TEXAS REGISTER

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Caroline Kirsch
11th Grade

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

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

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FAX (512) 463-5569

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register@sos.texas.gov

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

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

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

Opinions

Opinion No. KP-0057

The Honorable Myra Crownover

Chair, Committee on Public Health

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78711-2910

Re: The legality of fantasy sports leagues under Texas law (RQ-0071-KP)

S U M M A R Y

Under section 47.02 of the Penal Code, a person commits an offense if he or she makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest. Because the outcome of games in daily fantasy sports leagues depends partially on chance, an individual's payment of a fee to participate in such activities is a bet. Accordingly, a court would likely determine that participation in daily fantasy sports leagues is illegal gambling under section 47.02 of the Penal Code.

Though participating in a traditional fantasy sports league is also illegal gambling under section 47.02, participants in such leagues may avail themselves of a statutory defense to prosecution under section 47.02(b) of the Penal Code when play is in a private place, no person receives any economic benefit other than personal winnings, and the risks of winning or losing are the same for all participants.

For further information, please access the website at www.texasattorneygeneral.gov or call the Opinion Committee at (512) 463-2110.

TRD-201600213
Amanda Crawford
General Counsel
Office of the Attorney General
Filed: January 19, 2016

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Opinions

Opinion No. KP-0055

Dr. Vincent J.M. Di Maio

Presiding Officer

Texas Forensic Science Commission

1700 North Congress Avenue, Suite 445

Austin, Texas 78701

Re: Responsibilities of the Texas Forensic Science Commission under article 39.14 of the Code of Criminal Procedure (RQ-0032-KP)

S U M M A R Y

A court would likely conclude that article 39.14(h) of the Code of Criminal Procedure does not create a duty for the Texas Forensic Science Commission to notify relevant parties of exculpatory, impeachment, or mitigating information.

Given the conclusion that the Commission likely has no notification duties under article 39.14(h), the prosecutor member of the Commission would have a duty to comply with article 39.14 only in his or her capacity as a prosecutor for the state in a particular case.

Opinion No. KP-0056

The Honorable Chris Taylor

Tom Green County Attorney

Criminal Justice Center

122 West Harris

San Angelo, Texas 76903

Re: Whether state law authorizes a municipality to reimburse an appellant for costs incurred in a successful appeal to a zoning board (RQ-0037-KP)

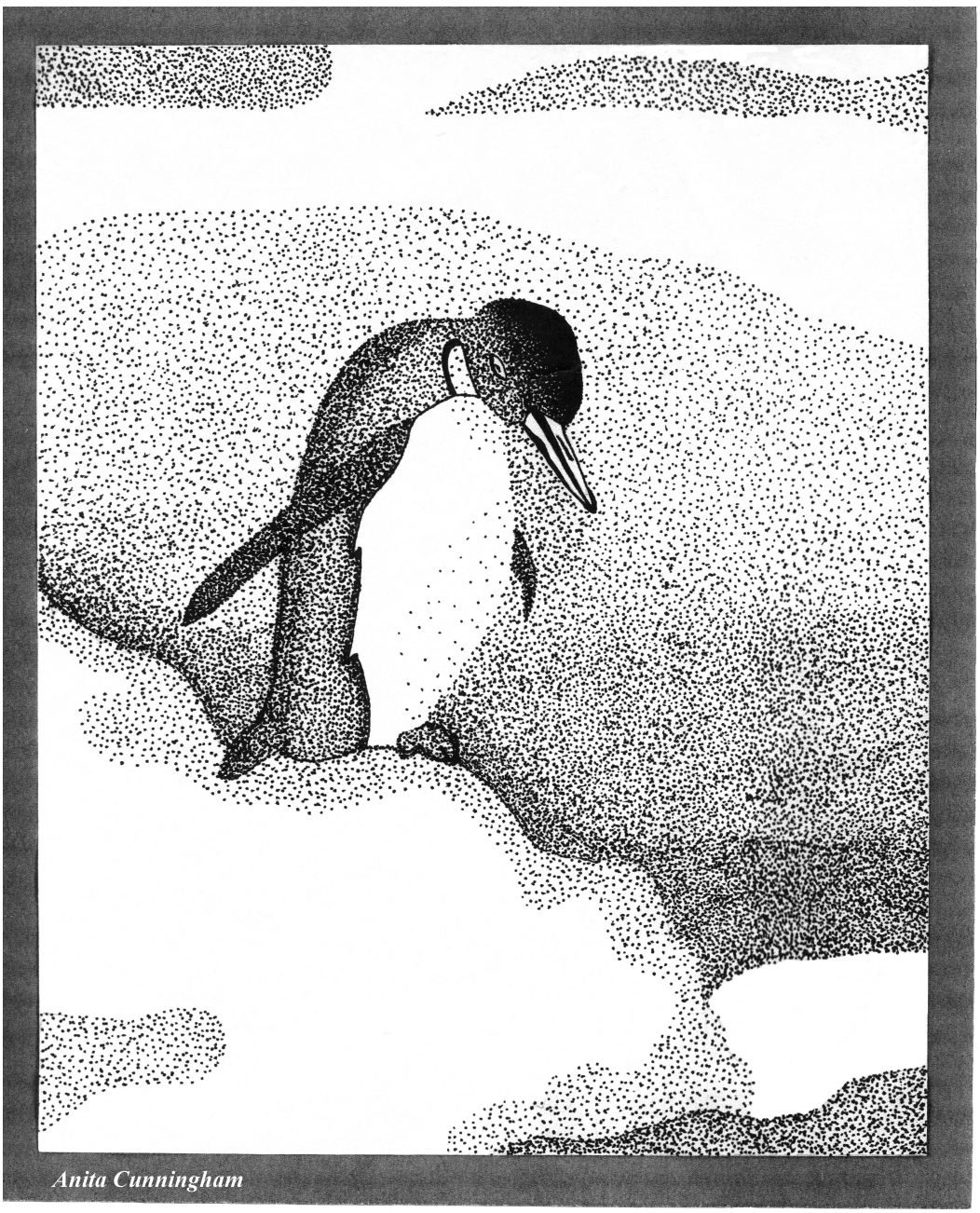
S U M M A R Y

Article III, section 52(a) of the Texas Constitution would likely prohibit a municipality from paying a private party's costs incurred in a successful appeal to a zoning board to the extent that such payment constitutes a gratuitous payment of public funds.

For further information, please access the website at www.texasattorneygeneral.gov or call the Opinion Committee at (512) 463-2110.

TRD-201600218
Amanda Crawford
General Counsel
Office of the Attorney General
Filed: January 20, 2016

♦ ♦ ♦



Anita Cunningham

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

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

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY

The Texas Health and Human Services Commission (HHSC) proposes amendments to Chapter 371 to implement recent legislation and to update and correct existing rules.

HHSC proposes to amend §§371.11, 371.17, 371.23, 371.25, 371.27, 371.29, and 371.31, concerning Office of Inspector General; §§371.200, 371.201, 371.203, 371.204, 371.206, 371.208, 371.210, 371.212, 371.214, and 371.216, concerning Utilization Review; §§371.1001, 371.1005, 371.1007, 371.1009, 371.1011, 371.1013, and 371.1015, concerning Provider Disclosure and Screening; §§371.1301, 371.1305, 371.1307, and 371.1309, concerning Investigations; §§371.1601, 371.1603, 371.1609, 371.1611, 371.1613, 371.1615, 371.1617, 371.1619, 371.1651, 371.1653, 371.1655, 371.1657, 371.1659, 371.1663, 371.1665, 371.1667, 371.1669, 371.1701, 371.1703, 371.1705, 371.1707, 371.1709, 371.1711, 371.1715, 371.1717, and 371.1719, concerning Administrative Actions and Sanctions; to repeal Subchapter A, concerning Introduction, and §371.1, concerning Purpose and Scope; §371.13, concerning Statutory Authority; §371.19, concerning Investigations; §371.1002, concerning Minimum Collection Goal; §371.1003, concerning Definitions; §371.1303, concerning Definitions; §371.1607, concerning Definitions; and §371.1713, concerning Restricted Reimbursement; and proposes new §371.1, concerning Definitions; §371.3, concerning Purpose and Authority; and §371.1311, concerning Role of the OIG and Special Investigative Units.

BACKGROUND AND JUSTIFICATION

The existing rules in Chapter 371 include various provisions to ensure the integrity of Medicaid and other HHS programs by discovering, preventing, and correcting fraud, waste, or abuse.

The rules in Chapter 371 are new, amended, or repealed to implement various provisions of Senate Bill 207 (S.B. 207), 84th Legislature, Regular Session, 2015; and to clarify, update, or eliminate obsolete provisions.

S.B. 207 amended various provisions in Texas Government Code Chapter 531 related to the Office of Inspector General's (OIG's) authority and duties. Among other things, the bill amended timelines in the OIG's investigation of fraud, waste, and abuse; clarified the use of payment holds; required the adoption of rules for opening and prioritizing cases; and required criminal history record information checks on health care professionals who wish to enroll as Medicaid providers.

The proposed amendments consequently revise the current process for investigations and provider background checks as mandated by S.B. 207. The amendments also include components and clarifications related to management practices and processes of the OIG, provider disclosure and screening, administrative actions and sanctions, and grounds for enforcement by the OIG.

The new rules as proposed consolidate all definitions into a single rule; move and revise the rule regarding the purpose of the chapter; and address the role of the OIG related to managed care organizations' Special Investigation Units.

In addition, portions of proposed new §371.1 and proposed amended §371.1009 are intended to alleviate an administrative burden currently experienced by providers. Providers enrolled in Texas Medicaid and Medicare historically have been able to submit new location information to the Texas Medicaid and Healthcare Partnership (the Texas Medicaid claims administrator) using Provider Information Change (PIC) forms alone. Business addresses submitted using a PIC form are currently not in compliance with Texas Medicaid rules, which require a completed application for each practice location. Proposed language in §371.1 and §371.1009 clarifies the requirements for a provider that wishes to add a location to its practice that will serve Texas Medicaid recipients.

HHSC intends that any obligations or requirements that accrued under Chapter 371 before the effective date of these rules will be governed by the prior rules in Chapter 371, and that those rules continue in effect for this purpose. HHSC does not intend for the amendments to the rules in Chapter 371 to affect the prior operation of the rules; any prior actions taken under the rules; any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred under the rules; any violation of the rules or any penalty, forfeiture, or punishment incurred under the rules before their amendment; or any investigation, proceeding, or remedy concerning any privilege, obligation, liability, penalty, forfeiture, or punishment. HHSC additionally intends that any investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the rules had not been amended.

HHSC intends that should any sentence, paragraph, subdivision, clause, phrase, or section of the amended or new rules in Chapter 371 be determined, adjudged, or held to be unconstitutional, illegal, or invalid, the same shall not affect the validity of the subchapter as a whole, or any part or provision hereof other than the part so declared to be unconstitutional, illegal, or invalid, and shall not affect the validity of the subchapter as a whole.

SECTION-BY-SECTION SUMMARY

Subchapter A is proposed for repeal because its only section, current §371.1, is repealed.

Proposed §371.1, which will be placed in Subchapter B, consolidates all definitions currently found in the chapter, adds definitions for multiple acronyms used throughout the chapter, and amends the definitions of "complete application" and "enrollment application" regarding the addition of a practice location.

Proposed §371.3 and §371.11 address the purpose and scope of the rules for this chapter.

Proposed §371.3 describes the responsibility and authority of the OIG.

Proposed §371.11 describes the OIG's duties. To clarify the rule's subject matter, the rule's heading is amended by deleting the words "Purpose and." Section 371.11 also is amended to delete unnecessary language.

Proposed §371.13 is being repealed because the content is included in §371.3.

Proposed §371.19 is being repealed because the language is obsolete or redundant.

Proposed §371.23 updates cross references to other rules.

Proposed §371.27 updates a cross reference to another rule.

Proposed §371.203 adds the requirement of provider training and education of the Diagnosis Related Group (DRG) validation criteria and the requirement that federal coding guidelines be used in the DRG assignment, consistent with Texas Government Code §531.1023 and §531.1024.

Proposed §371.1002 is being repealed to remove information that is no longer relevant.

Proposed §371.1003 is being repealed because all definitions are now consolidated in proposed new §371.1.

Proposed §371.1009 updates language referenced in Texas Government Code §531.1032, and provides that the OIG may rely on validated screenings performed by other entities, as provided in 42 C.F.R. §455.410.

Proposed §371.1011 updates language to be consistent with Texas Government Code §531.1032, which requires the Executive Commissioner to adopt guidelines for evaluating criminal history record information.

Proposed §371.1015 removes the recommendation to abate an enrollment because HHSC no longer abates enrollment decisions. An applicant is either enrolled or denied.

Proposed §371.1301 removes unnecessary language not in alignment with the subchapter's subject matter.

Proposed §371.1303 is being repealed because all definitions are now consolidated in proposed new §371.1.

Proposed §371.1305 implements Texas Government Code §531.102(p), which requires the Executive Commissioner, in consultation with the OIG, to adopt rules establishing criteria for prioritizing cases and delineating relevant factors for the preliminary investigative process.

Proposed §371.1307 updates time frames for the completion of investigatory processes to be consistent with Texas Government Code §531.102(f-1).

Proposed §371.1311 outlines the role of the OIG and managed care organization's special investigative units for coordination of investigations of fraud, waste, or abuse in accordance with Texas Government Code §531.113(e).

Proposed §371.1607 is being repealed because all definitions are now consolidated in proposed new §371.1.

Proposed §371.1617 addresses the procedural effect of failing to timely request an appeal of an imposition of a sanction, consistent with Texas Government Code §531.1201. The section also eliminates the term "contested case" because it is redundant.

Proposed §371.1663 adds new paragraphs (22) - (24) to be consistent with Texas Government Code §§531.1131, 531.1132, and 531.117. Section 371.1663 is further amended to eliminate redundant language.

Proposed §371.1703 reflects that the OIG can cancel a provider contract under certain circumstances.

Proposed §371.1705 addresses the provider exclusion process and clarifies that a provider who has been excluded from the federal system will be excluded in Texas as required by federal law. The state action will be a reciprocal action, and another hearing on this type of exclusion will not be had once the appellate process has been concluded on the federal level. This does not affect the due process rights granted when the state OIG initiates the exclusion process. Section 371.1705 updates the description of the information that will be in a notice and updates a regulatory reference. Erroneous references to Title VIII of the Social Security Act are also amended to reference Title XVIII.

Proposed §371.1707 addresses the contents of a final notice of exclusion and the effective date that exclusion begins. Erroneous references to Title VIII of the Social Security Act are also amended to reference Title XVIII.

Proposed §371.1713 is being repealed because it contains a process the OIG does not use.

Proposed §371.1715 deletes unnecessary language and outlines factors considered when damages or penalties are imposed, as reflected in Texas Government Code §531.102(q).

Proposed §371.1717 adds clarifying language that more accurately reflects the reinstatement process after a provider has been excluded.

In addition to the revisions specifically described, the proposed rules make several general changes. Throughout the rules, the term "waste" is inserted with references to fraud and abuse to more accurately reflect the OIG's mission. Terms throughout the rules are changed to be consistent with the definitional section. In addition, the term "OIG" is generally substituted for the term "Inspector General" to more accurately reflect the division of authority. Finally, nonsubstantive language changes are proposed throughout the chapter for language consistency, capitalization corrections, and punctuation corrections.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that for each year of the first five years the proposed rules are in effect, there will be no impact to costs and revenues to state or local government.

Small Business and Micro-business Impact Analysis

HHSC has determined that there will be no adverse economic effect on small businesses or micro businesses to comply with the proposed rules, as they will not be required to alter their business practices as a result of the proposed rules.

Public Benefit

Charles Smith, Chief Deputy Executive Commissioner, has determined that for each year of the first five years the proposed rules are in effect, the expected public benefit is that the rules will ensure the integrity of Medicaid and other HHS programs by discovering, preventing, and correcting fraud, waste, and abuse.

Ms. Rymal has also determined that there are no probable economic costs to persons who are required to comply with the proposed rules. The proposal will not affect a local economy.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Lisa Barragan, Texas Health and Human Services Commission-OIG, Broadmoor 902 (MC 1350), 11501 Burnet Road, Austin, Texas 78758; by fax to (512) 833-6484; or by e-mail to Lisa.Barragan@hhsc.state.tx.us within 30 days of publication in the *Texas Register.*

SUBCHAPTER A. INTRODUCTION

1 TAC §371.1

Legal Authority

The repeal is proposed under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The repeal implements Texas Government Code Chapter 531, as amended by S.B. 207. No other statutes, articles, or codes are affected by the proposal.

§371.1. Purpose and Scope.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 15, 2016.

TRD-201600177
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: February 28, 2016
For further information, please call: (512) 424-6900

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SUBCHAPTER B. OFFICE OF INSPECTOR GENERAL

1 TAC §§371.1, 371.3, 371.11, 371.17, 371.23, 371.25, 371.27, 371.29, 371.31

Legal Authority

The amendments and new rules are proposed under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The amendments and new rules implement Texas Government Code Chapter 531, as amended by S.B. 207. No other statutes, articles, or codes are affected by the proposal.

§371.1. Definitions.

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

(1) Abuse--A practice by a provider that is inconsistent with sound fiscal, business, or medical practices and that results in an unnecessary cost to the Medicaid program; the reimbursement for services that are not medically necessary or that fail to meet professionally recognized standards for health care; or a practice by a recipient that results in an unnecessary cost to the Medicaid program.

(2) Address of record--

(A) an HHS provider's current mailing or physical address, including a working fax number, as provided to the appropriate HHS program's claims administrator or as required by contract, statute, or regulation; or

(B) a non-HHS provider's last known address as reflected by the records of the United States Postal Service or the Texas Secretary of State's records for business organizations, if applicable.

(3) Affiliate; affiliate relationship--A person who:

(A) has a direct or indirect ownership interest (or any combination thereof) of five percent or more in the person;

(B) is the owner of a whole or part interest in any mortgage, deed of trust, note or other obligation secured (in whole or in part) by the entity whose interest is equal to or exceeds five percent of the value of the property or assets of the person;

(C) is an officer or director of the person, if the person is a corporation;

(D) is a partner of the person, if the person is organized as a partnership;

(E) is an agent or consultant of the person;

(F) is a consultant of the person and can control or be controlled by the person or a third party can control both the person and the consultant;

(G) is a managing employee of the person, that is, a person (including a general manager, business manager, administrator or director) who exercises operational or managerial control over a person or part thereof, or directly or indirectly conducts the day-to-day operations of the person or part thereof;

(H) has financial, managerial, or administrative influence over the operational decisions of a person;

(I) shares any identifying information with another person, including tax identification numbers, social security numbers, bank accounts, telephone numbers, business addresses, national provider numbers, Texas provider numbers, and corporate or franchise names; or

(J) has a former relationship with another person as described in subparagraphs (A) - (I) of this definition, but is no longer described, because of a transfer of ownership or control interest to an immediate family member or a member of the person's household of this section within the previous five years if the transfer occurred after the affiliate received notice of an audit, review, investigation, or potential adverse action, sanction, board order, or other civil, criminal, or administrative liability.

(4) Agent--Any person, company, firm, corporation, employee, independent contractor, or other entity or association legally acting for or in the place of another person or entity.

(5) Allegation of fraud--Allegation of Medicaid fraud received by HHSC from any source that has not been verified by the state, including an allegation based on:

(A) a fraud hotline complaint;

(B) claims data mining;

(C) data analysis processes; or

(D) a pattern identified through provider audits, civil false claims cases, or law enforcement investigations.

(6) Applicant--An individual or an entity that has filed an enrollment application to become a provider, re-enroll as a provider, or enroll a new practice location in a Medicaid program or the Children's Health Insurance Program as described in definition (23) of this section.

(7) At the time of the request--Immediately upon request and without delay.

(8) Audit--A financial audit, attestation engagement, performance audit, compliance audit, economy and efficiency audit, effectiveness audit, special audit, agreed-upon procedure, nonaudit service, or review conducted by or on behalf of the state or federal government. An audit may or may not include site visits to the provider's place of business.

(9) Auditor--The qualified person, persons, or entity performing the audit on behalf of the state or federal government.

(10) Business day--A day that is not a Saturday, Sunday, or state legal holiday. In computing a period of business days, the first day is excluded and the last day is included. If the last day of any period is a Saturday, Sunday, or state legal holiday, the period is extended to include the next day that is not a Saturday, Sunday, or state legal holiday.

(11) C.F.R.--The Code of Federal Regulations.

(12) CHIP--The Texas Children's Health Insurance Program or its successor, established under Title XXI of the federal Social Security Act (42 U.S.C. §§1397aa et seq.) and Chapter 62 of the Texas Health and Safety Code.

(13) Claim--

(A) A written or electronic application, request, or demand for payment by the Medicaid or other HHS program for health care services or items; or

(B) A submitted request, demand, or representation that states the income earned or expense incurred by a provider in providing a product or a service and that is used to determine a rate of payment under the Medicaid or other HHS program.

(14) Claims administrator--The entity an operating agency has designated to process and pay Medicaid or HHS program provider claims.

(15) Closed-end contract--A contract or provider agreement for a specific period of time. It may include any specific requirements or provisions deemed necessary by the OIG to ensure the protection of the program. It must be renewed for the provider to continue to participate in the Medicaid or other HHS program.

(16) CMS--The Centers for Medicare & Medicaid Services or its successor. CMS is the federal agency responsible for administering Medicare and overseeing state administration of Medicaid and CHIP.

(17) Complete Application--A provider enrollment application that contains all the required information, including:

(A) all questions answered completely, including correct dates of birth, social security numbers, license numbers, and all requirements per provider type defined in the Texas Medicaid Provider Procedures Manual;

(B) IRS Form W-9, if required;

(C) signed and certified provider agreements;

(D) Provider Information Form (PIF-1);

(E) Principal Information Forms (PIF-2) on all persons required to be disclosed, if required;

(F) full disclosure of all criminal history, including copies of complete dispositions on all criminal history;

(G) full disclosure of all board or licensing orders, including documentation of compliance with current board orders;

(H) full disclosure of all corporate compliance agreements, settlement agreements, state or federal debt, and sanctions;

(I) documentation of an active license that is not subject to expiration within 30 days of submission of the enrollment application, if required;

(J) completion of a pre-enrollment site visit by HHSC, if required, and all required current documentation (e.g., liability insurance);

(K) documentation of fingerprints of a provider or any person with a five percent or more direct or indirect ownership in the provider, if required; and

(L) any additional documentation related to the addition of a practice location, if required or requested by HHSC.

(18) Conviction or convicted--Means that:

(A) a judgment of conviction has been entered against an individual or entity by a federal, state, or local court, regardless of whether:

(i) there is a post-trial motion or an appeal pending; or

(ii) the judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed;

(B) a federal, state, or local court has made a finding of guilt against an individual or entity;

(C) a federal, state, or local court has accepted a plea of guilty or nolo contendere by an individual or entity; or

(D) an individual or entity has entered into participation in a first offender, deferred adjudication, pre-trial diversion, or other program or arrangement where judgment of conviction has been withheld.

(19) Credible allegation of fraud--An allegation of fraud that has been verified by the state. An allegation is considered to be credible when HHSC has carefully reviewed all allegations, facts, and evidence and has verified that the allegation has indicia of reliability. HHSC acts judiciously on a case-by-case basis.

(20) DADS--The Texas Department of Aging and Disability Services, or its successor or designee; the state agency responsible for administering long-term services and support for people who are aging and people with intellectual and physical disabilities.

(21) Day--A calendar day.

(22) Delivery of a health care item or service--Providing any item or service to an individual to meet his or her physical, mental or emotional needs or well-being, whether or not reimbursed under Medicare, Medicaid, or any federal health care program.

(23) Enrollment application--Documentation required by HHSC that an applicant submits to HHSC to enroll or re-enroll as a provider or to add a practice location. An enrollment application includes any supplemental forms used to add practice locations for Medicare-enrolled or limited-risk providers, as determined by HHSC.

(24) Exclusion--The suspension of a provider or any person from being authorized under the Medicaid program to request reimbursement of items or services furnished by that specific provider.

(25) Executive Commissioner--The HHSC Executive Commissioner.

(26) False statement or misrepresentation--Any statement or representation that is inaccurate, incomplete, or untrue.

(27) Federal health care program--Any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States government (other than the federal employee health insurance program under Chapter 89 of Title 5, U.S.C.).

(28) Fraud--Any intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to that person or some other person. The term does not include unintentional technical, clerical, or administrative errors.

(29) Full investigation--Review and development of evidence to support an allegation or complaint to resolution through dismissal, settlement, or formal hearing.

(30) Furnished--Items or services provided or supplied, directly or indirectly, by any person. This includes items and services manufactured, distributed, or otherwise provided by persons that do not directly submit claims to Medicare, Medicaid, or any federal health care program, but that supply items or services to providers, practitioners, or suppliers who submit claims to these programs for such items or services. This term does not include persons that submit claims directly to these programs for items and services ordered or prescribed by another person.

(A) Directly--The provision of items and services by individuals or entities (including items and services provided by them, but manufactured, ordered, or prescribed by another individual or entity) who submit claims to Medicare, Medicaid, or any federal health care program.

(B) Indirectly--The provision of items and services manufactured, distributed, or otherwise supplied by individuals or entities who do not directly submit claims to Medicare, Medicaid, or other federal health care programs, but that provide items and services to providers, practitioners, or suppliers who submit claims to these programs for such items and services.

(31) Health information--Any information, whether oral or recorded in any form or medium, that is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health care clearinghouse, and that relates to:

(A) the past, present, or future physical or mental health or condition of an individual;

(B) the provision of health care to an individual; or

(C) the past, present, or future payment for the provision of health care to an individual.

(32) HHS--Health and human services. Means:

(A) a health and human services agency under the umbrella of HHSC, including HHSC;

(B) a program or service provided under the authority of HHSC, including Medicaid and CHIP; or

(C) a health and human services agency, including those agencies delineated in Texas Government Code §531.001.

(33) HHSC--The Texas Health and Human Services Commission or its successor or designee.

(34) HIPAA--Collectively, the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§1320d et seq., and regulations adopted under that act, as modified by the Health Information Technology for Economic and Clinical Health Act (HITECH) (P.L. 111-105), and regulations adopted under that act at 45 C.F.R. Parts 160 and 164.

(35) Immediate family member--An individual's spouse (husband or wife); natural or adoptive parent; child or sibling; stepparent, stepchild, stepbrother, or stepsister; father-, mother-, daughter-, son-, brother-, or sister-in-law; grandparent or grandchild; or spouse of a grandparent or grandchild.

(36) Indirect ownership interest--Any ownership interest in an entity that has an ownership interest in another entity. The term includes an ownership interest in any entity that has an indirect ownership interest in the entity at issue.

(37) Inducement--An attempt to entice or lure an action on the part of another in exchange for, without limitation, cash in any amount, entertainment, any item of value, a promise, specific performance, or other consideration.

(38) Inspector General--The individual appointed to be the director of the OIG by the Texas Governor in accordance with Texas Government Code §531.102(a-1).

(39) "Item" or "service" means--

(A) Any item, device, medical supply or service provided to a patient:

(i) that is listed in an itemized claim for program payment or a request for payment; or

(ii) for which payment is included in other federal or state health care reimbursement methods, such as a prospective payment system; and

(B) In the case of a claim based on costs, any entry or omission in a cost report, books of account, or other documents supporting the claim.

(40) Jurisdiction--An issue or matter that the OIG has authority to investigate and act upon.

(41) Knew or should have known--A person, with respect to information, knew or should have known when the person had or should have had actual knowledge of information, acted in deliberate ignorance of the truth or falsity of the information, or acted in reckless disregard of the truth or falsity of the information. Proof of a person's specific intent to commit a program violation is not required in an administrative proceeding to show that a person acted knowingly.

(42) Managed care plan--A plan under which a person undertakes to provide, arrange for, pay for, or reimburse, in whole or in part, the cost of any health care service. A part of the plan must consist of arranging for or providing health care services as distinguished from indemnification against the cost of those services on a prepaid basis through insurance or otherwise. The term does not include an insurance plan that indemnifies an individual for the cost of health care services.

(43) Managing employee--An individual, regardless of the person's title, including a general manager, business manager, administrator, officer, or director, who exercises operational or managerial control over the employing entity, or who directly or indirectly conducts the day-to-day operations of the entity.

(44) MCO--Managed care organization. Has the meaning described in §353.2 of this title (relating to Definitions) and for purposes of this chapter includes an MCO's special investigative unit under Texas Government Code §531.113(a)(1), and any entity with which the MCO contracts for investigative services under Texas Government Code §531.113(a)(2).

(45) MCO provider--An association, group, or individual health care provider furnishing services to MCO members under contract with an MCO.

(46) Medicaid or Medicaid program--The Texas medical assistance program established under Texas Human Resources Code Chapter 32 and regulated in part under Title 42 C.F.R. Part 400 or its successor.

(47) Medicaid-related funds--Any funds that:

(A) a provider obtains or has access to by virtue of participation in Medicaid; or

(B) a person obtains through embezzlement, misuse, misapplication, improper withholding, conversion, or misappropriation of funds that had been obtained by virtue of participation in Medicaid.

(48) Medical assistance--Includes all of the health care and related services and benefits authorized or provided under state or federal law for eligible individuals of this state.

(49) Member of household--An individual who is sharing a common abode as part of a single-family unit, including domestic employees, partners, and others who live together as a family unit.

(50) OAG--Office of the Attorney General of Texas or its successor.

(51) OIG--HHSC Office of the Inspector General, or its successor or designee.

(52) OIG's method of finance--The sources and amounts authorized for financing certain expenditures or appropriations made in the General Appropriations Act.

(53) Operating agency--A state agency that operates any part of the Medicaid or other HHS program.

(54) Overpayment--The amount paid by Medicaid or other HHS program or the amount collected or received by a person by virtue of the provider's participation in Medicaid or other HHS program that exceeds the amount to which the provider or person is entitled under §1902 of the Social Security Act or other state or federal statutes for a service or item furnished within the Medicaid or other HHS programs. This includes:

(A) any funds collected or received in excess of the amount to which the provider is entitled, whether obtained through error, misunderstanding, abuse, misapplication, misuse, embezzlement, improper retention, or fraud;

(B) recipient trust funds and funds collected by a person from recipients if collection was not allowed by Medicaid or other HHS program policy; or

(C) questioned costs identified in a final audit report that found that claims or cost reports submitted in error resulted in money paid in excess of what the provider is entitled to under an HHS program, contract, or grant.

(55) Ownership interest--A direct or indirect ownership interest (or any combination thereof) of five percent or more in the equity in the capital, stock, profits, or other assets of a person or any mortgage, deed, trust, note, or other obligation secured in whole or in part by the person's property or assets.

(56) Payment hold (suspension of payments)--An administrative sanction that withholds all or any portion of payments due a provider until the matter in dispute, including all investigation and legal proceedings, between the provider and HHSC or an operating agency are resolved. This is a temporary denial of reimbursement under Medicaid for items or services furnished by a specified provider.

(57) Person--Any legally cognizable entity, including an individual, firm, association, partnership, limited partnership, corporation, agency, institution, MCO, Special Investigative Unit, CHIP participant, trust, non-profit organization, special-purpose corporation, limited liability company, professional entity, professional association,

professional corporation, accountable care organization, or other organization or legal entity.

(58) Person with a disability--An individual with a mental, physical, or developmental disability that substantially impairs the individual's ability to provide adequately for the person's care or his or her own protection, and:

(A) who is 18 years of age or older; or

(B) who is under 18 years of age and who has had the disabilities of minority removed.

(59) Physician--An individual licensed to practice medicine in this state, a professional association composed solely of physicians, a partnership composed solely of physicians, a single legal entity authorized to practice medicine owned by two or more physicians, or a nonprofit health corporation certified by the Texas Medical Board under Chapter 162, Texas Occupations Code.

(60) Practitioner--An individual licensed or certified under state law to practice the individual's profession.

(61) Preliminary investigation--A review by the OIG undertaken to verify the merits of a complaint/allegation of fraud, waste, or abuse from any source. The preliminary investigation determines whether there is sufficient basis to warrant a full investigation.

(62) Prima facie--Sufficient to establish a fact or raise a presumption unless disproved.

(63) Probationary contract--A contract or provider agreement for any period of time that must be renewed by the OIG for the provider to continue to participate in the program. It may include any special requirements or provisions deemed necessary by the OIG to ensure the protection of the program. It may also be referred to as a provisional contract, depending upon the terminology used by the provider's agency and program area.

(64) Professionally recognized standards of health care--Statewide or national standards of care, whether in writing or not, that professional peers of the individual or entity whose provision of care is an issue, recognize as applying to those peers practicing or providing care within the state of Texas.

(65) Program violation--A failure to comply with a Medicaid or other HHS provider contract or agreement, the Texas Medicaid Provider Procedures Manual or other official program publications, or any state or federal statute, rule, or regulation applicable to the Medicaid or other HHS program, including any action that constitutes grounds for enforcement as delineated in this chapter.

(66) Provider--Any person, including an MCO and its subcontractors, that:

(A) is furnishing Medicaid or other HHS services under a provider agreement or contract with a Medicaid or other HHS operating agency;

(B) has a provider or contract number issued by HHSC or by any HHS agency or program or its designee to provide medical assistance, Medicaid, or any other HHS service in any HHS program, including CHIP, under contract or provider agreement with HHSC or an HHS agency; or

(C) provides third-party billing services under a contract or provider agreement with HHSC.

(67) Provider agreement--A contract, including any and all amendments and updates, with Medicaid or other HHS program to subcontract services, or with an MCO to provide services.

(68) Provider screening process--The process in which a person participates to become eligible to participate and enroll as a provider in Medicaid or other HHS program. This process includes enrollment under this chapter or Chapter 352 of this title (relating to Medicaid and Children's Health Insurance Program Provider Enrollment), 42 C.F.R. Part 1001, or other processes delineated by statute, rule, or regulation.

(69) Provisional contract--A contract or provider agreement for any period of time that must be renewed by the OIG for the provider to continue to participate in the program. It may include any special requirements or provisions deemed necessary by the OIG to ensure the protection of the program. It may also be referred to as a probationary contract, depending upon the terminology used by the provider's agency and program area.

(70) Reasonable request--Request for access, records, documentation, or other items deemed necessary or appropriate by the OIG or a requesting agency to perform an official function, and made by a properly identified agent of the OIG or a requesting agency during hours that a person, business, or premises is open for business.

(71) Recipient--A person eligible for and covered by the Medicaid or any other HHS program.

(72) Records and documentation--Records and documents in any form, including electronic form, which include:

(A) medical records, charting, other records pertaining to a patient, radiographs, laboratory and test results, molds, models, photographs, hospital and surgical records, prescriptions, patient or client assessment forms, and other documents related to diagnosis, treatment, or service of patients;

(B) billing and claims records, supporting documentation such as Title XIX forms, delivery receipts, and any other records of services provided to recipients and payments made for those services;

(C) cost reports and documentation supporting cost reports;

(D) managed care encounter data and financial data necessary to demonstrate solvency of risk-bearing providers;

(E) ownership disclosure statements, articles of incorporation, bylaws, corporate minutes, and other documentation demonstrating ownership of corporate entities;

(F) business and accounting records and support documentation;

(G) statistical documentation, computer records, and data;

(H) clinical practice records, including patient sign-in sheets, employee sign-in sheets, office calendars, daily or other periodic logs, employment records, and payroll documentation related to items or services rendered under an HHS program; and

(I) records affidavits, business records affidavits, evidence receipts, and schedules.

(73) Recoupment of overpayment--A sanction imposed to recover funds paid to a provider or person to which the provider or person was not entitled.

(74) Requesting agency--The OIG; the OAG's Medicaid Fraud Control Unit or Civil Medicaid Fraud Division; any other state or federal agency authorized to conduct compliance, regulatory, or program integrity functions on a provider, a person, or the services rendered by the provider or person.

(75) Risk analysis--The process of defining and analyzing the dangers to individuals, businesses, and governmental entities posed by potential natural and human-caused adverse events. A risk analysis can be either quantitative, which involves numerical probabilities, or qualitative, which involves observations that are not numerical in nature.

(76) Sanction--Any administrative enforcement measure imposed by the OIG pursuant to this chapter other than administrative actions defined in §371.1701 of this chapter (relating to Administrative Actions).

(77) Sanctioned entity--An entity that has been convicted of any offense described in 42 C.F.R. §§1001.101 - 1001.401 or has been terminated or excluded from participation in Medicare, Medicaid in Texas, or any other state or federal health care program.

(78) Services--The types of medical assistance specified in §1905(a) of the Social Security Act (42 U.S.C. §1396d(a)) and other HHS program services authorized under federal and state statutes that are administered by HHSC and other HHS agencies.

(79) SIU--A Special Investigative Unit of an MCO as defined under Texas Government Code §531.113(a)(1).

(80) Social Security Act--Legislation passed by Congress in 1965 that established the Medicaid program under Title XIX of the Act and created the Medicare program under Title XVIII of the Act.

(81) Solicitation--Offering to pay or agreeing to accept, directly or indirectly, overtly or covertly, any remuneration in cash or in kind to or from another for securing a patient or patronage for or from a person licensed, certified, or registered or enrolled as a provider or otherwise by a state health care regulatory or HHS agency.

(82) State health care program--A State plan approved under Title XIX, any program receiving funds under Title V or from an allotment to a State under such Title, any program receiving funds under Subtitle I of Title XX or from an allotment to a State under Subtitle I of Title XX, or any State child health plan approved under Title XXI.

(83) Substantial contractual relationship--A relationship in which a person has direct or indirect business transactions with an entity that, in any fiscal year, amounts to more than $25,000 or five percent of the entity's total operating expenses, whichever is less.

(84) Suspension of payments (payment hold)--An administrative sanction that withholds all or any portion of payments due a provider until the matter in dispute, including all investigation and legal proceedings, between the provider and HHSC or an operating agency or its agent(s) are resolved. This is a temporary denial of reimbursement under the Medicaid or other HHS program for items or services furnished by a specified provider.

(85) System recoupment--Any action to recover funds paid to a provider or other person to which they were not entitled, by means other than the imposition of a sanction under this chapter. It may include any routine payment correction by an agency or an agency's fiscal agent to correct an overpayment that resulted without any alleged wrongdoing.

(86) TEFRA--The Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982, a federal law that allows states to make medical assistance available to certain children with disabilities without counting their parent's income.

(87) Terminated--Means:

(A) with respect to a Medicaid or CHIP provider, the revocation of the billing provider's Medicaid or CHIP billing privileges after the provider has exhausted all applicable appeal rights or the timeline for appeal has expired; and

(B) with respect to a Medicare provider, supplier, or eligible professional, the revocation of the provider's, supplier's, or eligible professional's Medicare billing privileges after the provider, supplier, or eligible professional has exhausted all applicable appeal rights or the timeline for appeal has expired.

(88) Terminated for cause--Termination based on allegations related to fraud, program violations, integrity, or improper quality of care.

(89) Title V--Title V (Maternal and Child Health Services Block Grant) of the Social Security Act, codified at 42 U.S.C. §§701 et seq.

