not a TERRA license holder and who removes wellsite equipment from a TERRA wellbore shall be subject to the regulatory jurisdiction of the Commission.

(8) Each license filed with the commission shall be considered public information and shall be available for public viewing during regular business hours. Pursuant to the Public Information Act, Texas Government Code, Chapter 552, and Texas Natural Resources Code §93.032(f).

(9) Prior to the movement of produced oil, gas, or condensate from the lease, the license holder shall file an application for movement authority with and secure the required authorization from the commission. All hydrocarbons produced during the license period may be sold without the filing of a Producer's Certificate of Compliance and Authorization to Transport Oil or Gas From Lease form provided the production is properly reported on all appropriate commission forms.

(10) Unless otherwise provided by a lease or other legal document, the license holder may retain one-half of the proceeds from the sale of production and shall apportion the remainder of the proceeds to the mineral interest ownership. Payments shall be promptly distributed as required under Texas Natural Resources Code, Chapter 91, Subchapter J. Acceptance of the proceeds by a mineral interest owner not bound by a TERRA agreement serves as a ratification and consent of the agreement and binds that owner to and for the remainder of the agreement.

(h) Produced hydrocarbons that meet the criteria of this section and gain concurrent certification from the commission and the Texas State Comptroller's Office may qualify for an exemption from the severance tax imposed under Texas Tax Code, Chapter 201. The commission may grant certification administratively or after the acceptance and approval of a proper application.

(1) The hydrocarbon production shall be established from wellbores under an active TERRA agreement and corresponding license, or from wellbores resuming production after formerly participating for a period of two or more years in the TERRA program to qualify for commission certification for severance tax exemption.

(2) An application for a severance tax exemption shall be made only by the operator of a well and shall be submitted to the commission's Austin office. The application shall be in the form of a letter of request and shall include certified copies of all commission production reports verifying the qualifying production periods and any other documents the commission may require for qualification determination.

(3) A commission designee may administratively approve or deny any application for severance tax exemption. If approved, the commission shall issue a certificate to the operator of the well. Such certificates are valid only with Comptroller approval of the exemption. The commission shall provide the Comptroller a copy of each certificate issued for a qualifying well.

(4) A commission designee may administratively revoke any certification based on information attesting to non-eligibility of the well or the revocation of the TERRA license at the time certification is sought.

(5) The commission may impose penalties against a person for:

(A) submitting any document in support of a certificate, tax exemption, or tax credit that the person knows contains a material misstatement; and

(B) submitting an application for tax exemption under a revoked certificate after receiving notice from the commission of the revocation.

(i) A wellbore may be released from the TERRA program upon plugging and abandonment, with prior commission permission, or upon application for and commission approval of release.

(1) A present possessory mineral interest owner of the tract in which the wellbore is located may submit a written request with a copy of the TERRA agreement covering the subject well or wells to the commission's Austin office requesting release of the wellbore from the TERRA program. The applicant shall state whether it is bound by a TERRA agreement or not. If approved, the effective date of release shall be no earlier than the day after any current TERRA license expires unless the applicant submits a written release from the license holder approving an earlier release date. An application by a mineral interest owner for release of a wellbore from the TERRA program shall have priority over new, amended, or renewed existing licenses. Such release is contingent upon:

(A) the applicant being in compliance with all commission rules and permits required for the operation or plugging of the subject well;

(B) the applicant assumes all plugging responsibility, including financial, for the well and cleanup of the site with the exception of the equipment reinstallation and land restoration responsibilities required of any valid TERRA license holder; and

(C) if the applicant is a present possessory mineral interest owner bound by a TERRA agreement, the commission may either impose financial obligations not to exceed twice the estimated plugging costs as determined by the commission at the time the

release is sought on the applicant to facilitate the release, or if the applicant agrees to plug the well and complies with all commission plugging rules, the commission may not require any payment upon application approval.

(2) The owner or owners of at least 50% of the surface estate of wellbores that have been in the TERRA program in excess of seven years may request in writing that the commission plug the wells. Upon receipt of the request and, if required of the surface owners by the commission, any instrument verifying the legal ownership claimed as the basis of their standing from which to compel the plugging of the wellbore, the commission shall

(A) notify all license holders and present possessory mineral interest owners who have signed a TERRA agreement of the request and potential commission action; and

(B) if, within the latter of 90 days from the date of notice or the expiration of any existing license, the notified individuals fail to effect a release of the wellbore from the TERRA program, the commission shall schedule the wellbore for plugging.

(3) At such time as the release of the last TERRA wellbore from a tract of land covered by a TERRA agreement, the commission shall file a release of all TERRA easements for that tract in the office of the clerk of the county in which that tract is located.

(j) The commission shall estimate the anticipated plugging costs biannually, or at such time as conditions or information warrant adjustment. The costs shall be established using the most current information available from state-funded pluggings, and shall be established on a depth interval per commission district basis. Fees imposed by this section and per these estimated plugging costs shall be based on similar well depths in the corresponding commission district in which the well is located.

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 November 17, 1998.

TRD-9817664
Mary Ross McDonald
Deputy General Counsel
Railroad Commission of Texas
Effective date: December 7, 1998
Proposal publication date: July 31, 1998
For further information, please call: (512) 463–7008

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Part VI. Texas Motor Vehicle Board

Chapter 101. Practice and Procedure

Subchapter C. Adjudicative Proceedings and Hearings

16 TAC §101.67

The Texas Motor Vehicle Board adopts new rule §101.67, relating to Format for Documents Filed with the Board Subsequent to the Issuance of a Proposal for Decision, with changes to the proposed text as published in the July 24, 1998 issue of the *Texas Register* (23 TexReg 7485).

This new section sets standards for document length, type size, margins, paper size, and number of copies, as well as requiring citations to the evidentiary record in contested cases. Except for document length, the rule will not be strictly construed in cases brought in warranty performance cases (the Lemon Law) or where a party appears without legal representation. The last sentence of subsection (f) was reworded for clarity but no substantive changes are made that differ from the original proposal. The section is adopted to standardize written submissions to the Motor Vehicle Board.

Comments were received from the Texas Automobile Dealers Association, Ford Motor Company, and attorneys in private practice opposing the rule. Comments were also received from Motor Vehicle Division staff.

Comments in opposition to the rule suggested that the rule is unnecessary, that it infringes on a party's right to be heard by the Board, that parties should have the same amount of space to reply as was used in the original proposal for decision, that the page limitations will result in incomplete analysis, that the page limitations will deny due process to the parties, that a mechanism should be provided for making an exception to the limitations, that non-binding guidelines should be issued instead; and that, for clarity, the last sentence in subsection (f) should be reworded. One commenter stated that it would not be difficult to comply with the proposed rule.

The Board's response to these comments is that written submissions benefit from standardized length constraints as these guidelines encourage precise presentation of definitive issues. Additionally, proposals for decision reiterate each party's position, and significant portions contain material that does not require a response, such as the procedural history. Therefore, a party does not need as much space to set forth its exceptions or replies as was utilized in the original proposal.

The new section is adopted under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules as necessary and convenient to effectuate the provisions of the Code.

§101.67. Format for Documents Filed with the Board Subsequent to the Issuance of a Proposal for Decision.