(90) Title XVIII--Title XVIII (Medicare) of the Social Security Act, codified at 42 U.S.C. §§1395 et seq.

(91) Title XIX--Title XIX (Medicaid) of the Social Security Act, codified at 42 U.S.C. §§1396-1 et seq.

(92) Title XX--Title XX (Social Services Block Grant) of the Social Security Act, codified at 42 U.S.C. §§1397 et seq.

(93) Title XXI--Title XXI (State Children's Health Insurance Program (CHIP)) of the Social Security Act, codified at 42 U.S.C. §§1397aa et seq.

(94) TMRP--The Texas Medical Review Program, which is the inpatient hospital utilization review process HHSC uses for hospitals reimbursed under HHSC's prospective payment system.

(95) U.S.C.--United States Code.

(96) Vendor hold--Any legally authorized hold or lien by any state or federal governmental unit against future payments to a person. Vendor holds may include tax liens, state or federal program holds, liens established by the OAG Collections Division, and State Comptroller voucher holds.

(97) Waste--Practices that a reasonably prudent person would deem careless or that would allow inefficient use of resources, items, or services.

§371.3. Purpose and Authority.

(a) The OIG is responsible for preventing, detecting, auditing, inspecting, reviewing, and investigating fraud, waste, and abuse in Medicaid and other HHS programs. In addition, the OIG is responsible for enforcing state law relating to the provision of HHS in Medicaid and other HHS programs.

(b) The statutory authority for this chapter is provided by Texas Human Resources Code Chapters 32 and 36; Texas Government Code Chapter 531, and federal law (Social Security Act) and regulations (42 C.F.R.).

§371.11. [~~Purpose and~~] Scope.

(a) The OIG is responsible for preventing, detecting, auditing, inspecting, reviewing, and investigating fraud, waste, and abuse in the provision of HHS in Medicaid and other HHS programs. [~~The Office of Inspector General (the Inspector General) is a division within the Health and Human Services Commission (the Commission). The Inspector General is responsible for the investigation of fraud and abuse in the provision of health and human services (HHS) in Medicaid and other HHS programs.~~] As part of its authority, the OIG [~~Inspector General~~] may impose sanctions upon a finding by the OIG [~~Inspector General~~] of fraud, waste, or [~~and~~] abuse in Medicaid. The OIG [~~Inspector General~~] is also responsible for enforcing [~~the enforcement of~~] state

law relating to the provision of HHS [~~health and human services~~] in Medicaid and other HHS programs. As a result, the OIG [~~Inspector General~~] may also investigate a suspected regulatory violation in a non-Medicaid, HHS program and, upon a finding of a violation, may recommend [~~direct~~] the HHS program [~~to~~] take appropriate enforcement action to the extent of the HHS program's regulatory authority. The OIG [~~Inspector General~~] administers program integrity and enforces program violations to the extent of applicable law governing Medicaid and the provision of other HHS [~~health and human services~~]. This includes pursuing Medicaid and other HHS [~~health and human services~~] fraud, abuse, overpayment, or [~~and~~] waste. To accomplish the objectives of this chapter, the OIG [~~Inspector General~~] implements review processes to distinguish payment discrepancies that can be corrected through routine payment adjustments from those suspected to result from program violations requiring investigation and possible administrative enforcement or judicial action.

(b) The Inspector General establishes objectives and priorities for the OIG [~~office~~] that emphasize:

(1) coordinating investigative efforts to aggressively recover funds;

(2) allocating resources to cases that have the strongest supportive evidence and the greatest potential for recovery of money; and

(3) maximizing opportunities for referral of cases to the OAG [~~Office of the Attorney General~~].

(c) In addition to performing functions and duties otherwise provided by law, the OIG [~~Inspector General~~] may:

(1) assess administrative penalties otherwise authorized by law on behalf of HHSC [~~the Commission~~];

(2) request that the OAG [~~Attorney General~~] obtain an injunction to prevent a person from disposing of an asset identified by the OIG [~~Inspector General~~] as potentially subject to recovery by the OIG [~~Inspector General~~] due to the person's fraud, waste, or abuse;

(3) provide for coordination between the OIG and SIUs [~~Inspector General and special investigative units formed by managed care organizations~~] or entities with which managed care organizations contract to identify and investigate fraudulent claims and other types of program abuse by recipients and providers, and approve the plan of the SIUs [~~special investigative units~~] to prevent and reduce fraud, waste, or [~~and~~] abuse;

(4) audit the use and effectiveness of state or federal funds, including contract and grant funds, administered by a person or state agency receiving the funds from an HHS [~~a health and human services~~] agency;

(5) conduct investigations relating to the funds described in paragraph (4) of this subsection; and

(6) recommend policies promoting economical and efficient administration of the funds described in paragraph (4) of this subsection and the prevention and detection of fraud, waste, or [~~and~~] abuse in the administration of those funds.

(d) The OIG [~~Inspector General~~] may require employees of HHS [~~health and human services~~] agencies to provide assistance to the OIG [~~Inspector General~~] in connection with its duties relating to the review, inspection, investigation, or [~~and~~] audit of fraud, waste, abuse, or [~~and~~] overpayment in the provision of HHS [~~health and human services~~].

(e) The OIG [~~Inspector General~~] is entitled to access to any information maintained by an HHS [~~a health and human services~~] agency, including internal records, relevant to the functions of the OIG [~~office~~]. This chapter sets forth the types of activities performed by the OIG [~~Inspector General~~] to ensure program integrity.

(f) HHSC [~~The Commission~~] may obtain any information or technology necessary to enable the OIG [~~Inspector General~~] to meet its responsibilities as mandated by state statute or other law.

§371.17. Detection.

The OIG [~~Inspector General~~] utilizes automation as well as other techniques to detect and identify program violations and possible fraud, waste, abuse, and overpayments. These automated detection systems are mandated by state and federal statutes. One automated system is additionally required to utilize neural network and learning technologies. These systems detect patterns of inappropriate billing from which an overpayment is identified immediately without the need for additional investigation. They also detect anomalous billing and service patterns, which then require investigation for evidence of program violations.

§371.23. Surety Bond.

(a) The OIG [~~Inspector General~~] may require each provider of medical assistance in the Medicaid program, in a provider type that has demonstrated significant potential for fraud, waste, or abuse, to file with the OIG [~~Inspector General,~~] a surety bond in a reasonable amount. The amount of the surety bond may [~~shall~~] not exceed the maximum amount allowed by state or federal law, plus the maximum amount of penalties allowed by state and federal law.

(b) The OIG requires [~~Inspector General will require~~] a provider of medical assistance or person to file, with the OIG [~~Inspector General~~], a surety bond in a reasonable amount if the OIG [~~Inspector General~~] identifies acts or behavior that [~~which~~] indicate suspected fraud, waste, or abuse involving criminal conduct relating to the provider's services under the program that indicates the need for protection against potential future acts of fraud, waste, or abuse. The amount of the surety bond shall not exceed the maximum amount allowed by state or federal law, plus the maximum amount of penalties allowed by state and federal law.

(c) The surety bond required of a provider or person, by the OIG [~~Inspector General~~], under subsections (a) and (b) of this section must be payable to HHSC [~~the Commission~~] to compensate HHSC [~~the Commission~~] for damages resulting from, or penalties or fines imposed in connection with, an act of fraud, waste, or abuse committed by the provider or person under the program.

(d) The OIG [~~Inspector General~~] may require a provider of medical assistance or person to file[~~,~~] with the OIG [~~Inspector General,~~] a surety bond in an amount and manner specified by the OIG [~~Inspector General~~]. A surety bond may be required if the OIG [~~Inspector General~~] identifies acts or behavior that [~~which~~] indicate suspected fraud, waste, or abuse that involves criminal conduct that relates to the provider's services under the program and that indicate [~~indicates~~] the need for protection against potential loss of recoupment of overpayments, penalties, damages, or other debts assessed against the provider by the OIG [~~Inspector General~~], due to potential default of the provider or failure of the provider to reimburse the OIG [~~Inspector General~~] assessed amounts. Among other reasons, a surety bond may be imposed in connection with a settlement agreement, a provisional, probationary, or closed end contract, or as a condition of reinstatement.

(e) Subject to subsection [~~subsections~~] (f) or (g) of this section, the OIG [~~Inspector General~~] may require each provider of medical assistance that establishes a resident's trust fund account to post a surety bond to secure the account. The bond must be payable to HHSC [~~the Commission~~] to compensate residents of the bonded provider for trust funds that are lost, stolen, or otherwise unaccounted for if the provider

does not repay any deficiency in a resident's trust fund account to the person legally entitled to receive the funds.

(f) For that portion of a case involving a resident's trust fund accounts, the OIG does [~~Inspector General will~~] not require the amount of a surety bond posted for a single facility provider under subsection (e) of this section to exceed the average of the total average monthly balance of all of the provider's resident trust fund accounts for the 12-month period preceding the bond issuance or renewal date. This limitation does not apply to any [~~other~~] type of violations other than resident trust fund accounts.

(g) If an employee of a provider of medical assistance is responsible for the loss of funds in a resident's trust fund account, the resident, the resident's family, and the resident's legal representative are not obligated to make any payments to the provider that would have been made out of the trust fund had the loss not occurred.

(h) Failure by a provider or person to post a surety bond timely and as required by the OIG [~~Inspector General~~] may result in imposition of any of the administrative actions or sanctions[~~, as specified in §371.1631 and §371.1643,~~] and/or imposition of damages and penalties, as specified in [~~§371.1721 et seq. of~~] Subchapter G of this chapter (relating to Administrative Actions and Sanctions).

(i) Surety bonds required by the OIG [~~Inspector General~~] are considered administrative actions. Administrative actions are further described in §371.1701 of this chapter (relating to Administrative Actions) [~~Subchapter G, §371.1629 and §371.1631 of this title~~].

§371.25. Injunction to Prevent Disposing of Assets and Application to Debts.

Based on the results of investigative findings and evidence that potential fraud, waste, or abuse exists and a potential overpayment, penalty, or damage has been identified, a method that may be used by the OIG [~~Inspector General~~], as a fiduciary for the state, is injunctive relief. The purpose of the injunctive relief is to ensure assets remain to reimburse the state monies owed such as recoupment of overpayments and assessed damages and penalties. The OIG [~~Inspector General~~] may request that the Attorney General obtain an injunction to prevent a provider or person from disposing of an asset identified by the OIG [~~Inspector General~~] as potentially subject to recovery by the OIG [~~Inspector General~~] due to the provider's or person's fraud, waste, or abuse. Upon final resolution of the case, any funds derived from the forfeited asset(s), after offsetting any expenses attributable to the sale of those assets, are applied to the unpaid debt by the OIG [~~will be applied, by the Inspector General, to the unpaid debt~~].

§371.27. Prohibition against Solicitation of Medicaid or CHIP Recipients.

(a) A provider or person who furnishes services, under the Medicaid program or Child Health Insurance Plan program, must comply with Chapter 102, Texas Occupations Code.

(b) A provider or person is prohibited from offering to pay or agreeing to accept, directly or indirectly, overtly or covertly, any remuneration in cash or in kind to or from another for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered or enrolled as a provider or otherwise by a state health care regulatory or HHS [~~health and human service~~] agency.

(c) A provider or person is prohibited from engaging in any of the actions or conduct described in the provisions relating to bribe, kickback, rebate, or inducement specified in §371.1669 of this chapter (relating to Self-Dealing) [~~Subchapter G, §371.1721~~].

(d) Providers or persons in violation of the prohibition against solicitation may be excluded from participation in the Medicaid and CHIP programs and may have their contract to participate cancelled.

§371.29. Random Prepayment Review.

The OIG [~~Inspector General~~] may perform a random prepayment review of claims submitted by Medicaid providers for reimbursement to determine whether the claim involves fraud, waste, or abuse. Suspect claims identified through this process may result in:

(1) imposition of a recoupment of overpayments and/or other pertinent administrative sanctions or actions;

(2) initiation of a full [~~full-scale~~] fraud, waste, or [~~and~~] abuse investigation;

(3) referral for criminal or civil investigation and prosecution;

(4) withholding payment of these claims for not more than five [~~(5)~~] working days without notice to the provider for which claims were submitted.

§371.31. Federal Felony Match.

The OIG has [~~Inspector General will implement~~] a system to cross-reference data collected for the programs identified in §531.008(c) of the Texas Government Code with the list of fugitive felons maintained by the federal government. The purpose of the data match is to identify fugitive felons who may be enrolled as recipients in programs that are referenced in §531.008(c) of the Texas Government Code.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 29, 2016.

TRD-201600178
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: February 28, 2016
For further information, please call: (512) 424-6900

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1 TAC §371.13, §371.19

Legal Authority

The repeals are proposed under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The repeals implement Texas Government Code Chapter 531, as amended by S.B. 207. No other statutes, articles, or codes are affected by the proposal.

§371.13. Statutory Authority.

§371.19. Investigation.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Karen Ray
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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SUBCHAPTER C. UTILIZATION REVIEW

1 TAC §§371.200, 371.201, 371.203, 371.204, 371.206, 371.208, 371.210, 371.212, 371.214, 371.216

Legal Authority

The amendments are proposed under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The amendments implement Texas Government Code Chapter 531, as amended by S.B. 207. No other statutes, articles, or codes are affected by the proposal.

§371.200. Inpatient Hospital Utilization Review Program.

(a) HHSC [~~The Texas Medical Review Program (TMRP) is the inpatient hospital utilization review process used by the Texas Health and Human Services Commission (Commission) for hospitals reimbursed under the Commission's prospective payment system. The Commission~~] conducts the TMRP in accordance with:

(1) applicable federal regulations at 42 C.F.R. [~~Code of Federal Regulations~~] Part 456, Subparts A, B, and C, which require HHSC [~~the Commission~~] to operate a utilization review program that controls the utilization of inpatient hospital services and assesses the appropriateness and quality of those services; and

(2) an approved waiver under the Social Security Act, §1903(i)(4), as it relates to the use of Title XVIII utilization review procedures for Title XIX patients in acute care general hospitals other than hospitals reimbursed under TEFRA [~~the Tax Equity and Fiscal Responsibility Act (TEFRA)~~] reimbursement principles.

(b) The TEFRA review process relates directly to hospitals reimbursed under the TEFRA reimbursement principles and facility-specific [~~facility specific~~] per diem methodology.

§371.201. Case Selection Process.

(a) HHSC selects TMRP [~~The Texas Health and Human Services Commission (Commission) selects Texas Medical Review Program (TMRP)~~] cases for review by a statistically valid random sampling methodology and/or focused case selection. Cases [~~will~~] consist of paid inpatient claims for diagnosis-related [~~diagnostic related~~] groups (DRGs), which may include:

(1) readmissions [~~Readmissions~~] up to 30 days;

(2) ambulatory [~~Ambulatory~~] surgical procedures billed on inpatient claims;

(3) questionable [~~Questionable~~] admissions or claims coding identified by other entities;

(4) admissions [~~Admissions~~] identified through HHSC's [~~the Commission's~~] quality review program as potential quality of care concerns;

(5) DRG payments made to freestanding rehabilitation facilities;

(6) day [~~Day~~] or cost outlier payments; or

(7) any [~~Any~~] other DRG or claims submission errors.

(b) HHSC [~~The Commission~~] selects TEFRA [~~Tax Equity and Fiscal Responsibility Act~~] and facility-specific [~~facility specific~~] per diem methodology cases for review by a statistically valid random sampling methodology and/or focused case selection. Cases [~~will~~] consist of paid inpatient claims for admissions to children's hospitals and freestanding psychiatric facilities.

§371.203. TMRP [~~Texas Medical Review Program (TMRP)~~] Review Process.

(a) The TMRP review process includes[~~, but is not limited to~~]:

(1) Admission review to evaluate the medical necessity of the admission. For purposes of the TMRP reviews, medical necessity means the patient has a condition requiring treatment that can be safely provided only in the inpatient setting.

(2) Diagnosis-related [~~Diagnosis related~~] group (DRG) validation to confirm documentation in the medical record of the critical elements necessary to assign a DRG. The hospital staff is responsible and held accountable for the accuracy of the required critical elements. Those elements are age, sex, discharge status, admission date, discharge date, principal diagnosis, principal and secondary procedures, any complications or comorbidities (secondary diagnoses), and Present on Admission (POA) indicators.

(A) POA review validates [~~will validate~~] the POA indicator assigned to the principal and secondary diagnoses codes reported on claim forms. If it is determined that the principal and/or secondary diagnoses were not present at the time the order for inpatient admission occurs, HHSC revises [~~the Commission will revise~~] the POA indicator for the diagnosis code. Conditions that develop during an outpatient encounter, including emergency department, observation, or outpatient surgery, are considered POA.

(B) DRG validation confirms that the principal and secondary diagnoses and procedures are sequenced correctly. The principal diagnosis is the diagnosis (condition) established after study to be chiefly responsible for occasioning the admission of the patient to the hospital for care. The secondary diagnoses are conditions that affect the patient care in terms of requiring: clinical evaluation, therapeutic treatment, diagnostic procedures, extended length of hospital stay, increased nursing care and/or monitoring, or in the case of a newborn, conditions the physician deems to have clinically significant implications for future health care needs. If the principal diagnosis, secondary diagnoses, or procedures are not substantiated in the medical record, are not sequenced correctly, or have been omitted, codes may be deleted, changed, or added.

(C) When the correct diagnosis and procedure coding and sequencing have been determined, the information is [~~will be~~] entered into the applicable version of the Grouper software for a DRG assignment. CMS-approved [~~The Centers for Medicare and Medicaid Services (CMS) approved~~] DRG Grouper software considers the re-

quired critical elements and determines the final DRG assignment. If the DRG validation process results in deletions, changes, or additions to the critical elements and these changes cause the DRG to be reassigned, HHSC directs [~~the Texas Health and Human Services Commission (Commission) will direct~~] the claims administrator to adjust the payment to the hospital accordingly.

(3) Quality of care review to assess whether the care provided meets generally accepted standards of medical and hospital care practices or puts the patient at risk of unnecessary injury, disease, or death. Quality of care review includes the use of discharge screens and generic quality screens. If quality of care issues are identified, physician consultants under contract with HHSC [~~the Commission,~~] and of the specialty related to the care provided[~~, will~~] determine possible clinical recommendations or corrective actions.

(4) Readmission review to evaluate each admission on its individual merits and determine if the second or subsequent admissions resulted from a premature discharge or were required to provide services that should have been provided in a previous admission.

(5) Day outlier review, which includes DRG validation, verifies the medical necessity of each day of the admission.

(6) Cost outlier review to verify that services billed were medically necessary, ordered by a physician or non-physician provider, rendered and billed appropriately, and substantiated in the medical record.

(b) HHSC reviews [~~The Commission will review~~] the complete medical record for the requested admission(s) to make decisions on all aspects of this review process. The complete medical record may include: emergency room records, medical/surgical history and physical examination, discharge summary, physicians' progress notes, physicians' orders, lab reports, diagnostic and imaging reports, operative reports, pathology reports, nurses' notes, medication sheets, vital signs sheets, therapy notes, specialty consultation reports, and special diagnostic and treatment records. If the complete medical record is not available during the review, HHSC issues [~~the Commission will issue~~] a preliminary technical denial and notifies [~~notify~~] the facility.

(c) A physician consultant under contract with HHSC makes [~~the Commission will make~~] all decisions concerning medical necessity, cause of readmission, and appropriateness of setting for the service provided. In the event the physician consultant determines the services were not medically necessary, should have been provided in a previous admission, or were not provided in the appropriate setting, the claim is [~~will be~~] denied, and HHSC notifies [~~the Commission will notify~~] the hospital in writing. If a hospital claim is denied for lack of medical necessity or for being provided in an inappropriate setting, HHSC considers [~~the Commission will consider~~] for denial physician and/or non-physician Medicaid provider claims associated with the hospital admission or service when such claims can be identified and are deemed to be the result of inappropriate admission orders. Physicians and/or non-physician providers are [~~will be~~] notified in writing if the claim for professional services is denied. The written notification explains [~~will explain~~] the process for appealing the denial.

(d) The OIG conducts training for providers, in a manner and format determined by the OIG, on at least an annual basis to communicate with and educate providers about the DRG validation criteria used by the OIG in conducting hospital utilization reviews and audits as outlined in this section.

§371.204. Hospital Screening Criteria for TMRP [~~Texas Medical Review Program (TMRP)~~], TEFRA [~~Tax Equity and Fiscal Responsibility Act (TEFRA)~~], and Facility-Specific Per Diem Methodology Reviews.

(a) HHSC [~~The Texas Health and Human Services Commission (Commission)~~] uses recognized evidence-based guidelines for inpatient hospital screening criteria. Non-physician reviewers use the guidelines as criteria for the initial approval or for the referral of inpatient reviews for medical necessity decisions. If the criteria are not met[~~,~~] or if the non-physician reviewer has any questions concerning the appropriateness of coding or quality of care, the non-physician reviewer refers [~~will refer~~] the medical record to a physician consultant under contract with HHSC [~~the Commission~~] for a decision. Even if the criteria are met, the physician consultant may determine that an inpatient admission was not medically necessary, and HHSC issues [~~and the Commission will issue~~] an admission denial. If a hospital claim is denied for lack of medical necessity or for being provided in an inappropriate setting, HHSC considers [~~the Commission will consider~~] for denial physician and/or non-physician Medicaid provider claims associated with the hospital admission or service when such claims can be identified and are deemed to be the result of inappropriate admission orders. A physician consultant may determine that an inpatient admission was not medically necessary if a physician admitted a patient in observation status and the patient was discharged from the outpatient status within the Texas Medicaid Provider Procedures Manual, or any subsequent provider manuals, defined observation period.

(b) For the purposes of the TMRP, TEFRA, and facility-specific per diem methodology reviews, medical necessity means that the patient has a condition requiring treatment that can be safely provided only in the inpatient setting.

§371.206. Denials and Recoupments for TMRP [~~Texas Medical Review Program (TMRP)~~], TEFRA [~~Tax Equity and Fiscal Responsibility Act (TEFRA)~~] Hospitals, and Facility-Specific Per Diem Methodology Reviews.

(a) Reviews conducted under the TMRP, TEFRA, and facility-specific per diem methodology[~~,~~] may result in denials of claims. HHSC notifies [~~The Texas Health and Human Services Commission (Commission) will notify~~] the hospital in writing of the denial decision[~~,~~] and instructs [~~instruct~~] the claims administrator to recoup payment. If a hospital claim is denied for lack of medical necessity or for being provided in an inappropriate setting, HHSC considers [~~the Commission will consider~~] for denial physician and/or non-physician Medicaid provider claims associated with the hospital admission or service when such claims can be identified and are deemed to be the result of inappropriate admission orders. Physicians and/or non-physician providers are [~~will be~~] notified in writing if the claim for professional services is denied. The written notification of denial explains [~~will explain~~] the appeal process. Types of denials are:

(1) Admission and days of stay denials. A physician consultant under contract with HHSC [~~the Commission~~] makes all decisions regarding medical necessity, cause of readmission, and appropriateness of setting.

(2) Technical denials. HHSC issues [~~The Commission will issue~~] a technical denial when a hospital fails to make the complete medical record available for review within specified time frames. These services may not be rebilled on an outpatient basis.

(A) For on-site reviews, if the complete medical record is not made available during the on-site review, HHSC issues [~~the Commission will issue~~] a preliminary technical denial at that time. The hospital is allowed 60 calendar days from the date of the exit conference to provide the complete medical record to HHSC [~~the Commission~~]. If the complete medical record is not received by HHSC [~~the Commission~~] within this time frame, HHSC issues [~~the Commission will issue~~] a final technical denial. If HHSC [~~the Commission~~] requests a copy of the medical record in writing, and the copy is not received within the specified time frame, HHSC issues [~~the Commission will issue~~] a pre-

liminary technical denial by certified mail or fax machine. The hospital has 60 calendar days from the date of the notice to submit the complete medical record. If the complete medical record is not received by HHSC [~~the Commission~~] within this time frame, HHSC issues [~~the Commission will issue~~] a final technical denial.

(B) For mail-in reviews, HHSC requests [~~the Commission will request~~] copies of medical records in writing. If HHSC [~~the Commission~~] does not receive the complete medical record within the specified time frame, HHSC issues [~~the Commission will issue~~] a preliminary technical denial by certified mail or fax machine. The hospital has 60 calendar days from the date of the notice to submit the complete medical record. If HHSC [~~the Commission~~] does not receive the complete medical record within this specified time frame, HHSC issues [~~the Commission will issue~~] a final technical denial.

(3) Readmission denial. If it is determined that the services provided in the second or subsequent admissions were the direct result of a premature discharge or should have been provided in the first or previous admission, HHSC denies [~~the Commission will deny~~] the admission in question.

(4) Day outlier denial. If it is determined that any days qualifying as outlier days during the admission were not medically necessary, HHSC denies [~~the Commission will deny~~] those days.

(5) Cost outlier denial. If it is determined that services delivered were not medically necessary, not ordered by a physician and/or authorized non-physician, not rendered or billed appropriately, or not substantiated in the medical record, HHSC denies [~~the Commission will deny~~] those services.

(b) When an admission denial or day of stay denial is issued, HHSC directs [~~the Commission will direct~~] the claims administrator to recoup payment. If a hospital claim is denied for lack of medical necessity or for being provided in an inappropriate setting, HHSC considers [~~the Commission will consider~~] for denial physician and/or non-physician Medicaid provider claims associated with the hospital admission or service when such claims can be identified and are deemed to be the result of inappropriate admission orders. HHSC makes [~~The Commission will make~~] an exception in the case of TMRP hospitals if the patient was placed in observation[~~,~~] and HHSC [~~the Commission~~] notified the hospital that it may submit a revised outpatient claim solely for medically necessary outpatient services provided during the Texas Medicaid Provider Procedures Manual (TMPPM), or any subsequent provider manuals, defined observation period. A physician's order for observation must be present in the physician's orders to document that the patient was placed in outpatient observation. The hospital must submit the revised outpatient claim and a copy of HHSC's [~~the Commission's~~] notification letter to the claims administrator at the address indicated in the notification letter. The claims administrator must receive the outpatient claim and copy of the notification letter within 120 calendar days of the date of the notification letter. The claims administrator may consider payment for the medically necessary services provided during the TMPPM-defined observation period. The hospital may provide observation services in any part of the hospital where a patient can be assessed, monitored, and treated.

§371.208. Appeals Related to [~~To~~] Utilization Review Department Review Decisions.

If a hospital receives notification from HHSC [~~the Texas Health and Human Services Commission (HHSC)~~] Utilization Review Unit of an adverse decision regarding medical necessity of admission, days of stay, diagnosis related group (DRG) validation, or a final technical denial, the hospital may appeal to HHSC. The written notification of adverse decision sets [~~will set~~] out the responsible area and time frame within which HHSC must receive the appeal [~~must be received by HHSC~~]. The Texas Medicaid Policy and Procedure Manual provides additional information on the appeal process.

§371.210. Inpatient Utilization Review for Hospitals Reimbursed Under TMRP and TEFRA [~~the Tax Equity and Fiscal Responsibility Act (TEFRA)~~] Principles of Reimbursement[~~,~~] and Facility-Specific Per Diem Methodology Reviews.

(a) The TEFRA and facility-specific per diem methodology reviews process includes the following:

(1) Admission review to evaluate the medical necessity of the admission. For purposes of the TMRP [~~Texas Medical Review Program (TMRP)~~], TEFRA, and facility-specific reviews, medical necessity means the patient has a condition requiring treatment that can be safely provided only in the inpatient setting.

(2) Continued stay review to verify the medical necessity of each day of stay.

(3) Quality of care review to assess whether the quality of care provided meets generally accepted standards of medical and hospital care practices or puts the patient at risk of unnecessary injury or death. Quality of care review includes the use of discharge screens and generic quality screens. If quality of care issues are identified, physician consultants under contract with HHSC [~~the Texas Health and Human Services Commission (Commission),~~] and of the specialty related to the care provided[~~, will~~] determine possible clinical recommendations or corrective actions.

(b) HHSC reviews [~~The Commission will review~~] the complete medical record for the requested admission(s) to make decisions on all aspects of this review process. The complete medical record may include: emergency room records, medical/surgical history and physical examination, discharge summary, physicians' progress notes, physicians' orders, lab reports, diagnostic and imaging reports, operative reports, pathology reports, nurses' notes, medication sheets, vital signs sheets, therapy notes, specialty consultation reports, and special diagnostic and treatment records. If the complete medical record is not available during the review, HHSC issues [~~the Commission will issue~~] a preliminary technical denial and notifies [~~notify~~] the facility.

(c) A physician consultant under contract with HHSC makes [~~the Commission will make~~] all decisions concerning medical necessity, cause of readmission, and appropriateness of setting for the service provided. In the event the physician consultant determines the services were not medically necessary, should have been provided in a previous admission, or were not provided in the appropriate setting, the claim is [~~will be~~] denied, and HHSC notifies [~~the Commission will notify~~] the hospital in writing. If a hospital claim is denied for lack of medical necessity or for being provided in an inappropriate setting, HHSC considers [~~the Commission will consider~~] for denial physician and/or non-physician Medicaid provider claims associated with the hospital admission or service when such claims can be identified and are deemed to be the result of inappropriate admission orders. Physicians and/or non-physician providers are [~~will be~~] notified in writing if the claim for professional services is denied. The written notification explains [~~will explain~~] the process for appealing the denial.

§371.212. Minimum Data Set Assessments.

(a) Under 40 TAC §19.801 (relating to Resident Assessment), a nursing facility must conduct initially and periodically thereafter a comprehensive, accurate, standardized, reproducible assessment of each nursing facility recipient's functional capacity that describes the recipient's ability to perform daily life functions and significant impairments in functional capacity. The nursing facility must conduct the assessment using a Minimum Data Set (MDS) Resident Assessment Instrument (RAI) based on the MDS RAI Resource Utilization Group

(RUG-III) 34-group case mix classification system selected by the state and established by CMS [~~the Centers for Medicare and Medicaid Services (CMS)~~].

(1) Requirements for completing the MDS are derived from the RAI, including the MDS, specified by the DADS [~~Department of Aging and Disability Services (DADS)~~]. The nursing facility must adhere to any updates released by CMS in addition to the state-specific [~~state specific~~] mandates. To the extent such CMS updates conflict with DADS-specific [~~DADS specific~~] mandates, the CMS updates [~~shall~~] control.

(2) Completion of the MDS does not remove the nursing facility's responsibility to document in a clinical record a detailed assessment of all relevant issues that affect the recipient. All clinical record documentation must chronicle, support, and be consistent with the findings of, rather than conflict with, each MDS assessment. Documentation in the clinical record must contain pertinent facts, findings, and observations about an individual's health history including past and present illnesses, treatments, and outcomes to support the care the recipients are receiving. Inconsistent and unsupported findings are not [~~will not be~~] validated and may result in an adjustment in the RUG-III classification.

(3) All coded items on MDS assessments submitted for Medicaid reimbursement must be supported by documentation in the recipient's clinical record. Sources of information (e.g., other health care professionals, family members) utilized for the MDS assessment must be identified and must be supported by the clinical record.

(4) Nursing facility resident records must be maintained in accordance with:

(A) 40 TAC §19.1910 (relating to Clinical Records);

(B) 40 TAC §19.1912 (relating to Additional Clinical Record Service Requirements);

(C) 40 TAC §19.1210 (relating to Certification and Recertification Requirements in Medicaid-Certified Facilities);

(D) 40 TAC §19.1924 (relating to Financial Records), including supporting documents and other records necessary to fully document the services and supplies provided and delivered to the resident, the medical necessity of those services and supplies, and records or documents necessary to determine whether payment for those items or services was due and was properly made;

(E) Section 354.1004 of this title (relating to Retention of Records), which requires a facility to maintain all records necessary to fully disclose the services provided and to retain these records for a period of five years from the date of the service, or until all audit questions are resolved, whichever is longer;

(F) HIPAA [~~the Health Insurance and Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 United States Code §§1320d-1320d-8~~];

(G) 45 C.F.R. [~~Code of Federal Regulations~~] Parts 160 and 164 (relating to Health Insurance Reform: Security Standards); and

(H) accepted professional health information management standards and practices.

(5) Documentation must have the recipient's name[~~,~~] and the signatures, dates of signatures, and titles of individuals providing care for the recipient. Documents, such as grids and flow sheets that include entries by multiple staff members at different times, must include complete dates with initials or signatures to clearly identify who provided the care. For purposes of this subchapter, a signature may be an original handwritten, electronic, photocopied [~~photocopier~~], or facsimile-transmitted [~~facsimile transmitted~~] signature or an electronic signature submitted in compliance with HHSC policy unless the authenticity of the signature is in doubt.

(b) An admission comprehensive assessment must be completed by day 14 and include the Basic Assessment Tracking form and MDS Sections AA, AB-AD, A-R, Sections V and W. The annual assessment must be completed no later than the 366th day from the last comprehensive assessment and no later than 92 days from the previous assessment.

(1) The MDS Long-Term Care Medicaid Information Section and Section W must be completed on all MDS assessments submitted for Medicaid.

(2) An admission assessment or quarterly assessment establishes [~~will establish~~] RUG-III classification. Medical necessity is evaluated each time an MDS assessment is completed, until permanent medical necessity [~~(PMN)~~] is established by the Texas Medicaid claims administrator (MCA), as set out in 40 TAC §19.2403 (relating to Medical Necessity Determination).

(3) A significant-change assessment must be completed as soon as needed to provide appropriate care to the resident, but in no case later than 14 calendar days after the determination was made that a significant change occurred. The nursing facility must document the significant change in condition. The documentation must include a completed comprehensive MDS assessment with Resident Assessment Protocols [~~(RAPS)~~]. A significant change assessment resets the schedule for the next annual assessment.

(4) A quarterly assessment following an admission assessment, an annual assessment, or a significant change-in-status assessment must be completed within 92 days of the previous assessment.

(5) An MDS assessment is considered complete on the date the registered nurse (RN) assessment coordinator signs and dates the MDS assessment as complete. That date may not be prior to dates for all sections completed.

(6) The MDS assessment is considered timely if it is submitted in accordance with the federal MDS submission schedule and is received by the state MCA within 31 days after the completion date.

(7) Each MDS assessment submitted must indicate the reason for the assessment.

(8) Assessment time frames are based on the assessment reference date [~~(ARD)~~], which is the specific end-point for a common observation period (look back period) in the MDS assessment process.

(c) All MDS items shall be coded in accordance with 42 C.F.R. [~~Code of Federal Regulations~~] §483.20 (relating to Resident Assessment); the CMS [~~the Centers for Medicare and Medicaid Services~~] Long-Term Care Facility Resident Assessment Instrument User's Manual (RAI User's Manual); and state-specific [~~state specific~~] requirements. Coding for items described in this subsection must be based on observations over the look back period specified. If the observation did not occur during the look back period, it is not coded on the MDS.

(1) Cognitive Patterns. The look back period for items described in this paragraph is seven days.

(A) Comatose Code One is claimed only when the recipient's clinical record includes a documented neurological diagnosis of coma or persistent vegetative state. The clinical record must include physician documentation of a diagnosis of coma or persistent vegetative state.

(B) Short-Term Memory Code One is claimed when it is determined that the recipient lacks the functional capacity to recall

recent events. Documentation in the clinical record must support the resident's capacity to remember short-term events.

(C) For Cognitive Skills for Daily Decision Making, code the correct response between zero and three that supports the recipient's level of ability based on the clinical record. The recipient's clinical record must include documentation describing the recipient's actual performance in making everyday decisions about tasks or activities of daily living.

(2) Communication/Hearing Patterns. For Making Self Understood, code the correct response between zero and three that supports the recipient's level of ability to make himself or herself understood. The recipient's clinical record must support the resident's level of ability to express or communicate requests, needs, opinions, urgent problems, and social conversation, whether in speech, writing, sign language, or a combination of these. The look back period is seven days.

(3) Mood and Behavior Patterns.

(A) For Indicators of Depression, Anxiety and Sad mood, code between zero and two based on documented interactions and observations of the recipient. The recipient's clinical record must support the frequency of the indicators of depression, anxiety, and/or sad mood. The look back period is 30 days.

(B) For Behavioral Symptoms, code between zero and three the frequency of behavioral symptoms manifested by the resident across all three shifts as it occurred during the look back period. The look back period is seven days. Record the frequency of behavioral symptoms manifested by the resident across all three shifts.

(4) Physical Functioning and Structural Problems. The look back period for items described in this paragraph is seven days.

(A) For Self Performance, code between zero and four or eight for self performance by the recipient in bed mobility, transfer, eating, and toilet use during the look back period. The clinical record must capture the total picture of the recipient's actual self care performance for each activity of daily living (ADL) over the seven day period, 24 hours a day.

(B) For ADL Support Provided, code from zero and three or eight to support assistance provided by staff in bed mobility, transfer, and toilet use. The clinical record must reflect the support provided by staff, for each ADL, over a 24-hour period, during the look back period.

(5) Continence Appliances and Programs. The look back period for items described in this paragraph is 14 days.

(A) For Scheduled Toileting Plan, check if recipient is on any scheduled toileting program. The documentation must include a plan for bowel and/or bladder elimination whereby staff members at scheduled times each day either take the recipient to the toilet, give the recipient a urinal, or remind the recipient to go to the toilet. This includes bowel habit training and/or prompted voiding, but does not include changing wet garments. A "program" refers to a specific approach that is organized, planned, documented, monitored and evaluated. The recipient's toileting schedule must be in a place where it is clearly communicated, available to and easily accessible to all staff. The care plan must indicate the recipient is on a routine toileting schedule.

(B) For Bladder Retraining Program, check if recipient is on any bladder retraining program that is a retraining program to teach the recipient to consciously delay urinating or to resist the urge to urinate. The care plan must include individualized goals and approaches that is organized, planned, documented, monitored, and evaluated.

(6) Disease Diagnosis. The disease conditions described in this paragraph require a physician-documented diagnosis in the clinical record. The look back period is seven days.

(A) For Diseases, code diabetes, aphasia, cerebral palsy, hemiplegia/hemiparesis, multiple sclerosis, and/or quadriplegia if there is a documented physician diagnosis in the clinical record. Include active diagnoses only; do not include conditions that have been resolved or have not affected the recipient's functioning, medical treatment, or care plan.

(B) For Infections, code pneumonia and/or septicemia, if the infection was present with a documented relationship to the recipient's current functioning, medical treatment, or care plan. A physician documented diagnosis in the clinical record is required to code this item.

(7) Health Conditions. The look back period for items described in this paragraph is seven days. As applicable, review the clinical records (including the current nursing care plan) and consult with facility staff members and resident's family if the resident is unable to respond.

(A) For Problem Conditions, code documented problems or symptoms that affect or could affect the recipient's health or functional status and to identify risk factors for illness, accident, and functional decline, as they occurred during the look back period.

(B) For Dehydrated; Output Exceeds Intake Code only if the recipient has at least two of the following indicators:

(i) Receives less than 1500ml fluids daily;

(ii) One or more clinical signs or symptoms of dehydration; or

(iii) Fluid loss exceeds daily intake.

(C) For Delusions, the recipient's clinical record must support that the recipient holds fixed, false beliefs not shared by others based on observation during the look back period.

(D) For Fever, include documentation that the recorded temperature of 2.4 degrees Fahrenheit or greater than the documented established baseline for that recipient was observed during the look back period.

(E) For Hallucinations, the recipient's clinical record must support the recipient's false sensory perceptions that occur in the absence of any real stimuli as observed and documented during the look back period.

(F) For Internal bleeding, the clinical record must support frank or occult bleeding in the clinical record based on observations during the look back period, excluding simple nosebleeds that are easily controlled.

(G) For Vomiting, the clinical record must support that regurgitation of stomach contents occurred during the look back period.

(8) Oral/Nutritional Status. For Weight Change, code zero or one for weight loss. Code one if there is documented evidence of weight loss of five percent [~~5%~~] as observed during a 30-day look back period, or ten percent [~~10%~~] or more as observed during a 180-day look back period. Do not round the actual weight. If a recipient cannot be weighed, the facility must use the standard no-information code.

(9) Nutritional Approaches. The look back period for items described in this paragraph is seven days.

(A) For Parenteral/Intravenous, check if there is documentation that the recipient received parenteral and/or intravenous fluids administered for nutrition or hydration during the look back period. This item can [~~only~~] be coded only if there is supporting documentation that reflects an identified need for additional fluid intake for nutrition and/or hydration.

(B) For Feeding Tube, check if there is documentation that supports the presence of any type of tube that can deliver food, nutritional substances, fluids, and/or medications directly into the gastrointestinal system.

(C) Parenteral or Enteral Intake. The look back period for items described in this paragraph is seven days.

(i) For Total Calories, code between zero and four for the documented proportion of total calories actually received by the recipient via parenteral or tube feeding as observed during the look back period.

(ii) Average Fluid Intake: Code between zero and five for the average documented fluid intake by intravenous or tube feeding received by the recipient each day as observed in the look back period. The actual amount of fluid the recipient received each day by this mode must be recorded.

(10) Skin Condition. The look back period for items described in this paragraph is seven days.

(A) For Ulcers, code between zero and nine, corresponding to the number of skin ulcers at each stage, due to circulatory problems or pressure, as observed during the look back period. A description of the wound must be documented in the clinical record during the look back period.

(B) For Type of Ulcer, code between zero and four to indicate the highest staged pressure ulcer present as observed during the look back period. The staging of the pressure ulcer(s) must be coded as assessed, described and documented during the look back period.

(11) Other Skin Problems or Lesions present. The look back period for items described in this paragraph is seven days.

(A) For Burns (Second or Third Degree), check for the presence of burns, from any cause (e.g., heat, chemicals) and document in the clinical record. This category does not include first-degree burns.

(B) For Open Lesions/Sores, check if documentation supports the presence of open skin lesion(s) that are not coded elsewhere. Do not code skin tears or cuts. A description of the lesions/sores must be documented in the clinical record during the look back period.

(C) For Surgical Wounds, check if documentation supports the presence of healing and non-healing, open or closed surgical incisions, skin grafts or drainage sites, on any part of the body. This category does not include healed surgical sites, stomas, or lacerations that required suturing or butterfly closure. Peripherally inserted central venous catheters [~~(PICC)~~] sites, central line sites, and peripheral intravenous sites are not coded as surgical wounds. A description of the wound must be documented in the clinical record during the look back period.

(12) Skin Treatments. Check all of the following provided and documented as observed during a look back period of seven days.

(A) Pressure relieving device(s) for chair, to include pressure relieving, pressure reducing, and pressure redistributing devices utilized in the recipient's chair or wheelchair, excluding egg crate cushions;

(B) Pressure relieving device(s) for bed, to include pressure relieving, pressure reducing and pressure redistributing devices, utilized in the recipient's bed, excluding egg crate mattresses;

(C) Turning/repositioning program, to include a continuous, consistent program for changing the recipient's position and realigning the body. There must be a specific approach that is organized, planned, documented, monitored, and evaluated;

(D) Nutrition or hydration intervention to manage skin problems, to include dietary measures received by the recipient and ordered for the purpose of preventing or treating specific skin conditions;

(E) Ulcer care, to include any intervention for treating ulcers due to circulatory problems and/or pressure and/or open lesions;

(F) Surgical wound care, to include any intervention for treating or protecting any type of surgical wound;

(G) Application of dressings (with or without topical medications) other than to feet; and

(H) Applications of ointments/medications (other than to feet), to include ointments or medications used to treat a skin condition.

(13) Foot Problems and Care. Check for the presence of foot problems and care to the feet supported by documentation in the clinical record. The foot problem(s) and the care provided, including signs and symptoms of infection, description of the open lesion(s), and application of dressing, must be documented as observed during a seven-day look back period.

(14) Activity Pursuit Patterns. Check all appropriate periods when recipient was awake all or most of the time with no more than a total of a one-hour nap during any such period. The clinical record must support the period(s) of a typical day when the recipient was awake all or most of the time as observed during a seven-day look back period.

(15) Medications. For injections, code from zero to seven the number of days that the recipient received any type of medication, antigen, or vaccine, by subcutaneous, intramuscular or intradermal injection. Do not include medications ordered but not given. This category does not include intravenous (IV) fluids or IV medications. The look back period for this item is seven days.

(16) Special Treatments and Procedures.

(A) For Special Treatments, check any treatments provided during the look back period. The clinical record must have documentation of administration of any treatment(s) the recipient received during the look back period, as it occurred. Do not code services that were provided solely in conjunction with a surgical or diagnostic procedure and the immediate post-operative or post-procedure recovery period. If the treatment was administered outside the facility during the look back period, documentation of the treatment administered must be documented and included in the clinical record. The look back period is 14 days.

(B) For Therapies, code the total number of days and the total number of minutes (for at least 15 minutes a day) that therapy was administered to a resident during the look back period. Code the total number of actual minutes the particular therapy was provided. Record therapies that occurred after admission/readmission to the nursing facility, were ordered by a physician, and were performed by a qualified therapist[~~,~~] who meets state credentialing requirements (i.e., qualified therapists or their assistants as contemplated by RAI User's Manual Chapter P.3.b) or, in some instances, under such person's direct supervision. Include only medically necessary therapies furnished af-

ter admission to the nursing facility. The time should include the actual treatment time, not the time waiting or writing reports. The therapist's initial evaluation time may not be counted, but subsequent evaluations conducted as part of the treatment process may be counted. Therapy evaluations, treatments, sessions, and minutes must be documented in the clinical record, each day, as they occur. The look back period is seven days.

(C) For Nursing Rehabilitation/Restorative Care, code between zero and seven the number of days on which the technique, procedure, or activity was practiced for a total of at least 15 minutes during each 24-hour period during the look back period. This includes nursing interventions that assist or promote the recipient's ability to attain his or her maximum functional potential, but does not include procedures or techniques carried out by or under the direction of a qualified therapist(s), as identified in the Special Treatments, Procedures, and Programs section of the MDS. The nursing rehabilitation and/or restorative care must meet all of the following additional criteria. The look back period for items described in this subparagraph is seven days.

(i) Measurable objectives and interventions must be documented in the care plan and in the clinical record as observed during the look back period.

(ii) Evidence of periodic evaluation by licensed nurse must be present in the clinical record.

(iii) Nurse assistants/aides must be trained in the techniques that promote recipient involvement in the activity.

(iv) The activities must be carried out or supervised by identified members of the nursing staff. There must be documentation, including minutes, in the clinical record for the nursing rehabilitation and/or restorative care program as observed during the look back period. This does not include groups with more than four recipients per identified supervising helper or caregiver. There must be documented evidence that services provided in a group setting were provided to a group of four or less.

(D) For Physician visits, code the number of days the physician examined the recipient over a 14-day look back period (or since admission if less than 14 days ago). Documentation of the physician's evaluation must be included in the clinical record.

(E) For Physician Orders, code the numbers of days on which physician orders were changed. Include written, telephone, fax, or consultation orders for new or altered treatment. Do not include order renewals without change. If no order changes exist, code zero.

§371.214. Resource Utilization Group Classification System.

(a) The Resource Utilization Group (RUG-III) 34-group classification system has seven major classification groups. The groups represent the recipient's relative direct care resource requirements.

(b) The Activities of Daily Living (ADL) score is based on the recipient's care needs that are provided by the nursing facility staff. The ADL score is used to determine a recipient's placement in a RUG-III category and is based on the recipient's care needs provided by the nursing facility staff. The score is incorporated into acuity measurements established under the RUG-III recipient classification methodology. The clinical record must support items claimed for Medicaid reimbursement on the Minimum Data Set (MDS).

(c) The state-specific Long-Term Care Medicaid Information Section is a part of the MDS assessment Resident Assessment Instrument (RAI) in Texas and must be completed for Medicaid reimbursement. The Long-Term Care Medicaid Information Section must include the last name and license number of the registered nurse (RN) assessment coordinator.

(d) The Basic Tracking Form must include:

(1) the [~~The~~] signature and title of each licensed nurse or health care professional completing any section of the MDS assessment for Medicaid reimbursement; and

(2) the [~~The~~] section(s) and completion date(s) corresponding to the signature of the nurse or health care professional.

(e) Each individual signing the signature section on the Basic Tracking Form is certifying that the information entered on the MDS assessment is accurate. A facility that submits false or inaccurate information is subject to sanctions under Subchapter G of this chapter (relating to Administrative Actions and Sanctions) [~~§371.1643 of this title (relating to Use of Sanctions)~~].

(f) If the nursing facility recipient is a hospice recipient, the nursing facility must comply with the requirements of 40 TAC §19.1926 (relating to Medicaid Hospice Services) and maintain in the recipient's clinical record[~~,~~] copies of the completed Texas Medicaid Hospice Program Recipient Election/Cancellation/Discharge Notice (Form 3071), and the DADS Medicaid/Medicare Hospice Program Physician Certification of Terminal Illness (Form 3074).

(1) The nursing facility must acknowledge a recipient's admission to hospice services on the Special Treatments, Procedures, and Programs section when completing an MDS full, comprehensive, or quarterly assessment.

(2) An MDS assessment indicating that a recipient has elected hospice services is not [~~will not be~~] processed until the Texas Medicaid Hospice Program Recipient Election/Cancellation/Discharge Notice (Form 3071), and the DADS Medicaid/Medicare Hospice Program Physician Certification of Terminal Illness (Form 3074) are received by the Texas Medicaid Claims Administrator [~~(MCA~~].

(3) When a recipient is admitted to hospice and there has not been a significant change in condition, a significant change in status assessment does not have to be completed. The recipient's next scheduled assessment may be used.

(g) Each nurse's license number submitted on the MDS assessment, Long-Term Care Medicaid Information Section, is [~~will be~~] validated with the Texas Board of Nursing or [~~will be validated~~] as applicable as a nurse compact license with the licensing state. An MDS assessment is [~~will be~~] rejected for Medicaid reimbursement if an invalid or delinquent license number is submitted on the MDS assessment, Long-Term Care Medicaid Information Section.

(h) Nursing facility staff must complete the HHSC-approved MDS training in accordance with this subsection.

(1) The nursing facility RN Assessment Coordinator must complete the HHSC-approved online MDS training course prior to completing an MDS assessment for Medicaid payment. All other staff completing the MDS assessment for Medicaid payment are encouraged to take the MDS Training prior to completing the MDS assessment.

(2) The nursing facility RN Assessment Coordinator must repeat the MDS online training every two years. A certificate of completion is [~~will be~~] issued at the conclusion of the training.

(3) If the nursing facility RN Assessment Coordinator does not complete the MDS training every two years as required by HHSC, the license number of the RN Assessment Coordinator is not [~~will not be~~] accepted into the state database and the MDS assessment is [~~will be~~] rejected by the Medicaid claims administrator.

(i) An admission assessment, a quarterly assessment, significant change in status assessment, annual assessment, significant cor-

rection to a prior quarterly assessment, or a significant correction to a prior annual assessment establishes a RUG-III group.

(1) A significant change in status assessment, which requires a comprehensive MDS with Resident Assessment Protocols [~~(RAPs)~~], must be completed by the end of the 14th calendar day following determination that a significant change has occurred.

(2) A significant change in status assessment resets the schedule for the next annual assessment.

(j) Permanent medical necessity is determined by DADS [~~the Texas Department of Aging and Disability Services (DADS)~~] in accordance with 40 TAC §19.2403 (relating to Medical Necessity Determination).

(k) When correcting errors in an MDS assessment, the nursing facility staff must use the MDS Correction Policy in Chapter 5 of the Minimum Data Set, Resident Assessment Instrument User's Manual, published by CMS [~~the Centers for Medicare and Medicaid Services (CMS)~~].

(1) Documentation must be maintained in the clinical record to support the corrected MDS assessment form and be available for review by the OIG [~~HHSC-OIG~~] staff during MDS utilization reviews.

(2) The Correction Request Form attestation of accuracy of signatures must contain the RN assessment coordinator's and Director of Nursing's [~~DON's~~] signatures, and the date the correction was completed.

(3) A correction to a RUG reclassification error identified during an on-site [~~onsite~~] review is considered an assessment error as described in subsection (r)(2) of this section. This does not negate the facility's responsibility to make quality of care corrections pursuant to the CMS MDS Correction Policy referenced in this section.

(l) The MDS assessment establishes the rate(s) at which the Texas Medicaid program pays a nursing facility[~~,~~] or hospice provider for the facility's hospice residents[~~,~~] to support the care the nursing facility's residents receive and any information on the MDS RAI is [~~shall be~~] considered part of each corresponding claim for Medicaid reimbursement.

(m) Prior to entering a nursing facility for review, the OIG [~~HHSC-OIG~~] identifies a population of paid claims from which a sample is [~~will be~~] drawn.

(1) The population is defined as claims associated with RUG classifications:

(A) paid to the nursing facility, or hospice provider for the facility's hospice residents, for a specified time period; and

(B) that meet certain criteria, such as dollar or claim volume, as determined by the OIG [~~HHSC-OIG~~].

(2) The OIG identifies [~~HHSC-OIG will identify~~] the population of paid claims, along with their related RUG classifications and MDS assessment claim forms, from which a statistically valid random sample is [~~will be~~] drawn for review. The sample generated is [~~will be~~] a statistically valid random sample generated at a minimum confidence level of 90 percent [90%] and a maximum precision of ten percent [~~10%~~]. Related extrapolations are [~~will be~~] done at the lower limit of the applicable confidence interval.

(n) Utilization reviews are [~~will be~~] conducted in accordance with this subsection.

(1) An OIG [~~HHSC-OIG~~] nurse reviewer conducts [~~will conduct~~] an unannounced on-site [~~onsite~~] MDS utilization review of a nursing facility at least every 15 months. The frequency of unannounced on-site [~~onsite~~] reviews is [~~will be~~] determined by the accuracy of the MDS assessment(s) and the facility's error rate.

(2) The unannounced on-site [~~onsite~~] review period begins when an OIG [~~HHSC-OIG~~] nurse reviewer presents an entrance letter to the facility, and ends when the OIG [~~HHSC-OIG~~] nurse reviewer informs the facility that the unannounced on-site [~~onsite~~] review is completed. The unannounced on-site [~~onsite~~] review period is subject to the provisions in subparagraphs (A) - (D) of this paragraph. The unannounced on-site [~~onsite~~] review period does not include the exit conference, which is described in paragraph (3) of this subsection.

(A) The nursing facility shall provide the OIG [~~HHSC-OIG~~] nurse reviewer initial access to clinical records and resources the OIG [~~HHSC-OIG~~] nurse reviewer determines are necessary to initiate the unannounced on-site [~~onsite~~] review process within two hours of entrance to the nursing facility. Although the facility is not required to produce all records within two hours, documentation to be reviewed must continue to be made available to the OIG [~~HHSC-OIG~~] nurse reviewer during the unannounced on-site [~~onsite~~] review period. If the facility indicates that necessary records or resources are located off-site or otherwise unavailable for immediate retrieval, and the facility can substantiate this fact, the OIG grants [~~HHSC-OIG will grant~~] an extension to the two-hour initial production of records requirement.

(B) The nursing facility, upon the OIG [~~HHSC-OIG~~] nurse reviewer request, must provide the signed and notarized Records Affidavit described in subsection (q)(4) of this section for each MDS assessment for which copies of clinical record documentation are provided to the nurse reviewer, attesting that the facility used its best efforts to obtain all relevant records, and that the documentation provided to the OIG [~~HHSC-OIG~~] nurse reviewer is as complete a compilation as was possible during the unannounced on-site [~~onsite~~] review period. If the nursing facility refuses to provide the required Records Affidavit, the nursing facility must state the refusal in writing and attach the statement to the records provided to the nurse reviewer.

(C) The nursing facility must ensure an assigned staff member knowledgeable of the MDS and clinical record is available at the facility to the OIG [~~HHSC-OIG~~] nurse reviewer during the entire unannounced on-site [~~onsite~~] review.

(D) When the OIG [~~HHSC-OIG~~] nurse reviewer identifies an item coded on the assessment that cannot [~~can not~~] be substantiated or does not accurately reflect the recipient's status during the applicable look back period, the OIG [~~HHSC-OIG~~] nurse reviewer notifies [~~will notify~~] the assigned nursing facility staff and requests [~~request~~] supporting documentation.

(i) The nursing facility must provide the requested supporting documentation to validate the coded items to the OIG [~~HHSC-OIG~~] during the unannounced on-site [~~onsite~~] review period and prior to the exit conference.

(I) If the unannounced on-site [~~onsite~~] review period is more than one day, the nursing facility must provide the requested information during regular business hours to the OIG [~~HHSC-OIG~~] reviewer by the end of the day the documentation was requested, provided[~~. Provided~~], however, that the facility will [~~shall~~] be allowed a minimum of six business hours in which to provide requested information.

(II) Nothing in this provision shall be construed to affect the timing of an exit conference or require the reviewer to incorporate an overnight stay near the facility. It shall be the facility's responsibility to submit the supplemental records to the reviewer's place of business. The reviewer's exit conference conclusions and er-

ror rates may change after reviewing the supplemental records. Any such changes are [~~will be~~] communicated to the provider within one business day.

(III) If a facility cannot produce or make available the requested information, the facility must provide a written statement explaining why the information cannot be provided as requested. The submission of a written statement does not negate the OIG's [~~HHSC-OIG's~~] authority to take enforcement action under Subchapter G of this chapter [~~(relating to Legal Action Relating to Providers of Medical Assistance~~]).

(ii) Lack of documentation to validate the items claimed on the MDS as described in this paragraph may be the basis for an error and RUG III group reclassification.

(iii) Lack of documentation, inconsistent documentation that misrepresents the patient's actual condition at the time it is documented, or altered documentation, which does not follow generally accepted error correction guidelines such as the MDS Correction Policy in Chapter 5 of the Minimum Data Set, may be the basis for an error and adjustment in the RUG-III group. The error or adjustment is [~~will be~~] made based on a review of the clinical record documentation provided for the look-back period of the MDS assessment.

(3) The OIG [~~HHSC-OIG~~] nurse reviewer holds [~~will hold~~] an exit conference with nursing facility staff.

(A) The exit conference is [~~will be~~] held with the nursing facility staff at the conclusion of the unannounced on-site [~~onsite~~] review period. Hospice staff is encouraged to attend to discuss the review findings of the MDS assessments for hospice recipients for whom the representative provided hospice services.

(B) The OIG [~~HHSC-OIG~~] nurse reviewer provides [~~will provide~~] the nursing facility representative(s) in a leadership position(s) (e.g., the administrator, Director of Nursing [~~DON~~], charge nurse) formal written notification of all MDS validation findings during the exit process.

(i) If a hospice representative is present at the exit conference, written notification is [~~will be~~] provided only on recipients to whom they provided services.

(ii) If the hospice representative is not present during the exit conference, the OIG provides [~~HHSC-OIG will provide~~] formal written notification of all RUG-III changes within 15 calendar days of the exit conference.

(iii) If the nursing facility disagrees with the HHSC RUG-III determination or assessment of errors, the nursing facility may submit a request for reconsideration as provided in subsection (q) of this section.

(o) The OIG [~~HHSC-OIG~~] may sanction any provider or person as defined in §371.1 [~~§371.1601~~] of this title (relating to Definitions), including a managed care organization or subcontractor, pursuant to Subchapter G of this chapter that:

(1) fails to grant immediate access upon reasonable request to:

(A) the OIG [~~HHSC-OIG~~];

(B) the OAG's [~~Attorney General's~~] Medicaid Fraud Control Unit or Civil Fraud Division;

(C) any state or federal agency authorized to conduct compliance, regulatory, or program integrity functions on the provider, person, or the services rendered by the provider or person; or

(D) any agent or consultant of any agency or division within an agency described in subparagraph (A) of this paragraph;

(2) fails to allow the OIG [~~HHSC-OIG~~] or any other federal or state agency, division, agent, or consultant, as described in paragraph (1) of this subsection to conduct any duties that are necessary to the performance of their statutory functions; or

(3) fails to provide to the OIG [~~HHSC-OIG~~] or any other federal or state agency, division, agent, or consultant, as described in paragraph (1) of this subsection, upon request and as requested, for the purpose of reviewing, examining, and securing custody of records, access to, disclosure of, and custody of:

(A) copies or originals of any records, documents, or other requested items, as determined necessary by the OIG [~~HHSC-OIG~~] or those specified in paragraph (1) of this subsection to perform statutory functions;

(B) any records the provider or person is required to maintain;

(C) any records necessary to verify items or services furnished and delivered under Medicaid, any other HHS [~~health and human services~~] program, or any state health care program to determine whether payment for those items or services is due or was properly made; or

(D) information that includes, without limitation:

(i) clinical patient records;

(ii) other records pertaining to the patient;

(iii) any other records of services provided to Medicaid or other HHS [~~health and human services~~] program recipients and payments made for those services;

(iv) documents related to diagnosis, treatment, service, lab results, charting, billing records, invoices, documentation of delivery of items, equipment, or supplies, and radiographs, and all requirements of Subchapter G, Division 2, of this chapter (relating to Grounds for Enforcement) [~~§371.1617(a)(2) of this title (relating to Program Violations)~~];

(v) business and accounting records with backup support documentation, statistical documentation, computer records and data, patient sign-in sheets, and schedules; or

(vi) any records necessary to fulfill its duty under the Improper Payments Information Act of 2002, Public Law 107-300, 116 Stat. 2350 (November 26, 2002) requiring state agencies take action to reduce improper payments. The term "improper payment" means any payment that should not have been made or that was made in an incorrect amount (including overpayments and underpayments) under statutory, contractual, administrative, or other legally applicable requirements, including any payment to an ineligible recipient, any payment for an ineligible service, any duplicate payment, any payment for services not received, or any payment that does not account for credit for applicable discounts.

(p) A facility that uses an electronic clinical record system and electronic submissions must [~~shall~~] comply with this subsection.

(1) A nursing facility that elects to submit electronic or digital signatures on MDS assessments is required to have a policy in effect on the date of transmission that ensures it has [~~they have~~] proper security measures to protect against the use of an electronic or digital signature by anyone other than the individual to whom the electronic or digital signature belongs. The policy must also ensure that clinical

records are made available to the OIG [~~HHSC-OIG~~] and others who are authorized by law.

(2) In order to receive Medicaid reimbursement, a nursing facility that utilizes a clinical record system that [~~which~~] is entirely electronic must maintain a hard copy of all MDS assessments in the recipient's clinical record. The hard copy of an MDS assessment must include the signatures, title, and date of all individuals completing the MDS.

(q) The OIG conducts [~~HHSC-OIG will conduct~~] a reconsideration review upon receipt of a written request for reconsideration.

(1) The reconsideration request must be sent in the form of a letter. The letter must describe in detail the reason a reconsideration review is requested for each specified assessment error. A copy of each signed affidavit executed during the unannounced on-site [~~onsite~~] review for which reconsideration is requested must be attached to the letter. The reconsideration request must be submitted in the order outlined in the reconsideration request requirements provided to the nursing facility staff during the exit conference[~~,~~] and must include all of the information required for a reconsideration request.

(2) The reconsideration request must be mailed to the OIG [~~HHSC-OIG~~] Utilization Review [~~(UR)~~] unit at the address indicated on the exit documentation provided to facility staff at the exit conference.

(A) The reconsideration request must be postmarked on or before the 15th calendar day after the date of the exit conference, provided, however, that if the 15th calendar day falls on a Sunday or national holiday as defined in Texas Government Code [~~Annotated~~] §662.003(a), the request must be postmarked on the next following business day.

(B) A reconsideration request that does not meet the requirements of this paragraph is not [~~will not be~~] granted.

(3) An MDS assessment error that is not identified in the request is not [~~will not be~~] reconsidered.

(4) A nursing facility may submit additional clinical records along with a timely request for reconsideration review. Any such additional records must be accompanied by a notarized Fact and Records Affidavit that properly authenticates the documents as true and correct duplicates of business records pursuant to TEX. R. EVID. 803(6) and TEX. R. EVID.[~~,~~] 902(10). Additionally, the Fact Affidavit must specify: why the records were not produced during the unannounced on-site [~~onsite~~] review, when the records were obtained, where the records were located, who located the records, and the circumstances under which the records were obtained. If recipient medical record documentation that was not provided during the unannounced on-site [~~onsite~~] review is submitted for reconsideration, the weight to be given any supplemental documentation remains [~~shall remain~~] within the discretion of the reviewer.

(5) If the reconsideration review establishes that the OIG [~~HHSC-OIG~~] has changed an MDS RUG-III group in error, the OIG directs [~~HHSC-OIG will direct~~] the Texas Medicaid claims administrator to correct the error retroactively.

(6) If the provider disagrees with the reconsideration determination, the provider may request a formal appeal as described in Chapter 357, Subchapter I of this title (relating to Hearings Under the Administrative Procedure Act).

(7) The RUG-III group and the associated per diem rate specified in the reconsideration determination remain in effect during the formal appeal process.

(r) The OIG recovers [~~HHSC-OIG will recover~~] overpayments based on unannounced on-site [~~onsite~~] review findings associated with an administrative or assessment error in accordance with this subsection.

(1) An administrative error occurs if a requirement in subsections (c) and (d) of this section are not met, or the Long-Term Care Medicaid Information Section or Basic Tracking Form is not made available to the OIG [~~HHSC-OIG~~] during regular business hours of the unannounced on-site [~~onsite~~] review period and prior to the exit conference.

(A) If the unannounced on-site [~~onsite~~] review period is more than one day, the nursing facility must provide the requested information to the OIG [~~HHSC-OIG~~] reviewer by the end of the day information is requested, during regular business hours.

(B) If a facility cannot produce or make available the requested information, the facility must provide a written statement explaining why the information cannot be provided as requested. The submission of a written statement does not negate the OIG's [~~HHSC-OIG's~~] authority to take enforcement action under Subchapter G of this chapter.

(C) An administrative error may be reconsidered as described in subsection (q) of this section.

(2) An assessment error is a RUG reclassification resulting in an overpayment or underpayment of an MDS assessment claim(s) identified during a utilization review of a facility.

(A) During the MDS assessment utilization review of a facility, the OIG identifies [~~HHSC-OIG will identify~~] each assessment error (e.g.[~~,~~] overpayment amount or underpayment amount of an MDS assessment claim) from the population as that term is described in subsection (m) of this section.

(B) Following the unannounced on-site [~~onsite~~] review of the sampled MDS assessment claim forms, an assessment error rate is [~~will be~~] calculated as follows:
Figure: 1 TAC §371.214(r)(2)(B) (No change.)

(C) The OIG processes [~~HHSC-OIG will process~~] all RUG reclassifications identified as a result of the unannounced on-site [~~onsite~~] utilization review.

(i) The OIG recovers [~~HHSC-OIG will recover~~] from the facility any overpayment(s) associated with an MDS assessment claim. The recovered amount is a debt owed by the facility to the Texas Medicaid program. The facility is [~~will be~~] reimbursed for any underpayment(s) identified.

(ii) To calculate any overpayment, the OIG extrapolates [~~HHSC-OIG will extrapolate~~] to the population and the extrapolation is [~~will be~~] applied only to the RUG classifications found in error. An adjustment equal to the net value of the identified overpayment(s) and underpayment(s) is [~~will be~~] made. Any net overpayments [~~will~~] constitute a debt owed by the facility/provider, as applicable, to the Texas Medicaid program. Net underpayments are [~~will be~~] reimbursed to the facility/provider, as applicable. The OIG Utilization Review extrapolates to the population in all cases of overpayment, and the extrapolation is applied only to the RUG classifications found in error.

~~*[(I)* For Utilization Reviews conducted on September 1, 2008 through August 31, 2009, HHSC-OIG Utilization Review will extrapolate to the population only when the error rate exceeds 25%.]~~

~~*[(II)* For Utilization Reviews conducted on September 1, 2009 through February 28, 2010, HHSC-OIG Utilization~~

Review will extrapolate to the population only when the error rate exceeds 20%.]

[(III) For Utilization Reviews conducted on March 1, 2010 through August 31, 2010, HHSC-OIG Utilization Review will extrapolate to the population only when the error rate exceeds 15%.]

[(IV) For Utilization Reviews conducted on or after September 1, 2010, HHSC-OIG Utilization Review will extrapolate to the population in all cases of overpayment as set forth in clause (ii) of this subparagraph and the extrapolation will be applied only to the RUG classifications found in error.]

(iii) An error rate greater than 25 percent [25%] or suspected program violation described in Subchapter G, Division 2, of this chapter, results [§371.1617 of this chapter (relating to Program Violations), will result] in a referral for investigation to the OIG [HHSC-OIG] Medicaid Program Integrity [(MPI)] Division. This referral is [will be] made part of the state's method for identification, investigation and referral for fraud under Chapter 357, Subchapter M, of this title (relating to Fraud or Abuse Involving Medical Providers) and Chapter 371, Subchapter G of this title (relating to Administrative Actions and Sanctions [Legal Action Relating to Providers of Medical Assistance]).

(D) An assessment error is subject to reconsideration in accordance with subsection (q) of this section.

(i) If the facility timely requests reconsideration of the unannounced on-site [onsite] review results, the assessment error rate is [will be] based on the results of the reconsideration.

(ii) If the facility does not timely request reconsideration of the unannounced on-site [onsite] review, the assessment error rate is [will be] based on the results of the unannounced on-site [onsite] review.

(s) Suspected fraudulent documentation, such as medical or clinical records that appear to have been altered, falsified, or fabricated, results [will result] in a referral for investigation to the OIG [HHSC-OIG] Medicaid Program Integrity [(MPI)] Division. This referral is [will be] made part of the state's method for identification, investigation, and referral for fraud under Chapter 357, Subchapter M, of this title.

§371.216. Waiver of Extrapolation.

(a) The OIG [inspector general] may waive the calculation of an overpayment by extrapolation, as described in §371.214(r)(2) of this subchapter (relating to Resource Utilization Group Classification System), to any or all of the Resource Utilization Group (RUG) classifications found in error.

(b) A provider must request a waiver of extrapolation in writing on or before the 15th calendar day after receipt of the final notice of overpayment. The provider's request for waiver of extrapolation must include sufficient evidence to demonstrate good cause for the waiver. The OIG [Office of the Inspector General] may request additional evidence or documentation from the provider or other informational sources in evaluating the request.

(c) The OIG [inspector general] is vested with the sole discretion to evaluate the provider's showing of good cause and to determine whether waiver of extrapolation is warranted.

(d) The decision to grant, deny, or modify a request for waiver of extrapolation is not subject to administrative or judicial review.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 15, 2016.

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Karen Ray
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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SUBCHAPTER E. PROVIDER DISCLOSURE AND SCREENING

1 TAC §§371.1001, 371.1005, 371.1007, 371.1009, 371.1011, 371.1013, 371.1015

Legal Authority

The amendments are proposed under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The amendments implement Texas Government Code Chapter 531, as amended by S.B. 207. No other statutes, articles, or codes are affected by the proposal.

§371.1001. Applicability.

(a) This subchapter describes the disclosure requirements for applications and screening criteria used by the OIG [HHSC Office of Inspector General (HHSC-OIG)] in making a recommendation for an enrollment determination.

(b) This subchapter applies to:

(1) all applicants for enrollment as a provider in the Medicaid program or CHIP [the Children's Health Insurance Program]; and

(2) if requested by an HHS [a health and human services] agency, applicants for enrollment with an HHS [a health and human services] agency program.

§371.1005. Disclosure Requirements.

(a) An applicant must disclose in its enrollment application the identity of any person or entity as requested by HHSC.

(b) The applicant's disclosures must identify every person whose identity must be disclosed pursuant to the Affordable Care Act, Title 42 of the Code of Federal Regulations, or state statute or administrative rule, as amended. Such disclosures include [but are not limited to] owners, certain subcontractors, creditors, managers, and agents.

(c) An applicant must disclose in its enrollment application every person that previously had an ownership or control interest in the applicant but whose interest was transferred to another person, if the person's former interest was transferred to an immediate family member or to a member of the person's household and the person's former

interest was transferred within one year before or at any time after receiving notice of any potential adverse actions by a governmental entity against the person or against a provider for which the person has or had an ownership or control interest.

(d) An applicant must disclose in the enrollment application all information required by state or federal law or regulation, and all additional information requested by HHSC or the OIG [~~HHSC-OIG~~], in its discretion, during the provider screening and enrollment process.

(e) If any information required to be disclosed under this section changes during the processing of an enrollment application, the applicant or provider must disclose that information pursuant to §352.21 of this title (relating to Duty to Report Changes).

(f) A failure by an applicant, provider, or person to meet any of the disclosure requirements specified in this section constitutes a material non-disclosure of relevant information.

(g) The OIG [~~HHSC-OIG~~] may use information submitted by another HHS [~~health and human services~~] agency that relates to information required to be disclosed in lieu of requiring another submission of the same information by the applicant.

§371.1007. Screening Levels.

(a) The OIG [~~HHSC-OIG~~] uses a screening level of "Limited," "Moderate," or "High" risk, assigned in accordance with §352.9 of this title (relating to Screening Levels) to determine the verifications and further screening required under §371.1009 of this subchapter (relating to Verifications Required for Each Screening Level).

(b) Case-by-case recommendation of screening levels. For any enrollment application, the OIG [~~HHSC Office of Inspector General~~] may, in its sole discretion and on a case-by-case basis, recommend that HHSC assign a higher or lower screening level in accordance with §352.9(b) of this title if the OIG [~~HHSC-OIG~~] determines in its discretion that the applicant may pose an increased risk of committing fraud, waste, or abuse or may demonstrate unfitness to provide or bill for medical assistance items or services. The OIG [~~HHSC-OIG~~] may make such a recommendation after considering all circumstances, including the applicant's criminal, regulatory, and administrative sanction history, as well as the following, if applicable:

(1) The applicant or any person required to be disclosed in the enrollment application is under a payment suspension based on a credible allegation of fraud.

(2) The applicant or any person required to be disclosed in the enrollment application has failed to repay any overpayments incurred under Medicaid, CHIP, or other HHS [~~health and human services~~] programs.

(3) The applicant or any person required to be disclosed in the enrollment application was excluded from participation in Medicaid, CHIP, or other HHS [~~health and human services~~] program during the ten years before the date of the enrollment application.

(4) The applicant is seeking enrollment as a provider type that was subject to a state or federal temporary moratorium, if the moratorium was lifted within six months before the date of the enrollment application.

§371.1009. Verifications Required for Each Screening Level.

(a) For an applicant or provider assigned a screening level of "Limited," the OIG [~~HHSC-OIG~~] verifies the accuracy and completeness of the information in or related to the enrollment application and 42 C.F.R. §455.450(a)(1), information about the applicant contained in state or federal records, including criminal history records, and any additional information requested of the applicant by the OIG [~~HHSC-OIG~~].

(b) For an applicant assigned a screening level of "Moderate," the OIG [~~HHSC-OIG~~]:

(1) verifies all items described in subsection (a) of this section; and

(2) performs at least one unscheduled and unannounced pre- and post-enrollment site visit, as described in subsection (d) of this section and in accordance with §352.9 of this title (relating to Screening Levels), if applicable, as described in subsection (d) of this section.

(c) For an applicant or provider assigned a screening level of "High," HHSC or the OIG [~~HHSC-OIG~~] performs:

(1) all the verifications described in subsections (a) and (b) of this section; and

(2) a fingerprint-based criminal history check, in the form and manner prescribed by state or federal law, of each person that is an individual and has an ownership or control interest as defined in §371.1005 of this subchapter (relating to Disclosure Requirements) in the applicant.

(d) An unscheduled and unannounced pre- or post-enrollment site visit conducted in accordance with subsections (b) and (c) of this section verifies compliance with state and federal law, rule, and policy governing the Medicaid and CHIP programs. Documents compiled, subpoenaed, or maintained by the OIG [~~HHSC-OIG~~] in connection with a site visit are confidential pursuant to Texas Government Code §531.1021(g) and (h).

(e) The OIG [~~HHSC-OIG~~], in its sole discretion, may accept previously submitted fingerprints if an individual has been subjected to a fingerprint-based criminal history check by a licensing or regulatory authority or by another state's Medicaid, CHIP, or medical assistance program and the results are made available to HHSC.

(f) As provided in 42 C.F.R. §455.452, the OIG may establish provider screening methods in addition to or more stringent than those required by applicable federal regulations. The OIG may require a fingerprint-based criminal history check when required to do so under State law or because of the level of screening based on risk of fraud, waste, or abuse as determined for that category of provider.

(g) For the requirements outlined above, the OIG may rely on validated screenings as provided by 42 C.F.R. §455.410.

§371.1011. Recommendation Criteria.

(a) A felony or misdemeanor conviction, as defined in 42 C.F.R. §1001.2, under Texas law, the laws of another state, or federal law, may affect a provider's and/or person's ability to participate.

(b) [~~(a)~~] The OIG [~~Except as provided by subsection (b) of this section,~~ ~~HHSC-OIG~~] may recommend denial of an enrollment application of the applicant or a person required to be disclosed in accordance with §371.1005 of this subchapter (relating to Disclosure Requirements) on the basis of information revealed through a background [~~criminal history~~] check on the applicant, provider, or a person required to be disclosed. A background check may include:

(1) information concerning the licensing status of the health care professional;

(2) information contained in the criminal history record information check performed in accordance with Texas Government Code §531.1032;

(3) a review of federal databases;

(4) the pendency of an open investigation by the OIG; and

(5) any other reason that the OIG determines appropriate.

(c) [(b)] On a case-by-case basis, the OIG [HHSC-OIG] may recommend approval of an enrollment application despite the existence of a criminal history. The case-by-case recommendation for approval is [will be] made by considering the following circumstances:

(1) the number of criminal convictions as defined in 42 C.F.R. §1001.2;

(2) the nature and seriousness of the crime;

(3) whether the individual or entity has completed the sentence, punishment, or other requirements that were imposed for the crime and, if so, the length of time since completion;

(4) in the case of an individual, the age of the individual at the time the crime was committed;

(5) whether the crime was committed in connection with the individual's or entity's participation in Medicaid or other HHS [health and human services] programs;

(6) the extent of the individual's or entity's rehabilitation efforts and outcome;

(7) the conduct of the individual or entity, and the work history of the individual, both before and after the crime;

(8) the relationship of the crime to the individual or entity's fitness or capacity to remain a provider or become a provider;

(9) whether approving the individual or entity would offer the individual or entity the opportunity to engage in further criminal activity;

(10) the extent to which the individual or entity provides relevant information or otherwise demonstrates that approval should be granted; and

(11) any other circumstances that HHSC determines are relevant to the individual or entity's eligibility.