(a) The total number of typewritten pages of a party's exceptions to proposals for decision and motions for rehearing must not exceed the total number of pages of the examiner's proposal for decision, and the total number of typewritten pages of a party's replies to exceptions and replies to motions for rehearing must not exceed three-fourths of the total number of pages of the examiner's proposal for decision, exclusive of pages containing the cover, index, table of authority, and attachments. The total number of pages of amicus briefs must not exceed three-fourths of the total number of pages of the examiner's proposal for decision, exclusive of pages containing the cover, index, table of authority, and attachments. In no event, such as when the examiner's proposal for decision is less than 15 pages, will this rule be construed to limit the length of a party's exception to a proposal for decision, motion for rehearing, or response thereto, to less than 10 pages.

(b) Exceptions, motions for rehearing, replies to exceptions, replies to motions for rehearing, and amicus briefs shall be printed or typed on 8 1/2 inch by 11 inch bond paper in no smaller than 11 point type with margins of at least one inch at the top, bottom, and each side. Pages shall be numbered in the 1 inch margin at the bottom of each page. All typewriting except block quotations and footnotes shall be double spaced.

(c) Where applicable, when the exceptions, motions for rehearing, replies to exceptions, and replies to motions for rehearing refer to facts or testimony from the evidentiary record, these statements must be followed by a reference to the specific exhibit or page number in the transcript where the fact or testimony is found.

(d) Each party or interested person shall file an original and 15 copies of its exceptions, motions for rehearing, replies to exceptions, replies to motions for rehearing, and amicus briefs.

(e) Other than document length, the requirements in subsections (a)-(d) of this section are not to be strictly construed in cases brought under §6.07 (the Lemon Law) or §3.08(i) (warranty performance) of the Texas Motor Vehicle Commission Code or where a party appears pro se.

(f) The examiner, director, or Board have the sole right to examine and determine whether documents meet the requirements of this section. If a document fails to meet the requirements of this section, the examiner, director, or Board have the discretion to accept the document as written, consider only those pages which meet the requirements of this section, or direct the party to make whatever modifications necessary to substantially conform the document to the requirements of this section. No motion or request to strike a document for failure to meet the requirements of subsections (a)-(d) of this section will be considered by the examiner, director, or Board.

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 November 20, 1998.

TRD-9817861
Brett Bray
Director, Motor Vehicle Division
Texas Motor Vehicle Board
Effective date: December 10, 1998
Proposal publication date: July 24, 1998
For further information, please call: (512) 416-4899

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Chapter 105. Advertising

16 TAC §105.4, §105.32

The Texas Motor Vehicle Board adopts amendments to §105.4, concerning Definitions and new §105.32, concerning Enforcement. Section 105.32 is adopted with changes to the proposed text, as published in the August 28, 1998 issue of the *Texas Register* (23 TexReg 8797) and will be republished. Section 105.4 is adopted without changes and will not be republished.

The amendments to §105.4 create definitions to clarify requirements of other rules within this title. New §105.32 is adopted, pursuant to action taken by the 75th Legislative Session, House Bill 1595, which, effective June 11, 1997, mandates notice of and an opportunity to cure an alleged advertising rule violation before an administrative complaint may be filed. After considering comments, the Board agreed to amend §105.32 by removing the word "relevant" from subsections (a)(2) and (b)(1) and (3). The Board also agreed to amend subsection (a)(2) by changing the period within which a licensee is liable for subsequent violations after receiving notice of the first violation from 6 days to 15 days.

Proposed new definitions in §105.4 define "balloon payment", a term used in §105.25 of this title (relating to Sales Payment Disclosures). The "Code" is defined as the Texas Motor Vehicle Commission Code. The relationship of an "advertising provision" to the Code and rules is clarified. "Board" is defined as the Texas Motor Vehicle Board. "Subsequent violation", a term created in new §105.32, is defined as conduct that is the same or substantially the same as alleged in a prior action. The definitions have been numbered in accordance with Texas Register requirements and for ease of reference. New §105.32 sets forth the procedures for providing notice of an alleged violation and provides that publication of a retraction notice may be required as part of the cure procedure.

Comments were received from the Texas Automobile Dealers Association and attorney David Sapp regarding both sections. Comments were supportive of the proposed changes to the new definitions in §105.4. Concerning §105.32, one commenter noted that a dealer might not be in town when a notice of violation was received by the dealership and that 6 days would not be enough time to correct an offending advertisement, and suggested the time limit be changed to 15 days. Another commenter suggested removal of the word "relevant" in subsections (a)(2) and (b)(1) and (3). The Board concurred with both these comments and made the recommended changes.

The amendments and new section are adopted under the Texas Motor Vehicle Commission Code, §3.06, which provides the Board with authority to adopt rules as necessary and convenient to effectuate the provisions of the Code.

§105.32. Enforcement.

(a) The Board may file a complaint against a licensee alleging a violation of an advertising provision pursuant to Section 3.05(b) of the Code only if the Board can show:

(1) that the licensee who allegedly violated an advertising provision has received from the Board a notice of an opportunity to cure the violation by certified mail, return receipt requested, in compliance with subsection (b) of this section relating to effectiveness of notice; and

(2) that the licensee committed a subsequent violation of the same advertising provision within the period beginning 6 days and ending 12 months after the licensee has received the notice required by paragraph (1) of this subsection.

(b) An effective notice issued under subsection (a)(1) of this section must:

(1) state that the Board has reason to believe that the licensee violated an advertising provision and identify the provision;

(2) set forth the facts upon which the Board bases its allegation of a violation; and

(3) state that if the licensee commits a subsequent violation of the same advertising provision within the time set forth in subsection (a)(2) of this section, the Board will formally file a complaint.

(c) As a part of the cure procedure, the Board may require a licensee, who allegedly violated an advertising provision, to publish a retraction notice to effect an adequate cure of the alleged violation. An adequate retraction notice must:

(1) appear in a newspaper of general circulation in the area in which the alleged violation occurred;

(2) appear in that portion of the newspaper, if any, devoted to motor vehicle advertising;

(3) identify the date and the medium of publication, print, electronic or other, in which the advertising alleged to be a violation appeared; and

(4) identify the alleged violation of the advertising provision and contain a statement of correction.

(d) Performance of a cure is made solely for the purpose of settling an allegation and is not an admission of a violation of these rules, the Code, or other law.

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 November 20, 1998.

TRD-9817862
Brett Bray
Director, Motor Vehicle Division
Texas Motor Vehicle Board
Effective date: December 10, 1998
Proposal publication date: August 28, 1998
For further information, please call: (512) 416–4899

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TITLE 19. EDUCATION

Part II. Texas Education Agency

Chapter 109. Budgeting, Accounting, and Auditing

Subchapter C. Adoptions By Reference

19 TAC §109.41

The Texas Education Agency (TEA) adopts an amendment to §109.41, concerning the "Financial Accountability System Resource Guide." The amendment is adopted without changes to the proposed text as published in the October 16, 1998, issue of the *Texas Register* (23 TexReg 10607) and will not be republished.

Section 109.41 adopts by reference the "Financial Accountability System Resource Guide" as the TEA's official rule. The "Resource Guide" describes rules for financial accounting such as financial reporting; budgeting; purchasing; auditing; site-based decision making; data collection and reporting; and management. Public school districts use the "Resource Guide" to meet the accounting, auditing, budgeting, and reporting requirements as set forth in the Texas Education Code and other state statutes relating to public school finance. The "Resource Guide" is available at www.tea.state.tx.us/school.finance/ on the TEA web site.

Under §109.41(b), the commissioner of education shall amend the "Financial Accountability System Resource Guide," adopting it by reference, as needed. The amendments to the "Resource Guide" include changes to auditing and financial accounting and reporting guidelines. These changes are necessary to implement: (1) an update to auditing standards, released in June 1998, by the Office of Management and Budget (OMB) relating to OMB Circular No. A-133, *Audits of States, Local Governments, and Non-Profit Organizations*; (2) financial reporting standards established by the Governmental Accounting Standards Boards, released in July 1998, relating to Year 2000 technology issues; and (3) other minor technical amendments to the "Resource Guide."

No comments were received regarding the adoption of the amendment.

The amendment is adopted under the Texas Education Code, §§7.102(c)(32), 44.002, 44.007, and 44.008, which authorizes the State Board of Education to adopt rules relating to school district budgets and audits of school district fiscal accounts.

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 November 23, 1998.

TRD-9817893
Criss Cloudt
Associate Commissioner, Policy Planning and Research
Texas Education Agency
Effective date: December 13, 1998
Proposal publication date: October 16, 1998
For further information, please call: (512) 463–9701

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TITLE 22. EXAMINING BOARDS

Part XV. Texas State Board of Pharmacy

Chapter 309. Generic Substitution

22 TAC §309.3

Note: The Texas State Board of Pharmacy submits this adoption of 22 TAC §309.3, which supersedes the rule that appeared in the September 18, 1998, issue of the Texas Register (23 TexReg 9547). This action by the Texas State Board of Pharmacy follows a decision by a Travis Country District court judge, which held that the Order adopting the rule was invalid. The Texas State Board of Pharmacy has subsequently corrected the procedural error.

The Texas State Board of Pharmacy ("Board") adopts the amendments to §309.3 ("Rule"), concerning Prescription Drug Orders without changes to the proposed text as published in the July 3, 1998 issue of the *Texas Register* (22 TexReg 6829).

This amendment implements the provisions of Section 21 of Senate Bill 609 passed by the 75th Legislature by establishing a list of narrow therapeutic index drugs ("NTI drugs") that are subject to the provisions of new Section 40(m) of the Texas Pharmacy Act. Narrow therapeutic index drugs are drugs in which small variances in the blood levels of the drug can change the effectiveness or toxicity of the drug, and, as a result, the blood levels of these drugs are closely monitored by prescribing physicians.

The Legislature, in Section 40(m) of the Texas Pharmacy Act, requires the Board, in consultation with the Texas State Board of Medical Examiners, "to establish, by rule, a list of narrow therapeutic index drugs that are subject to [Section 40(m)]." The Legislature further mandated the manner in which a refill of a drug on this list is to be dispensed:

A prescription for a narrow therapeutic index drug may be refilled only by using the same drug product by the same manufacturer that the pharmacist last dispensed under the prescription, unless otherwise agreed to by the prescribing physician. If a pharmacist does not have the same drug product by the same manufacturer in stock to refill the prescription, the pharmacist may dispense a drug product that is generically equivalent if the pharmacist, before dispensing the generically equivalent product, notifies:

(1) the patient, at the time the prescription is dispensed, that a substitution of the prescribed drug product has been made; and

(2) the prescribing practitioner of the drug product substitution by telephone, facsimile, or mail, at the earliest reasonable time, but no later than 72 hours after dispensing the prescription.

The Rule simply restates the statute. The language of the statute and the language of the Rule are identical in substance, if not in form. The Rule requires a pharmacist to refill a prescription for a narrow therapeutic index drug using the same drug product by the same manufacturer that the pharmacist last dispensed under the prescription, unless otherwise agreed to by the prescribing physician. If a pharmacist does not have the same drug product by the same manufacturer in stock to refill the prescription, the pharmacy may dispense a drug product that is generically equivalent if the pharmacist notifies the patient and the prescribing physician. The Rule also establishes a list of narrow therapeutic index drugs, which are subject to the provisions of the new Section 40(m) of the Texas Pharmacy Act.

It is also clear that neither the Rule nor Section 40(m) of the Texas Pharmacy Act require the substitution of a generic NTI drug for a brand version of an NTI drug when a pharmacist receives a new prescription for an NTI drug. Section 40(m) of the Texas Pharmacy Act does not change the law in Texas that generic substitution can only be done by substituting a drug that is AB rated by the federal Food and Drug Administration (FDA).

In order to utilize expert assistance in the task of developing a list of NTI drugs, the Board appointed a Task Force, and charged it with recommending a list of drugs to be included in the Rule. The Rule incorporates the recommendations of the Task Force.

In comprising the Task Force, the Texas State Board of Pharmacy distributed letters to the Texas Pharmacy Association, Texas Federation of Drug Stores, Texas Society of Health-System Pharmacists, Texas Medical Association, Texas Osteopathic Medical Association, a brand name manufacturer, and a generic drug manufacturer requesting that the organizations provide names of individuals for appointment to the Task Force to Develop a List of Narrow Therapeutic Index Drugs. The individuals recommended by the organizations were appointed to the Task Force to Develop a List of Narrow Therapeutic Index Drugs (NTI Task Force). The Task Force consisted of primarily practicing physicians and pharmacists. The Task Force also contained representatives from the Texas State Board of Medical Examiners and the Texas State Board of Pharmacy. On January 15, 1998, the Task Force met to develop a list of narrow therapeutic index drugs. The Task Force members received various materials and documents for their consideration and review, which included the relevant statutes, rules, the FDA list of NTI drugs, articles and letters on the issue of NTI drugs. Of specific interest is a letter written by the FDA Deputy Center Director for Pharmaceutical Science, Center for Drug Evaluation and Research, which stated the FDA's opposition to "NTI initiatives that are occurring at the state level", but also noted that "FDA is aware that the practice of pharmacy and medicine is regulated at the state level and not by the Federal Government." It should be noted that, since the August 4, 1998 meeting of the Board at which the amendment to 22 Texas Administrative Code was first considered, the FDA Commissioner nominee has been quoted in Drug Topics (October 5, 1998) as saying:

It seems to me that if the drugs are rated therapeutically equivalent, the substituted drug can be expected to perform the same as the drug for which the prescription was written.... I have not had the opportunity to determine whether, given the similarity in performance of the drugs, there are other reasons physicians should be notified of modifications to prescriptions. There may be a stronger case for notification where the modification involved drugs that have a narrow therapeutic index.

The Task Force's Final Report contained a list of nine (9) drugs recommended for inclusion in the Rule. The nine (9) drugs are digoxin, phenytoin, warfarin sodium, theophylline, levothroxine, carbamazepine, valproic acid, lithium, and divalproex sodium. Each of these nine (9) drugs is a NTI drug in that each has a narrow therapeutic range; that is, small changes in the amount of any of these drugs in the body can result in sub-therapeutic or toxic effects, which may threaten a patient's health. Each of these nine drugs requires careful dosage titration and patient monitoring for safe and effective use of the drugs. The Task Force also recommended that the list of drugs should be reviewed at least once every two years. The Board accepted the Task Force's recommendations.

The Texas State Board of Medical Examiners has reviewed the list of drugs established by the Task Force, and approved by the Board, and agrees that the list of drugs in the proposed amendment is appropriate for the purpose of Section 40(m) of the Texas Pharmacy Act. In addition, Board staff has reviewed the laws and rules in other states and has determined that this list is consistent with similar lists in at least five states (Arkansas, Florida, Kentucky, North Carolina, and Virginia).

It is important to note that Section 40(m) of the Texas Pharmacy Act, as passed by the Legislature, and the Rule do not prohibit or restrict generic substitution of these nine (9) NTI drugs. In fact, as noted above, the law and Rule do not change any of the procedures and requirements for generic substitution on the initial dispensing of a prescription for any of the nine (9) NTI drugs listed in the Rule.