(d) [(c)] The OIG [HHSC-OIG] may recommend permanent denial of an enrollment application if:

(1) the applicant, provider, or a person required to be disclosed has been convicted, as defined in 42 C.F.R. [CFR] §1001.2, of an offense arising from a fraudulent act under Medicaid or other HHS [health and human services] programs; and

(2) that fraudulent act resulted in injury to an elderly person, a person with a disability, or a person younger than 18 years of age.

(e) [(d)] The OIG [HHSC-OIG] may recommend denial of an enrollment application if it determines in its discretion that the applicant may pose an increased risk for committing fraud, waste, or abuse or may demonstrate unfitness to provide or bill for medical assistance items or services. In addition to the applicant's criminal, regulatory, and administrative sanction history, the OIG considers [HHSC-OIG will consider] all applicable circumstances, including the following, if applicable:

(1) the applicant, a person required to be disclosed, or a person with an ownership or control interest in the provider did not submit complete, timely, and accurate information, failed to cooperate with any provider screening methods, or refused to permit access for a site visit;

(2) the applicant or a person required to be disclosed has failed to repay overpayments to Medicaid, CHIP, or other HHS [health or human services] programs;

(3) the applicant, provider, or a person required to be disclosed pursuant to §371.1005 of this subchapter, has been suspended or prohibited from participating, excluded, terminated, or debarred from participating in any state Medicaid, CHIP or other HHS [health and human services] agency program;

(4) the applicant, provider, or a person required to be disclosed has participated in Medicaid or CHIP program and failed to bill for medical assistance or refer clients for medical assistance within the 12-month period prior to submission of the enrollment application;

(5) the applicant, provider, or a person required to be disclosed has falsified any information on the enrollment application; and

(6) The OIG [HHSC-OIG] is unable to verify the identity of the applicant, provider, or a person required to be disclosed.

§371.1013. Provider Enrollment Recommendations.

(a) The OIG [HHSC-OIG] makes a recommendation on each enrollment application submitted for review in accordance with the requirements of this subchapter (relating to Provider Disclosure and Screening) and Chapter 352 of this title (relating to Medicaid and Children's Health Insurance Program Provider Enrollment), or other rule, as applicable. The recommendation is at the sole discretion of the OIG [HHSC-OIG], and is not subject to administrative review or reconsideration.

(b) In making its enrollment recommendation, the OIG [HHSC-OIG] may consider any relevant circumstance or factor as it applies to the applicant, provider, or any person required to be disclosed in the enrollment application in accordance with this subchapter and Chapter 352 of this title, if applicable.

(c) Upon making a recommendation on a complete application, the OIG [HHSC-OIG] informs HHSC of its recommendation. HHSC makes the final enrollment decision after considering:

(1) the OIG's [HHSC-OIG's] recommendation;

(2) any conditions for approval recommended by the OIG [HHSC-OIG];

(3) the availability of access to care; and

(4) any other relevant facts or circumstances.

§371.1015. Types of Provider Enrollment Recommendations.

(a) The OIG [HHSC-OIG] may make the following types of recommendations regarding an enrollment application:

(1) Approval. If an enrollment application is recommended for approval, the recommendation is for a time-limited period of participation as specified in the provider agreement or notification of the enrollment decision. The prospective provider must complete and submit the provider agreement before enrollment is granted.

(2) Conditional approval. An enrollment application may be recommended for conditional approval with conditions as specified in the notification of the enrollment recommendation. The conditions may consist of the imposition of any one or more administrative actions or sanctions as specified in Subchapter G of this chapter (relating to Administrative Actions and Sanctions) or in other Medicaid or CHIP policy or rule.

[(3) Abatement. An enrollment application may be abated and the recommendation delayed for up to six months from the date of submission of the completed enrollment application.]

(3) [(4)] Denial. If an enrollment application is denied, HHSC sends [will send] a written notice of the decision by certified

mail to the address of record on the enrollment application. The reason or reasons for denial are as specified in the written notice. If the denial is based upon a pending investigation, charge, or other legal proceeding, the applicant or provider is [~~will be~~] ineligible to reapply until such investigation or proceeding is finally resolved.

(b) If an enrollment application is [~~abated or~~] denied based upon the OIG's [~~HHSC-OIG's~~] recommendation, an applicant may request an informal desk review by the OIG [~~HHSC-OIG~~] of the recommendation within 20 calendar days from the date of the notice of [~~abatement or~~] denial as follows.

(1) The request for an informal desk review must be made in writing and must be submitted in accordance with the instructions in the notice.

(2) The request should state the basis for disagreement with the enrollment recommendation, include any documentary evidence, and describe any mitigating circumstances that would support a reconsideration of the initial enrollment recommendation.

(3) Upon conclusion of the resulting informal desk review, the OIG notifies [~~HHSC-OIG will notify~~] HHSC of its final recommendation. HHSC sends [~~will send~~] a written notice of the final enrollment decision to the address of record on the enrollment application.

(4) The final enrollment recommendation is not subject to administrative review or reconsideration.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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1 TAC §371.1002, §371.1003

Legal Authority

The repeals are proposed under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The repeals implement Texas Government Code Chapter 531, as amended by S.B. 207. No other statutes, articles, or codes are affected by the proposal.

§371.1002. Minimum Collection Goal.

§371.1003. Definitions.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER F. INVESTIGATIONS

1 TAC §§371.1301, 371.1305, 371.1307, 371.1309, 371.1311

Legal Authority

The amendments and new rule are proposed under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The amendments and new rule implement Texas Government Code Chapter 531, as amended by S.B. 207. No other statutes, articles, or codes are affected by the proposal.

§371.1301. Purpose.

(a) This subchapter provides [~~Pursuant to §531.033 and §531.102 of the Texas Government Code, the Executive Commissioner is authorized to adopt rules relating to the investigation of a fraud, waste, or abuse complaint filed with the Texas Health and Human Services Commission's Office of Inspector General. The purpose of this chapter is to provide~~] procedures for the investigation of complaints or allegations to [~~that will~~] promote their just and efficient disposition.

(b) This subchapter [~~chapter~~] governs the investigation of all jurisdictional complaints or allegations before the OIG [~~Commission's Office of Inspector General~~].

§371.1305. Preliminary Investigation [~~and Report~~].

(a) The OIG may receive and investigate complaints related to fraud, waste, or abuse within HHSC or an HHS agency. The OIG prioritizes complaints for purposes of determining the order in which complaints are investigated, taking into account the seriousness of the allegations made in a complaint. The OIG may consider the following factors when opening cases and prioritizing cases for the efficient management of the OIG's workload:

(1) the highest potential for recovery or risk to the State;

(2) the history of noncompliance with applicable law and regulations;

(3) identified fraud trends;

(4) internal affairs investigations according to the seriousness of the threat to recipient or public safety or the risk to program integrity in terms of the amount or scope of fraud, waste, or abuse posed by the allegation that is the subject of the investigation;

(5) acts or the failure to act that potentially threatens the public health or may result in physical harm to the public; and

(6) the potential for or actual physical destruction of state property, including the loss, theft and destruction of State assets, property, benefits, or equipment.

(b) [~~(a)~~] The OIG assesses complaints received by the OIG from any source to determine within 30 days of receipt [~~will determine~~] whether it has:

(1) sufficient indicators of fraud, waste, or abuse; and

(2) jurisdiction [~~sufficient information and whether it has jurisdiction within 30 days of receipt of a complaint or allegation of fraud, waste, or abuse; within 30 days of OIG having reason to believe that fraud or abuse has occurred; or within 30 days of OIG having identified possible questionable practices~~].

(c) If the OIG has jurisdiction and sufficient information to justify [~~initiate~~] an investigation, the OIG completes [~~will conduct~~] a preliminary investigation within 45 days of receipt of the complaint to determine whether there is sufficient basis to warrant a full investigation. The OIG may also collaborate with federal or other state authorities in conducting audits or investigations and in taking enforcement measures in response to program violations.

(1) After completing its preliminary investigation, the OIG may, at its discretion, initiate settlement discussions of an administrative case with the person who is the subject of the investigation. If the matter cannot reasonably be settled or if the OIG determines that further investigation is required before the propriety of settlement or other enforcement can be evaluated, the OIG may conduct a full investigation.

(2) If, at any point during its investigation, the OIG determines that an overpayment resulted without wrongdoing, the OIG may refer the matter for routine payment correction by HHSC's fiscal agent or an operating agency or may offer a payment plan.

(d) The OIG may also consider the following factors in determining whether to open a full investigation:

(1) the nature of the program violation;

(2) evidence of knowledge and intent;

(3) the seriousness of the program violation;

(4) the extent of the violation;

(5) prior noncompliance issues;

(6) prior imposition of sanctions, damages, or penalties;

(7) willingness to comply with program rules;

(8) efforts to interfere with an investigation or witnesses;

(9) recommendations of peer review groups;

(10) program violations within Medicaid, Medicare, Titles V, XIX, XX, CHIP, and other HHS programs;

(11) pertinent affiliate relationships;

(12) past and present compliance with licensure and certification requirements;

(13) history of criminal, civil, or administrative liability; and

(14) any other relevant information or analysis the OIG deems appropriate.

(e) Once the preliminary investigation is completed, the OIG reviews the allegations of fraud, waste, abuse, or questionable practices, and all facts and evidence relating to the allegation and prepares a preliminary report before the allegation of fraud or abuse proceeds to a full investigation. The preliminary report documents the following:

(1) the allegation that is the basis of the report;

(2) the evidence reviewed;

(3) the procedures used to conduct the preliminary investigation;

(4) the findings of the preliminary investigation; and

(5) whether a full investigation is warranted.

[~~(b) Once the preliminary investigation is completed, OIG will review the allegations of fraud, abuse, or questionable practices, and all facts and evidence relating to the allegation and will prepare a preliminary report before the allegation of fraud or abuse will proceed to a full investigation. The preliminary report will document the following:~~]

[~~(1) the allegation that is the basis of the report;~~]

[~~(2) the evidence reviewed;~~]

[~~(3) the procedures used to conduct the preliminary investigation, if available;~~]

[~~(4) the findings of the preliminary investigation; and~~]

[~~(5) whether a full investigation is warranted.~~]

[~~(c) OIG will also consider the factors listed in §371.1603(f)(1) of this chapter (relating to Legal Basis and Scope).~~]

(f) [~~(d)~~] The OIG maintains [~~OIG will maintain~~] a record of all allegations of fraud, waste, or abuse against a provider containing the date each allegation was received or identified and the source of the allegation, if available. This record is confidential under Texas Government Code §531.1021(g) and subject to Texas Government Code §531.1021(h).

§371.1307. Full Investigation.

(a) The OIG begins a full investigation within 30 days of completing the preliminary investigation if it determines that a full investigation is warranted.

(b) A full investigation must be completed within 180 days unless the OIG determines that more time is needed to complete the investigation.

(c) If the OIG determines that more time is needed to complete the investigation, the OIG must notify the provider who is the subject of the investigation indicating that the investigation will exceed 180 days and specifying the reasons the OIG is unable to complete the investigation within the 180-day time period. However, the OIG is not required to notify the provider if the OIG determines that notice would jeopardize the investigation.

(d) Within 30 days of completion of the preliminary investigation, the OIG refers [~~OIG will refer~~] the case to the state's Medicaid fraud control unit if a provider is suspected of fraud, waste, or abuse involving criminal conduct or if the OIG learns or has reason to suspect that a provider's records are being withheld, concealed, destroyed, fabricated, or in any way falsified. This referral does [~~will~~] not preclude the OIG from continuing its investigation of the provider.

§371.1309. Training of Investigators.

Investigators who investigate Medicaid providers for potential fraud, waste, or abuse [~~will~~] receive annual training on notice, service, due process, and any additional regulations or policies that may affect the OIG investigatory process.

§371.1311. Role of the OIG and SIUs.

(a) An MCO is required by §353.502 of this title (relating to Managed Care Organization's Plans and Responsibilities in Preventing and Reducing Waste, Abuse, and Fraud) and §370.501 of this title (relating to Purpose) to establish and maintain an SIU to investigate allegations of fraud, waste, or abuse for all services in the MCO plan. If an MCO suspects possible fraud, waste, or abuse, the MCO must conduct a preliminary investigation in accordance with criteria in §353.502 and §370.501 of this title. If the preliminary investigation confirms fraud, waste, or abuse, the MCO must refer the matter to the OIG.

(b) For a potential overpayment amount less than $100,000, the MCO pursues recovery of the overpayment.

(c) For MCO referrals to the OIG where the potential overpayment amount exceeds $100,000, the OIG accepts the referral and conducts a preliminary investigation.

(1) The OIG evaluates the allegation(s) and evidence from the MCO-SIU for intentional deception, repeat billing pattern, or other indicators of questionable practices.

(2) The OIG determines within 30 business days whether to take additional investigative action, and notifies the referring MCO of the decision.

(d) If the preliminary investigation determines a full investigation is warranted, the OIG assesses the provider's billing activity in fee-for-service Medicaid and other MCOs in which the provider is credentialed.

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1 TAC §371.1303

Legal Authority

The repeal is proposed under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The repeal implements Texas Government Code Chapter 531, as amended by S.B. 207. No other statutes, articles, or codes are affected by the proposal.

§371.1303. Definitions.

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SUBCHAPTER G. ADMINISTRATIVE ACTIONS AND SANCTIONS
DIVISION 1. GENERAL PROVISIONS

1 TAC §§371.1601, 371.1603, 371.1609, 371.1611, 371.1613, 371.1615, 371.1617, 371.1619

Legal Authority

The amendments are proposed under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The amendments implement Texas Government Code Chapter 531, as amended by S.B. 207. No other statutes, articles, or codes are affected by the proposal.

§371.1601. Applicability.

(a) Unless otherwise provided, this subchapter applies to all administrative actions and sanctions imposed by the OIG and arising out of an investigation of fraud, waste, or abuse.

[~~(b) If an investigation, utilization review, or audit procedure is conducted on a person whose program area is regulated by another health and human services (HHS) agency, the substantive rules governing that program area also apply.~~]

[~~(c) This subchapter supersedes any other HHS agency rule regarding enforcement involving fraud, waste, or abuse.~~]

(b) [~~(d)~~] This subchapter does not apply to system recoupments or other administrative or clerical corrections.

[~~(e) An investigation pending on September 1, 2013, is governed by this subchapter as it existed on that date, unless by mutual agreement of the parties.~~]

§371.1603. Legal Basis and Scope.

[(a) The statutory authority for this subchapter is provided by:]

[(1) Texas Human Resources Code Chapters 32 and 36;]

[(2) Texas Government Code Chapter 531;]

[(3) Title 42, United States Code; and]

[(4) Title 42, Code of Federal Regulations.]

[(b) OIG is responsible for:]

[(1) preventing, detecting, auditing, inspecting, reviewing, and investigating fraud, abuse, overpayments, and waste in the provision and delivery of Medicaid and all other state-administered HHS programs and services that are wholly or partly federally funded;]

[(2) minimizing the opportunity for fraud, abuse, overpayments, and waste within Medicaid and other HHS programs;]

[(3) protecting recipients of federally funded programs; and]

[(4) ensuring compliance with state law relating to the provision of health and human services.]

(a) [(c)] The OIG may take administrative enforcement measures against a person or an affiliate of a person based upon an investigation or finding, including an audit finding, in the Medicaid or other HHS programs. Administrative enforcement measures may include:

(1) making referrals for further investigation or action;

(2) taking an administrative action;

(3) imposing a sanction;

(4) assessing damages, penalties, costs related to an administrative appeal, and investigative and administrative costs; or

(5) denying the enrollment of a person for participation in the Medicaid program.

(b) [(d)] When the OIG receives information regarding a possible program violation or possible fraud, abuse, overpayment, or waste, the OIG conducts [will conduct] an investigation pursuant to Subchapter [subchapter] F of this chapter (relating to Investigations). If, at any point during its investigation, the OIG determines that an overpayment resulted without wrongdoing, the OIG may refer the matter for routine payment correction by the agency's fiscal agent or an operating agency or may offer a payment plan.

[(e) When OIG conducts a risk analysis, creates an audit plan, or receives a request to conduct an audit service or agreed-upon procedure, OIG may initiate an audit service, singly or in combination with an investigation. OIG may also collaborate with other federal or state authorities in conducting audit services and enforcing audit findings and questioned costs.]

[(f) OIG may take administrative actions, sanctions, or both against a person or an affiliate of a person who commits a program violation.]

[(1) In determining whether to open a full scale investigation or administer appropriate administrative actions and sanctions, OIG will consider:]

[(A) the nature of the program violation;]

[(B) evidence of knowledge and intent;]

[(C) the seriousness of the program violation;]

[(D) the extent of the violation;]

[(E) prior non-compliance issues;]

[(F) prior imposition of sanctions, damages, or penalties;]

[(G) willingness to comply with program rules;]

[(H) efforts to interfere with an investigation or witnesses;]

[(I) recommendations of peer review groups;]

[(J) program violations within Medicaid, Medicare, Titles V, XIX, XX, CHIP, and other HHS programs;]

[(K) pertinent affiliate relationships;]

[(L) past and present compliance with licensure and certification requirements;]

[(M) history of criminal, civil, or administrative liability. The lack of a prior record is considered neutral; and]

[(N) any other relevant information or analysis deemed appropriate by OIG.]

[(2) Administrative enforcement measures include:]

[(A) making referrals for further investigation or action;]

[(B) taking an administrative action;]

[(C) imposing a sanction;]

[(D) assessing damages, penalties, costs related to an administrative appeal, and investigative and administrative costs; or]

[(E) abating, denying, or postponing a decision to enroll a person for participation in the Medicaid program.]

[(3) OIG will determine by prima facie evidence that a person or affiliate has committed a program violation prior to taking administrative enforcement measures. Upon a credible allegation of fraud, however, OIG may impose the sanction of payment hold before establishing prima facie evidence.]

[(A) The medical director employed by OIG ensures that any investigative findings based on medical necessity or the quality of medical care have been reviewed by a qualified expert as described by the Texas Rules of Evidence before OIG imposes a payment hold or seeks recoupment of an overpayment, damages, or penalties.]

[(B) The dental director employed by OIG ensures that any investigative findings based on the necessity of dental services or the quality of dental care have been reviewed by a qualified expert as described by the Texas Rules of Evidence before OIG imposes a payment hold or seeks recoupment of an overpayment, damages, or penalties.]

[(g) OIG has authority to settle any administrative issue or case. All settlement negotiations are confidential according to the protections in the Texas Government Code.]

(c) [(h)] At the OIG's sole discretion, overpayments may be collected in a lump sum or through installments. The OIG determines a reasonable length of time for a [OIG may collect recoupments by deducting them incrementally from prospective or retrospective payments owed to the person. A] payment plan based on [will be for a reasonable length of time as determined by OIG considering] the circumstances of each individual case.

(d) [(i)] Nothing in these rules is intended to prevent concurrent administrative, civil, or criminal investigation and action. Subject to express statutory limitations, the OIG may proceed with recoupment

or other administrative enforcement concurrently with judicial prosecution of the same matter.

(e) [(i)] An OIG case remains open until:

(1) the investigation is complete;

(2) the case is settled;

(3) the OIG makes an administrative determination that closes the case for lack of evidence or appropriate administrative enforcement; or

(4) all administrative remedies have been exhausted.

(f) In determining the appropriate administrative action or sanction, including the amount of any administrative penalty to assess, the OIG considers:

(1) the seriousness of the violation;

(2) the prevalence of errors by the provider;

(3) the financial or other harm to the state or recipients; and

(4) any aggravating or mitigating factors the OIG determines appropriate.

(g) The following may be considered as aggravating factors that warrant more severe or restrictive action by the OIG. Aggravating factors may include:

(1) harm to one or more patients;

(2) the severity of patient harm;

(3) one or more violations that involve more than one patient;

(4) economic harm to any individual or entity and the severity of such harm;

(5) increased potential for harm to the public;

(6) attempted concealment of the act constituting a violation;

(7) intentional, premeditated, knowing, or grossly negligent act constituting a violation;

(8) prior similar violations;

(9) previous disciplinary action by a licensing board, any government agency, peer review organization, or health care entity;

(10) violation of a licensing board or government agency order; or

(11) other relevant circumstances increasing the seriousness of the misconduct.

(h) The following may be considered as mitigating factors that warrant less severe or restrictive action by the OIG. The provider shall have the burden to present evidence regarding any mitigating factors that may apply in the particular case. Mitigating factors may include:

(1) self-reported and voluntary admissions of violation(s);

(2) implementation of remedial measures to correct or mitigate harm from the violation(s);

(3) acknowledgment of wrongdoing and willingness to cooperate with the OIG, as evidenced by acceptance of a settlement agreement;

(4) rehabilitative potential;

(5) prior community service and present value to the community;

(6) other relevant circumstances reducing the seriousness of the misconduct; or

(7) other relevant circumstances lessening responsibility for the misconduct.

(i) Any administrative penalties assessed are determined as provided in §371.1715 of this chapter (relating to Damages and Penalties).

§371.1609. Notice and Service.

(a) Service of notice.

(1) When required by this subchapter, the OIG provides written notice by:

(A) hand delivery, in which case notice is presumed to be received on the date of delivery;

(B) certified mail with return receipt requested, in which case notice is presumed to be received on the date of the signature of the addressee or its agent on the return receipt or on the delivery date as reflected in the records of the United States Postal Service if the return receipt is unsigned or certified mail is unclaimed;

(C) registered mail, in which case notice is presumed to be received on the date of delivery as reflected in the records of the United States Postal Service;

(D) fax with confirmation page, in which case notice is presumed to be received on the date of the confirmation of the fax; or

(E) regular mail plus one of the other methods enumerated in subparagraphs (A) - (D) of this paragraph.

(2) Notice may be delivered to the subject of the OIG action, any affiliate of the subject, the subject's authorized representative, or any adult at the subject's address of record. Receipt by any of these persons is [~~will be~~] effective as against the provider or person subject to the OIG action.

(3) Notice provided in any manner as provided for in this section constitutes prima facie evidence of proper notice of agency action.

(b) Contents of Notice. The OIG notices[,] generally[, ~~will~~] include, as applicable:

(1) a description of the action or potential action being taken, including any financial amounts at issue;

(2) the basis of the action or potential action;

(3) the effect of the action or potential action;

(4) the duration of the action;

(5) a statement regarding the person's due process rights and the right to submit additional evidence or information for consideration, if applicable; and

(6) any additional information required by statute or this subchapter.

(c) Documents sent to the OIG are considered received by the OIG only when received by 5:00 p.m. on a business day. A document received after 5:00 p.m. on a business day is considered received on the next business day.

§371.1611. Due Process.

(a) The OIG affords to any provider or person against whom it imposes sanctions the administrative due process remedies applicable to administrative sanctions as set forth in this subchapter.

(b) The imposition of administrative actions as defined in §371.1701 of this subchapter (relating to Administrative Actions) does not give rise to due process remedies.

§371.1613. Informal Resolution Process.

(a) A person who is served a notice of intent to impose a sanction or notice of a payment hold may request an informal resolution meeting (IRM) to discuss the issues identified by the OIG in the notice.

(b) A written request for an IRM must:

(1) be sent by certified mail to the address specified in the notice letter;

(2) arrive at the address specified in the notice of intent to impose the sanction no later than:

(A) for a payment hold, ten [~~10~~] days after service on the person of the notice of payment hold;[~~.~~]

(B) for any sanction other than a payment hold or notice of recoupment of overpayment or debt, 30 days after service on the person of the notice; or[~~.~~]

(C) for a notice of recoupment or overpayment or debt, a person may request an IRM any time prior to the issuance of the final notice;[~~.~~]

(3) include a statement as to the specific issues, findings, and/or legal authority in the notice letter with which the person disagrees, and, in the case of a payment hold, why an IRM would be beneficial for the resolution of the case;

(4) state the basis for the person's contention that the specific issues or findings and conclusions of the OIG are incorrect; and

(5) be signed by the person or an attorney for the person. No other person or party may request an IRM for or on behalf of the subject of the sanction.

(c) On timely request for an initial IRM:

(1) For [~~for~~] any sanction other than a payment hold, the OIG schedules [~~OIG shall schedule~~] the IRM and gives [~~give~~] notice of the time and place of the meeting.

(2) For [~~for~~] a request based on a payment hold, the OIG decides [~~OIG shall decide~~] whether to grant the provider's request for an IRM and, if the OIG decides to grant the IRM, the OIG schedules [~~OIG shall schedule~~] the IRM and notice of the time and place of the meeting.

(d) A person may also submit to the OIG any documentary evidence or written argument regarding whether the sanction is warranted. Documentary evidence or written argument that may be submitted is not necessarily controlling upon the OIG, however.

(e) A written request for an IRM may be combined with a request for an administrative hearing, if a person is entitled to such hearing, and if it meets the requirements of this subchapter. If both an IRM and an administrative hearing have been requested by a person entitled to both, the informal resolution process shall run concurrently with the administrative hearing process, and the administrative hearing process may not be delayed on account of the informal resolution process.

(f) Upon written request of a provider, the OIG provides [~~OIG will provide~~] for a recording of an IRM at no expense to the provider who requested the meeting. The recording of an IRM is [~~will be~~] made available to the provider who requested the meeting. The OIG does [~~OIG shall~~] not record an IRM unless the OIG receives a written request from a provider.

(g) Notwithstanding Texas Government Code §531.1021(g), an IRM is confidential, and any information or materials obtained by the OIG, including the OIG's employees or agents, during or in connection with an IRM, including a recording, are privileged and confidential and may not be subject to disclosure under Chapter 552, Texas Government Code, or any other means of legal compulsion for release, including disclosure, discovery, or subpoena.

§371.1615. Appeals.

(a) A person who is served with final notice of a sanction may appeal the imposition of the sanction.

(b) Request for hearing.

(1) A request for an administrative hearing at HHSC Appeals Division or at SOAH on a final notice of overpayment, must be received in writing by the OIG no later than 30 days after the date the person is served the final notice.

(2) A request for an administrative hearing at HHSC Appeals Division on a Final Notice of Contract Cancellation, Final Notice of Exclusion, or Notice of Final Assessment of Administrative Penalties must be received in writing by the OIG no later than 15 days after the date the person is served the notice.

(3) A request for an expedited administrative hearing at SOAH on a payment hold must be received in writing by the OIG no later than ten [~~10~~] days after the date the person is served the notice.

(4) A written request for an administrative hearing must:

(A) be sent by certified mail to the address specified in the notice letter;

(B) timely arrive at the address specified in the final notice; and

(C) be signed by the person or an attorney for the person. No other person or party may request a hearing for or on behalf of the subject of the sanction.

(5) Other than a final notice of overpayment or payment hold, an administrative hearing for a final notice of a sanction is [~~will be~~] held at the HHSC Appeals Division.

(6) The costs for an administrative hearing held at SOAH is [~~will be~~] borne by the OIG, but a provider is responsible for the provider's own costs incurred in preparing for the hearing.

(7) All other costs incurred by either party, including attorney's fees, transcript copies, expert fees, and deposition costs, is [~~will be~~] the responsibility of the party incurring those costs.

(8) The OIG contacts [~~OIG will contact~~] the HHSC Appeals Division or SOAH to request that the hearing be docketed. The OIG files [~~OIG will file~~] a docketing request for a payment hold hearing with SOAH not later than the third [~~3rd~~] day after the hearing is requested.

(c) If a person who has been served notice of a final sanction or notice of a payment hold fails to timely request an administrative hearing, the sanction becomes [~~will become~~] final and unappealable.

§371.1617. Finality and Collections.

(a) Unless otherwise provided in this subchapter, a sanction becomes final upon any of the following events:

(1) expiration of 30 calendar days after service [~~receipt~~] of the notice of final sanction [~~or notice of a payment hold~~] if no [~~timely~~]

request for appeal of imposition of the sanction is received by the OIG by the 30th calendar day after service [~~OIG~~];

(2) execution of a settlement agreement with the OIG; or

(3) a final order entered by the Executive Commissioner or his designee after an administrative [~~contested case~~] hearing.

(b) The effect of a final sanction resulting in recoupment, [~~restricted reimbursement,~~] assessment of damages, penalties, recoupment of audit overpayments, or other financial recovery is to create a final debt in favor of the State [~~of Texas~~]. Within 30 days after the date on which the sanction becomes final, the person must:

(1) pay the amount of the overpayment, assessment of damages, penalties, or other costs;

(2) negotiate and execute a payment plan, the terms of which are granted at the sole discretion of the OIG; or

(3) file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both the occurrence of the violation and the amount of the penalty.

(c) If a final payment plan agreement is not executed by all parties or full restitution is not received within 30 calendar days after finality, the debt is [~~will be~~] delinquent and one or more vendor holds may be placed on the provider's payment claims and account by HHSC, the Medicaid/CHIP division, the state Comptroller, the OAG Collection Division, or any other state agency with authority to interrupt payments in satisfaction of a debt to the state.

(d) The OIG may, at its sole discretion, agree to suspend any vendor holds pending negotiations of payment plan terms.

(e) When a debt is delinquent, the OIG may collect funds owed. Collection methods may include:

(1) placing the person on prepayment or postpayment hold. Funds withheld by a payment hold may be used to satisfy any portion of an unpaid assessment of overpayments, damages, or penalties;

(2) using a collection agency;

(3) collecting from Medicare for Medicaid debts;

(4) requesting the State Comptroller to place a hold on all state voucher revenue for the person from all state agencies;

(5) requesting the OAG's Collection Division to file suit in district court or engage in other collection efforts;

(6) requesting the OAG to seek an injunction prohibiting the person from disposing of an asset(s) identified by the OIG as potentially subject to recovery due to the person's fraud, waste, or abuse;

(7) applying any funds derived from forfeited asset(s), after offsetting any expenses attributable to the sale of those assets; and

(8) receiving and reporting credit information on a person with outstanding debts.

§371.1619. Award for Reporting Medicaid Fraud, Waste, Abuse, or Overcharges.

(a) The OIG may grant an award to a person who reports activity that constitutes fraud, waste, or abuse of funds in the Medicaid program or reports overcharges in the program if the OIG determines that the disclosure results in the recovery of a damage or penalty imposed under §32.039, Texas Human Resources Code, and described in this subchapter. Unless the person is the original source of the information as defined in §36.113(b), Texas Human Resources[~~,~~] Code, the OIG may not grant an award to a person in connection with a report if:

(1) The OIG or the OAG had independent knowledge of the activity;

(2) The OIG or the OAG had an open complaint or investigation on the provider or person;

(3) the state or any agent of the state was a party to civil or criminal proceedings in which the allegations were disclosed;

(4) the allegations were disclosed in a legislative or administrative report, hearing, audit, or investigation; or

(5) the allegations were disclosed by the news media.

(b) A person who brings an action under Chapter 36, Subchapter C, Texas Human Resources Code is not eligible for an award under this section.

(c) A person who makes a report under this section must make known at the time of the report of the complaint that they are reporting the potential fraud, waste, or abuse in accordance with this section.

(d) The OIG determines, at its discretion, the amount of an award. The award may not exceed five percent [~~5%~~] of the amount of the administrative damage or penalty collected under this subchapter that resulted from the person's disclosure. In determining the amount of the award, the OIG considers how important the disclosure was in ensuring the fiscal integrity of the program. The OIG may also consider whether the individual participated in the fraud, waste, abuse, or overcharge.

(e) The OIG pays an award made under this section only after collecting the funds to be awarded. Recovery of funds, including overpayments, damages and penalties, and any other collections from the provider or person committing the fraud, waste, or abuse, is applied in the following order:

(1) the overpayment;

(2) refund of the federal share of any overpayment, damages, or penalties;

(3) the OIG's method of finance [~~OIG's "method of finance"~~] from the collected damages and penalties;

(4) the OIG's investigative costs from the collected damages and penalties;

(5) other costs of recovery from the collected damages and penalties;

(6) an award from the collected damages and penalties; and

(7) any other accounts receivable against the person or provider.

(f) The priority of application and distribution of the collected funds under subsection (e) of this section may be altered, at the discretion of the OIG, due to state or federal statute or other policy determinations.

(g) The OIG calculates awards based on the collected state general revenue portion of the penalties and damages. If HHSC [~~the Commission~~] enters into global or national settlements where the federal government or other agencies receive a portion of the amount of damages or penalties, the award is [~~only~~] calculated only on the remaining state general revenue share collected.

(h) The OIG does not award a distribution unless the OIG has met its ["]method of finance["] threshold for the biennium, as defined in the General Appropriations Act, from damages and penalties collected under this subchapter.

(i) The person reporting a complaint has no discretion or authority over the [an] OIG decision to allow a payment plan or to decide the terms of the payment plan.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 15, 2016.

TRD-201600185
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: February 28, 2016
For further information, please call: (512) 424-6900

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1 TAC §371.1607

Legal Authority

The repeal is proposed under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The repeal implements Texas Government Code Chapter 531, as amended by S.B. 207. No other statutes, articles, or codes are affected by the proposal.

§371.1607. Definitions.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 15, 2016.

TRD-201600186
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: February 28, 2016
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DIVISION 2. GROUNDS FOR ENFORCEMENT

1 TAC §§371.1651, 371.1653, 371.1655, 371.1657, 371.1659, 371.1663, 371.1665, 371.1667, 371.1669

Legal Authority

The amendments are proposed under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The amendments implement Texas Government Code Chapter 531, as amended by S.B. 207. No other statutes, articles, or codes are affected by the proposal.

§371.1651. Provider Eligibility.

A person is subject to administrative actions or sanctions if the person:

(1) is suspended, terminated, or otherwise sanctioned by Medicare, Medicaid, another HHS program, CHIP, or any state or federally funded health care program;

(2) is affiliated with a person who has been suspended, terminated, or otherwise prohibited from participating in Medicare, Texas Medicaid, CHIP, or other HHS program;

(3) is a provider and any person with an ownership interest in the provider has been convicted of a criminal offense related to that person's involvement with the Medicare, Medicaid, or Title XXI program in the last ten [10] years;

(4) is a person with an ownership or control interest in a provider or is an agent or managing employee of the provider and fails to:

(A) disclose or submit timely and accurate information, including fingerprints if required by federal or state rule, statute, regulation, or published policy; or

(B) cooperate with any and all screening methods required during the provider screening process under statute or regulation;

(5) is a provider, has an ownership or control interest in a provider, or is an agent or managing employee of a provider and fails to:

(A) submit timely and accurate information, including fingerprints if required by CMS or state rule; and

(B) cooperate with any and all screening methods required during the provider screening process as provided by statute, rule, or regulation;

(6) is a provider or person with an ownership interest in the provider and fails to timely submit sets of fingerprints during the provider screening process as required by rule, statute, or other regulation;

(7) fails to permit access to any and all provider locations for unannounced or announced on-site visits or inspections during the provider screening process as required by rule, statute, or other regulation;

(8) falsifies any information provided on a provider enrollment application;

(9) is a provider whose identity CMS or the OIG is unable to verify;

(10) has a criminal history that would result in denial of a provider enrollment application pursuant to rule;

(11) fails to disclose or omits any material fact on a provider enrollment application;

(12) fails to meet standards required for licensure or loses licensure, as finally determined by the licensing authority, when such licensure is required by state or federal law, administrative rule, provider agreement, or provider manual for participation in the Medicaid or other HHS program;

(13) fails to fully and accurately make any disclosure required by the Social Security Act §1124 or §1126;

(14) fails to identify or disclose in the provider screening process for any HHS program:

(A) all persons with a direct or indirect ownership or control interest, as defined by 42 C.F.R. [~~CFR~~] §455.101;

(B) all information required to be disclosed in accordance with state administrative rule, 42 C.F.R. [~~CFR~~] Part 1001, or other by statute, rule, or regulation;

(C) all agents or subcontractors of the provider:

(i) if the provider or a person with an ownership interest in the provider has an ownership interest in the agent or subcontractor; or

(ii) if the provider engages in a business transaction with the agent or subcontractor that meets the criteria specified by 42 C.F.R. [~~CFR~~] §455.105;

(15) makes a false statement, misrepresentation or omission of a pertinent fact on, or fails to fully or correctly complete or execute a provider enrollment application, provider agreement or amendment, reinstatement request or any document requested as a prerequisite for Medicaid or other HHS program participation; or

(16) fails to timely correct, supplement, or update information on a provider enrollment application, provider agreement or amendment, reinstatement request, or any document requested as a prerequisite for continued Medicaid or other HHS program participation, including:

(A) change of mailing address;

(B) fax number;

(C) loss or forfeiture of corporate charter; or

(D) change in ownership.

§371.1653. Claims and Billing.

A person is subject to administrative actions or sanctions if the person submits, or causes to be submitted, a claim for payment by the Medicaid or other HHS program:

(1) for an item or service for which the person knew or should have known the claim or cost report was false or fraudulent;

(2) for an item or service that was not provided as claimed;

(3) for an item or service that requires prior authorization, prior order, or prescription, where prior authorization, prior order, or prescription was not properly obtained, including where prior authorization, prior order, or prescription requirements were met by misrepresentation or omission;

(4) for an item or service that requires the name and National Provider Number of the supervising, ordering, or referring person for prior authorization, where the correct name and National Provider Number of the supervising, ordering, or referring person were not provided;

(5) based on a code that would result in greater payment than the code applicable to the item or service that was actually provided;

(6) for an item or service that was not coded, bundled, or billed in accordance with standards required by statute, regulation, contract, Medicaid or other HHS program policy or provider manual, and that, if used, has the potential of increasing any individual or state provider payment rate or fee;

(7) for an item or service that was not reimbursable by, permitted by, or associated with the Medicaid or other HHS program, including an item or service substituted without authorization by the Medicaid or other HHS program and a prescription drug substituted without authorization by an HHS program;

(8) for any order or prescription in which a false statement, misrepresentation, or omission of pertinent facts was made by the ordering or prescribing person on a claim, attachments to a claim, medical record, documentation used to adjudicate a claim for payment or to support representations on cost reports, used by the provider to show the medical necessity, or on documents used to establish fees, daily payment rates, or vendor payments;

(9) for an item or service where the charges for that item or service exceed [~~are in excess of~~] the usual and customary fee the person charges to the public, privately insured persons, or private-pay persons for the same item or service, including a claim submitted under Title XVIII (Medicare);

(10) for an item or service where the charges or costs for that item or service were discounted for the public, privately insured persons, or private-pay persons for the same item or service, including a claim submitted under Title XVIII (Medicare);

(11) for an item or service that is furnished, prescribed, or otherwise ordered or presented by a person that is excluded, terminated, or otherwise prohibited from participation in an HHS program or any state or federally funded health care program, except an order or prescription that was:

(A) written before the exclusion or termination of a physician or other practitioner legally authorized to write a prescription; and

(B) delivered within 30 days of the effective date of such exclusion or termination;

(12) for a home health service for which no in-person evaluation of the recipient was performed within the 12-month period preceding the date of the order or other authorization for the home health service;

(13) for durable medical equipment for which the physician, physician assistant, nurse practitioner, clinical nurse specialist, or certified nurse-midwife that ordered or otherwise authorized the durable medical equipment has failed to certify on the order or authorization that he or she conducted an in-person evaluation of the recipient within the 12-month period preceding the date of the order or other authorization;

(14) for an item or service for which the provider knowingly made, used, or caused the making or use of a false record or statement material to an obligation to pay or transmit money or property to this state under the Medicaid program, or knowingly concealed or knowingly and improperly avoided or decreased an obligation to pay or transmit money or property to this state under the Medicaid program;

(15) for an item or service that constitutes a violation of §32.039(b) or §36.002 [sections §32.039(b) or 36.002] of the Texas Human Resources Code;

(16) for an item or service rendered to a child who was not accompanied by an authorized adult or who was accompanied by the provider or its affiliate to treatment; or

(17) for damages, costs, or penalties collected or assessed by the OIG.

§371.1655. Program Compliance.

A person is subject to administrative actions or sanctions if the person:

(1) is excluded or terminated for cause on or after January 1, 2011, under Title XVIII of the Social Security Act or under the Medicaid program or CHIP of any other state;

(2) commits an act for which sanctions, damages, penalties, or liability could be or are assessed by the OIG;

(3) fails to repay overpayments or other assessments after receiving written notice of the overpayment or of delinquency by the OIG or any HHS program or HHS agency;

(4) fails to repay overpayments within 60 calendar days of self-identifying or discovering an overpayment that was made to the person by the Medicaid, CHIP or other HHS program;

(5) fails to comply, when required for participation in Medicaid or other HHS program or award, with financial record and supporting document retention requirements designed to ensure that a person's claims or costs may be reviewed objectively for accuracy and validity. Such requirements include compliance with:

(A) United States Office of Management and Budget (OMB) [OMB] circulars;

(B) generally accepted accounting principles (GAGAS);

(C) state or federal law; or

(D) contractual requirements;

(6) fails to comply, when required for participation in Medicaid or other HHS program or award, with standards or requirements related to allowable and valid expenses and costs, including requirements related to cost allocation methodologies and the correct application of cost allocation methodologies. Such standards include compliance with:

(A) OMB circulars;

(B) GAGAS;

(C) state or federal law; or

(D) contractual requirements;

(7) fails to establish an effective compliance program for detecting criminal, civil, and administrative violations, that promotes quality of care, contains appropriate protection for whistleblowers, and contains the core elements identified in the federal sentencing guidelines for corporations or established by the United States Secretary of Health and Human Services;

(8) fails to ensure that items or services furnished personally by, at the direction of, or on the prescription or order of an excluded person are not billed to the Titles V, XIX, XX, or CHIP programs after the effective date of the person's exclusion, whether the exclusion was imposed directly or through an MCO, or through an individual or a group billing number;

(9) fails to comply with Medicaid or other HHS program policy, a published medical assistance or other HHS program bulletin, a policy notification letter, a provider policy or procedure manual, a contract, a statute, a rule, a regulation, or an interpretation previously published or sent to the provider by an operating agency or the Commission, including statutes or standards governing occupations;

(10) fails to comply with the terms of Medicaid or other HHS program contract, provider enrollment application, provider agreement or amendment, assignment agreement, the provider certification on Medicaid or other HHS program claim form or rules or regulations published by the Commission or the medical assistance program or other HHS operating agency;

(11) enrolls as a provider as a corporation and loses or forfeits its corporate charter, and fails to obtain reinstatement retroactive to the time of the original loss or forfeiture;

(12) was found liable in a court judgment, assumed liability for repaying an overpayment in a settlement agreement or was convicted of a violation relating to performance of a provider agreement or program violation of Medicare, Texas Medicaid, other HHS program, or any other state's Medicaid program;

(13) fails to comply with any provision of the Texas Human Resources Code Chapter 32 or 36, the Texas Government Code, the Texas Health and Safety Code, or any rule or regulation issued under those codes;

(14) fails to abide by applicable federal and state law regarding persons with disabilities or civil rights;

(15) fails to correct deficiencies in provider operations, medical care, billing, records management, or reporting after receiving written notice of them from an operating agency, the Commission, or their authorized agents;

(16) defaults on repayments of scholarship obligations or items relating to health profession education made or secured, in whole or in part, by the United States Department of Health and Human Services [HHS] or the state when all reasonable steps have been taken to secure repayment;

(17) fails to notify and reimburse the relevant operating agency or the Commission or their agents for services paid by Medicaid or other HHS program if the provider also receives reimbursement from a liable third party;

(18) requests from a third party liable for payment of the services or items provided to a recipient under Medicaid or other HHS program, any payment other than as authorized by 42 C.F.R. [CFR] §447.20;

(19) unless otherwise allowed by law, solicits recipients or causes recipients to be solicited, through offers of transportation or otherwise, for the purpose of delivering to those recipients health care items or services or solicits for treatment or treats a child who was not accompanied by an authorized adult or who was accompanied by the provider or its affiliate to treatment;

(20) fails to include within any subcontracts for services or items to be delivered within Medicaid all information that is required by 42 C.F.R. [CFR] §434.10(b);

(21) fails, as a hospital, to comply substantially with a corrective action required under 42 U.S.C. §1395ww(f)(2)(B) [the Social Security Act, §1886(f)(2)(B)];

(22) commits an act described as grounds for exclusion under 42 U.S.C. §1320a-7(a) [in the Social Security Act, §1128A]

(civil monetary penalties for false claims) or 42 U.S.C. §1320a-7(b) [§1128B] (criminal liability for health care violations);

(23) could be excluded for any reason for which the Secretary of the United States [U.S.] Department of Health and Human Services or its agent could exclude such person under 42 U.S.C. §1320a-7(a) (mandatory exclusion), 42 U.S.C. §1320a-7(b) (permissive exclusion), or 42 C.F.R. Part [CFR Parts] 1001 or 1003;

(24) prevents, obstructs, impedes, or attempts to impede the OIG or any other federal or state agency, division, agent, or consultant from conducting any duties that are necessary to the performance of their official functions;

(25) fails to screen all employees and contractors for exclusions from the Medicaid or other HHS program on a monthly basis and to confirm that no employees or contractors are excluded individuals or entities;

(26) fails to document that the provider and its employees and contractors are not excluded;

(27) fails to immediately inform the OIG after identification of an excluded employee;

(28) fails to immediately inform the OIG when the provider takes any action against an employee or contractor, including suspension actions, settlement agreements, and situations where an individual or entity voluntarily withdraws from the program to avoid a formal sanction;

(29) fails to refund Medicaid for funds spent, if any, for an excluded person's salary, expenses, or fringe benefits paid during the period of exclusion if those funds were reflected or calculated into a cost report or any other document used by the state to determine an individual payment rate, a statewide payment rate, or a fee;

(30) commits any act or omission described in:

(A) 42 C.F.R. [CFR] §1001.801 (failure of health maintenance organizations [HMOs] and Competitive Medical Plans [CMPs] to furnish medically necessary items or services);

(B) 42 C.F.R. [CFR] §1001.901 (false or improper claims);

(C) 42 C.F.R. [CFR] §1001.951 (fraud and kickbacks and other prohibited activities);

(D) 42 C.F.R. [CFR] §1001.1001 (exclusion of entities owned or controlled by a sanctioned person);

(E) 42 C.F.R. [CFR] §1001.1051 (exclusion of individuals with ownership or control interest in sanctioned entities);

(F) 42 C.F.R. [CFR] §1001.1101 (failure to disclose certain information);

(G) 42 C.F.R. [CFR] §1001.1501 (default of health education loan or scholarship obligations);

(H) 42 C.F.R. [CFR] §1001.1601 (violations of the limitations on physician charges); or

(I) 42 C.F.R. [CFR] §1001.1701 (billing for services of assistant at surgery during cataract operations); or

(31) commits or conspires to commit a violation of §32.039(b) [section 32.039(b)] of the Texas Human Resources Code.

§371.1657. Unallowable Fiscal Gain.

A person is subject to administrative actions or sanctions if the person:

(1) requests payment from a recipient for services or items delivered within the Medicaid or other HHS program when payment for the services was recouped by Medicaid or another HHS program for any reason;

(2) requests payment from recipients for services or items furnished [by], directed [by], ordered, or prescribed by an excluded person without first:

(A) informing the recipient, before delivery of the item or service, that those services are not reimbursable by the Medicaid or other HHS program; and

(B) obtaining and retaining, before delivery of the item or service, a written signed consent from the recipient indicating that the recipient understands he or she is responsible for payment for the services and that the services or items are still desired;

(3) misapplies, misuses, embezzles, converts, steals, or fails to promptly release upon a valid request, or fails to keep detailed receipts of expenditures relating to any funds or other property in trust for a Medicaid or other HHS program recipient;

(4) causes or permits the embezzlement, misuse, misapplication, improper withholding, conversion, or misappropriation of Medicaid or Medicaid-related funds:

(A) while the Medicaid provider is bankrupt, in receivership, or insolvent;

(B) rendering the Medicaid provider insolvent by such act; or

(C) deepening or contributing to the insolvency of the Medicaid provider by such act;

(5) requests payment from a recipient for services or items delivered within the Medicaid or other HHS program for any amount that exceeds the amount Medicaid or other HHS program paid for such services or items, with the exception of any cost-sharing authorized by the program;

(6) markets, offers, supplies, or sells confidential information, including recipient names, Medicaid recipient identification numbers, and other recipient information, for a use that is not expressly authorized by a Medicaid or other HHS program;

(7) discloses a recipient's protected health information to any person in exchange for direct or indirect remuneration, except that a person may disclose a recipient's protected health information:

(A) to a covered entity as defined by §181.001 of the Texas Health and Safety Code or to a covered entity as that term is defined by §602.001 of the Texas Insurance Code for the purpose of:

(i) treatment;

(ii) payment;

(iii) health care operations; or

(iv) performing an insurance or health maintenance organization function as described by §602.053 of the Texas Insurance Code; or

(B) as otherwise authorized by state or federal law.

§371.1659. Compliance with Health Care Standards.

A person is subject to administrative actions or sanctions if the person:

(1) engages in any negligent or abusive practice that results in death, injury, or substantial probability of death or injury to a recipient;

(2) fails to provide an item or service to a recipient in accordance with accepted medical community standards or standards required by statute, regulation, or contract, including statutes and standards that govern occupations;

(3) furnishes or orders services or items for a recipient under the Medicaid or other HHS program that substantially exceed a recipient's needs, are not medically necessary, are not provided economically or are of a quality that fails to meet professionally recognized standards of health care;

(4) is the subject of a voluntary or involuntary action taken by a licensing or certification agency or board, which action is based upon the agency or board's receipt of evidence of noncompliance with licensing or certification requirements;

(5) has its license to provide health care revoked, suspended, or probated by any state's licensing or certification authority, or surrenders a license or certification while a formal disciplinary proceeding is pending before any state's licensing or certification authority;

(6) fails to abide by applicable statutes and standards governing providers;

(7) fails to comply with the security, privacy, marketing, disclosure, notification, business associate and breach requirements of HIPAA [~~the Health Insurance Portability and Accountability Act (HIPAA)~~] and regulations promulgated under HIPAA or the Texas Medical Records Privacy Act in chapter 181 of the Texas Health and Safety Code and regulations promulgated under that Act;

(8) fails to timely provide notice of electronic disclosure to a recipient for whom the person creates or receives protected health information that is subject to electronic disclosure;

(9) electronically discloses or permits the electronic disclosure of a recipient's protected health information to any person without a separate, documented authorization from the recipient or the recipient's legally authorized representative for each disclosure, unless the disclosure is:

(A) to a covered entity as defined by §181.001 of the Texas Health and Safety Code or to a covered entity as that term is defined by §602.001 of the Texas Insurance Code for the purpose of:

(i) treatment;

(ii) payment;

(iii) health care operations; or

(iv) performing an insurance or health maintenance organization function as described by §602.053 of the Texas Insurance Code; or

(B) as otherwise authorized by state or federal law;

(10) employs any treatment modality that has been declared unsafe or ineffective by the Food and Drug Administration [~~(FDA)~~], CMS, the Public Health Service [~~(PHS)~~], or other state or federal agency with regulatory authority; or

(11) fails to comply with eligibility or meaningful use or other standards of the Health Information Technology for Economic and Clinical Health [~~(HITECH)~~] Act incentive programs and regulations promulgated under the Act.

§371.1663. Managed Care.

A person is subject to administrative action or sanctions if the person:

(1) is an MCO or an MCO provider and fails to provide a health care benefit, service, or item that the MCO or MCO provider is required to provide according to the terms of its contract with an operating agency, its fiscal agent, or other contractor [~~contract~~] to provide health care services to Medicaid or HHS program recipients;

(2) is an MCO or MCO provider and fails to provide to an individual a health care benefit, service, or item that the MCO or MCO provider is required to provide by state or federal law, regulation, or program rule;

(3) is an MCO and engages in actions that indicate a pattern of wrongful denial, excessive delay, barriers to treatment, authorization requirements that exceed professionally recognized standards of health care, or other wrongful avoidance of payment for a health care benefit, service or item that the organization is required to provide under its contract with an operating agency;

(4) is an MCO and engages in actions that cause a delay in making payment for a health care benefit, service or item that the organization is required to provide under its contract with an operating agency, and the delay results in processing or paying the claim on a date later than that allowed by the MCO's contract;

(5) is an MCO or MCO provider and engages in fraudulent activity or misrepresents or omits material facts in connection with the enrollment in the MCO's managed care plan of an individual eligible for medical assistance or in connection with marketing the organization's services to an individual eligible for medical assistance;

(6) is an MCO or MCO provider and receives a capitation payment, premium, or other remuneration after enrolling a member in the MCO's managed care plan whom [~~who~~] the MCO knows or should have known is not eligible for medical assistance;

(7) is an MCO or MCO provider and discriminates against MCO-enrollees or prospective MCO-enrollees in any manner, including marketing and disenrollment, and on any basis, including, without limitation, age, gender, ethnic origin, or health status;

(8) is an MCO or MCO provider and fails to comply with any term of a contract with a Medicaid or other HHS program or operating agency or other contract to provide health care services to Medicaid or HHS program recipients and the failure leads to patient harm, creates a risk of fiscal harm to the state, or results in fiscal harm to the state;

(9) is an MCO or an MCO provider and fails to provide, in the form requested, to the relevant operating agency or its authorized agent upon written request, accurate encounter data, accurate claims data, or other information contractually or otherwise required to document the services and items delivered by or through the MCO to recipients;

(10) is an MCO or an MCO provider and files a cost report or other report with the Medicaid or other HHS program that violates any of the cost report violations in §371.1665 of this division (relating to Cost Report Violations);

(11) is an MCO or MCO provider and misrepresents, falsifies, makes a material omission, or otherwise mischaracterizes any facts on a request for proposal, contract, report, or other document with respect to the MCO's ownership, provider network, credentials of the provider network, affiliated persons, solvency, special investigative unit, plan for detecting and preventing fraud, waste, or [~~and~~] abuse, or any other material fact;

(12) is an MCO or MCO provider and fails to maintain the criteria and conditions supporting an application and grant of a waiver to HHSC, or fails to demonstrate the results that were contemplated, based upon representations by the MCO or provider in its proposal submissions or contract negotiations when the waiver was granted, if the

failure is related to representations made by the MCO in its proposal, readiness review, contract, marketing materials, audit management responses, or other written representation submitted to the state, and the failure leads to patient harm, creates a risk of fiscal harm to the state, or results in fiscal harm to the state;

(13) is an MCO or MCO provider and misrepresents, falsifies, makes a material omission, or otherwise mischaracterizes any facts on a patient assessment or any other document that would have the effect of increasing the MCO's capitation or reimbursement rate, would increase incentive payments or premiums, would decrease the amount of capitation at risk, or would decrease the experience rebate owed to the Medicaid program;

(14) is an MCO or MCO provider and fails to simultaneously [~~immediately and contemporaneously~~] notify the OIG and the OAG in writing of the discovery of fraud, waste, or abuse in the Medicaid or CHIP program;

(15) is an MCO and fails to ensure that any payment recovery efforts in which the MCO engages are in accordance with applicable law, contract requirements, or [~~and~~] other applicable procedures established by the Executive Commissioner or the OIG;

(16) is an MCO and engages in payment recovery of an amount sought that exceeds $100,000 and that is related to fraud, waste, or abuse in the Medicaid or CHIP program:

(A) without first [~~immediately and contemporaneously~~] notifying the OIG and the OAG in writing of the discovery of fraud, waste, or abuse in the Medicaid or CHIP program;

(B) within ten [~~10~~] business days after notifying the [~~notification of~~] OIG or the OAG of the discovery or fraud, waste, or abuse in the Medicaid or CHIP program; or

(C) after receipt of a notice from the OIG or the OAG indicating that the MCO is not authorized to proceed with recovery efforts;

(17) is an MCO and fails to timely submit an accurate monthly [~~a quarterly~~] report to the OIG detailing the amount of money recovered after any and all payment recovery efforts engaged in as a result of the discovery of fraud, waste, or abuse in the Medicaid or CHIP program;

(18) notwithstanding the terms of any contract, is an MCO or MCO provider and fails to timely comply with the requirements of the Texas Medicaid Managed Care program or with the terms of the MCO contract with HHSC [~~the Commission~~] or other contract to provide health care services to Medicaid or HHS program recipients, and the failure leads to patient harm, creates a risk of fiscal harm to the state, or results in fiscal harm to the state;

(19) is an MCO or MCO provider and engages in marketing services in violation of §531.02115 [~~section 531.02115~~] of the Texas Government Code, the program rules or contract and has not received prior authorization from the program for the marketing campaign;

(20) is an MCO or an MCO provider and fails to use prior authorization and utilization review processes to reduce authorizations of unnecessary services and inappropriate use of services; [~~or~~]

(21) is an MCO or MCO provider and commits or conspires to commit a violation of §32.039(b) [~~section 32.039(b)~~] of the Texas Human Resources Code;[~~.~~]

(22) is an MCO and fails to implement or release a payment hold as directed by the OIG or to report accurate payment hold amounts to the OIG;

(23) is an MCO and fails to comply with any provision in Chapter 353, Subchapter F of this title (relating to Special Investigative Units) or Chapter 370, Subchapter F of this title (relating to Special Investigative Units); or

(24) is an MCO and releases information pertaining to an OIG investigation of a provider.

§371.1665. Cost Report Violations.

A person is subject to administrative actions or sanctions if the person:

(1) reports costs of non-covered or non-chargeable health care or administrative services, supplies, equipment, or other unallowable expenses in a cost report;

(2) incorrectly apportions or allocates costs in a cost report;

(3) reports costs of unallowable health care or administrative services, supplies, or equipment as allowable costs in a cost report;

(4) reports costs of health care services, supplies, or equipment that were not delivered to the recipient;

(5) reports costs of administrative services, supplies, or equipment that were not actually incurred;

(6) engages in an arrangement between providers and employees, related parties, independent contractors, suppliers, and/or others that appear to be designed to overstate the costs to the program through any device (such as commissions or fee splitting) or to siphon off or conceal illegal profits;

(7) reports costs in a cost report that were not incurred, that were incurred at a discount or lesser cost than that which was reported, or that were attributable to non-program activities, other enterprises, or personal expenses;

(8) manipulates or falsifies statistics that result in overstatement of costs or avoidance of recoupment, including incorrectly reporting square footage, hours worked, revenues received, or units of service delivered;

(9) claims bad debts without first attempting to collect payment;

(10) depreciates assets that have been fully depreciated or sold, or uses an incorrect basis for depreciation;

(11) affiliates with, retains, or employs a person excluded from participation in Medicare, Medicaid, or other HHS program and includes the salary, fringe, overhead, or any other costs associated with the excluded person within a cost report or any documents used to determine a person's payment rate, a statewide payment rate, or a fee;

(12) reports a cost above the cost actually paid to a related party;

(13) reports a damage, cost, or penalty collected by the OIG as an allowable expense in a cost report;

(14) minimizes or understates profits on a cost report;

(15) manipulates or understates profits on a cost report in a manner that reduces the experience rebate that would have been owing to the state;

(16) manipulates or falsifies supporting documentation related to a cost report, including the use of market data rather than actual expenses; or

(17) manipulates or falsifies any cost report supporting documentation including medical loss statistics, annual statements, encounter data, cash disbursement journal entries, or annual reports.

§371.1667. Records and Documentation.

A person is subject to administrative actions or sanctions if the person:

(1) fails to make, maintain, retain, or produce adequate documentation according to Medicaid or other HHS policy, state or federal law, rule or regulation, or contract for a minimum period of:

(A) five years from the date of service or until all audit questions, administrative hearings, investigations, court cases, or appeals are resolved;

(B) six years or until all audit questions, administrative hearings, investigations, court cases, or appeals are resolved if the person is a Freestanding Rural Health Clinic; and

(C) ten years or until all audit questions, administrative hearings, investigations, court cases, or appeals are resolved if the person is a hospital-based Rural Health Clinic;

(2) fails to provide originals or complete and correct copies of records or documentation as requested upon reasonable request by a requesting agency [~~Requesting Agency~~]; or

(3) fails to grant immediate access to the premises, records, documentation, or any items or equipment determined necessary by the OIG to complete its official functions related to a fraud, waste, or abuse investigation upon request by a requesting agency [~~Requesting Agency~~]. Failure to grant immediate access may include, but is not limited to, the following:

(A) failure to allow the OIG or any requesting agency [~~Requesting Agency~~] to conduct any duties that are necessary to the performance of their official functions;

(B) failure to provide to the OIG or a requesting agency [~~Requesting Agency~~], upon request and as requested, for the purpose of reviewing, examining, and securing custody of records, access to, disclosure of, and custody of copies or originals of any records, documents, or other requested items, as determined necessary by the OIG or a requesting agency [~~Requesting Agency~~] to perform official functions;

(C) failure to produce or make available records within 24 hours of a request for production, for the purpose of reviewing, examining, and securing custody of records upon reasonable request, as determined by the OIG or a requesting agency [~~Requesting Agency~~] except where the OIG or a requesting agency [~~Requesting Agency~~] reasonably believes that requested documents are about to be altered or destroyed or that the request may be completed at the time of the request and/or in less than 24 hours;

(D) failure to grant access to a person's premises at the time of a reasonable request;

(E) failure to provide access to records at the time of a request, for the purpose of reviewing, examining, and securing custody of records upon reasonable request, when the OIG or a requesting agency [~~Requesting Agency~~] has reason to believe that:

(i) requested documents are about to be altered or destroyed; or

(ii) in the opinion of the OIG or a requesting agency [~~Requesting Agency~~], the request could be met at the time of the request or in less than 24 hours;

(F) failure to relinquish custody of records and documents as directed by the OIG or a requesting agency [~~Requesting Agency~~];

(G) failure to complete a records affidavit, business records affidavit, evidence receipt, or patient record receipt, at the direction of the OIG or a requesting agency [~~Requesting Agency~~] and to attach these documents to the records or documentation requested; or

(4) fails to make, maintain, retain, or produce documentation sufficient to demonstrate compliance with any federal or state law, rule, regulation, contract, Medicaid or other HHS policy, or professional standard in order to:

(A) participate in the Medicaid or other HHS program;

(B) support a claim for payment;

(C) verify delivery of services or items provided;

(D) establish medical necessity, medical appropriateness, or adherence to the professional standard of care related to services or items provided;

(E) determine appropriate payment for items or services delivered in accordance with established rates;

(F) confirm the eligibility of a person to participate in the Medicaid or other HHS program;

(G) demonstrate solvency of risk-bearing providers;

(H) support a cost or expenditure;

(I) verify the purchase and actual cost of products, items, or services; or

(J) establish compliance with applicable state and federal regulatory requirements.

§371.1669. Self-Dealing.

A person is subject to administrative actions or sanctions if the person:

(1) rebates or accepts a fee or a part of a fee or charge for a Medicaid or other HHS program patient referral;

(2) solicits recipients or causes recipients to be solicited, through offers of transportation or otherwise, for the purpose of claiming payment related to those recipients;

(3) knowingly offers to pay or agrees to accept, directly or indirectly, overtly or covertly, any remuneration in cash or in kind to or from another for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered by a state health care regulatory agency or HHS agency;

(4) knowingly offers to pay or agrees to accept, directly or indirectly, overtly or covertly, any remuneration in cash or in kind to or from another for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered by a state health care regulatory agency, subject to the exceptions enumerated in Chapter 102, Texas Occupations Code;

(5) solicits or receives, directly or indirectly, overtly or covertly, any remuneration, including any kickback, bribe, or rebate, in cash or in kind for referring an individual to a person for the furnishing of, or for arranging the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid or other HHS program, provided that this paragraph does not prohibit the referral of a patient to another practitioner within a multispecialty group or university medical services research and development plan (practice plan) for medically necessary services;

(6) solicits or receives, directly or indirectly, overtly or covertly, any remuneration, including any kickback, bribe, or rebate, in cash or in kind for purchasing, leasing, or ordering, or arranging for or recommending the purchasing, leasing, or ordering of, any good,

facility, service, or item for which payment may be made, in whole or in part, under the Medicaid or other HHS program;

(7) offers or pays, directly or indirectly, overtly or covertly, any remuneration, including any kickback, bribe, or rebate, in cash or in kind to induce a person to refer an individual to another person for the furnishing of, or for arranging the furnishing of, any item or service for which payment may be made, in whole or in part, under the Medicaid or other HHS program, provided that this paragraph does not prohibit the referral of a patient to another practitioner within a multispecialty group or university medical services research and development plan (practice plan) for medically necessary services;

(8) offers or pays, directly or indirectly, overtly or covertly, any remuneration, including any kickback, bribe, or rebate, in cash or in kind to induce a person to purchase, lease, or order, or arrange for or recommend the purchase, lease, or order of, any good, facility, service, or item for which payment may be made, in whole or in part, under the Medicaid or other HHS program;

(9) provides, offers, or receives an inducement in a manner or for a purpose not otherwise prohibited by this section or §102.001, Texas Occupations Code, to or from a person, including a recipient, provider, employee or agent of a provider, third-party vendor, or public servant, for the purpose of influencing or being influenced in a decision regarding:

(A) selection of a provider or receipt of a good or service under the Medicaid or other HHS program;

(B) the use of goods or services provided under the Medicaid or other HHS program; or

(C) the inclusion or exclusion of goods or services available under the Medicaid program;

(10) is a physician and refers a Medicaid or other HHS program recipient to an entity with which the physician has a financial relationship for the furnishing of designated health services, payment for which would be denied under Title XVIII (Medicare) pursuant to [~~§1877 and §1903(s) of the Social Security Act, codified at~~] 42 U.S.C. §1395nn, §1396b(s) (Stark I, II, and III), the federal Anti-Kickback Statute, the Affordable Care Act, or other state or federal law prohibiting self-dealing or self-referral;

(11) engages in marketing services in violation of §531.02115 of the Texas Government Code, program rules, or contract and has not received prior authorization from the program for the marketing campaign; or

(12) fails to disclose documentation of financial relationships necessary to establish compliance with §1877 and §1903(s) of the Social Security Act or 42 C.F.R. §§411.350 - .389 [~~§§411.350-389~~] (Stark I, II, and III), the federal Anti-Kickback Statute, the [~~The~~] Affordable Care Act, or other state or federal law prohibiting self-dealing or self-referral.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 15, 2016.

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Karen Ray
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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DIVISION 3. ADMINISTRATIVE ACTIONS AND SANCTIONS

1 TAC §§371.1701, 371.1703, 371.1705, 371.1707, 371.1709, 371.1711, 371.1715, 371.1717, 371.1719

Legal Authority

The amendments are proposed under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The amendments implement Texas Government Code Chapter 531, as amended by S.B. 207. No other statutes, articles, or codes are affected by the proposal.

§371.1701. Administrative Actions.

(a) The OIG may impose one or more administrative actions if it determines that the person committed an act for which a person is subject to administrative actions or sanctions, including the following:

(1) commits a program violation;

(2) commits an act for which sanctions, damages, penalties, or liability could be or are assessed by the OIG;

(3) commits an act that amounts to fraud, abuse, overpayment, or waste in relation to Medicaid or an HHS program or service; or

(4) is affiliated with a person who commits an act described in paragraphs (1) - (3) of this subsection.

(b) An administrative action may be taken in conjunction with or independently of other enforcement measures, and is not a prerequisite to the imposition of a sanction or other enforcement measure.

(c) Administrative actions include:

(1) transferring a person to a closed-end contract or agreement for a specified period of time or to a provisional or probationary contract or agreement with modified terms and conditions;

(2) attendance at education sessions;

(3) prior authorization of selected services (failure to submit and receive prior authorization prior to the service being rendered or billed would result in denial of the claim);

(4) prepayment review of all claims or certain specific claims or services of a person;

(5) conducting post-payment review of all claims or certain specific claims or services of a person after payment;

(6) attendance at informal or formal person corrective action meetings;

(7) requiring submission of additional documentation or justification for a claim, as deemed advisable by the OIG, as a condition precedent to payment of the claim;

(8) oral, written, or personal educational contact with the person;

(9) requiring a person to post a surety bond or provide a letter of credit, as provided in §371.23 of this chapter (relating to Surety Bond);

(10) serving a subpoena to compel the production of a witness or of relevant evidence;

(11) reinstatement; and

(12) referral for additional review or investigation of any person suspected of committing fraud, waste, or abuse. Such referrals include the following entities:

(A) all cases of suspected Medicaid fraud or patient abuse or neglect to the OAG Medicaid Fraud Control Unit or Civil Medicaid Fraud Division for investigation;

(B) peer review outside HHSC [~~the Commission~~] or operating agency;

(C) the appropriate state licensing board;

(D) the United States Department of Health and Human Services, including for action under the Civil Monetary Penalties Law (the Social Security Act, §1128);

(E) other federal or state law enforcement agencies for fraud investigation and criminal fraud prosecution;

(F) other federal or state agencies for civil fraud prosecution and imposition of civil damages or penalties or recovery of overpayments and administrative penalties and damages through judicial means;

(G) a collection agency, the OAG, or any other collection authority, for recovery of overpayments, administrative penalties and damages or other debts established by the OIG;

(H) credit bureaus for failure to pay all imposed recoupments and damages and penalties; and

(I) any other entity determined to be advisable or necessary by the OIG [~~to perform its official functions~~].

(d) The OIG provides written notice of the administrative actions described in subsection (c)(1) - (11) of this section to persons who are the subject of administrative actions. The notice includes [~~will include~~]:

(1) a description of the administrative action;

(2) the general basis for the administrative action; and

(3) a description of what the person must do to comply with the administrative action.

(e) An administrative action does not give rise to due process, additional notice, or hearing requirements.

§371.1703. Termination of Enrollment or Cancellation of Contract.

(a) The OIG may terminate the enrollment or cancel the contract of a person by debarment, suspension, revocation, or other deactivation of participation, as appropriate. The OIG may terminate or cancel a person's enrollment or contract if it determines that the person committed an act for which a person is subject to administrative actions or sanctions.

(b) When the OIG establishes the following by prima facie evidence, the OIG must terminate or cancel the enrollment or contract from the Medicaid program or any other HHS program of:

(1) a provider or any person with an ownership interest in the provider has been convicted of a criminal offense related to that person's involvement with the Medicare, Medicaid, or CHIP program in the last ten years;

(2) a provider that is terminated or revoked for cause, excluded, or debarred under Title XVIII of the Social Security Act or under the Medicaid program or CHIP program of any other state;

(3) a provider that fails to permit access to any and all provider locations for unannounced or announced on-site inspections required during the provider screening process as provided by rule;

(4) a provider when any person with an ownership or control interest or who is an agent or managing employee of the provider fails to submit timely and accurate information, including fingerprints if required by CMS or state rule, and cooperate with any and all screening methods required during the provider screening process as provided by rule, statute, rule, or regulation;

(5) a provider that fails to submit sets of fingerprints in a form and manner to be provided by rule;

(6) a person that fails to repay overpayments under the Medicaid program or CHIP;

(7) a person that owns, controls, manages, or is otherwise affiliated with and has financial, managerial, or administrative influence over a provider who has been suspended or prohibited from participating in Medicare, Medicaid, or CHIP;

(8) a provider that fails to identify or disclose in the provider screening process for any HHS program:

(A) all persons with a direct or indirect ownership or control interest, as defined by 42 C.F.R. [~~CFR~~] §455.101;

(B) all information required to be disclosed in accordance with 42 C.F.R. [~~CFR~~] §1001.1101, 42 C.F.R. [~~CFR~~] chapter 455, or other by statute, rule, or regulation; or

(C) all agents or subcontractors of the provider:

(i) if the provider or a person with an ownership interest in the provider has an ownership interest in the agent or subcontractor; or

(ii) if the provider engages in a business transaction with the agent or subcontractor that meets the criteria specified by 42 C.F.R. [~~CFR~~] §455.105; or

(9) a provider that has been excluded or debarred from participation in a state or federally funded health care program as a result of:

(A) a criminal conviction or finding of civil or administrative liability for committing a fraudulent act, theft, embezzlement, or other financial misconduct under a state or federally funded health care program; or

(B) a criminal conviction for committing an act under a state or federally funded health care program that caused bodily injury to:

(i) a person who is 65 years of age or older;

(ii) a person with a disability; or

(iii) a person under 18 years of age.

(c) When the OIG establishes the following by prima facie evidence, the OIG may terminate or cancel the enrollment or contract from Medicaid, CHIP, [~~the medical assistance program~~] or any other HHS program of:

(1) a provider if a criminal history check reveals a prior criminal conviction;

(2) a provider that has failed to bill for medical assistance or refer clients for medical assistance within a 12-month period;

(3) a provider that has been excluded or debarred from participation in any federally funded health care program not described in subsection (b)(2) of this section;

(4) a provider that has falsified any information on its application for enrollment as determined by the OIG;

(5) a provider whose identity on an application for enrollment cannot be verified by the OIG;

(6) a person that commits a program violation;

(7) a person that is affiliated with a person who commits a program violation;

(8) a person that commits an act for which sanctions, damages, penalties, or liability could be or are assessed by the OIG; or

(9) a person whose contract [~~that~~] may be cancelled [~~terminated~~] for any other reason specified by statute or regulation.

(d) Exceptions.

(1) The OIG need not terminate participation if the person or provider voluntarily resigned from participation under Title XVIII of the Social Security Act or under the Medicaid program or CHIP program of any other state, and the resignation was not in lieu of or to avoid exclusion, termination, or any other sanction.

(2) The OIG need not terminate participation based on a conviction described in subsection (b)(1) of this section, a termination described in subsection (b)(2) of this section, or a failure to allow access described in subsection (b)(3) of this section if the OIG:

(A) determines that termination is not in the best interests of the Medicaid program; and

(B) documents that determination and the rationale in writing.

(e) Notice. Notice of termination includes:

(1) a description of the termination;

(2) the basis for the termination;

(3) the effect of the termination;

(4) the duration of the termination;

(5) whether re-enrollment will be required after the period of termination; and

(6) a statement of the person's right to request an informal resolution meeting or an administrative hearing regarding the imposition of the termination unless the termination is required under 42 C.F.R. §455.416.

(f) Due process.

(1) After receiving a notice of termination, a person has a right to the informal resolution process in accordance with §371.1613 of this subchapter (relating to Informal Resolution Process) unless the termination is required under 42 C.F.R. §455.416.

(2) A person may request an administrative hearing after receipt of a final notice of termination in accordance with §371.1615 of this subchapter (relating to Appeals) unless the termination is required under 42 C.F.R. §455.416. The OIG must receive the written request for a hearing no later than the 15 days after the date the person receives the notice.

(g) Scope and effect of termination.

(1) A person's enrollment agreement or contract is [~~will be~~] nullified on the effective date of the termination.

(2) Once a person's enrollment agreement or contract is terminated or cancelled [~~person has been terminated~~], no items or services furnished are [~~will be~~] reimbursed by the Medicaid or other HHS program during the period of termination or cancellation.

(3) Following termination [~~When the termination period expires~~], the person must [~~may need to~~] re-enroll in order to participate as a provider in the Medicaid or other HHS program, if the person was terminated for any grounds in subsection (b) or (c)(1) - (3) of this section. Re-enrollment requires [~~will require~~] the provider to meet all applicable screening requirements, including the payment of any application fees. [~~Re-enrollment will be required if the person was terminated for any grounds in subsection (b) or (c)(1) - (3) of this section.~~]

(4) A person may be terminated from participation in the Medicare program and in the Medicaid program of every other state as a result of the termination.

(5) If, after the effective date of the termination or cancellation, a [~~terminated~~] person submits or causes to be submitted claims for services or items furnished within the period of termination or cancellation, the person may be liable to repay any submitted claims or subject to civil monetary penalty liability under §1128A(a)(1)(D), and criminal liability under §1128B(a)(3) of the Social Security Act in addition to sanctions or penalties by the OIG.

(6) The termination or cancellation may, as determined by the OIG, [~~will~~] become immediately effective and final on the date reflected on the notice of cancellation [~~termination~~] in the following circumstances:

(A) [~~OIG determines that~~] the person subject to termination or cancellation may be placing at risk the health or safety of persons receiving services under Medicaid [~~at risk~~];

(B) the person who is subject to termination or cancellation fails:

(i) to grant immediate access to the OIG or to a requesting agency [~~Requesting Agency~~] upon reasonable request;

(ii) to allow the OIG or a requesting agency [~~Requesting Agency~~] to conduct any duties that are necessary to the performance of their official functions; or

(iii) to provide to the OIG or a requesting agency [~~Requesting Agency~~] as requested copies or originals of any records, documents, or other items, as determined necessary by the OIG or the requesting agency [~~Requesting Agency~~].

(7) If the person timely filed a written request for an administrative hearing, the effective date of termination is the date the hearing officer's or administrative law judge's decision to uphold the termination becomes final; however, if the administrative law judge upholds a termination for grounds described in paragraph (6) of this subsection,

the effective date is [~~will be~~] made retroactive to the date of the notice of termination.

(8) Unless otherwise provided in this section, the termination becomes [~~will become~~] final as provided in §371.1617(a) of this subchapter (relating to Finality and Collections).

(h) Reinstatement.

(1) The OIG may reinstate a provider's enrollment if the OIG finds:

(A) good cause to determine that it is in the best interest of the medical assistance program; and

(B) the person has not committed an act that would require revocation of a provider's enrollment or denial of a person's application to enroll since the person's enrollment was revoked.

(2) The OIG must support a determination made under this section with written findings of good cause for the determination.

§371.1705. Mandatory Exclusion.