In filling a new prescription for an NTI drug listed in the Rule, a pharmacist is still allowed to substitute a generically equivalent drug product for a brand name drug product if: (1) the physician authorizes the substitution; (2) the patient does not refuse the substitution; (3) the equivalent costs the patient less than the brand name product; and (4) the pharmacist chooses a generic drug product that is rated as equivalent to the brand name by the federal Food and Drug Administration in its publication titled: "Approved Drug Products with Therapeutic Equivalence Evaluations" or the "Orange Book." The fact that a drug product is included on the list in the Rule in no way questions the therapeutic equivalence of a generic version of the drug product if the FDA has determined the drug product is equivalent to the brand name product. In fact, all oral dosage forms of the listed drugs are specifically included in the Rule.

Section 40(m) specifically applies to the refilling of a prescription for a NTI drug. The Rule follows the statutory language in Section 40(m) of the Texas Pharmacy Act and specifies that, if a pharmacist does not have the same drug product used on the previous filling of a prescription in stock, the pharmacist may dispense another generically equivalent drug product, provided the pharmacist notifies: (1) the patient of the change at the time of dispensing; and (2) the prescribing physician of the change within 72 hours after the prescription is dispensed. The notice requirement in the Rule promotes good communication between the patient, the prescribing practitioner, and the pharmacist, particularly with regard to medications that require frequent monitoring of performance. The statute and the Rule also provide that where a pharmacist has the same drug product and another generically equivalent drug product in stock, but for some reason a different drug product is preferred, then the pharmacist must contact the prescribing practitioner before dispensing a different drug product. This reflects the public policy in Texas, as mandated by the Legislature in Section 40(m) of the Texas Pharmacy Act, that health-care practitioners be informed of changes in a patient's drug regimen.

The agency received oral comments on the rule at a public hearing on August 4, 1998, and also received numerous written comments. A total of 15 persons commented at the public hearing and 72 letters of written comments were received. Included in these comments were those of nine organizations.

The organizations commenting in favor of the rule included: Texas Academy of Family Physicians, Epilepsy Foundation of Central and South Texas, and Epilepsy Foundation of Greater North Texas. Each of these organizations urged the adoption of the Rule and commented that the notification requirement in the Rule would provide for better patient care and, therefore, was in the best interest of the patient. Several practicing physicians also commented on the proposed rule. Of the fifteen (15) individuals who identified themselves as physicians, thirteen (13) were in favor of the proposed rule. These doctors stressed that their patients were suffering from chronic conditions and that they, as doctors, needed to be notified of any change in the medications. The doctors who treated epileptic patients commented that, while the generic medications may be bioequivalent according to FDA regulations, the minor deviations allowed by the FDA could be hazardous to their patients and be more expensive in the long run because of possible trips to the hospital or use of emergency medical services. The agency agrees with these comments. Of the two doctors who commented against the Rule, one was a member of the Legislature, which unanimously passed the statute.

Organizations commenting against the rule included: Texas Citizens for a Sound Economy; Gray Panthers; Citizens Against Government Waste; National Pharmaceutical Alliance; and the National Association of Chain Drug Stores. Each of these organizations expressed concern that the rule would limit the substitution of generic alternatives to brand name products and thus increase the cost of prescription drugs to the consumer. In addition to these organizations, several individual comments also expressed this opinion. The agency disagrees with these comments because, as stated above, the Rule does not prohibit the substitution of generic drug products for brand name products. Section 40(m) of the Texas Pharmacy Act and the Rule do not change any of the existing requirements for generic substitution on the filling of an initial prescription for a narrow therapeutic index drug. As stated earlier, on the initial filling of a prescription, a pharmacist may use a product that is generically equivalent to a brand name product if: (1) the physician authorizes the substitution; (2) the patient does not refuse the substitution; (3) the equivalent costs the patient less than the brand name product; and (4) the pharmacist chooses a generic drug product that is rated as equivalent to the brand name by the federal Food and Drug Administration (FDA) in its publication titled: "Approved Drug Products with Therapeutic Equivalence Evaluations" or the "Orange Book." Under the provisions of new Section 40(m) of the Texas Pharmacy Act and the Rule, a pharmacist who dispensed a generic product on the initial filling of a prescription for a NTI drug must use the same generic product on refilling the prescription. In a case where the pharmacist does not have the same product in stock, the pharmacist can use another generically equivalent drug product, provided the pharmacist notifies the patient and the prescribing physician of the change. Further, the statute and the Rule expressly provide that, on a refill of an NTI prescription, a pharmacist is permitted to substitute and change to another manufacturer's drug product when prescribing physician agrees.

The Texas Society of Health-System Pharmacists commented that FDA should still continue to be the authority in terms of determining the equivalence and substitutability of drugs. The Board agrees with this comment and notes that current rules specify that a pharmacist may only substitute drugs that are rated equivalent to the brand name product by the FDA. The Rule does not change this requirement.

A number of comments asked the agency to amend the list of drugs to include only those drugs that are not considered to be therapeutically equivalent to their brand name counterpart by the federal Food and Drug Administration. The agency disagrees with this proposal because the purpose of the Rule is to require notification to the physician and patient if the pharmacist dispenses a different equivalent drug product on a refill. Texas Pharmacy rules specify that a pharmacist can only substitute drug products if the federal Food and Drug Administration has rated the products equivalent. If the list only included drugs that were not equivalent, it would essentially be a non-list, because none of the products on the list could be used by the pharmacist for substitution. Section 40(m) of the Texas Pharmacy Act directed the Texas State Board of Pharmacy, in consultation with the Texas State Board of Medical Examiners, to establish, by rule, a list of narrow therapeutic index drugs (emphasis added). One comment asked the agency to delete warfarin sodium from the list of drugs. Warfarin sodium is an anticoagulant that is prescribed primarily for patients at risk for blood clotting. The agency disagrees with this comment because patients taking warfarin sodium are required to be closely monitored by health care professionals when taking this product, whether they are taking the generic or the brand name product. The risks to a patient's health due to an improper blood level of the drug are significant, including hemorrhage, blood clots, or strokes. Many factors, including diet, other medications and patient compliance, can affect the absorption and subsequent effect of the drug. Therefore, it is important that the physician be informed of any change in the patient's drug regimen, including a change in the warfarin sodium drug product dispensed.

Several comments asked the Board to support efforts to make sure that, when a physician requests a brand name and specific formulation of NTI drugs, no substitutions occur. The Board is perplexed by this comment because this is a requirement

of the Texas substitution laws and the Rule does not in any way change this requirement. If a physician specifies on a prescription that the brand name drug product must be dispensed, the pharmacist cannot legally dispense a generic drug product without contacting the prescribing physician for permission to use the generic drug product.

The agency received 12 comments from members of the Texas Legislature. Five were in favor of the Rule as proposed, and seven suggested modification of the list.

The amendments are adopted under Sections 4, 16(a), and 40(m) of the Texas Pharmacy Act (Article 4542a-1, Texas Civil Statutes). The Texas State Board of Pharmacy interprets Section 4 as authorizing the agency to adopt rules to protect the public health, safety, and welfare through the effective control and regulation of the practice of pharmacy. The Texas State Board of Pharmacy interprets Section 16(a) as authorizing the agency to adopt rules for the proper administration and enforcement of the Act. The Texas State Board of Pharmacy interprets Section 40(m) as directing the agency to consult with the Board of Medical Examiners and by rule to establish a list of narrow therapeutic index drugs.