(a) The OIG must exclude from participation in Titles V, XIX, XX, and CHIP programs, as applicable, any person if it determines that the person:

(1) has been excluded from participation in Medicare or any other federal health care programs;

(2) is a provider whose health care license, certification, or other qualifying requirement to perform certain types of service is revoked, suspended, voluntarily surrendered, or otherwise terminated such that the provider is unable to legally perform their profession due to loss of their license, certification, or other qualifying requirement;

(3) has been convicted of a criminal offense related to the delivery of an item or service under Medicare or a state health care program, including the performance of management or administrative services relating to the delivery of items or services under any such program;

(4) has been convicted, under federal or state law, of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct:

(A) in connection with the delivery of a health care item or service, including the performance of management or administrative services relating to the delivery of such items or services; or

(B) with respect to any act or omission in a health care program (other than Medicare and a State health care program) operated by, or financed in whole or in part, by any federal, state or local government agency;

(5) has been convicted, under federal or state law, of a felony relating to the unlawful manufacture, distribution, prescription or dispensing of a controlled substance, as defined under federal or state law. This applies to a person that:

(A) is, or has ever been, a health care practitioner, person, or supplier;

(B) holds, or has held, a direct or indirect ownership or control interest (as defined in §1124(a)(3) of the Social Security Act) in an entity that is a health care person or supplier, or is, or has ever been, an officer, director, agent or managing employee (as defined in §1126(b) of the Social Security Act) of such an entity; or

(C) is or has ever been, employed in any capacity in the health care industry;

(6) is an MCO or other entity furnishing services under a waiver approved under §1915(b)(1) of the Social Security Act that has an affiliate relationship with a person, and that person:

(A) has been convicted:

(i) of an offense that is a ground for mandatory exclusion under this section;

(ii) of an offense under federal or state law consisting of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct:

(I) in connection with the delivery of a health care item or service;

(II) with respect to any act or omission in a health care program (other than those specifically described in paragraph (1) of this subsection) operated by or financed in whole or in part by any federal, state, or local government agency; or

(III) relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct with respect to any act or omission in a program (other than a health care program) operated by or financed in whole or in part by any federal, state, or local government agency;

(iii) of an offense under federal or state law in connection with the interference with or obstruction of any investigation related to:

(I) an offense that is a ground for mandatory exclusion under this section; or

(II) the use of funds received, directly or indirectly, from any federal health care program;

(iv) of an offense under federal or state law for acts that took place after January 1, 2010, in connection with the interference with or obstruction of any audit related to:

(I) an offense that is a ground for mandatory exclusion under this section; or

(II) the use of funds received, directly or indirectly, from any federal health care program;

(v) has had civil money penalties or assessments imposed under §1128A of the Social Security Act (federal false claims); or

(vi) has been excluded from participation in Medicare or any of the state health care programs or CHIP; and

(B) that person:

(i) has an ownership interest in the entity;

(ii) is the owner of a whole or part interest in any mortgage, deed of trust, note or other obligation secured (in whole or in part) by the entity or any of the property assets thereof, in which whole or part interest is equal to or exceeds five [~~(5)~~] percent of the total property and assets of the entity;

(iii) is an officer or director of the entity, if the entity is organized as a corporation;

(iv) is a partner in the entity, if the entity is organized as a partnership;

(v) is an agent of the entity;

(vi) is a managing employee, that is, a an person (including a general manager, business manager, administrator, or director) who exercises operational or managerial control over the entity or

part thereof, or directly or indirectly conducts the day-to-day operations of the entity or part thereof; or

(vii) was formerly described in clauses (i) - (vi) of this subparagraph, but is no longer so described because of a transfer of ownership or control interest to an immediate family member or a member of the person's household in anticipation of or following a conviction, assessment of a civil monetary penalty, or imposition of an exclusion;

(7) is an individual and has an ownership or control interest or a substantial contractual relationship in or is an officer or managing employee of a sanctioned entity, and who knew or should have known of an action that constituted the basis for a conviction or mandatory exclusion of the sanctioned entity; or

(8) is convicted, pleads guilty or pleads nolo contendere to an offense arising from a fraudulent act under the Medicaid program, which results in injury to a person age 65 or older, a person with a disability, or a person younger than 18 years of age.

(b) The OIG may exclude a person without sending prior notice of intent to exclude in the following circumstances:

(1) The OIG determines that the person is subject to mandatory exclusion under subsection (a) of this section and the person may be placing the health and/or safety of persons receiving services under an HHS program at risk; or

(2) a person who is subject to mandatory exclusion under subsection (a) of this section fails:

(A) to grant immediate access to the OIG or to a requesting agency [~~Requesting Agency~~] upon reasonable request;

(B) to allow the OIG or a requesting agency [~~Requesting Agency~~] to conduct any duties that are necessary to the performance of their official functions; or

(C) to provide to the OIG or a requesting agency [~~Requesting Agency~~] as requested copies or originals of any records, documents, or other items, as determined necessary by the OIG or the requesting agency [~~Requesting Agency~~].

(c) When the OIG issues a final notice of exclusion, the notice includes the requirements and procedures for reinstatement. [~~Notice.~~]

[~~(1) Except as provided in subsection (b) of this section, when OIG proposes to exclude any person on mandatory grounds, it gives written notice of its intent to exclude, which will include:~~]

[~~(A) the basis for the potential exclusion;~~]

[~~(B) the potential effect of the exclusion; and~~]

[~~(C) whether OIG also proposes to cancel any agreement held by the person to be excluded.~~]

[~~(2) When OIG makes a final determination to exclude a person on mandatory grounds or when the exclusion is based upon the grounds described in subsection (b) of this section, OIG issues a final notice of exclusion, which will include:~~]

[~~(A) a description of the final exclusion;~~]

[~~(B) the basis of the final exclusion;~~]

[~~(C) the effect of the final exclusion;~~]

[~~(D) the duration of the final exclusion;~~]

[~~(E) the earliest date on which OIG will consider a request for reinstatement;~~]

[~~(F) the requirements and procedures for reinstatement; and~~]

[~~(G) a statement of the person's right to request a formal administrative appeal hearing regarding the exclusion.~~]

(d) Due process.

(1) After receiving a notice of intent to exclude, a person has a right to the informal resolution process in accordance with §371.1613 of this subchapter (relating to Informal Resolution Process) unless the exclusion is required under subsection (a)(1) of this section or under 42 C.F.R. §1001.101.

(2) A person may request an administrative appeal hearing in accordance with §371.1615 of this subchapter (relating to Appeals) after receipt of a final notice of exclusion unless the exclusion is required under subsection (a)(1) of this section or under 42 C.F.R. §1001.101. The OIG must receive the written request for an appeal no later than 15 days after the date the person receives final notice.

(3) When the exclusion is based on the existence of a criminal conviction;[,] a civil fraud finding;[,] a civil judgment imposing liability by federal, state, or local court;[,] a determination by another government agency or board;[,] any other prior determination;[,] or provisions within a settlement agreement, [~~the basis for the underlying determination is not reviewable and~~] the individual or entity subject to exclusion may not collaterally attack the underlying determination, either on substantive or procedural grounds, in an administrative appeal.

(e) Scope and effect of exclusion.

(1) [~~The period of exclusion begins on the effective date.~~] An exclusion becomes effective on the following:

(A) the date the person's health care services or items became ineligible for federal financial participation as described in subsection (a)(1) of this section;

(B) the effective date the person lost its [~~their~~] license, certification, or other qualifying requirement as described in subsection (a)(2) of this section;

(C) the date of the criminal judgment of conviction or date of order the person received for deferred adjudication or pre-trial diversion as described in subsection (a)(3) - (5) and (8) of this section;

(D) the date of the criminal judgment of conviction, or effective date of the assessment of civil monetary penalties or exclusion as described in subsection (a)(6) of this section;

(E) the effective date of final determination of liability pursuant to Texas Human Resources Code §32.039(c) as described in subsection (a)(8) of this section;

(F) the date of [~~reflected on~~] the final notice of exclusion if the exclusion is based on a health or safety risk as described in subsection (b)(1) of this section;

(G) the date of the original request for records if the exclusion is based on failure to provide access as described in subsection (b)(2) of this section; or

(H) if the exclusion is upheld at an administrative hearing, the effective date is made retroactive to the applicable effective date described in this section.

[~~(H) unless otherwise provided, twenty (20) days after the person's receipt of the final notice of exclusion if the provider does not timely file a written request for an appeal that satisfies the requirements of §371.1615 of this subchapter; or~~]

[(I) if the person timely filed a written request for appeal, the date the hearing officer's or administrative law judge's decision to uphold the exclusion becomes final; however, if the administrative law judge upholds an exclusion, the effective date will be made retroactive to the applicable effective date described in this paragraph.]

(2) An exclusion remains in effect for the period indicated in the final notice of exclusion. The person is not eligible to apply for reinstatement or reenrollment as a provider until the exclusion period has elapsed. The minimum length of exclusion is determined as follows:

(A) The minimum length of exclusion is the federally mandated exclusion period plus one additional year if the exclusion is based upon a conviction as described in subsection (a)(3), (4), or (5) of this section.

(B) An MCO is [will be] excluded for the same period as the related person was excluded, as described in subsection (a)(6) of this section.

(C) An individual is [will be] excluded for the same period as the sanctioned entity in which the individual held an ownership, control interest, or substantial contractual relationship as described in subsection (a)(7) of this section.

(D) The exclusion is effective for ten years if the exclusion is based upon an assessment of civil monetary penalties pursuant to Texas Human Resources Code §32.039(c) arising out of injury to a person who is 65 years of age or older, a person with a disability, or a person under 18 years of age as described in subsection (a)(8) of this section.

(E) The exclusion is effective for three years if the exclusion is based upon an assessment of civil monetary penalties pursuant to Texas Human Resources Code §32.039(c).

(F) The exclusion is permanent if the exclusion is based upon a criminal conviction for committing a fraudulent act under the Medicaid program that results in injury to a person who is 65 years of age or older, a person with a disability, or a person under 18 years of age as described in subsection (a)(8) of this section.

(G) Unless otherwise provided, the length of exclusion is [will be] determined by the OIG in its discretion. The OIG considers [OIG will consider] the factors enumerated in §371.1305(c) of this chapter (relating to Preliminary Investigation and Report) [§371.1603(f)(1) of this subchapter (relating to Legal Basis and Scope)] in determining the length of exclusion.

(3) Unless a person is [first] reinstated and [then] re-enrolled as a provider in the Texas Medicaid program, no payment is [will be] made by the Medicaid program for any item or service furnished or requested by an excluded person on or after the effective date of exclusion.

(4) An excluded person is prohibited from:

(A) personally or through a clinic, group, corporation, or other association or entity, billing or otherwise requesting or receiving payment for any Title V, XVIII [VIII], XIX, XX, or CHIP program for items or services provided on or after the effective date of the exclusion;

(B) providing any service under the Medicaid program, whether or not the excluded person directly requests Medicaid program payment for such services;

(C) assessing care or ordering or prescribing services, directly or indirectly, to Title V, XIX, XX, or CHIP recipients after the effective date of the person's exclusion; and

(D) accepting employment by any person whose revenue stream includes funds from a Title V, XVIII [VIII], XIX, XX, or CHIP program.

(5) If, after the effective date of an exclusion, an excluded person submits or causes to be submitted claims for services or items furnished within the period of exclusion, the person may be subject to civil monetary penalty liability under §1128A(a)(1)(D), and criminal liability under §1128B(a)(3) of the Social Security Act in addition to sanctions or penalties by the OIG.

(6) In accordance with federal and state requirements, when the OIG excludes a person, the OIG may notify each state agency administering or supervising the applicable state health care program, as well as the appropriate state or local authority or agency responsible for licensing or certifying the person excluded. If issued, notification includes [will include]:

(A) the facts, circumstances, and period of exclusion;

(B) a request that appropriate investigations be made and any necessary sanctions or disciplinary actions be imposed in accordance with applicable law and policy; and

(C) a request that the state or local authority or agency fully and timely inform the OIG with respect to any actions taken in response to the OIG's request.

(7) The OIG notifies the public of all persons excluded.

(8) A person who has been excluded from the Texas Medicaid or CHIP program is [will be] excluded from the Medicaid and/or CHIP program in every other state and from the Medicare program pursuant to each program's applicable state or federal authority. When exclusion from the Texas Medicaid and/or CHIP program is based on the person's exclusion from Medicare, or from another state's Medicaid or CHIP program, the prohibitions enumerated in paragraph (4) of this subsection may apply.

§371.1707. Permissive Exclusion.

(a) The OIG may exclude from participation in Titles V, XVIII [VIII], XIX, XX, or CHIP programs any person if it determines that the person:

(1) commits a program violation;

(2) is affiliated with a person who commits a program violation;

(3) commits an act for which damages, penalties, or liability could be or are assessed by the OIG;

(4) is a person not enrolled as a provider whose health care license, certification, or other qualifying requirement to perform certain types of service is revoked, suspended, voluntarily surrendered, or otherwise terminated such that the provider is unable to legally perform their profession due to loss of their license, certification, or other qualifying requirement;

(5) could be excluded for any reason for which the Secretary of the United States [U.S.] Department of Health and Human Services, its Office of Inspector General, or its agents could exclude such person under 42 U.S.C. §1320a-7(b) or 42 C.F.R. Part [CFR Parts] 1001 or 1003;

(6) is found liable for any violation under subsection (c) of Texas Human Resources Code §32.039 that resulted in injury to a person who is 65 years of age or older, a person with a disability, or a person younger than 18 years of age;

(7) is found liable for any violation under subsection (c) of Texas Human Resources Code §32.039 that did not result in injury to a

person 65 years of age or older, a person with a disability, or a person younger than 18 years of age; or

(8) has been excluded from participation in Medicare or any other federal health care programs.

(b) The OIG may exclude a person without sending prior notice of intent to exclude in the following circumstances:

(1) The OIG determines that the person is or may be placing the health and/or safety of persons receiving services under an [a] HHS program at risk;

(2) a person fails:

(A) to grant immediate access to the OIG or to a requesting agency [~~Requesting Agency~~] upon reasonable request;

(B) to allow the OIG or a requesting agency [~~Requesting Agency~~] to conduct any duties that are necessary to the performance of their official functions; or

(C) to provide to the OIG or a requesting agency [~~Requesting Agency~~] as requested copies or originals of any records, documents, or other items, as determined necessary by the OIG or the requesting agency [~~Requesting Agency~~];

(3) the person engages in acts that violate 42 C.F.R. [~~CFR~~] §1001.1401 (hospital's failure to comply with corrective action plan required by the Centers for Medicare and Medicaid Services);

(4) the person engages in acts that violate 42 C.F.R. [~~CFR~~] §1001.1501 (default on health education loan or scholarship obligations);

(5) the person engages in acts that violate 42 C.F.R. [~~CFR~~] §1001.901 (false or improper claims);

(6) the person engages in acts that violate 42 C.F.R. [~~CFR~~] §1001.951 (fraud and kickbacks and other prohibited activities);

(7) the person engages in acts that violate 42 C.F.R. [~~CFR~~] §1001.1601 (violations of the limitations on physician charges);

(8) the person engages in acts that violate 42 C.F.R. [~~CFR~~] §1001.1701 (billing for services of assistant at surgery during cataract operations); or

(9) the person has been excluded from the Medicaid program and obtains a new provider number without [~~first~~] completing the reinstatement and re-enrollment process as required by §371.1719 of this division (relating to Recoupment of Overpayments Identified by Audit).

(c) When the OIG issues a final notice of exclusion, the final notice states: [~~Notice.~~]

[~~(1) Except as provided in subsection (b) of this section, OIG will issue a notice of intent to exclude when it proposes to exclude any person on permissive grounds. The notice of intent to exclude will include:~~]

[~~(A) the basis for the potential exclusion;~~]

[~~(B) the potential effect of the exclusion; and~~]

[~~(C) whether OIG also proposes to cancel any agreement held by the person to be excluded.~~]

[~~(2) When OIG makes a final determination to exclude the person or when the exclusion is based upon the grounds enumerated in subsection (b) of this section, OIG issues a final notice of exclusion, which will state:~~]

[~~(A) a description of the final exclusion;~~]

[~~(B) the basis of the final exclusion;~~]

[~~(C) the effect of the final exclusion;~~]

[~~(D) the duration of the final exclusion;~~]

[~~(E) the earliest date on which OIG will consider a request for reinstatement;~~]

(1) [~~(F)~~] the requirements and procedures for reinstatement;

(2) [~~(G)~~] whether the OIG will also cancel any agreement held by the person to be excluded; and

(3) [~~(H)~~] a statement of the person's right to request a formal administrative appeal hearing regarding the exclusion.

[~~(d) Due process.~~]

[~~(1) After receiving a notice of intent to exclude, a person has a right to the informal resolution process in accordance with §371.1613 of this subchapter (relating to Informal Resolution Process).~~]

[~~(2) A person may request an administrative appeal hearing in accordance with §371.1615 of this subchapter (relating to Appeals) after receipt of a final notice of exclusion. OIG must receive the written request for an appeal no later than the 15th calendar day after the date the person receives final notice.~~]

(d) [~~(e)~~] Scope and effect of exclusion.

(1) [~~The period of exclusion begins on the effective date.~~] An exclusion becomes effective on the following:

(A) the date of [~~reflected on~~] the final notice of exclusion, if the exclusion is based on a health or safety risk as described in subsection (b)(1) of this section;

(B) the date of the original request for records, if the exclusion is based on failure to provide access as described in subsection (b)(2) of this section;

[~~(C) unless otherwise provided, 30 days after the person's receipt of the final notice of exclusion if the provider does not timely file a written request for an appeal that satisfies the requirements of §371.1615 of this subchapter; or~~]

(C) [~~(D)~~][~~if the person timely filed a written request for appeal, the date the hearing officer or administrative law judge upholds the decision to exclude; however,~~] if the exclusion is upheld at an administrative hearing [~~law judge upholds an exclusion~~] based upon subsection (b)(1) of this section, the effective date is [~~will be~~] made retroactive to the date of the final notice;[~~,~~] and

(D) if the exclusion is upheld at an administrative hearing [~~judge upholds an exclusion~~] based upon subsection (b)(2) of this section, the effective date is [~~will be~~] made retroactive to the date of the original request for records.

(2) An exclusion remains in effect for the period indicated in the final notice of exclusion. The person is not eligible to apply for reinstatement or re-enrollment as a provider until the exclusion period has elapsed.

(3) Unless a person is [~~first~~] reinstated and [~~then~~] re-enrolled as a provider in the Texas Medicaid program, no payment is [~~will be~~] made by the Medicaid program for any item or service furnished or requested by an excluded person on or after the effective date of exclusion.

(4) An excluded person is prohibited from:

(A) personally or through a clinic, group, corporation, or other association or entity, billing or otherwise requesting or receiving payment from any Title V, XVIII [~~VIII~~], XIX, XX, or CHIP programs for items or services provided on or after the effective date of the exclusion;

(B) providing any service pursuant to the Medicaid program, whether or not the excluded person directly requests Medicaid program payment for such services;

(C) assessing care or ordering or prescribing services, directly or indirectly, to Title V, XVIII, XIX, XX, or CHIP recipients after the effective date of the person's exclusion; and

(D) accepting employment by any person whose revenue stream includes funds from a Title V, XVIII [~~VIII~~], XIX, XX, or CHIP program.

(5) If, after the effective date of an exclusion, an excluded person submits or causes to be submitted claims for services or items furnished within the period of exclusion, the person may be subject to civil monetary penalty liability under §1128A(a)(1)(D) and criminal liability under §1128B(a)(3) of the Social Security Act in addition to sanctions or penalties by the OIG.

(6) In accordance with federal and state requirements, when the OIG excludes a person, the OIG may notify each state agency administering or supervising the applicable state health care program, as well as the appropriate state or local authority or agency responsible for licensing or certifying the person excluded. If issued, notification includes [~~will include~~]:

(A) the facts, circumstances, and period of exclusion;

(B) a request that appropriate investigations be made and any necessary sanctions or disciplinary actions be imposed in accordance with applicable law and policy; and

(C) a request that the state or local authority or agency fully and timely inform the OIG with respect to any actions taken in response to the OIG's request.

(7) The OIG notifies the public of all persons excluded.

(8) A person who has been excluded from the Texas Medicaid or CHIP program is [~~will be~~] excluded from the Texas Medicaid and/or CHIP program in every other state and from the Medicare program pursuant to each program's applicable state or federal authority. When exclusion from the Texas Medicaid and/or CHIP program is based on the person's exclusion from Medicare, or from another state's Medicaid or CHIP program, the prohibitions enumerated in paragraph (4) of this subsection may apply.

§371.1709. Payment Hold.

(a) Subject to subsections (c) and (d) of this section, the OIG imposes [~~OIG shall impose~~] a payment hold against a provider only:

(1) to compel the production records or documents;

(2) when requested by the state's Medicaid Fraud Control Unit; or

(3) upon the determination a credible allegation of fraud exists.

(b) The OIG may elect not to impose a payment hold, to discontinue [~~not continue~~] a payment hold, to impose a payment hold only in part, or to convert a payment hold imposed in whole to one imposed only in part, for any of the good cause exceptions enumerated in 42 C.F.R. §455.23 and in Texas Government Code §531.102(g)(8) [~~and in 42 C.F.R. §455.23~~].

(c) The OIG may not impose a payment hold on claims for reimbursement submitted by a provider for medically necessary services for which the provider has obtained prior authorization from the commission or a contractor of the commission unless the OIG has evidence that the provider has materially misrepresented documentation relating to those services.

(d) Unless the OIG receives a request from a law enforcement agency to temporarily withhold notice pursuant to 42 C.F.R. §455.23, the OIG shall provide notice as required by 42 C.F.R. [~~CFR~~] §455.23(b) and Texas Government Code §531.102(g).

(e) Scope and effect of payment hold.

(1) Once a person is placed on payment hold, payment of Medicaid claims for specific procedures or services is [~~will be~~] limited or denied as long as the payment hold is in effect.

(2) After a payment hold is terminated for any reason, the OIG may retain the funds accumulated during the payment hold to offset any overpayment, criminal restitution, penalty or other assessment, or agreed-upon amount that may result from ongoing investigation of the person, including any payment amount accepted by the prosecuting authorities made in lieu of a prosecution to reimburse the Medicaid or other HHS program.

(3) The payment hold may be terminated or partially lifted for the reasons outlined in 42 C.F.R. [~~CFR~~] §455.23 or Texas Government Code §531.102(g)(8).

§371.1711. Recoupment of Overpayments and Debts.

(a) The OIG recovers overpayments made to providers within the Medicaid or other HHS programs, whether the overpayment resulted from error by the provider, the claims administrator, or an operating agency, misunderstanding, or a program violation.

(b) Application. The OIG may recoup from any person if it determines that the person committed an act for which a person is subject to administrative actions or sanctions, including the following:

(1) commits a program violation that leads to the payment of an overpayment;

(2) has failed to pay a debt owed to Medicare or to any Medicaid program as the result of fraudulent or abusive actions by a person participating in such program;

(3) is affiliated with a person who commits a program violation that leads to the payment of an overpayment;

(4) commits an act for which sanctions, damages, penalties, or liability could be or are assessed by the OIG; or

(5) who causes or receives an overpayment.

(c) Notice includes [~~will include~~]:

(1) the specific basis for the overpayment or debt;

(2) a description of facts and supporting evidence;

(3) a representative sample of any documents that form the basis for the overpayment or debt;

(4) the extrapolation methodology, information relating to the extrapolation methodology used as part of the investigation, and the methods used to determine the overpayment or debt in sufficient detail so that the extrapolation results may be demonstrated to be statistically valid and are fully reproducible;

(5) the calculation of the overpayment or debt amount;

(6) the amount of damages and penalties, if applicable; and

(7) a description of administrative and judicial due process remedies, including the provider's option to seek informal resolution, the provider's right to seek a formal administrative appeal hearing, or [that] the provider's option to [provider may] seek both.

(d) The person who is the subject of a recoupment of overpayment or recoupment of a debt is responsible for payment of all overpayment amounts or debts assessed.

§371.1715. Damages and Penalties.

(a) [Application.] The OIG may assess administrative damages, penalties, or both against a person pursuant to §32.039, Texas Human Resources Code. [any person if it determines that the person committed an act for which a person is subject to administrative actions or sanctions, including the following:]

[(1) presents or causes to be presented to OIG or its fiscal agent, a claim that contains a statement or representation the person knows or should know to be false;]

[(2) commits an act of self-dealing in violation of §371.1669 of this subchapter (relating to Self-Dealing);]

[(3) commits a managed care violation prohibited by §371.1663 of this subchapter (relating to Managed Care);]

[(4) fails to maintain adequate documentation to support a claim for payment in accordance with the requirements specified by rule or policy of Medicaid or Texas Medicaid Managed Care program policy; or]

[(5) engages in any other conduct that OIG has defined as a program violation.]

(b) When determining whether or not a person is prohibited from providing or arranging to provide health care services under the Medicaid program, the OIG considers the following:

(1) the person's knowledge of the violation;

(2) the likelihood that education provided to the person would be sufficient to prevent future violations;

(3) the potential impact on availability of services in the community served by the person; and

(4) any other reasonable factor identified by the OIG.

[(b) Exceptions.]

[(1) Unless the provider submitted information to OIG for use in preparing a voucher that the provider knew or should have known was false or failed to correct information that the provider knew or should have known was false when provided an opportunity to do so, this section does not apply to a claim based on the voucher if OIG calculated and printed the amount of the claim on the voucher and then submitted the voucher to the provider for the provider's signature.]

[(2) Subsection (a)(2) of this section does not prohibit a person from engaging in generally accepted business practices, including:]

[(A) conducting a marketing campaign;]

[(B) providing token items of minimal value that advertise the person's trade name;]

[(C) providing complimentary refreshments at an informational meeting promoting the person's goods or services;]

[(D) providing a value-added service if the person is an MCO; or]

[(E) other conduct specifically authorized by law, including conduct authorized by federal safe harbor regulations (42 CFR §1001.952).]

(c) The OIG gives notice of a preliminary penalty report and of its final assessment of penalties to the person charged with committing the violation, pursuant to §32.039, Texas Human Resources Code. [Notice.]

[(1) Notice of preliminary report. If after an examination of the facts OIG determines by prima facie evidence that a person commits a violation that subjects the person to assessment of damages or penalties, OIG may issue a preliminary report stating the facts on which it based its conclusion, its proposal that administrative damages or penalty under this section be imposed, and stating the amount of the proposed damages or penalty. OIG will issue notice of the preliminary report to the person subject to the assessment.]

[(2) Content of the notice of preliminary report. The notice of preliminary report will include:]

[(A) a brief summary of the facts forming the basis for the assessment;]

[(B) a statement of the amount of the proposed damages or penalty; and]

[(C) a statement of the person's right to an informal resolution meeting (IRM) of the alleged violation, the amount of the damages or penalty, or both the alleged violation and the amount of the damages or penalty.]

[(3) Notice of final assessment. The notice of final assessment of damages or penalty includes:]

[(A) a brief summary of the facts forming the basis for the assessment;]

[(B) a statement of the amount of the damages or penalty;]

[(C) a statement of the effect of the assessment; and]

[(D) a statement of the person's right to an appeal of the alleged violation, the amount of the damages or penalty, or both the alleged violation and the amount of the damages or penalty.]

(d) Due process.

(1) After service [receipt] of a notice of preliminary report, a person has a right to request an informal review not later than the tenth day after service of the notice [the informal resolution process in accordance with §371.1613 of this subchapter (relating to Informal Resolution Process)].

(2) After service of a final notice of assessment of penalties, a [A] person may request an administrative appeal hearing [in accordance with §371.1615 of this subchapter (relating to Appeals) after receipt of a notice of final assessment. OIG must receive the written request for an appeal] no later than ten [15] days after the date of service of the notice [the person receives the notice of final assessment].

[(e) Scope and effect of assessment of damages and penalties.]

[(1) A person who violates subsection (a)(1) - (3) of this section is liable for:]

[(A) damages equal to the amount paid, if any, as a result of the violation and interest on that amount determined at the rate provided by law for legal judgments and accruing from the date on which the payment was made; plus]

[(B) an administrative penalty of an amount not to exceed twice the amount paid, if any, as a result of the violation, plus:]

[(i) an administrative penalty of an amount not less than $5,500 or more than $15,000 for each violation that results in injury to a person who is 65 years of age or older, a person with a disability, or a person younger than 18 years of age; or]

[(ii) an administrative penalty of an amount not more than $11,000 for each violation that does not result in injury to a person who is 65 years of age or older, a person with a disability, or a person younger than 18 years of age.]

[(2) A person who violates subsection (a)(4) or (a)(5) of this section is liable for:]

[(A) the amount paid in response to the claim for payment; or]

[(B) the payment of an administrative penalty in an amount not to exceed $500 for each violation, as determined by OIG.]

[(3) Additionally, a person against whom damages or penalties have been assessed may be responsible for OIG's and other HHS program's costs related to the investigation that resulted in the assessment and the costs of any administrative hearing arising out of the assessment.]

[(4) In determining the amount of administrative damages or penalties to be assessed, OIG considers:]

[(A) the seriousness of the violation;]

[(B) whether the person had previously committed a violation; and]

[(C) the amount necessary to deter the person from committing future violations.]

[(5) The assessment of damages or penalty will become final as provided in §371.1617(a) of this subchapter (relating to Finality and Collections).]

§371.1717. Reinstatement.

(a) [A person who has been excluded from Medicaid or any state health care program by OIG may be reinstated by OIG.] A person excluded from the Medicaid program, Titles V, XVIII, XIX, XX, CHIP, or any other HHS program may submit to the OIG [Inspector General] a written request for reinstatement at any time after the period of exclusion has ended. The request for reinstatement must establish good cause for granting reinstatement.

(b) The OIG may require the requestor to furnish specific information and authorization for the OIG to obtain information from private health insurers, peer review bodies, probation officers, professional associates, investigative agencies, and others as may be necessary to determine whether reinstatement should be granted.

(c) The request for reinstatement may be approved, abated, postponed, or denied by the OIG. The OIG grants [OIG will grant] reinstatement only if it is reasonably certain that the types of actions that formed the basis for the original exclusion have not recurred and will not recur. In making this determination, the OIG considers [OIG will consider]:

(1) the conduct of the provider or person before and after the date of the notice of exclusion;

(2) whether all fines, damages, penalties, and any other debts due and owing to any federal, state, or local government have been paid, or satisfactory arrangements have been made that fulfill these obligations;

(3) the accessibility of other health care to the recipient population that would be served by the person who has been excluded;

(4) the person's previous conduct, including conduct during participation in the Titles V, XVIII, XIX, XX[, and V], CHIP, and any HHS programs in any state, or any conduct or action for which a sanction could have been taken, as described in this subchapter;

(5) any previous criminal convictions of the person regardless of its relation to Titles V, XVIII, XIX, XX, [V,] CHIP, or other HHS programs;

(6) whether the person complies with or has made satisfactory arrangements to fulfill the applicable conditions of participation or supplier conditions for coverage under the statutes and regulations;

(7) whether the person has, during the period of exclusion, submitted claims, or caused claims to be submitted or payment to be made by the Medicaid program or any state health care program, for items or services the excluded party furnished, ordered or prescribed, including health care administrative services; [and]

(8) whether a person has, during the period of exclusion, submitted claims or caused claims to be submitted or payments to be made by the Medicaid program or any state health care program for items or services furnished, ordered, or prescribed, including administrative and management services or salary, during the period of exclusion and before reinstatement has been granted and re-enrollment completed; and

(9) [(8)] any other factors or circumstances deemed by the OIG to be relevant to the determination of reinstatement.

(d) If an entity, association, or affiliation seeks reinstatement, and any affiliate of that entity, as defined by §371.1607 of this subchapter (relating to Definitions), was also excluded on grounds arising out of the same program violations, the OIG may approve reinstatement of the entity, association, or affiliation if the OIG [it] determines that the excluded principal for the entity or association:

(1) has terminated its [his or her] ownership or control interest in the entity;

(2) is no longer an officer, director, agent, consultant, managing employee, or bears any other title with the same duties, ownership, or control of the entity; or

(3) has been reinstated in accordance with this section.

(e) Notice.

(1) Approval of request for reinstatement. If the OIG approves the request for reinstatement, the OIG provides [OIG will provide] written notice to the excluded person and enters [will enter] the fact of that person's reinstatement into the OIG exclusion database. The OIG must support a determination granting reinstatement after termination with written findings that support the decision. The notice of approval includes [will include]:

(A) any conditions precedent to reinstatement and the date by which they must be satisfied;

(B) any limiting conditions on the person's continued participation in the Medicaid program;

(C) the provider's obligations to re-enroll as a Medicaid provider; and

(D) the effective date of reinstatement.

(2) Denial of request for reinstatement. If the OIG denies a [the] request for reinstatement, it gives [will give] written notice to the requesting person, which includes [will include]:

(A) notice of the denial; and

(B) a description of the person's right to [~~for~~] a desk review.

(3) Desk review results. After concluding a desk review, the OIG issues written notice to the provider which includes [~~OIG will send the provider written notice, which will include~~]:

(A) notice of approval of reinstatement as specified in paragraph (1) of this subsection; or

(B) notice the request was denied and that a subsequent request for reinstatement will not be considered until at least one year after the date of denial.

(f) Due process.

(1) The excluded person may submit a request for a desk review of a denial of reinstatement. The request must be received by the OIG within 30 calendar days of receipt of the notice of denial. The request must include any documentary evidence and written argument against the continued exclusion. Upon timely receipt of a request for desk review, the OIG reviews [~~OIG will review~~] the evidence and argument and notify the person of the results.

(2) The denial of reinstatement is an administrative action, not a sanction. A reinstatement decision does not give rise to additional due process or notice requirements.

(3) A determination with respect to reinstatement is not subject to administrative or judicial review. [~~An administrative law judge or judge may not require reinstatement of an individual or entity in accordance with this section. The determination is subject only to informal resolution meeting by OIG.~~]

(g) Scope and effect of reinstatement.

(1) Reinstatement is not effective unless the OIG approves [~~will not be effective until OIG grants~~] the request and provides notice under this section. Reinstatement is [~~will be~~] effective as provided in the notice. The provider may apply for re-enrollment on or after the effective date of reinstatement.

(2) An excluded person may not be granted a contract or provider agreement in the Medicaid program unless and until:

(A) reinstatement is approved by the OIG;

(B) the exclusion status is removed; and

(C) the person re-enrolls and is admitted as a provider.

(3) If a person circumvents or attempts to circumvent the reinstatement and reenrollment requirements specified in subsections (a), (b), and (e) of this section and receives or uses another [~~a new~~] Medicaid program provider number before being reinstated, the person may be excluded without prior notice. The person may also be subject to recoupment of all of the Medicaid provider payments made to that provider number and imposition of administrative penalties.

(4) If a person submits claims or causes claims to be submitted or payments to be made by the programs for items or services furnished, ordered or prescribed, including administrative and management services or salary, during the period of exclusion and before reinstatement has been granted and re-enrollment completed, the OIG may deny reinstatement on that basis. This section applies regardless of whether a person has obtained a program provider number or equivalent, either as an individual or as a member of a group, prior to being reinstated. The person is subject to imposition of recoupment of any payments made and administrative penalties.

§371.1719. Recoupment of Overpayments Identified by Audit.

(a) The OIG may recoup an overpayment if the overpayment was identified in an audit that found claims or cost reports resulted in money paid in excess of what the person is or was entitled to receive under an HHS program, contract, or grant. This section does not include overpayments identified by a Recovery Audit Contractor (RAC) pursuant to 42 C.F.R. [~~CFR~~] §455.506.

(b) Audit procedures.

(1) An audit conducted by the OIG or its contractor must:

(A) be conducted and reported in accordance with Generally Accepted Governmental Auditing Standards (GAGAS) or other appropriate standards recognized by the United States Government Accountability Office;

(B) limit the period covered by an audit to five years;

(C) notify the person, and the person's corporate headquarters if the person is incorporated, of the impending audit not later than the seventh day before the date the site visit, if any, begins, except when an element of surprise is critical to the audit objective, such as surprise audits, cash counts, or fraud-related procedures; and

(D) permit the person to produce, for consideration, documentation to address any exception found during an audit not later than the tenth [~~10th~~] calendar day after the date the exit conference, if any, is completed, or by a later date as specified by the auditor.

(2) If an exit conference is conducted after the site visit, the auditor must allow the person to:

(A) orally respond to questions by the auditor; and

(B) orally comment on the initial findings of the auditor.

(c) Notice.

(1) Point of contact. A person may designate a specific address and individual point of contact to receive all correspondence related to the audit by sending the designated individual's contact information to the auditor and to the OIG Sanctions unit. The OIG begins [~~OIG will begin~~] sending all notices and correspondence to the designated point of contact within 30 calendar days after receiving the designation.

(2) Draft audit report. After the field work is completed, the OIG or its auditor delivers [~~will deliver~~] written notice of a draft audit report in accordance with §371.1609 of this subchapter (relating to Notice and Service [~~Notice, Service, and Subpoena Authority~~]).

(3) Revised draft audit report and additional revisions. The auditor may elect whether to issue a revised draft audit report or to issue a final report. The auditor may revise the draft audit report as needed to incorporate the management responses and reconsideration of any initial findings. A revised draft audit report is [~~will be~~] delivered to the person in accordance with §371.1609 of this subchapter.

(A) The auditor, in its discretion, may consider additional management or HHS agency staff responses to the revised draft audit report and make additional revisions.

(B) If additional revisions are made that modify the basis or rationale for determining that an overpayment exists or that increase the overpayment amount, the OIG or its auditor provides [~~will provide~~] written notice of the revised draft audit report.

(4) Notice of final audit report. The OIG or its auditor delivers written notice of a final audit report in accordance with §371.1609 of this subchapter. The final audit report must include:

(A) a statement of the auditor's compliance with GAGAS;

(B) the management response, which may be summarized;

(C) the final determination of overpayment amount;

(D) reconsideration results and the revisions of any initial findings; and

(E) a recitation of the person's rights and obligations as set forth in subsections (d) and (e) of this section.

(5) Notice of appeal results. After the conclusion of any appeal hearing, the OIG delivers [~~OIG will deliver~~] written notice of the appeal results in accordance with §371.1609 of this subchapter. The written notice identifies [~~will identify~~] the final overpayment amount.

(d) Due process.

(1) Draft audit report. A person who is the subject of a draft audit report may request an informal appeal, may make a written management response, or both. The OIG or its auditor, as designated in the notice letter, must receive a written request for the informal appeal or written management response no later than the 30th calendar day after the date the person receives the draft audit report, or by the date specified by the auditor, whichever is earlier. The informal appeal, if requested, consists [~~will consist~~] of a desk review by the auditing division or entity at the OIG or its auditor.

(2) Revised draft audit report. If the person is the subject of a revised draft audit report that modifies the basis or rationale for determining that an overpayment exists or that increases the overpayment amount, the person may request an informal appeal, may make a written management response, or both. The OIG or its auditor, as designated in the notice letter, must receive a written request for the informal appeal or written management response no later than the 30th calendar day after the date the person receives the revised draft audit report, or by the date specified by the auditor, whichever is earlier. The informal appeal, if requested, consists [~~will consist~~] of a desk review by the auditing division or entity at the OIG or its auditor.

(3) Response to final audit report. A person who receives a final audit report must respond in one of the following ways:

(A) The person can refund the overpayment within 60 calendar days after receipt of the final audit report.