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 November 19, 1998.

TRD-9817741
Gay Dodson, R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
Effective date: December 9, 1998
Proposal publication date: July 3, 1998
For further information, please call: (512) 305–8028

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Part XVII. Texas State Board of Plumbing Examiners

Chapter 363. Examinations

22 TAC §§363.1, 363.6, 363.9

The Texas State Board of Plumbing Examiners adopts amendments to §§363.1, 363.6, and 363.9, concerning examinations, without changes to the proposed text as published in the October 2, 1998 issue of the *Texas Register* (23 TexReg 9892).

Section 363.1 specifies the requirements for all examinations. The amendment changes the experience at the trade requirements from 8,000 hours to 6,000 hours for journeyman plumber examination applicants and removes the experience at the trade requirements for the plumbing inspector examination applicants.

Section 363.6 allows the Board to conduct examinations for individuals that need special examination accommodations due to a disability. The amendment provides for a separate application that specifies the disability and justifies the request for accommodation. The application will assist the Board in ensuring fair treatment to all applicants.

Section 363.9 specifies the requirements for reexamination after failure of an examination. The proposed amendment would allow an applicant that failed only one part of a multiple part examination, but passed all other parts of that examination, to retake only the part that the applicant failed. The amendment specifies that if more than one part of an examination is failed, the entire examination must be retaken. The amendment would also shorten the training period for any applicant that desires to retake an examination, in part or in its' entirety, after failure.

Favorable comments regarding deletion of the experience at the trade requirements for Plumbing Inspector qualifications were received from a municipal building official. The building official stated that the proposal would allow municipal departments to cross train other inspectors in other fields to perform plumbing inspections.

Favorable comments were received from the Director of Community Development from the City of Arlington regarding the rule changes relative to qualifications for Plumbing Inspectors in the State of Texas. The City of Arlington believes that reasonable qualifications, and the Board's comprehensive examination process will continue to result in plumbing systems that will protect the health and safety of the citizens of Arlington.

Favorable comments regarding deletion of the experience at the trade requirements for Plumbing Inspector qualifications were received from representatives from the International Conference of Building Officials, the Southern Building Code Congress International, and the Building Officials Association of Texas.

Unfavorable comments were received from the Associated Plumbing-Heating-Cooling Contractors of El Paso (APHCC of EP) regarding the reduction of hours of training required for Journeyman Plumber qualifications and the deletion of the experience at the trade requirements for Plumbing Inspector qualifications. APHCC of EP stated that the rule amendment proposal substantially reduces the requirements for professional training of those engaged in the plumbing profession. Additionally, APHCC of EP stated that the amendment would seriously damage the potential for conducting the four year Plumbing Apprentice training program as sponsored by APHCC of EP and established by the National Plumbing, Heating, and Cooling Contractors Association and the U.S. Department of Labor, Bureau of Apprenticeship Training.

The Board disagrees with the unfavorable comments submitted for the following reasons:

In regards to the requirements to examine for a Journeyman Plumber License: When considering career choices, individuals with potential for the plumbing trade may decide not to train the required 8,000 hours for a Journeyman Plumber License when the same amount of training (approximately 4 years) is required to receive many college degrees. By reducing the required training hours to become a licensed Journeyman Plumber to 6,000 hours, many individuals with potential for the plumbing trade will choose plumbing as a vocation as opposed to other possibilities that require additional training. The 6,000 required hours of training will be the minimum number of hours required to take the Journeyman Plumber examination and will not limit the number of hours that a plumbing apprenticeship school may wish to require for graduation in addition to the minimum 6,000 hours. To protect the health and safety of the citizens, the requirement for a high school diploma or equivalent will remain in effect, along with the Board's rigorous examination to ensure that only qualified individuals will become licensed.

In regards to the requirements to examine for a Plumbing Inspector License: As currently and historically interpreted, the requirement of 5,000 hours experience at the trade allows anyone who has worked at the plumbing trade or any another construction trade for at least 5,000 hours to meet the experience at the trade requirement. The requirement is not beneficial to the protection of the health and safety of the citizens since it allows individuals with 5,000 hours of construction experience not related to plumbing to meet that requirement. Additionally, the requirement limits the availability of otherwise qualified individuals that could become Licensed Plumbing Inspectors to protect the health and safety of the citizens. To protect the health and safety of the citizens, the requirement for a high school diploma or equivalent will remain in effect, along with the Board's rigorous examination to ensure that only qualified individuals will become licensed.

No comments were received regarding the adoption of §363.6 and §363.9.

The amendments are adopted under and effects Texas Revised Civil Statutes Annotated Article 6243-101, ("Act"), §5(a), §8, (Vernon Supp. 1998) and the rule it amends. Section 5(a) of the Act authorizes, empowers and directs the Board to prescribe, amend and enforce all rules and regulations necessary to carry out the Act. Section 8 of the Act directs the Board to administer a uniform and reasonable examination to determine the fitness, competency and qualifications of persons to engage in the business, trade or calling of a master or journeyman plumber or plumbing inspector.

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 November 19, 1998.

TRD-9817740
Robert L. Maxwell
Chief of Field Services/Investigations
Texas State Board of Plumbing Examiners
Effective date: December 9, 1998
Proposal publication date: October 2, 1998
For further information, please call: (512) 458–2145

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Part XXII. Texas State Board of Public Accountancy

Chapter 501. Professional Conduct

Subchapter B. Professional Practices

22 TAC §501.14

The Texas State Board of Public Accountancy adopts an amendment to §501.14 concerning Commissions and Receipt of Other Compensation with changes to the proposed text as published in the October 9, 1998, issue of the *Texas Register*, (23 TexReg 10275). The change is in the first sentence of subsection (b) where "is" was added to read "licensee is engaged" to improve the language and readability.

The amendment allows for a clearer understanding of the effect on a CPA's independence by the CPA's receipt of commissions from a client.

The amendment will function by making the Texas Rules consistent with Ethics Rule 501.01 of the AICPA Code of Professional Conduct and the Ethics Codes of at least forty-three other states, which either prohibit commissions or limit commissions to non-attest clients. The rule will also function by listing those services, which preclude receipt of commissions from a client.

No comments were received regarding adoption of the rule.

The amendment is adopted under Texas Civil Statutes, Article 41a-1, Section 6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law.

§501.14. Commissions and Receipt of Other Compensation.

(a) A licensee shall not for a commission recommend or refer to a client any product or service, or for a commission recommend or refer any product or service to be supplied by a client, or receive a commission, when the licensee or the licensee's practice unit also performs for that client:

(1) an audit or review of a financial statement;

(2) a compilation of a financial statement when the licensee expects, or reasonably might expect, that a third party will use the financial statement and the licensee's compilation report does not disclose a lack of independence;

(3) an examination of prospective financial information; or

(4) any other service requiring independence.

(b) This prohibition applies during the period in which the licensee is engaged to perform any of the services listed above and the period covered by any of the historical financial statements involved in such listed services.

(c) A certificate or registration holder who receives or agrees to receive other compensation with respect to services or products recommended, referred, or sold by him to another person shall, no later than the making of such recommendation, referral, or sale, make the following disclosures in writing to such other persons:

(1) if the other person is a client, the nature, source, and amount of all such other compensation; or

(2) if the other person is not a client, the nature and source only of any such other compensation received from a third party.

(d) The disclosure required by this section shall be made regardless of the amount of other compensation involved.

(e) This section does not apply to payments received from the sale of all, or a material part, of an accounting practice, or to retirement payments to persons formerly engaged in the practice of public accountancy.

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 November 20, 1998.

TRD-9817800

William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 10, 1998
Proposal publication date: October 9, 1998
For further information, please call: (512) 305-7848

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22 TAC §501.24

The Texas State Board of Public Accountancy adopts an amendment to §501.24 concerning Other Professional Standards without changes to the proposed text as published in the October 2, 1998, issue of the *Texas Register*, (23 TexReg 9894).

The amendment allows for a better understanding of which standards the Board considers to be professional and authoritative standards. The Board intends for this rule to be interpreted as being applicable to present and all future pronouncements on these subjects by the American Institute of Certified Public Accountants.

The amendment will function by having a clear understanding of which standards the Board considers to be professional and authoritative standards.

No comments were received regarding adoption of the rule.

The amendment is adopted under Texas Civil Statutes, Article 41a-1, Section 6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law.

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 November 20, 1998.

TRD-9817801
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 10, 1998
Proposal publication date: October 2, 1998
For further information, please call: (512) 305-7848

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Chapter 511. Certification as CPA

Subchapter H. Certification

22 TAC §511.161

The Texas State Board of Public Accountancy adopts an amendment to §511.161 concerning Qualifications for Issuance of a Certificate without changes to the proposed text as published in the October 2, 1998, issue of the *Texas Register*, (23 TexReg 9895).

The amendment allows the Board to require applicants for licensure to complete a four-hour ethics course as a condition for licensure and clarifies that the examination on the Board's rules is a written examination.

The amendment will function by having new CPAs who are familiar with the Board's rules and professional ethics.

The Board specifically invited comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses, and received only one comment. After considering the comment, staff's estimated tuition cost for a four-hour course, and the availability of the course through the Internet, the Board concludes that while the $65 tuition has an economic effect, it does not impose an adverse economic effect on applicants for licensure. Licensed CPAs are currently required to complete one four-hour ethics course. This amendment moves the burden of a four-hour ethics course from an already licensed CPA to an applicant to become a CPA.

One comment was received by telephone from Richard Forrest. Mr. Forrest noted that after December 1998 ethics course providers would be offering the four-hour course less frequently. This is because the size of the group required to attend a four-hour course will be significantly smaller because CPAs are only required to take the four-hour course once. Some applicants who are seeking a four-hour course may have to travel to find such a course. For example, applicants living in the Lower Rio Grande Valley may have to travel to Houston. Mr. Forrest said that applicants are at heightened awareness about ethics due to their recent graduation and possibly taking an ethics course in college. He suggested requiring applicants to complete only a two-hour ethics course.

Tuition ranges by vendor from $35 to $50 for a two-hour course and from $45 to $65 for a four-hour course. One-way airfare from Harlingen to Houston ranges from $60 to $91, and airfare from El Paso to Dallas is $88 to $135. If overnight stay were required, its cost would also vary by provider.

Mr. Forrest's suggestion would not work for those applicants who either did not take an ethics course in college based on the Board's Rules of Professional Conduct or who had not recently completed such a course, say within the last two years.

The amendment is adopted under Texas Civil Statutes, Article 41a-1, Section 6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law.

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 November 20, 1998.

TRD-9817802
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 10, 1998
Proposal publication date: October 2, 1998
For further information, please call: (512) 305-7848

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22 TAC §511.163

The Texas State Board of Public Accountancy adopts an amendment to §511.163 concerning Examination of the Rules of Professional Conduct without changes to the proposed text as published in the October 2, 1998, issue of the *Texas Register*, (23 TexReg 9895).

The amendment allows the Board to require applicants for licensure to complete a four-hour ethics course as a condition for licensure and clarifies that the examination on the Board's rules is a written examination.

The amendment will function by having new CPAs who are familiar with the Board's rules and professional ethics.

The Board specifically invited comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses, and received only one comment. After considering the comment, staff's estimated tuition cost for a four-hour course, and the availability of the course through the Internet, the Board concludes that while the $65 tuition has an economic effect, it does not impose an adverse economic effect on applicants for licensure. Licensed CPAs are currently required to complete one four-hour ethics course. This amendment moves the burden of a four-hour ethics course from an already licensed CPA to an applicant to become a CPA.

One comment was received by telephone from Richard Forrest. Mr. Forrest noted that after December 1998 ethics course providers would be offering the four-hour course less frequently. This is because the size of the group required to attend a four-hour course will be significantly smaller because CPAs are only required to take the four-hour course once. Some applicants who are seeking a four-hour course may have to travel to find such a course. For example, applicants living in the Lower Rio Grande Valley may have to travel to Houston. Mr. Forrest said that applicants are at heightened awareness about ethics due to their recent graduation and possibly taking an ethics course in college. He suggested requiring applicants to complete only two-hour ethics course.

Tuition ranges by vendor from $35 to $50 for a two-hour course and from $45 to $65 for a four-hour course. One-way airfare from Harlingen to Houston ranges from $60 to $91, and airfare from El Paso to Dallas is $88 to $135. If overnight stay were required, its cost would also vary by provider.

Mr. Forrest's suggestion would not work for those applicants who either did not take an ethics course in college based on the Board's Rules of Professional Conduct or who had not recently completed such a course, say within the last two years.

The amendment is adopted under Texas Civil Statutes, Article 41a-1, Section 6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law.

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 November 20, 1998.

TRD-9817803
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 10, 1998
Proposal publication date: October 2, 1998
For further information, please call: (512) 305-7848

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Chapter 519. Practice and Procedure

22 TAC §§519.1-519.9, 519.11, 519.12, 519.17-519.29, 519.32-519.47

The Texas State Board of Public Accountancy adopts the repeal of §§519.1-519.9, 519.11, 519.12, 519.17-519.29, 519.32-519.47 concerning Practice and Procedure, without changes to the proposed text as published in the October 2, 1998, issue of the *Texas Register* (23 TexReg 9896).

The repeal allows the State office of Administrative Hearings (SOAH) to use one uniform set of procedural rules for most of its administrative hearings.

The repeal will function by removing the Board's procedural rules which were superseded by the procedural rules adopted by SOAH.

No comments were received regarding adoption of the rule.

The repeals are adopted under Texas Civil Statutes, Article 41a-1, Section 6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law and Section 2003.050 of the Government Code which requires the Chief Administrative Law Judge to adopt rules that govern hearings conducted by SOAH.

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 November 20, 1998.

TRD-9817798
William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 10, 1998
Proposal publication date: October 2, 1998
For further information, please call: (512) 305-7848

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22 TAC §§519.1-519.13

The Texas State Board of Public Accountancy adopts new §§519.1-519.13 concerning Practice and Procedure, with changes to the proposed text as published in the October 2, 1998, issue of the *Texas Register*, (23 TexReg 9898). The changes are in the language of §519.8(a) of this rule that was modified from that proposed to conform the Rule to the language of the Administrative Procedure Act and the Public Accountancy Act. An express reference to the Public Accountancy Act was also added to the Rule. The words ",orders for production or inspection and commissions for depositions; discovery from experts" were deleted from the title and in subsection (a). In subsection (b) the word "from" should be "form".

The new sections allow the Board to have procedural rules for administrative hearings for topics not addressed by the State Office of Administrative Hearings' (SOAH) procedural rules.

The new sections will function by having Board procedural rules in harmony with SOAH's procedural rules for contested case hearings.

No comments were received regarding adoption of the rule.