(B) The person can timely request and execute a final payment plan agreement that has been approved by the OIG. A written request for a final payment plan agreement must be received by the OIG within 15 [~~fifteen (15)~~] calendar days after the person received the final audit report. The request must be signed by the person or its attorney and contain a statement that the person agrees not to dispute the findings of the final audit report for purposes of the overpayment recoupment sanction at issue and waives its right to an appeal of any findings for which a payment plan agreement is sought.

(i) The request for a final payment plan agreement is not binding upon the OIG. A resolution is not final until the person and the OIG execute a written final payment plan agreement.

(ii) A request for a final payment plan agreement does not abate the imposition of a final debt in accordance with subsection (e) of this section.

(iii) The OIG may agree to toll the repayment obligation deadline pending negotiations of payment plan terms. The OIG sends [~~OIG will send~~] written notice to the person of any decision to toll the repayment obligations or to discontinue further payment plan negotiations.

(iv) The OIG retains discretion to determine when payment plan negotiations have been exhausted.

(C) The person can timely request an administrative hearing appeal. To request an appeal of the final audit report, the person must file a written request for an appeal, which must be received by the OIG within 15 calendar days after receipt of the final audit report. The request must:

(i) be signed by the person or its attorney;

(ii) contain a statement as to the specific issues, findings, or legal authority in the final audit report being challenged, and the basis for the person's contention that the specific issues or findings and conclusion are incorrect; and

(iii) with respect to any audit findings that are not being challenged [~~on appeal~~], indicate whether the person intends to remit payment within 60 calendar days or whether the person seeks a payment plan in accordance with this section. Recoupment of overpayments at issue on appeal is not [~~will not be~~] initiated by the OIG until the appeal has been finally determined.

(4) Request for a hearing to appeal. Upon timely receipt of a proper written request for appeal, the OIG notifies [~~OIG will notify~~] the HHSC Appeals Division of the provider's hearing request. The appeal then proceeds [~~will then proceed~~] pursuant to Chapter 357, Subchapter I of this title (relating to Hearings Under the Administrative Procedure Act).

(e) Scope and effect.

(1) The effect of a final overpayment identified in an audit is to create a final debt in favor of the State of Texas.

(2) A final audit report becomes final and unappealable if a written request for an appeal is not received by the OIG within 15 [~~fifteen (15)~~] calendar days after the person's receipt of the final audit report.

(3) If a duly requested final payment plan agreement is not executed by all parties or full restitution is not received within 60 calendar days after receipt by the person of an unappealed final audit report or final disposition of an administrative appeal, one or more vendor holds may be placed on the person's payment claims and account; however, the OIG may agree to toll the imposition of any vendor holds pending negotiations of payment plan terms. The OIG sends [~~OIG will send~~] written notice to the person of any decision to toll the imposition of any vendor holds.

(4) If the person has duly requested an appeal, the contested amount of the overpayment becomes final 30 days after the person receives written notice of the appeal results. Recoupment of any overpayments at issue on appeal is not [~~will not be~~] initiated until the appeal has been finally determined.

(f) Reporting.

(1) For purposes of refunding the federal share of any questioned costs, the final audit report constitutes the State's written notice of the identified overpayment amount. The date of the written notice of overpayment accompanying a final audit report constitutes the date of discovery.

(2) If a person appeals a final audit report, the State issues [~~state will issue~~] a written notice of the identified overpayment amount at the conclusion of the appeal, and the date of that notice of final audit report constitutes [~~will constitute~~] the date of discovery.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 15, 2016.

TRD-201600188
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: February 28, 2016
For further information, please call: (512) 424-6900

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1 TAC §371.1713

Legal Authority

The repeal is proposed under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

The repeal implements Texas Government Code Chapter 531, as amended by S.B. 207. No other statutes, articles, or codes are affected by the proposal.

§371.1713. Restricted Reimbursement.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 15, 2016.

TRD-201600189
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: February 28, 2016
For further information, please call: (512) 424-6900

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TITLE 22. EXAMINING BOARDS

PART 9. TEXAS MEDICAL BOARD

CHAPTER 177. BUSINESS ORGANIZATIONS AND AGREEMENTS

SUBCHAPTER E. PHYSICIAN CALL COVERAGE MEDICAL SERVICES

22 TAC §§177.18 - 177.20

The Texas Medical Board (Board) proposes new Subchapter E, §§177.18 - 177.20, concerning Physician Call Coverage Medical Services.

The amendment to the title of Chapter 177, Business Organizations, changes the title to include the word "Agreements," to reflect the proposed addition of new Subchapter E, concerning "Physician Call Coverage Medical Services", and in order to better describe the topic and content of Chapter 177 as a whole.

New Subchapter E, titled "Physician Call Coverage Medical Services," is added as a subchapter title in order to identify the subject matter of the rules contained in Subsection E. The subchapter's addition results from the Board's meetings with stakeholders who expressed the need for more clarity with respect to the application of the rules relating to on-call services, as it pertains to all physicians and not just those physicians practicing in the area of telemedicine.

New §177.18, relating to Purpose and Scope, is added to set forth the purpose, scope and applicability of Subchapter E, relating to the rules contained in Subchapter E and indicate that the rules pertaining to "on-call" coverage apply to all physicians, rather than just those physicians practicing in the area of telemedicine.

New §177.19, relating to Definitions, is added to define the "Act" and the "Board" as used throughout Subchapter E.

New §177.20, relating to Call Coverage Minimum Requirements, is added to set forth specific minimum requirements for each call coverage model, including expanded and limited call coverage arrangements and a description for each particular model.

Scott Freshour, General Counsel for the Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing this proposal will be a chapter title that clearly identifies the nature and substance of the rules contained therein; to clearly identify the scope of the rules contained therein, rather than having such rules remain isolated in Chapter 174, which pertains to Telemedicine; and to provide physicians with guidance and clarity as it relates to the applicability of the rules pertaining to physician call coverage agreements and requirements. Furthermore, the public benefit anticipated as a result of enforcing these sections will be to provide physicians more clarity about on-call service agreements and eliminate confusion as to the applicability of the rules and requirements surrounding on-call service agreements; to have clearly defined terms as used throughout Subchapter E; and to improve all physicians' understanding of the required elements to ensure call coverage and continuity of care to patients in Texas while protecting patient health and welfare. Furthermore, the public benefit anticipated as a result of enforcing these sections will be to allow physicians to provide call coverage for patients of another physician who is in the same or a similar specialty, while maintaining the covering and covered physicians' mutual responsibility for patients cared for through the call coverage agreements. Finally, the public benefit anticipated as a result of enforcing these sections will be to expand the ability of physicians to provide call coverage, provide clarity and improved guidance to all physicians regarding minimum requirements for call coverage agreements, and ultimately increase patients' access to quality health care in Texas.

Mr. Freshour has also determined that for the first five-year period the sections are in effect there will be no fiscal implication to state or local government as a result of enforcing the sections as proposed. The effect to individuals required to comply

with these rules as proposed will include costs associated with preparing a call coverage agreement. The effect on small or micro businesses will include costs associated with preparing a call coverage agreement. However, because the new rules will allow expanded call coverage for physicians' patients, the anticipated economic costs may be offset by potential industry growth, as it will create opportunities for new business arrangements and/or opportunities.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018 or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

The new rules are proposed under the authority of the Texas Occupations Code Annotated, §153.001, which provides authority for the Board to adopt rules and bylaws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine in this state; enforce this subtitle; and establish rules related to licensure.

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

§177.18. Purpose and Scope.

(a) Purpose. Pursuant to §153.001 of the Act, the Board is authorized to adopt rules relating to the practice of medicine. The purpose of this subchapter is to set forth minimum requirements relating to a physician's provision of call coverage services for another physician's established patients. Advances in technology have enabled a more expansive model of call coverage, requiring that minimum standards be adopted so as to better protect and promote the health and safety of the public while accounting for such technological advances. In setting forth these rules, the board recognizes that a call coverage model outside of the traditional office setting between physicians who are not of the same specialty and do not provide reciprocal call coverage can provide effective and safe patient care, contingent upon physicians remaining mutually responsible for meeting the standard of care for call coverage provided under an agreement, and minimum standards being in place proportionate to the level of care being provided. Such standards will allow increased access to healthcare, while maintaining accountability between physicians, in order to provide continuity and coordination of care, thereby protecting patient safety and health.

(b) Scope. This chapter applies to all physicians providing call coverage in Texas, regardless of the nature and scope of technology being used to provide care to patients through the call coverage relationship.

§177.19. Definitions.

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

(1) Act--The Texas Medical Practice Act, Texas Occupations Code Annotated, Title 3 Subtitle B.

(2) Board--Texas Medical Board.

§177.20. Call Coverage Minimum Requirements.

(a) Generally. Physicians who are in same specialty or similar specialties may provide medical services through a call coverage agreement (CCA) to established patients of a physician who requests the coverage. Physicians who enter into a CCA are contractually obligated and mutually responsible for meeting the standard of care in providing call coverage medical services to established patients through the CCA, and for documenting and relaying such documentation to the physician who requested the coverage. A record created or relayed solely by the patient to the physician who requested coverage is not sufficient to meet this burden.

(b) Expanded Call Coverage Model. For physicians who enter into a CCA and are not of the same specialty or similar specialties, or do not require that reciprocal medical call coverage services be provided to the covering physician's patients through the CCA, the CCA must be in writing and at a minimum include terms that:

(1) establish and maintain the physicians' mutual responsibility for meeting the standard of care in providing call coverage for the established patients of the physician requesting coverage;

(2) provide a list of all of the physicians that may provide the call coverage under the CCA;

(3) require that at the time of the service provided, the covering physician have access to the necessary and appropriate medical records related to the patient who is being treated under the CCA;

(4) for non-emergency care provided for a diagnosis previously made by the physician who requested call coverage, require the covering physician to furnish a written report to the physician requesting the call coverage within 7 days from the end of each call coverage period;

(5) for non-emergency care provided for an injury, illness, or disease not previously diagnosed by the physician who requested call coverage, require the covering physician to furnish a written report to the physician who requested the call coverage within 72 hours from the end of each call coverage period;

(6) for emergency care provided, require the covering physician to furnish a written report to the physician who requested call coverage within an appropriate time period according to the circumstances of the emergency situation; and

(7) require that the physician who requested the coverage make the written report provided by the covering physician a part of the patient's medical record.

(c) Limited Call Coverage Model.

(1) Physicians who are of the same specialty or similar specialties and require that reciprocal call coverage services be provided to the covering physician'(s) patients, may enter into a verbal or written CCA, so long as the CCA limits such medical services to solely responding to the patient's complaint or inquiry for the purpose of determining the following:

(A) whether the patient should be referred or directed to seek immediate emergency care;

(B) whether the patient should be seen by the covering physician for further evaluation in an office setting or through telemedicine; or

(C) whether the patient should receive treatment for a condition that is limited to a 72-hour maximum requiring a follow-up visit with either the covering physician or the physician who requested the coverage.

(2) Terms of the CCA at a minimum must establish the covering and covered physicians' mutual obligation for meeting the standard of care for the covered physician's established patients and for documenting and relaying information related to the patient care provided to the covered physician within an appropriate amount of time from the conclusion of each call coverage period.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 13, 2016.

TRD-201600136
Mari Robinson, J.D.
Executive Director
Texas Medical Board
Earliest possible date of adoption: February 28, 2016
For further information, please call: (512) 305-7016

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PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 513. REGISTRATION
SUBCHAPTER B. REGISTRATION OF CPA FIRMS

22 TAC §513.10

The Texas State Board of Public Accountancy (Board) proposes an amendment to §513.10, concerning Firm License.

Background, Justification and Summary

The amendment to §513.10 will clarify that: 1) CPA firms may be organized under the Texas Business Corporation Act and LLC law, as well as the Texas Professional Corporation Act and professional LLC law, and 2) Professional organizations must be composed entirely of licensees.

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit Cost Note

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be an understanding that CPA firm shareholders may only be CPAs.

There will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business and Micro-Business Impact Analysis

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses because the amendment does not impose any duties or obligations upon small businesses or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis is not required.

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on February 29, 2016.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§513.10. Firm License.

(a) Except as provided for in §501.81(d) of this title (relating to Firm License Requirements), a firm providing attest services or using the titles CPAs, CPA Firm, Certified Public Accountants, Certified Public Accounting Firm, Auditing Firm, or a variation of any of those titles shall do so only through a licensed firm.

(b) To be eligible for a firm license, the firm must show:

(1) that a majority of the ownership of the firm, in terms of both financial interests and voting rights, belongs to individuals who hold certificates issued under this chapter or are licensed as a CPA in another state; or [~~and~~]

(2) that when the firm ownership includes professional organizations, as defined in §301.003(7) of the Texas Business Organizations Code, the professional organizations must be owned by individuals that hold a certificate issued under this chapter or are licensed in another state; and

(3) [~~(2)~~] that all attest services performed in this state are under the supervision of an individual who holds a certificate issued by the board or by another state.

(c) Financial interests shall include but shall not be limited to stock shares, capital accounts, capital contributions, and equity interests of any kind. Financial interests also include contractual rights and obligations similar to those of partners, shareholders or other owners of an equity interest in a legal entity.

(d) Voting rights shall include but shall not be limited to any right to vote on the firm's ownership, business, partners, shareholders, management, profits, losses and/or equity ownership.

(e) Interpretive comment: A licensee offering services as defined in §901.005 of the Act (relating to Findings; Public Policy; Purpose) through an unlicensed firm in accordance with §501.81(d) of this title may not use the CPA designation in the unlicensed firm's name. For example: John Smith may not use the firm name "John Smith, CPA" unless the firm is licensed by the board.

(f) Interpretive comment: §901.351(a) of the Act (relating to Firm License Required), §501.81(a) of this title and subsection (a) of this section require a firm license in order to use the title CPA except as provided for in §501.81(d) of this title.

(g) Interpretive comment: A professional organization includes a professional corporation or professional limited liability company.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 15, 2016.

TRD-201600190
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: February 28, 2016
For further information, please call: (512) 305-7842

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22 TAC §513.11

The Texas State Board of Public Accountancy (Board) proposes an amendment to §513.11, concerning Qualifications for Non-CPA Owners of Firm License Holders.

Background, Justification and Summary

The amendment to §513.11 will clarify that: 1) CPA firms may be organized under the Texas Business Corporation Act and LLC law, as well as the Texas Professional Corporation Act and professional LLC law, and 2) Professional organizations must be composed entirely of licensees.

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit Cost Note

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be an understanding that the requirements for being a non-CPA firm owner applies only to natural persons.

There will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business and Micro-Business Impact Analysis

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses because the amendment does not impose any duties or obligations upon small businesses or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis is not required.

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on February 29, 2016.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§513.11. Qualifications for Non-CPA Owners of Firm License Holders.

(a) A firm which includes non-CPA owners may not qualify for a firm license unless every non-CPA individual who is an owner of the firm:

[~~(1) is an individual;~~]

(1) [~~(2)~~] is actively providing personal services in the nature of management of some portion of the firm's business interests or performing services for clients of the firm or an affiliated entity;

(2) [~~(3)~~] is of good moral character as demonstrated by a lack of history of dishonest or felonious acts; and

(3) [~~(4)~~] is not a suspended or revoked licensee or certificate holder excluding those licensees that have been administratively suspended or revoked. (Administratively suspended or revoked are those actions against a licensee for Continuing Professional Education reporting deficiencies or failure to renew a license.)

(b) Each of the non-CPA individual owners who are residents of the State of Texas must also:

(1) pass an examination on the rules of professional conduct as determined by board rule;

(2) comply with the rules of professional conduct;

(3) maintain professional continuing education applicable to license holders including the Board approved ethics course as required by board rule;

(4) hold a baccalaureate or graduate degree conferred by a college or university within the meaning of §511.52 of this title (relating to Recognized Institutions of Higher Education [~~Colleges and Universities~~]) or equivalent education as determined by the board; and

(5) maintain any professional designation held by the individual in good standing with the appropriate organization or regulatory body that is identified or used in an advertisement, letterhead, business card, or other firm-related communication.

(c) A "Non-CPA Owner" includes any individual or qualified corporation who has any financial interest in the firm or any voting rights in the firm.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 15, 2016.

TRD-201600191
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: February 28, 2016
For further information, please call: (512) 305-7842

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CHAPTER 523. CONTINUING PROFESSIONAL EDUCATION

SUBCHAPTER C. ETHICS RULES: INDIVIDUALS AND SPONSORS

22 TAC §523.131

The Texas State Board of Public Accountancy (Board) proposes an amendment to §523.131, concerning Board Approval of Ethics Course Content.

Background, Justification and Summary

The amendment to §523.131 would require ethics course providers to have in their presentation and materials information on the services available to licensees from the Accountants Confidential Assistance Network (ACAN).

Fiscal Note

William Treacy, Executive Director of the Board, has determined that for the first five-year period the proposed amendment is in effect, there will be no additional estimated cost to the state, no estimated reduction in costs to the state and to local governments, and no estimated loss or increase in revenue to the state, as a result of enforcing or administering the amendment.

Public Benefit Cost Note

Mr. Treacy has determined that for the first five-year period the amendment is in effect the public benefits expected as a result of adoption of the proposed amendment will be increased exposure of the services available to CPAs and CPA applicants from ACAN.

There will be no probable economic cost to persons required to comply with the amendment and a Local Employment Impact Statement is not required because the proposed amendment will not affect a local economy.

Small Business and Micro-Business Impact Analysis

Mr. Treacy has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses because the amendment does not impose any duties or obligations upon small businesses or micro-businesses; therefore, an Economic Impact Statement and a Regulatory Flexibility Analysis is not required.

Public Comment

Written comments may be submitted to J. Randel (Jerry) Hill, General Counsel, Texas State Board of Public Accountancy, 333 Guadalupe, Tower 3, Suite 900, Austin, Texas 78701 or faxed to his attention at (512) 305-7854, no later than noon on February 29, 2016.

The Board specifically invites comments from the public on the issues of whether or not the proposed amendment will have an adverse economic effect on small businesses; if the proposed rule is believed to have an adverse effect on small businesses, estimate the number of small businesses believed to be impacted by the rule, describe and estimate the economic impact of the rule on small businesses, offer alternative methods of achieving the purpose of the rule; then explain how the Board may legally and feasibly reduce that adverse effect on small businesses considering the purpose of the statute under which the proposed rule is to be adopted, finally describe how the health, safety, environmental and economic welfare of the state will be impacted by the various proposed methods. See Texas Government Code, §2006.002(c).

Statutory Authority

The amendment is proposed under the Public Accountancy Act ("Act"), Texas Occupations Code, §901.151 which authorizes the Board to adopt rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by this proposed amendment.

§523.131. Board Approval of Ethics Course Content.

(a) The content of an ethics course designed to satisfy the four hour ethics CPE requirements of §523.130 of this chapter (relating to Ethics Course Requirements) must be submitted to the CPE committee of the board for initial approval and upon request thereafter. The primary objectives of the ethics course shall be to:

(1) encourage the licensee to become educated in the ethics of the profession;

(2) convey the intent of the board's Rules of Professional Conduct in the licensee's performance of professional accounting services, and not mere technical compliance;

(3) apply ethical judgment in interpreting the rules and provide for a clear understanding of the public interest. The public interest shall be placed ahead of self-interest, even if it means a loss of job or client;

(4) emphasize the ethical standards of the profession, as described in this section; and

(5) review and discuss the board's Rules of Professional Conduct and their implications for persons in a variety of practices, including at least one example from subparagraph (A) of this paragraph and at least one example from either subparagraph (B) or (C) of this paragraph:

(A) a licensee engaged in the client practice of public accountancy who performs attest and non-attest services, as defined in §501.52 of this title (relating to Definitions); and

(B) a licensee employed in industry who provides internal accounting and auditing services; or

(C) a licensee employed in education or in government accounting or auditing.

(b) To meet the objectives of subsection (a) of this section, a course must be four hours in length and its components should be approximately:

(1) 25% on ethical principles and values;

(2) 25% on ethical reasoning and dilemmas;

(3) 15% on the board's Rules of Professional Conduct with special focus on recent changes in those rules and including information on the peer assistance available to Texas CPAs, CPA candidates and accounting students with alcohol, substance abuse, depression, stress or other mental health issues through the Accountants Confidential Assistance Network (ACAN); and

(4) 35% on case studies that require application of ethical principles, values, and ethical reasoning within the context of the board's Rules of Professional Conduct.

(c) Course content shall be approved only after demonstrating, either in a live instructor format, a blended program format, or interactive (computer based) format, as defined in §523.102(c)(1) of this chapter (relating to CPE Purpose and Definitions), that the course contains the underlying intent established in the following criteria:

(1) the course shall be designed to teach CPAs to achieve and maintain the highest standards of ethical conduct through ethical reasoning and the core values of the profession: integrity, objectivity, and independence, as ethical principles in addition to rules of conduct;

(2) the course shall address ethical considerations and the application of the board's Rules of Professional Conduct to all aspects of the professional accounting work whether performed by CPAs in client practice or CPAs who are not in client practice; and

(3) the course shall convey the spirit and intent of the board's Rules of Professional Conduct in the licensee's performance of accounting services, and not mere technical compliance.

(d) Ethics courses must be taught in one single four-hour session, including one 10-minute break each hour or its equivalent.

(e) Ethics courses may be reevaluated every three years or as required by the CPE committee. Updated versions of the course and any other course materials, such as course evaluations, shall be provided when requested by the committee for the course to be continued as an approved course.

(f) At the conclusion of each course, the sponsor shall administer a test to determine whether the program participants have obtained a basic understanding of the course content, including the need for a high level of ethical standards in the accounting profession.

(g) A sponsor of an ethics course approved by the board pursuant to this section shall comply with the board's rules concerning sponsors of CPE and shall provide its advertising materials to the board's CPE committee for approval. Such advertisements shall:

(1) avoid commercial exploitation;

(2) identify the primary focus of the course; and

(3) be professionally presented and consistent with the intent of §501.82 of this title (relating to Advertising).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on January 15, 2016.

TRD-201600192
J. Randel (Jerry) Hill
General Counsel
Texas State Board of Public Accountancy
Earliest possible date of adoption: February 28, 2016
For further information, please call: (512) 305-7842

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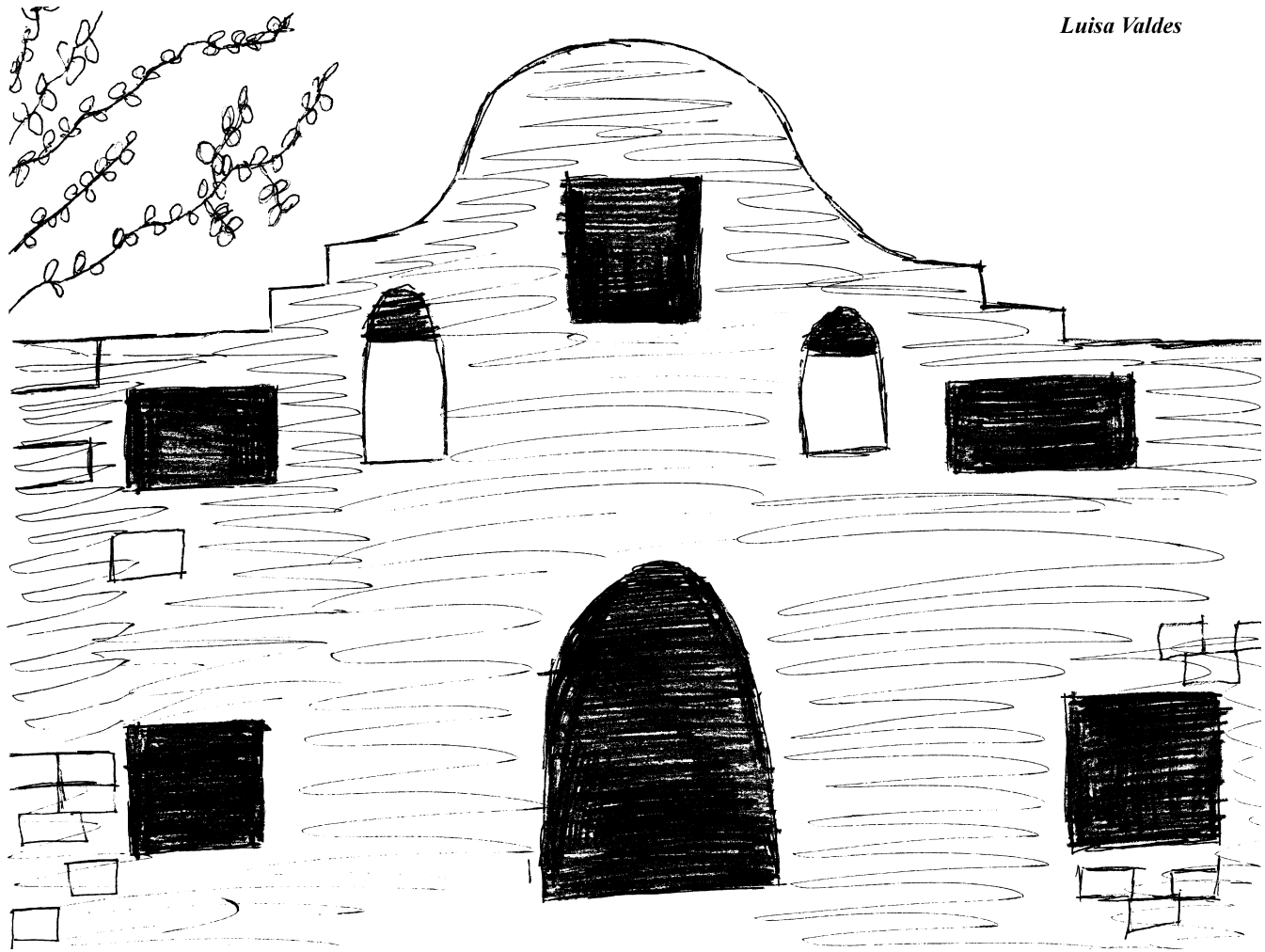

Luisa Valdes

WITHDRAWN RULES

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

TITLE 22. EXAMINING BOARDS

PART 7. STATE COMMITTEE OF EXAMINERS IN THE FITTING AND DISPENSING OF HEARING INSTRUMENTS

CHAPTER 141. FITTING AND DISPENSING OF HEARING INSTRUMENTS

22 TAC §141.16

Proposed amended §141.16, published in the July 10, 2015, issue of the *Texas Register* (40 TexReg 4436), is withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on January 12, 2016.

TRD-201600119

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Lizeth Rosas 8th Grade

ADOPTED RULES

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

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 3. BOLL WEEVIL ERADICATION PROGRAM

SUBCHAPTER K. MAINTENANCE PROGRAM

4 TAC §3.704

The Texas Department of Agriculture (the Department) adopts amendments to §3.704, concerning the West Texas Maintenance Area - Collection of Maintenance Fees, without changes to the proposed text as published in the December 11, 2015, issue of the *Texas Register* (40 TexReg 8850). The amendments are adopted upon the request and recommendation of the Texas Boll Weevil Eradication Foundation and clarify the process for collection of fees on cotton produced in the West Texas Maintenance area.

No comments were received on the proposal.

The amendments are adopted in accordance with the Texas Agriculture Code, §74.203, which provides the Department with the authority to adopt rules to impose a maintenance fee on all cotton grown or on all cotton acres in a maintenance area.

The code that is affected by the adoption is Texas Agriculture Code, Chapter 74.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 12, 2016.

TRD-201600133
Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
Effective date: February 1, 2016
Proposal publication date: December 11, 2015
For further information, please call: (512) 463-4075

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CHAPTER 30. COMMUNITY DEVELOPMENT

SUBCHAPTER A. TEXAS COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM

The Texas Department of Agriculture (Department or TDA) adopts amendments to §§30.1, 30.3, 30.7, 30.21, 30.23, 30.24, 30.26, 30.29, 30.52 - 30.54, 30.58, 30.63, 30.64, 30.81, 30.82, 30.84, 30.101, and 30.102; and new §30.65 and §30.66 without changes to the proposed text as published in the December 11, 2015, issue of the *Texas Register* (40 TexReg 8851). The Department adopts the retitle of Chapter 30, Subchapter A to "Texas Community Development Block Grant Program" to reflect the accurate name of the program. The adopted amendments and new rules are to clarify existing rules, to clarify the Department's legal and regulatory authority to administer the program and to eliminate obsolete requirements to ensure a process that is more amenable for applicants, and to add two additional programs that have not been implemented under the Texas Community Development Block Grant (TxCDBG) Program, as administered by the Department.

TDA received one written comment from Langford Community Management Services. The response suggested a substantive change to §30.82, relating to disqualification of an administrator, which would require additional public comment. TDA intends to consider these suggestions through a rule revision at a future date, and will adopt the rule without changes.

DIVISION 1. GENERAL PROVISIONS

4 TAC §§30.1, 30.3, 30.7

The amendments are adopted under Texas Government Code §487.051, which provides the Department authority to administer the state's community development block grant non-entitlement program, and §487.052, which provides authority for the Department to adopt rules as necessary to implement Chapter 487.

The code affected by the adoption is Texas Government Code Chapter 487.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 12, 2016.

TRD-201600128
Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
Effective date: February 1, 2016
Proposal publication date: December 11, 2015
For further information, please call: (512) 463-4075

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DIVISION 2. APPLICATION INFORMATION

4 TAC §§30.21, 30.23, 30.24, 30.26, 30.29

The amendments are adopted under Texas Government Code §487.051, which provides the Department authority to administer the state's community development block grant non-entitlement program, and §487.052, which provides authority for the Department to adopt rules as necessary to implement Chapter 487.

The code affected by the adoption is Texas Government Code Chapter 487.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 12, 2016.

TRD-201600129
Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
Effective date: February 1, 2016
Proposal publication date: December 11, 2015
For further information, please call: (512) 463-4075

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DIVISION 3. ADMINISTRATION OF PROGRAM FUNDS

4 TAC §§30.52 - 30.54, 30.58, 30.63 - 30.66

The amendments and new sections are adopted under Texas Government Code §487.051, which provides the Department authority to administer the state's community development block grant non-entitlement program, and §487.052, which provides authority for the Department to adopt rules as necessary to implement Chapter 487.

The code affected by the adoption is Texas Government Code Chapter 487.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 12, 2016.

TRD-201600130
Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
Effective date: February 1, 2016
Proposal publication date: December 11, 2015
For further information, please call: (512) 463-4075

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DIVISION 4. AWARDS AND CONTRACT ADMINISTRATION

4 TAC §§30.81, 30.82, 30.84

The amendments are adopted under Texas Government Code §487.051, which provides the Department authority to administer the state's community development block grant non-entitlement program, and §487.052, which provides authority for the Department to adopt rules as necessary to implement Chapter 487.

The code affected by the adoption is Texas Government Code Chapter 487.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 12, 2016.

TRD-201600131
Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
Effective date: February 1, 2016
Proposal publication date: December 11, 2015
For further information, please call: (512) 463-4075

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DIVISION 5. REALLOCATION OF PROGRAM FUNDS

4 TAC §30.101, §30.102

The amendments are adopted under Texas Government Code §487.051, which provides the Department authority to administer the state's community development block grant non-entitlement program, and §487.052, which provides authority for the Department to adopt rules as necessary to implement Chapter 487.

The code affected by the adoption is Texas Government Code Chapter 487.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 12, 2016.

TRD-201600132
Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
Effective date: February 1, 2016
Proposal publication date: December 11, 2015
For further information, please call: (512) 463-4075

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TITLE 10. COMMUNITY DEVELOPMENT

PART 5. OFFICE OF THE GOVERNOR, ECONOMIC DEVELOPMENT AND TOURISM OFFICE

CHAPTER 190. GOVERNOR'S UNIVERSITY RESEARCH INITIATIVE GRANT PROGRAM

The Office of the Governor, Economic Development and Tourism Office (OOG) adopts new rules in 10 TAC §§190.1 - 190.8,

190.10 - 190.14, 190.20 - 190.29, 190.30 - 190.38, 190.40 - 190.53 and 190.55 - 190.58, relating to the establishment and administration of the Governor's University Research Initiative (GURI) under Chapter 62 of the Texas Education Code.

Some of the new rules are adopted with changes to the proposed text as published in the November 6, 2015, issue of the *Texas Register* (40 TexReg 7758) and they will be republished. The rules adopted with changes are §§190.1, 190.7, 190.21 and 190.34.

Some of the new rules are adopted without changes to the proposed text as published in the November 6, 2015, issue of the *Texas Register* (40 TexReg 7758) and they will not be republished. The rules adopted without changes are §§190.2 - 190.6, 190.8, 190.10 - 190.14, 190.20, 190.22 - 190.29, 190.30 - 190.33, 190.35 - 190.38, 190.40 - 190.53 and 190.55 - 190.58.

Basis for the Rules

The purpose of the rules as adopted is to implement and administer the GURI grant program as enacted by Senate Bill 632, House Bills 7 and 26 during the 84th Legislature, Regular Session to facilitate the recruitment of distinguished researchers to eligible Texas universities. The rules will implement Subchapter H of Chapter 62, Texas Education Code. The grant program will be administered by the Economic Development and Tourism Office within the Office of the Governor. The basis of the rules is to establish the processes and procedures necessary to govern the grant program and to ensure the state grant funds are spent in an efficient and effective manner.

Comments

The OOG received public comments on the proposed rules from various the system offices of the University of Texas, Texas Tech University, and the University of Houston. Some comments were general in nature, while others addressed concerns or questions about specific rule sections. The general comments are addressed as follows:

Comment: One commenter states that the rules, as a general matter, propose a more bureaucratic and complex regulatory scheme than is necessary given the goal of the GURI program to recruit distinguished researchers to public institutions. The commenter suggests that the application, award process, and reporting requirements should be simplified. The commenter suggests that the sole goal of the GURI grant program is to recruit distinguished researchers and hence milestones or other targets relating to research or other economic elements are not appropriate.

Response: The OOG agrees that the objective of the GURI grant program is to assist eligible institutions in recruiting distinguished researchers, but disagrees with the general comment that the application, award process and reporting requirements are too burdensome or unnecessary. The proposed rules offer additional direction in areas where applicable statute was silent while also holding the grantor and the grantee accountable to ensure that awards of grant funds are transparent and take into consideration the award priorities established by law, and that state funds are spent properly.

Comment: One commenter states that the rules, as a general matter, treat the GURI grant program as "research grants" akin to other economic development grants administered by the OOG and consequently the rules impose too many restrictions on the grant application, award process and reporting requirements. The commenter also suggests that the product of the research to be obtained by the distinguished researcher is irrelevant. The commenter suggests that the GURI grants should be treated simply as "recruitment grants" and hence the rules should focus solely on whether the researcher was recruited. Another commenter requests clarification of the performance measures to be associated with grant awards.

Response: The OOG agrees that the objective of the GURI grant program is to assist eligible institutions in recruiting distinguished researchers. Section 62.163(a), Education Code (SB 632 and HB 26), and §62.162(b)(HB 7), Education Code specifically state that GURI grants are made for the purpose "to assist eligible institutions in recruiting distinguished researchers." For the purposes of GURI grant awards, the grant "project" is the effort to recruit an identified distinguished researcher. However, the law specifically provides that the OOG "shall" give priority to applications "that demonstrate a reasonable likelihood of contributing substantially to this state's national and global economic competitiveness,"(Section 62.164, Education Code, SB 632 and HB 26), and applications that (1) demonstrate a reasonable probability of enhancing Texas' national and global economic competitiveness; (2) demonstrate a reasonable probability of creating a nationally or internationally recognized locus of research superiority or a unique locus of research; (3) are matched with a significant amount of funding from a federal or private source that may be transferred to the eligible institution; (4) are interdisciplinary and collaborative; or (5) include a strategic plan for intellectual property development and commercialization of technology." §62.164(a)(1)-(5), Education Code (HB 7). Consistent with these statutory provisions, these matters are relevant in the grant evaluation and award process. While the OOG is obligated to consider these priorities in making grant award determinations, these priorities will not be established as project goals or performance measures to be evaluated or monitored throughout the grant term once a grant award has been made.

In addition to these general comments, the responses to comments received on various individual rule sections are addressed as follows:

Comments on Subchapter A, Definitions and General Provisions, 10 TAC §§190.1 - 190.8

Comments on §190.1, Definitions.

Comment: One commenter suggests the OOG should define "equivalent honor" or "equivalent honorific organization," in the broadest possible terms to enable, to the extent possible, the use of GURI to recruit promising, "rising star" researchers who may not have yet attained National Academy or Nobel status but whose abilities and honors can reasonably be considered equivalent. In the absence of a clear definition, applicant institutions may unknowingly submit proposals that do not demonstrate that the researcher meets the eligibility requirements, as required by §190.21(2), or fail to pursue recruitment of a promising researcher whose recruitment would be eligible. Similarly, the commenter suggests that a GURI-funded recruitment package could be structured to provide a bonus if a researcher attains academy membership or Nobel status or to provide an incentive for an up and coming researcher to attain that membership or status.

Response: The OOG, disagrees and declines to further define an "equivalent honor" or "equivalent organization" in the rules. The determination of an "equivalent honor" or "equivalent organization" will be determined on a case-by-case basis, which will allow the OOG the opportunity to consider the facts as then presented with each grant application. The OOG will remain

available to assist eligible institutions during the grant application process and invites institutions to consult with our office prior to submitting a grant application for assistance in determining whether a particular honor will qualify as an eligible "equivalent honor" or "equivalent organization."

Comment: One commenter notes that the proper former name for the National Academy of Medicine is "Institute of Medicine."

Response: The OOG agrees the proper former name for the National Academy of Medicine is the "Institute of Medicine" and will modify the §190.1 accordingly. This change is also consistent with §62.161(1)(B), Education Code (SB 632 and HB 26) or §62.161(2)(B), Education Code (HB 7).

Comments on §190.3, Construction of Rules.

Comment: One commenter suggests that if the OOG Chief of Staff or a designee has the ability to "waive any provision" of the rules based solely on a finding that the waiver serves the public interest, the waiver is ambiguous and gives too much authority in a single individual. The commenter states that any exceptions to the rules should be the subject of a future rulemaking process.

Response: The OOG disagrees. It is not uncommon for an agency to provide for the limited authority to grant a waiver to an administrative rule if doing so will serve the public interest and comply with applicable law.

Comments on §190.6, Funding Levels and Withholding of Funds.

Comment: One commenter suggests that the absence from the rules of a minimum or maximum grant funding level creates ambiguity for the institutions applying, and that even if the grant application specifies a minimum and maximum grant award amount, it is still ambiguous because it may mean that the applicant is to propose a range of funding or it may mean that the OOG will prescribe the minimum and maximum amount for which an institution may apply.

Response: The OOG declines to set a specific minimum or maximum amount of grant award in the administrative rules. The amount of funding available will depend upon the amount of biennial appropriations authorized by the legislature and other available funding as it may become available. The OOG intends that the grant application will clearly state the maximum amount of commitment that an eligible institution may propose for grant match at the time of application, and consequently the applicant will know the available funding before it files an application. The OOG will remain available to assist eligible institutions in answering any further questions regarding funding levels during the grant application process.

Comment: One commenter suggests that the OOG is exceeding its statutory authority in determining funding levels. The commenter cites §62.163(a), Education Code (HB 7) ("the office shall award to the applicant institution a grant amount equal to the amount committed by the institution.") and §62.163(c), Education Code (HB 7) ("After fully funding approved grant applications. . . .") for the proposition that the OOG has no discretion to set any limit on the maximum amount of an award.