The new sections are adopted under Texas Civil Statutes, Article 41a-1, Section 6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law and section 2003.050 of the Government Code which requires the Chief Administrative Law Judge to adopt rules that govern hearings conducted by SOAH.

§519.1. Purpose and Scope.

This chapter will govern the processes followed by the board in rulemaking proceedings, contested cases under the Administrative Procedure Act, and informal conferences and dispositions of matters before the board. These rules also supplement, as appropriate, the Rules of Practice and Procedure of the State Office of Administrative Hearings.

§519.2. Computation of Time.

In computing any period of time prescribed or allowed by these sections, by order of the board, or by any applicable statute, the period shall begin on the day after the act or the event considered, and conclude on the last day of such computed period, unless it be a Saturday, Sunday, or legal state holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal state holiday.

§519.3. Rulemaking Proceedings.

(a) Service of a proposed section of the rules or amendment of any existing section of the rules shall be governed by Sections 2001.023 and 2001.024 of the Administrative Procedure Act.

(b) A request for a public hearing to receive comments on a proposed rulemaking must be received in the offices of the board no later than 5:00 p.m. of the tenth calendar day prior to the board meeting scheduled to consider the adoption of the proposed rule.

(c) A person wishing to testify at a public hearing to receive comments on a proposed rulemaking or revision must file a written copy of his or her testimony in the offices of the board by no later than 5:00 p.m. of the fifth calendar day prior to the public hearing unless the board announces a different filing date.

§519.4. Conduct and Decorum.

(a) Every party, witness, attorney, or other representative appearing before the board, board committees or board staff shall comport himself in all proceedings with proper dignity, courtesy, and respect for the board, the executive director, and all other parties. Disorderly conduct will not be tolerated. Attorneys and other representatives of parties shall observe and practice the standards of ethical behavior prescribed for attorneys at law by the State Bar of Texas.

(b) Any person engaging in disorderly conduct or communicating with board members in violation of the prohibitions on ex parte communication may be excluded from any board, committee or staff proceeding and treated as if defaulting on obligations to the board.

§519.5. Ex Parte Consultations.

Unless required for the disposition of ex parte matters as authorized by law, board members, committee members, or employees of the board assigned to render a decision or make findings of fact and conclusion of law in a contested case may not communicate, directly or indirectly, in connection with any issue of fact or law with any party or his representative, except on notice and with opportunity for all parties to participate.

§519.6. Informal Conferences and Informal Dispositions.

(a) An informal conference is defined as an informal meeting between a licensee and person(s) designated by the executive direc or a board committee with subject-matter responsibility, held for th purpose of reaching agreement on a proposed informal disposition of a disciplinary action. An informal conference shall be voluntary and shall not be a prerequisite to a hearing in a disciplinary action.

(b) Procedure.

(1) The executive director or committee may request the parties, their attorneys, or representatives to appear at a specified time and place for an informal conference.

(2) Notice of an informal conference shall state the nature of the charge or charges against the respondent and shall be served on the respondent no less than 10 days prior to the date of said conference either personally or by mailing a copy thereof by certified mail to the last known address of the respondent.

(3) Complainant shall be notified and given opportunity to appear at the informal conference.

(c) At any informal conference, the respondent may appear in person and by counsel and may produce evidence and witnesses on his own behalf.

(d) Informal disposition. In the event the respondent and the board agree to an informal disposition, an agreed consent order shall be prepared and presented to the board for final decision thereon. The agreed consent order shall contain agreed findings of fact and conclusions of law, and shall be signed by all parties thereto.

(e) Ratification by the board. An agreed consent order shall be submitted to the board for ratification and the board may:

(1) adopt the order, at which time it becomes final; or

(2) remand the order to the committee.

§519.7. Administrative Penalties.

(a) Board committees and the executive director are delegated the authority to determine that any alleged violation warrants an administrative penalty under Section 21D of the Public Accountancy Act.

(b) The report of any such determination may be included in a notice of hearing.

(c) A request for a hearing under Section 21D(d) of the Public Accountancy Act shall clearly notify the staff that the hearing must address issues relevant to the assessment of an administrative penalty by including the language "RESPONDENT SPECIFICALLY REQUESTS A HEARING ON ADMINISTRATIVE PENALTIES" in capital letters. Failure to include such language shall be a waiver of the right to a hearing within the meaning of Section 21(D)(d) of the Public Accountancy Act.

§519.8. Subpoenas.

(a) The executive director is delegated authority to issue subpoenas authorized by the Administrative Procedure Act in contested cases and the Public Accountancy Act.

(b) A party may obtain discovery of the identity and location (name, address, and telephone number) of an expert who may be called as an expert witness, the subject matter on which the expert is expected to testify, the mental impressions and opinions held by the expert and the facts known to the expert (regardless of when the factual information was acquired) which related to or form the basis of the mental impressions and opinions held by the exp Provided, however, that under no circumstances may the respon

resist discovery in any action by the board on the grounds that the respondent as a licensee may testify as an expert.

§519.9. Procedures after Hearing.

(a) Filing of exceptions and replies. Any party of record may, within 15 days of the date of service of the proposal for decision, unless the administrative law judge has set a shorter or longer period of time, file exceptions to the proposal for decision. Replies to these exceptions shall be filed within 15 days after the date of filing the exceptions unless the administrative law judge has set a shorter or longer period of time. A request for extension or decrease of time within which to file exceptions or replies shall be filed with the administrative law judge, and a copy of the request shall be served on all parties of record by the party making the request. The administrative law judge shall promptly notify the parties of the decision with regard to these requests. Additional time shall be allowed only when the interests of justice so require. Upon the expiration of the time for filing exceptions or replies to exceptions, or after time for filing exceptions or replies to exceptions, or after the replies and exceptions have actually been timely filed, the proposal for decision will be considered by the board and either adopted, modified and adopted, or remanded to the administrative law judge. If remanded to the administrative law judge, the revised proposal for decision thereafter rendered by the administrative law judge shall be clearly labeled as an amended proposal for decision. A copy of the proposal for decision shall be served forthwith by the administrative law judge on each party, or each party's attorney of record, and the board. Service shall be in accordance with the board's rules.

(b) Form of exceptions and replies. Exceptions and replies to exceptions shall conform as nearly as practicable to the rules provided for pleadings. The specific exceptions shall be concisely stated. The evidence relied upon shall be pointed out with particularity, and that evidence and any arguments and legal authority relied upon shall be grouped under the exceptions to which they relate. Any party filing exceptions and replies shall provide the board with an original and 17 copies.

(c) Oral argument before the board. Any party may request oral argument before the board before the final determination of any proceeding, but the request must be filed in the offices of the board by no later than 5:00 p.m. of the fifth working day prior to the board meeting. Oral argument shall be allowed only at the discretion of the board. A request for oral argument may be incorporated in the exception, reply to exceptions, or in a separate pleading. In the event oral argument is granted by the board, each party who has filed exceptions and replies may be limited to a maximum of 20 minutes for presentation thereof. The board shall require one spokesman per party and position.

(d) Motion for rehearing. In the event a motion for rehearing is filed, the executive director shall have authority to act for the board in either granting or denying such motion.

(e) Administrative cost recovery rule. The board may for good cause and in accordance with the Public Accountancy Act of 1991, after notice and hearing, impose direct administrative costs in addition to other sanctions provided by law or these rules. Direct administrative costs include, but are not limited to, attorneys' fees, investigative costs, witness fees and deposition expenses, travel expenses of witnesses, fees for professional services of expert witnesses, the cost of a study, analysis, audit, or other projects the board finds necessary in preparation of the state's case.

(f) Changes to recommendation. To protect the public interest and to ensure that sound accounting principles govern the decisions of the board, it is the policy of the board to change a finding of fact or conclusion of law or to vacate or modify the proposed order of an administrative law judge when the proposed order is clearly:

(1) erroneous;

(2) against the weight of the evidence;

(3) based on unsound accounting principles or auditing standards;

(4) based on an insufficient review of the evidence;

(5) not sufficient to protect the public interest; or

(6) not sufficient to adequately allow rehabilitation of the licensee.

§519.10. The Record and Assessment of Cost of Preparation.

(a) The record in any case shall include:

(1) all pleadings, motions, and intermediate rulings;

(2) evidence received or considered;

(3) the statement of matters officially noticed;

(4) questions and offers of proof, objections, and rulings on them;

(5) any decision, opinion, objections, and rulings on them; and

(6) all staff memoranda and correspondence from parties or data submitted to or considered by the administrative law judge or the board in making decisions.

(b) The board may require a party who appeals a final decision of the board to pay all or part of the actual cost of preparation of the original or a certified copy of record that is required to be transmitted to a reviewing court.

§519.11. Follow-Up.

The board may utilize investigators, board staff, committee members, or enforcement advisory committee members to insure that all persons adhere to the terms and conditions of board orders in disciplinary matters.

§519.12. Publication of Disciplinary/Administrative Sanctions.

The board may cause to be published in the board's official publication, the Texas State Board Report, and may publish in newspapers of general distribution in the state, the name of any certificate or registration holder who is the subject of a reprimand, suspension of certificate or registration, revocation of certificate or registration, or surrender of certificate or registration in lieu of disciplinary action, or any other disciplinary action. Such publication shall not occur until a final board order has been issued. The publication may contain a narrative factual summary of the actions giving rise to the disciplinary/administrative action.

§519.13. Mediation and Alternative Dispute Resolution.

The board's executive director or his delegate shall represent the board in any mediation or other alternative dispute resolution process ordered by the State Office of Administrative Hearings or by any tribunal with jurisdiction over the board.

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 November 20, 1998.

TRD-9817799

William Treacy
Executive Director
Texas State Board of Public Accountancy
Effective date: December 10, 1998
Proposal publication date: October 2, 1998
For further information, please call: (512) 305-7848

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Chapter 523. Continuing Professional Education

Subchapter A. Continuing Professional Education (CPE) Programs

22 TAC §523.1

The Texas State Board of Public Accountancy adopts an amendment to §523.1 concerning Formal Continuing Professional Education Purpose and Definition with changes to the proposed text as published in the October 2, 1998, issue of the *Texas Register*, (23 TexReg 9900). The changes are deletion of "of the Instructor" towards the end of the first sentence in subsection (c).

The amendment allows CPAs to take continuing professional education courses through an interactive format.

The amendment will function by allowing CPAs to take continuing professional education courses through an interactive format.

No comments were received regarding adoption of the rule.

The amendment is adopted under Texas Civil Statutes, Article 41a-1, Section 6, which provide the Texas State Board of Public Accountancy with the authority to make such rules as may be necessary or advisable to carry in effect the purposes of the law.

§523.1. Formal Continuing Professional Education Purpose and Definition.

(a) To help insure that practitioners receive quality continuing education, appropriate standards are needed. With appropriate standards, programs are less likely to vary in quality of development, presentation, and measurement in reporting of credits. Moreover, the large number of programs available throughout the United States, the varying backgrounds of credentials of sponsoring organizations, and the mobility of participants in these programs, create measuring and reporting problems that suggest the need for nationally uniform standards. If a group program complies with the standards in this statement, it becomes a formal group program.

(b) A self-study program is an educational process designed to permit a participant to learn a given subject without major interaction with an instructor. For a self-study program to be formal:

(1) the sponsor must provide a certificate based upon evidence of satisfactory completion, such as a completed workbook or examination; and

(2) it must comply with the standards in this statement.

(c) "Computer-based interactive format" shall mean a program designed to simulate a classroom learning process by employing structured software or technology-based systems that provide significant ongoing interactive feedback between the participant and the software regarding the learning process. These programs clearly define lesson objectives and manage the participant through the learning process by:

(1) requiring frequent response to questions that test for understanding of the material presented;

(2) providing evaluative feedback to incorrectly answered questions; and

(3) providing reinforcement feedback to correctly answered questions.

(d) Sponsors are the organizations responsible for presenting programs and are not necessarily program developers; however, it is the sponsor's responsibility to see that their programs comply with all the standards in this statement.

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 November 20, 1998.

TRD-9817804
William Treacy
Executive Director
Texas State Board of Public Accountancy
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Proposal publication date: October 2, 1998
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♦ ♦ ♦

Subchapter B. Continuing Professional Education Standards

22 TAC §523.32

The Texas State Board of Public Accountancy adopts an amendment to §523.32 concerning Ethics Course with changes to the proposed text as published in the October 2, 1998, issue of the *Texas Register*, (23 TexReg 9901). The Board determines that the changes are not substantive because the changes are a rewriting of subsection (a) of the proposed rule for easier understanding and clarification with minor corrections.

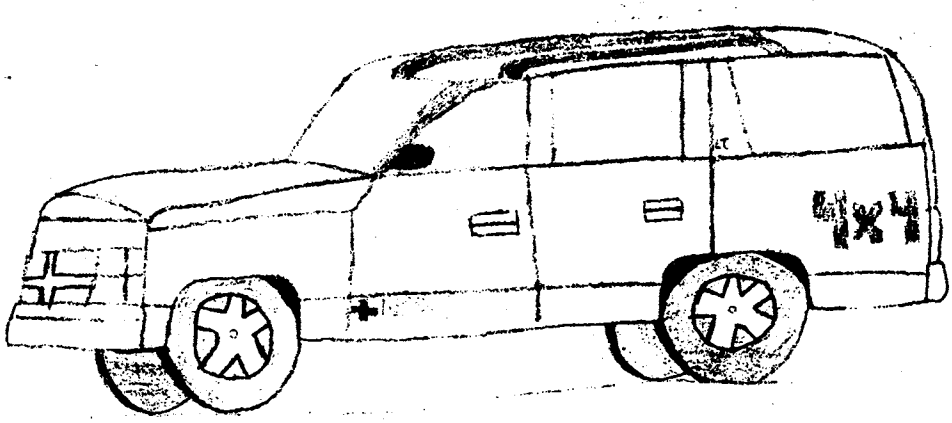
None of the changes were the result of any comments received from the public, applicants, licensees, potential applicants or anyone else. All of the changes occurred after much discussion between staff departments. Staff was concerned about implementation of the proposed rule, about the ability to and method by which the board's computer would be able to accurately track applicants or licensees, and about Enforcement's ability to track and sort between individuals in compliance and not in compliance.

Subsection (a) was rewritten for clarification and to correspond an individual's requirement to report completion of the subsequent two-hour ethics course to the individual's licensing year rather than the date the individual completed the initial four-hour course.

Subsection (a)(1) was rewritten for clarification and to correct an incorrect date (1998 changed to 1999).

Subsection (a)(2) was rewritten for clarification.

The amendment allows the Board to require applicants for licensure to complete a four-hour ethics course as a condition for licensure and clarifies that the examination on the Board's rules is a written examination. The rule also states that a licensee who is granted exempt status does not have to



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