Response: The OOG disagrees. The OOG will comply with §62.163 of the Education Code by awarding grants to eligible institutions in an amount equal to the grant match amount committed by the institution for the recruitment of a distinguished researcher. The proposed rule complies with this statutory mandate because the OOG has broad authority to adopt administrative rules necessary to administer the GURI program, and in doing so, the OOG will place a maximum cap on the amount of commitment that an eligible institution may propose for grant match. Placing caps on the amount of grant match commitment is necessary to administer the program because an unlimited commitment amount could allow the GURI fund to be exhausted by a single grant applicant, which would defeat the overall purposes of the program.

Comment: Another commenter encourages the OOG to establish a maximum limit on each award amount that would apply to all institutions, given the limited funds available. Such a limit would allow more institutions to participate in the program. The limit could be adjusted from fiscal year to fiscal year as funds are available, and published on the GURI website.

Response: The OOG agrees that a maximum limit on each award should apply. The OOG agrees that flexibility is needed depending upon available funding and will provide that information in the application. The grant application will state the maximum amount of commitment that an eligible institution may propose for grant match at the time of application.

Comment: One commenter states the authority of the OOG to withhold grant funds for failure to attain program or project goals raises several questions. The commenter suggests that GURI grants are for the single, specific, purpose of recruitment of a distinguished researcher by the applicant institution, and hence any reference to a "program," "project," or "goals" is confusing. The commenter states that the notion of recruitment as the single goal of the program is reinforced by §62.165, Education Code (HB 7), which provides for the confidentiality of information relating to distinguished researchers who are the subject of a GURI grant application.

Response: The OOG agrees that the purpose of the GURI grant program is to recruit distinguished researchers to Texas institutions. Section 62.163(a), Education Code (SB 632 and HB 26) and §62.162(b), Education Code (HB 7) specifically state that GURI grants are made for the purpose "to assist eligible institutions in recruiting distinguished researchers." For the purposes of §190.6, the grant "program" or "project goals" refers to the effort to recruit an identified distinguished researcher. However, GURI grant awards will include controls to ensure that grant funds are expended only for the authorized purposes of the GURI program. For example, failure to achieve the recruitment of a distinguished researcher could result in the withholding or possibly the return of grant funds. Statutory provisions concerning the confidentiality of the identity of a particular distinguished researcher who is the subject of a grant proposal has no correlation to the types of financial controls that may be implemented with respect to the expenditure of grant funds.

Comments on §190.7, Match

Comment: One commenter suggests that if the OOG's determination of the amount of the grant determines the amount of the required match, this methodology is the inverse of the statutory design which provides that the match amount committed by the institution determines the amount of the grant from the OOG.

Response: As stated in the response to comments on §190.6, the OOG will comply with §62.163 of the Education Code by awarding grants to eligible institutions in an amount equal to the grant match amount committed by the institution for the recruitment of a distinguished researcher, however the statute only requires the OOG to award a grant in the amount committed by

the institution if the OOG approves a grant application. The proposed rule complies with this statutory mandate because the OOG has broad authority to adopt administrative rules necessary to administer the GURI program, and in doing so, the OOG will place a maximum cap on the amount of commitment that an eligible institution may propose for grant match. Placing caps on the amount of grant match commitment is necessary to administer the program because an unlimited commitment amount could allow the GURI fund to be exhausted by a single grant applicant, which would defeat the overall purposes of the program.

Comment: With regard to the statutory prohibition against the use of appropriated general revenue as grant match, one commenter encourages the OOG to include examples of other types of funding available to institutions that the OOG will recognize for match purposes, as well as identifying funding sources that the OOG would consider ineligible for use as matching funds. Commenters suggest, in general, that the OOG should expand the list of allowable cost categories for which grant funds may be awarded in order to allow eligible institutions to more easily meet the grant match requirement. In the alternative, these commenters suggest that the OOG should provide a broad list of approved costs that the OOG would consider eligible to meet the match requirement, even if those same cost-types would not be allowed as direct cost categories in the grant award.

Response: The OOG declines to provide an exhaustive list of eligible match funding sources in the rules, as a such list may prove impracticable in administering individual grant awards. However, due to general comments questioning the eligibility of various cost categories to meet the match requirement, the OOG will revise the adopted rule to clarify that cash or in-kind contributions may be acceptable forms of match. In addition, the rule will be clarified to state that GURI grants may not be used as a source of funding to support the match requirement for any other grant obtained by the institution.

Comments on §190.8, Compliance with Other Standards.

Comment: Two commenters suggest that compliance with the Uniform Grant Management Standards (UGMS) and the Texas Contract Management Guide is burdensome. One commenter suggests the relevant standards should be those of major federal research sponsors such as the National Institutes of Health (NIH) or the National Science Foundation (NSF). Two commenters note that institutions of higher education are not governed by the State Contract Management Guide adopted under Chapter 2262, Government Code, but rather are required by §51.9337, Education Code, to adopt a contract management handbook specific to the institution and urge the OOG to not use the State Contract Management Guide for the grant agreements.

Comment: One commenter suggested that the federal rules applicable to NIH or NSF awards would allow eligible institutions to use grant funds for more types of expenses related to recruitment efforts than either the UGMS or the proposed rules currently permit. Another commenter suggested since the UGMS requires matching funds meet the same allowability criteria as grant funds and as salaries are not allowable on GURI grant funds (except for the one-time salary payment), then salaries would also not be allowable on matching funds, the OOG should not use the UGMS.

Response: The UGMS were established to promote the efficient use of public funds by providing awarding agencies and grantees with a standardized set of financial management procedures and definitions, by requiring consistency among grantor agencies in their dealings with grantees, and by ensuring accountability for the expenditure of public funds. State agencies, including the OOG, are required by Chapter 783 of the Government Code to adhere to these standards when administering grants and other financial assistance agreements. The UGMS states that while the UGMS standards do not specifically apply to colleges and universities, "to further consistency and accountability, some state agencies have applied these standard by rule or contract to all their subrecipients." Since GURI is funded with state funds, the OOG, as a state entity, will comply with the UGMS as well as the State Contract Management Guide and will include those provisions in its grant program.

Comments on Subchapter B, Governor's University Research Initiative Advisory Board, 10 TAC §§190.10 - 190.14

Comments on §190.13, Conflicts of Interest.

Comment: One commenter suggests that prohibition for participation by an advisory board member who "has been employed by" or "has been a party to a contract for any purpose with," or is a "former student of" an applicant is unreasonably restrictive and narrow and recommends that the restriction be limited to current employees, contractors, or students.

Response: The OOG disagrees. The rule as proposed strictly complies with the law. Section 62.166(d), Education Code (HB 7), regarding the Advisory Board, specifically states "A member of the advisory board who is or has been employed by, is or has been a party to a contract for any purpose with, or is a student or former student of an applicant eligible institution may not be involved in the review, evaluation, or recommendation of a grant proposal made by that institution."

Comments on §190.14, Communications between the Advisory Board and Applicants, Distinguished Researchers and Others.

Comment: One commenter suggests restricting communication between an advisory board member and an applicant or distinguished researcher may lead to an unintentional disqualification. The commenter suggests that the rule should include a mens rea element of intentionally or knowingly initiating communication for the purpose of influencing the advisory board member as a standard by which the OOG would determine whether a communication results in a disqualification.

Response: The OOG disagrees and declines to modify the rule restricting communications with advisory board members about a GURI grant application. The purpose of the proposed rule is to promote fairness, transparency, and preserve the integrity of the grant award process. However, the rule does not require the automatic disqualification of a grant application based on communication between an advisory board member and an applicant or distinguished researcher. The OOG will consider the circumstances of the unauthorized contact with advisory board members as well as the effect, if any, of the unauthorized contact, to determine whether the application may be disqualified.

Comments on Subchapter C, Application, Review and Award Process, 10 TAC §§190.20 - 190.29

Comments on §190.20, Application Process.

Comment: One commenter suggests that the OOG should not be permitted to change the terms of the formal application document except through a formal rulemaking process. The comment suggests that any changes in the terms and conditions on which grants are awarded, or in the process governing GURI,

should be proposed as formal rulemaking and published for comment as required by law.

Response: The OOG disagrees that a formal rulemaking process is required to make changes to the application or the grant agreement. A detailed rulemaking establishing all the possible requirements and information to be contained in a grant application document is not a standard practice in grants administration and could unreasonably limit the ability of the OOG to effectively administer the program.

Comment: One commenter notes the timing for recruitments can be unpredictable and a rolling basis would prevent a flood of applications to the board at one time.

Response: The OOG agrees but declines to narrow the rule to provide for accepting applications on a rolling basis only. With the launch of a new and innovative program such as GURI, and depending upon the availability of funds, the OOG will need the flexibility to choose the most efficient approach to processing grant applications.

Comments on §190.21, GURI Eligible Applicants.

Comment: One commenter notes the rules do not define what constitutes a "recruit" for eligibility purposes, nor does the statute define or limit what constitutes a recruit. The commenter, and another commenter, urge that the rules expressly permit applications for a GURI grant that would be used to support or retain a distinguished researcher already under contract with the applicant institution.

Response: The OOG declines to expand the GURI program to include retention of a distinguished researcher. The statute only contemplates that the GURI program is to assist institutions with the recruitment of a distinguished researcher. Section 62.163(a), Education Code (SB 632 and HB 26) and §62.162(b), Education Code (HB 7), specifically state that GURI grants are made for the purpose "to assist eligible institutions in recruiting distinguished researchers."

Comment: One commenter states that to require the applicant to have the support of the "president, governing board, and chair of the governing board, or the chancellor of the University System, if the applicant institution is a component of a University System" is incorrect. The commenter suggests the rule, as written, grammatically requires multiple approvals (the president, governing board, and chair of the governing board) and presents the approval of a single individual--the chancellor--as an alternative to the approval of each of other three individuals or entities and is not consistent with the statute. In addition, the commenter states the provision is redundant of §190.23(b), which correctly reflects the statutory support requirement.

The commenter's preferred reading is that only two approvals are required: (1) approval by the president; and (2) approval by one of three entities presented as a series of alternatives. The applicant must indicate the support of:

(1) the institution's president; and

(2) one of the following:

(a) the governing board;

(b) the chair of the governing board; or

(c) the chancellor of the university system, if the institution is a component of a university system.

The commenter states the purpose of indicating support for the application is well served by the preferred reading, and the most logical in that it always requires the support of the institutional president. The commenter recommends eliminating §190.21(4) in favor of §190.23(b), which the OOG should consider presenting in the form described above to clarify the meaning.

Response: The OOG agrees with the interpretation suggested by the commenter, but declines to eliminate §190.21(4) or adopt a different construction of §190.23(b). §190.21(4) will be corrected in the adopted rule so that it is consistent with both §190.23(b) and the statutory provisions of §62.163(c), Education Code (SB 632 and HB 26) and §62.163(b), Education Code (HB 7).

Comments on §190.23, Application Form.

Comment: One commenter notes the grant application form requirement to include a narrative of the grant proposal, including objectives, and timeline to accomplish grant purpose, is confusing and unclear. The commenter suggests that information beyond the name and credentials of the distinguished researcher to be recruited is unnecessary as it may be asking for a description of the research to be conducted.

Response: The OOG disagrees. The narrative requirement is essential to determine the type of research the distinguished researcher to be involved in, how it will benefit the State of Texas, and whether or how the proposal addresses the grant award priorities established by the legislature. The OOG will be available to assist eligible institutions during the grant application process in answering any questions about application's narrative requirements.

Comments on §190.25, Grant Award Recommendations and Decisions.

Comment: Another commenter notes that the National Academies and the Nobel Foundation both grant awards on the basis of new knowledge being created, as opposed to commercialization, and urges the OOG to increase the priority of applications for researchers engaged in basic, translational or applied research or for research that offers the opportunity for interdisciplinary and collaborative research.

Response: The OOG declines to change the priorities as the rules strictly comply with the law. The relevant statutory sections specifically provide that the OOG "shall" give priority some applications while for others the OOG "may" give priority. Section 62.164(a), Education Code (SB 632 and HB 26), and §62.164(a)(1)-(5), Education Code (HB 7) state the priorities that the OOG "shall" consider. Section 62.164(b), Education Code (HB 7), provides further additional factors the OOG "may" consider for funding.

Comments on §190.28, Grant Agreement.

Comment: One commenter suggests the grant agreement should not be for a specific length of time or duration because the GURI grant funds should be allocated without any requirement that they be expended within a particular timeframe.

The commenter suggests that if the duration reference in the grant agreement is relating to the expenditure of grant funds, it may be challenging to judiciously spend the amount of a GURI grant in one or two years as well as meet the matching funds requirement within that same time period. The commenter also notes that the funds, once awarded, need to be guaranteed and insulated from the state budget and the economy, to the full

extent allowed by state law governing appropriations and expenditures. The commenter also suggests that if the duration of the grant agreement is tied to when the recruitment must be achieved, the rule should be clarified accordingly because recruitment is be a one-time event that may take a significant length of time to complete, and all the elements of the recruitment package may take years to implement.

Response: The OOG declines to modify §190.28 to eliminate a duration or term in the GURI grant agreement. Specifying the grant term in the grant agreement is necessary for the proper planning and managing administration of the grant funds and program. The GURI grant program is a state-funded grant program and will be subject to the state laws governing appropriations and expenditures, however, the funding terms can be extended by an amendment to the grant agreement to accomplish the objectives of the grant if continued funding is available.

Comment: One commenter suggests that adding any special conditions to a grant agreement injects uncertainty as to the OOG's expectations, possibly creating a reluctance to apply and the possibility of evolving grant requirements not set by rule.

Response: The OOG needs discretion and the ability to require special grant conditions in certain circumstances to appropriately administer and operate the program in a fiscally responsible manner consistent with the best interests of the State of Texas. Special conditions are common provisions in most grant agreements and, by their nature, are not necessarily the subject of a formal rulemaking.

Comments on Subchapter D, Grant Budget Requirements, 10 TAC §§190.30 - 190.38

Comments on §190.30, General Budget Provisions.

Comment: One commenter urges that the budget categories be broadened to account for such items as relocation costs and transfer fees, as well as to allow the salaries of researcher's team, assistants and other appropriate staff to be counted as an eligible expense. The commenter suggests that the package to recruit a distinguished researcher is likely to be complex and take place over a number of years and institutions should be allowed to use the grant as a method of finance for a budget over a period of time. The commenter suggests that the budget categories as described in the proposed rules reflect a focus on a budget to support the research the recruit will be conducting, rather than the recruitment process.

Response: The OOG declines to broaden the allowable cost categories. The budget categories listed in the GURI rules are the most prudent due to nature of the grant program to support the recruitment of a distinguished researcher and the legislative appropriation constraints for the state-funded GURI grant program. Applicants may elect to propose the payment of direct expenses for relocation costs or transfer fees as part of their overall grant proposal, but the OOG declines to add an additional cost category in the administrative rule specifically for this purpose.

Comment: One commenter suggests the rule regarding reimbursement of expenses unnecessarily creates a bureaucratic burden tied to invoices for purchases by the university. The commenter suggests that not all recruitment expenses can be easily identified for reimbursement, occur at the time the distinguished researcher is hired, or be completed within a limited time period. The commenter also states that proposed rule's reference to the use of an alternative method of payment provides no guidance on the standards to be used to govern the decision or the alternative method.

Response: Cost reimbursement is the preferred and most common method of grant payment and provides the best protection to the State of Texas to ensure that grant funds are properly allocated and managed. The rule's reference to the possible use of an alternative method of payment is intended to provide for limited program flexibility as may be necessary from time-to-time to support the public purposes of the grant program.

Comments on §190.31, One-Time Salary Supplement.

Comment: One commenter suggests that the payment of salary is one of the key elements to recruiting a distinguished researcher and urges that grant funds be made available for use by grantees in paying salary and benefits generally.

Response: The OOG declines to broaden this allowed cost category beyond use of grant funds for the payment of a one-time salary supplement for recruitment purposes. The GURI grant program is designed to support the recruitment of distinguished researchers. Allowing GURI grant funds to be used for the payment of an eligible institution's ongoing operating expenses, such as salaries and benefits for the distinguished researcher or other personnel, does not further the OOG's intent to administer the grant program in a cost-effective and expeditious manner.

Comments on §190.32, Professional and Consultant.

Comment: One commenter notes that given the prohibition on use of grant funds for indirect costs, the rule creates an anomaly in which the institution may use grant funds to contract with an outside source for services such as information technology, legal, and accounting, but may not use grant funds to reimburse the institution directly for the costs associated with providing those services with existing institutional staff at a lower cost. Therefore, the commenter suggests the rule should expressly allow for the payment for professional and consultant services that are provided by institutional staff.

Response: The OOG declines to change this provision to allow the use of GURI grant funds for the payment of professional or consultant services provided by institutional staff because it would constitute the use of grant funds for an otherwise unallowable indirect cost. Moreover, the purpose of including professional and consultant services as an allowable cost category is to permit institutions to use grant funds to pay the for costs associated with the procurement of specialized services that are not routinely supportable with existing institutional staff or resources, but that are reasonable, necessary, and directly attributable to the recruitment effort.

Comments on §190.34, Equipment.

Comment: One commenter suggests the requirement for equipment to be used only for "grant-related purposes" and not for "non-grant related purposes" could mean that an equipment purchase made as part of a recruitment package may be used only by the distinguished researcher or in support of that research. Such an interpretation may result in a very expensive item being underused when the item's use could support a wide variety of research across the campus. In addition, a narrow interpretation would prevent the collaboration with other institutions prioritized by §190.25(d)(4) and (e)(2), and urges that to avoid the waste of resources, the rule should expressly permit equipment purchased with grant funds to be used for any purpose consistent with the teaching and research mission of the institution.

Response: The OOG agrees, that as long as the primary purpose of the equipment purchased with grant funds will be related to the GURI grant program, the rule will be changed to allow other reasonable use by the institution.

Comments on §190.35, Supplies and Direct Operating Expenses.

Comment: One commenter requests including examples of direct operating expenses.

Response: The OOG declines to provide further specific examples in the rule as the Uniform Grants Management Standards already provide grant guidance on direct operating expenses.

Comments on §190.37, Indirect Costs.

Comment: One commenter urges that indirect costs should be allowable to include overhead or institutional expenses that are not readily identified with a particular grant but that are necessary for the operation of the institution. The commenter states that even in recruitment grants, the institution may provide significant institutional support, including facilities, maintenance, safety, professional and administrative staff, and support for grant application, reporting, compliance and monitoring processes. The commenter also urges that if the prohibition on indirect costs remains, the proposed rule should be modified to expressly allow indirect costs and in-kind resources to be accounted for as contributing to the institution's match of the GURI grant.

Response: The OOG declines to include indirect costs as an allowed cost category.

Comments on §190.38, Unallowable Costs.

Comment: One commenter urges that salary and benefits for the members of the research team should be included as allowable cost categories, as these expenses are the largest start-up cost relating to a recruitment effort. The commenter also urges that salaries for personnel to design and build equipment and laboratories for the researchers should also be included as allowable cost categories.

Response: The OOG declines to modify the rule with respect to unallowable costs. The reasons for disallowing the use of grant funds for the general payment of salaries and benefits is further addressed in the agency's response to comments on §190.31.

Comments on Subchapter E, Administering Grants, 10 TAC §§190.40 - 190.53

Comments on §190.42, Financial Reporting.

Comment: One commenter suggests the requirement to obtain written approval from the OOG to move grant funding from one budget category to another is unnecessary bureaucracy. The commenter also requests that the financial reporting rule expressly authorize the use of accrual accounting in contrast to reporting expenditures on a cash only basis.

Response: Obtaining prior written approval from the grantor before reallocating funds from one cost category to another is a common grant management financial control to ensure that grant funds are expended for the purpose for which the grant was awarded. The proposed rules do not address or require the use of a particular accounting methodology and the OOG declines to require a specific accounting method. However the expectation is that institutions will comply with Generally Accepted Accounting Principles (GAAP) with respect to any account methods used for grant funds.

Comments on §190.43, Performance Reporting.

Comment: One commenter states the rule is not clear what performance reporting would be required for a recruitment program grant.

Response: Performance reporting is a common grant administration requirement. The content of performance reports will necessarily depend upon the scope of the grant award, but will generally require grantees to report on the progress towards achieving the recruitment of a distinguished researcher and the related expenditure of funds as proposed by the grantee and approved by the OOG. The OOG does not intend performance reporting to encompass reporting on progress towards any research activities or other objectives that are not related to the recruitment of the distinguished researcher. Furthermore, as indicated by §190.41, the OOG anticipates that there will be regular communication between the grantee's designated point of contact and the OOG so that all information and documentation meets requirements.

Comments on Subchapter F, Program Administration and Audit, 10 TAC §§190.55 - 190.58

Comments on §190.55, Monitoring.

Comment: One commenter is concerned that the language of the rule suggesting that the OOG will monitor grantees to ensure the effective and efficient use of grant funds, while not expressly using the term "milestones," may be used by the OOG to assess performance and compliance. The commenter states that it is not clear what milestones would be relevant to the GURI grant program.

Response: Methods to assess the effective and efficient use of grant funds, including assessing grantee compliance with the grant agreement, will be utilized. For example, grantees must be expected to use funds in accordance with the approved grant proposal, including for the recruitment of the identified distinguished researcher. Grant monitoring will not encompass the monitoring or review of any research activities or other objectives that are not related to the project for the recruitment of the distinguished researcher.

Comments on §190.56, Compliance Review or Audit.

Comment: One commenter states that the various rules have a significant, even burdensome, reporting and compliance regimen, including performance reports (§190.43), programmatic monitoring (§190.55), financial status reports (§190.42), progress reports (§190.6(c)(4)), inventory reports (§190.44), and contract monitoring and financial audits (§190.56), even the possibility that the State Auditor's Office can request information and audit (§190.58). The commenter suggests that the proposed rules focus too much on compliance and too little on the recruitment and the research.

Response: The OOG declines to modify the proposed rule with respect to compliance review or audit requirements. The GURI rules are intended to provide transparency and accountability to ensure the proper expenditure of awarded grant funds. Certain duties and responsibilities will be imposed on the grantee, and the OOG expects that compliance with grant standards will be reported, monitored, and subject to verification.

SUBCHAPTER A. DEFINITIONS AND GENERAL PROVISIONS

10 TAC §§190.1 - 190.8

Statutory Authority

The rules are adopted under §62.162(b), Education Code (as enacted by SB 632 and HB 26, 84th R.S. 2015), and §62.162(c), Education Code (as enacted by HB 7, 84th R.S. 2015), which provide that the Office of the Governor may enact any rules the office considers necessary to administer the Governor's University Research Initiative grant program. It is noted that two versions of Subchapter H, Education Code, governing the GURI grant program were enacted by the 84th Legislature; for purposes of this rule adoption notice, each statutory references will be identified by its enacted legislative bill number(s).

Cross Reference to Statute

Subchapter H of Chapter 62, Education Code, as amended by Senate Bill 632, House Bill 7 and House Bill 26, 84th Legislature, Regular Session.

§190.1. Definitions.

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

(1) "Applicant" is the entity that applies for a grant from the Governor's University Research Initiative program.

(2) "Application" is the information that is required to be completed and submitted by an applicant for a grant from the Governor's University Research Initiative program.

(3) "Advisory board" means the Governor's University Research Initiative Advisory Board, the nine member board appointed by the Governor.

(4) "Distinguished researcher" means a researcher who is:

(A) a Nobel laureate or the recipient of an equivalent honor; or

(B) a member of a national honorific society, such as the National Academy of Sciences, the National Academy of Engineering, or the National Academy of Medicine, formerly known as the Institute of Medicine or an equivalent honorific organization.

(5) "Eligible institution" means a general academic teaching institution or medical and dental unit or health-related institution.

(6) "Fund" means the Governor's University Research Initiative fund established under §§62.165 and 62.168 of the Education Code.

(7) "General academic teaching institution" has the meaning assigned by §61.003 of the Education Code.

(8) "Governing Board" has the meaning assigned by §61.003 of the Education Code.

(9) "Grant agreement" means the GURI grant agreement executed by the Office of the Governor and the grantee.

(10) "Grantee" is the entity named as the recipient of the award in the grant agreement.

(11) "GURI" means Governor's University Research Initiative.

(12) "Health-related institution" means a medical and dental unit as defined by §61.003 of the Education Code and any other public health science center, public medical school, or public dental school established by statute or in accordance with Chapter 61 of the Education Code.

(13) "Medical and dental unit" has the meaning assigned by §61.003 of the Education Code.

(14) "OOG" or "Office" means the Texas Economic Development and Tourism Office within the Office of the Governor.

(15) "Private or independent institution of higher education" has the meaning assigned by §61.003 of the Education Code.

§190.7. Match.

(a) The GURI grant program will have a match requirement. An applicant eligible institution may commit for matching purpose any funds of the institution immediately available for that purpose other than appropriated general revenue.

(b) The match requirement must be met by cash or in-kind commitments equal to the amount of the grant award made by OOG.

(c) The GURI grant award may not be used as a source of funding to support a match requirement for any other grant obtained by the institution.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Shane Linkous
Assistant General Counsel
Office of the Governor, Economic Development and Tourism Office
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For further information, please call: (512) 936-0100

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SUBCHAPTER B. GOVERNOR'S UNIVERSITY RESEARCH INITIATIVE ADVISORY BOARD

10 TAC §§190.10 - 190.14

Statutory Authority

The rules are adopted under §62.162(b), Education Code (as enacted by SB 632 and HB 26, 84th R.S. 2015), and §62.162(c), Education Code (as enacted by HB 7, 84th R.S. 2015), which provide that the Office of the Governor may enact any rules the office considers necessary to administer the Governor's University Research Initiative grant program. It is noted that two versions of Subchapter H, Education Code, governing the GURI grant program were enacted by the 84th Legislature; for purposes of this rule adoption notice, each statutory references will be identified by its enacted legislative bill number(s).

Cross Reference to Statute

Subchapter H of Chapter 62, Texas Education Code, as amended by Senate Bill 632, House Bill 7 and House Bill 26, 84th Legislature, Regular Session.

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Office of the Governor, Economic Development and Tourism Office
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SUBCHAPTER C. APPLICATION, REVIEW AND AWARD PROCESS

10 TAC §§190.20 - 190.29

Statutory Authority

The rules are adopted under §62.162(b), Education Code (as enacted by SB 632 and HB 26, 84th R.S. 2015), and §62.162(c), Education Code (as enacted by HB 7, 84th R.S. 2015), which provide that the Office of the Governor may enact any rules the office considers necessary to administer the Governor's University Research Initiative grant program. It is noted that two versions of Subchapter H, Education Code, governing the GURI grant program were enacted by the 84th Legislature; for purposes of this rule adoption notice, each statutory references will be identified by its enacted legislative bill number(s).

Cross Reference to Statute

Subchapter H of Chapter 62, Texas Education Code, as amended by Senate Bill 632, House Bill 7 and House Bill 26, 84th Legislature, Regular Session.

§190.21. GURI Eligible Applicants.

An applicant interested in applying for an award from the GURI fund must meet all basic qualifying criteria, including but not limited to, the following:

(1) an applicant must be an eligible institution;

(2) the researcher proposed for recruitment must meet all the eligibility requirements necessary to qualify as a distinguished researcher;

(3) the applicant and researcher meet the requirements of the applicable provisions of Chapter 62 of the Education Code; and

(4) the grant application has the support of the applicant institution's president and of the institution's governing board, the chair of the institution's governing board, or the chancellor of the University System if the applicant institution is a component of a University System.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. GRANT BUDGET REQUIREMENTS

10 TAC §§190.30 - 190.38

Statutory Authority

The rules are adopted under §62.162(b), Education Code (as enacted by SB 632 and HB 26, 84th R.S. 2015), and §62.162(c), Education Code (as enacted by HB 7, 84th R.S. 2015), which provide that the Office of the Governor may enact any rules the office considers necessary to administer the Governor's University Research Initiative grant program. It is noted that two versions of Subchapter H, Education Code, governing the GURI grant program were enacted by the 84th Legislature; for purposes of this rule adoption notice, each statutory references will be identified by its enacted legislative bill number(s).

Cross Reference to Statute

Subchapter H of Chapter 62, Texas Education Code, as amended by Senate Bill 632, House Bill 7 and House Bill 26, 84th Legislature, Regular Session.

§190.34. Equipment.

(a) "Equipment" means tangible, nonexpendable personal property (including information technology systems) having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

(b) The grantee may use equipment paid for with OOG funds for any purpose consistent with the teaching and research mission of the institution, as long as the primary use of such equipment remains for grant-related purposes.

(c) The grantee shall not give any security interest, lien or otherwise encumber any item of equipment purchased with grant funds. The grantee shall permanently identify all equipment purchased under the grant by appropriate tags or labels affixed to the equipment. The grantee shall maintain a current inventory of all equipment, which shall be available to the OOG at all times upon request, however, the title for equipment will remain with the grantee.

(d) The grantee will operate, maintain, repair, and protect all equipment purchased in whole or in part with grant funds so as to ensure the full availability and usefulness of such equipment for the purposes of the GURI grant award. In the event the grantee is indemnified, reimbursed, or otherwise compensated for any loss of, destruction of, or damage to the equipment purchased with grant funds, it shall use the proceeds to repair or replace said equipment.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Shane Linkous
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SUBCHAPTER E. ADMINISTERING GRANTS

10 TAC §§190.40 - 190.53

Statutory Authority

The rules are adopted under §62.162(b), Education Code (as enacted by SB 632 and HB 26, 84th R.S. 2015), and §62.162(c), Education Code (as enacted by HB 7, 84th R.S. 2015), which provide that the Office of the Governor may enact any rules the office considers necessary to administer the Governor's University Research Initiative grant program. It is noted that two versions of Subchapter H, Education Code, governing the GURI grant program were enacted by the 84th Legislature; for purposes of this rule adoption notice, each statutory references will be identified by its enacted legislative bill number(s).

Cross Reference to Statute

Subchapter H of Chapter 62, Texas Education Code, as amended by Senate Bill 632, House Bill 7 and House Bill 26, 84th Legislature, Regular Session.

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Shane Linkous
Assistant General Counsel
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SUBCHAPTER F. PROGRAM ADMINISTRATION AND AUDIT

10 TAC §§190.55 - 190.58

Statutory Authority

The rules are adopted under §62.162(b), Education Code (as enacted by SB 632 and HB 26, 84th R.S. 2015), and §62.162(c), Education Code (as enacted by HB 7, 84th R.S. 2015), which provide that the Office of the Governor may enact any rules the office considers necessary to administer the Governor's University Research Initiative grant program. It is noted that two versions of Subchapter H, Education Code, governing the GURI grant program were enacted by the 84th Legislature; for purposes of this rule adoption notice, each statutory references will be identified by its enacted legislative bill number(s).

Cross Reference to Statute

Subchapter H of Chapter 62, Texas Education Code, as amended by Senate Bill 632, House Bill 7 and House Bill 26, 84th Legislature, Regular Session.

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Shane Linkous
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Office of the Governor, Economic Development and Tourism Office
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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §§3.5, 3.31, 3.38, 3.40, 3.45, 3.51, 3.52, 3.86

The Railroad Commission of Texas (Commission) adopts amendments to §§3.5, 3.31, 3.38, 3.40, 3.45, 3.51, 3.52 and 3.86, relating to Application To Drill, Deepen, Reenter, or Plug Back; Gas Reservoirs and Gas Well Allowable; Well Densities; Assignment of Acreage to Pooled Development and Proration Units; Oil Allowables; Oil Potential Test Forms Required; Oil Well Allowable Production; and Horizontal Drainhole Wells, respectively. Sections 3.5, 3.31, 3.38, 3.40, 3.45, 3.51 and 3.52 are adopted without changes, and §3.86 is adopted with changes from the proposed text as published in the November 6, 2015, issue of the *Texas Register* (40 TexReg 7766).

The Commission adopts the amendments to establish a procedure for designating certain fields as unconventional fracture treated fields ("UFT fields"). A UFT field is a field in which horizontal drilling and hydraulic fracturing must be used in order to recover resources from all or part of the field and which is developed using either vertical or horizontal drilling techniques. This designation includes shale formations, such as the Eagle Ford and Barnett Shale, in which the drainage of a wellbore is based upon the area reached by the hydraulic fracturing treatments rather than conventional flow patterns. The substantive amendments to incorporate this concept are adopted in §3.86(i) - (l), with supporting and conforming amendments proposed in the other sections.

Additionally, the Commission adopts amendments to update various Commission requirements related to the drilling of horizontal drainhole wells as defined in §3.86(a)(5). The Commission adopts these amendments to incorporate common special field rule provisions, which apply on a field-by-field basis, into rules that apply statewide. The amendments will reduce and simplify field rule hearings, resulting in a more efficient regulatory process. The amendments would implement requirements related to the following: (1) take points through which a horizontal drainhole can be produced; (2) notification for off-lease penetra-

tion points when the proposed horizontal drainhole will penetrate the productive formation at a point not on the applicant's lease, pooled unit or developmental tract; (3) the creation and production of a structure known as a "stacked lateral" wellbore (a series of horizontal drainholes producing from the same geographical area at differing depths); and (4) plats for permitting, drilling and completion of horizontal wells.

Further, the Commission adopts non-substantive amendments to clarify, update, and conform the rules to current Commission practice.

The Commission received comments from 47 parties, including six associations, two companies, and 39 individuals.

Comments from Occidental Petroleum Corporation (Occidental) and one individual, and a late-filed comment from Apache Corporation (Apache) stated support for the proposed rule changes and contained no recommended changes. The Commission thanks these commenters for their support.

Four associations (Texas Oil and Gas Association (TXOGA), Texas Independent Producers and Royalty Owners Association (TIPRO), Permian Basin Petroleum Association (PBPA), and Texas Alliance of Energy Producers (the Alliance)) filed comments supporting the proposed amendments and suggesting one change to §3.86(i)(2)(A)(ii) regarding the designated person to bear the burden of proof in the event a hearing is set on the Commission's motion.

The Commission agrees with the suggestion and adopts §3.86(i)(2)(A)(ii) with a change to require the proponent of UFT field designation to bear the burden of proof.

The remaining individuals, most of whom identified themselves as professional land surveyors, and two associations (the Texas Society of Professional Surveyors and the Texas Board of Professional Land Surveying) expressed general support for the proposed rule changes, but objected to the inclusion of professional engineers within proposed §3.86(g)(6) regarding plat requirements.

The Commission disagrees with this objection. Professional engineers are included in §3.86(g)(6) because they are qualified to certify downhole data provided to the Commission. Further, Section 3.86(g)(6) does not alter the scope of authority granted to professional land surveyors or to professional engineers. That scope of authority is established by relevant statutes and rules, and is enforced by the authorities created to regulate those professions. The authority granted to either profession is not affected by the Commission's acceptance of certifications related to work performed pursuant to that authority. Therefore, the Commission makes no change in response to these comments.

A separate comment filed by PBPA supported the proposed amendments and addressed some of the comments from the professional land surveyors regarding §3.86(g)(6). PBPA stated that the proposed amendments did not modify the Commission's standards for plats, boundary surveys, or other products of registered professional land surveyors. The Commission agrees. The amendments do not affect the authority of professional land surveyors and professional engineers, and do not permit acts that are not authorized by either profession's governing statutes or rules.

As adopted, the amendments to §3.5 provide plat standards for the drilling of horizontal wells, and require applicants to provide GPS coordinates in connection with drilling permit applications.

The amendments to §3.31 conform the wording related to allowable assignments for gas wells in UFT fields, and update provisions regarding the correct office in which to file completion reports.

The amendments to §3.38 add a reference to the UFT field procedures found in §3.86(k).

The amendments to §3.40 provide that in UFT fields the assignment of acreage to vertical wells and the assignment of acreage to horizontal wells will be regulated independently of one another. The amendments also clarify requirements and update language regarding the filing of Form P-12, Certificate of Pooling Authority, and the filing of Form P-16, Acreage Designation. Finally, the amendments clarify the right of offset, overlying, or underlying operators and lessors or mineral interest owners to file a complaint in situations where a violation of applicable acreage assignment rules may exist.

The amendments to §3.45 add a reference to the UFT field provisions found in §3.86(d).

The amendments to §3.51 provide that potential tests will be filed by the deadline for completion reports, and that the resulting allowable may be backdated no more than 30 days. These amendments will conform §3.51 to previous amendments to §3.16, related to Log and Completion or Plugging Report, adopted by the Commission effective April 28, 2015.

The amendments to §3.52 provide for administrative cancellation of overproduction following notice to offset operators in the field. This change will provide for cancellation of overproduction without the need for a hearing in situations where there is no protest to the cancellation and where the subject wells are otherwise compliant with Commission rules.

The majority of the adopted substantive amendments are found in §3.86, which is adopted with one change, as previously discussed. Amendments to §3.86(a) define nonperforation zone, record well, stacked lateral well, unconventional fracture treated field, and the different types of take points.

Amendments to §3.86(b) implement take point language and provisions related to nonperforation zones within horizontal drainhole wells. The new language also adds additional requirements related to plats to be filed in connection with such drainholes.

Amendments to §3.86(d) clarify the assignment of production allowables for horizontal drainhole wells in conventional fields and in UFT fields.

Section 3.86(f) implements the use of stacked lateral wells as defined in §3.86(a)(10). Due to the limited area drained by this structure, the amendments treat a stacked lateral well as a single wellbore for purposes of calculating density and assigning allowable.

Section §3.86(g), which was §3.86(f) in the previous version of this rule, implements notice requirements related to drilling permit applications for wellbores in which the entry into the correlative interval occurs on an offsite tract.

Section 3.86(i) establishes criteria for designation of a field as a UFT field. The language establishes criteria which, if met, would allow such designation of a field without the need for a hearing; and further provides for a hearing process if the field does not meet the criteria for administrative processing or if an objection is filed. The language provides that either an operator or Commission staff may initiate the designation process. In all cases,

a UFT field will be designated by Commission order. The Commission adopts a change in subsection (i)(2)(A)(ii) to clarify the burden of proof.

Section 3.86(j) clarifies that if an existing special field rule applies to a field designated as a UFT field, the special field rule prevails over all conflicting provisions in Chapter 3 of this title (relating to Oil and Gas Division). This subsection also provides for certain limited areas in which amendments to special field rules in UFT fields may be made upon notice to all affected parties but without the need for a hearing if there are no objections to the proposed change. Specifically, the language provides that, absent any objection from an affected party, a hearing may not be required to: reduce the standard density to one-half of the existing density, delete a between-well spacing rule, or alter the controlling provision under which the allowable is calculated. Similar provisions have been adopted as special field rules for fields in which horizontal drilling and hydraulic fracturing treatments are common.

Section 3.86(k) establishes an alternate procedure for approval of density exceptions for wells in UFT fields. The alternate procedure includes notice provisions to allow affected parties an opportunity to object to the approval of a density exception. In the absence of any objection, the alternate procedure provides for the administrative approval of such exceptions without the need for a hearing or the submission of supporting data. Similar provisions have been adopted as special field rules for fields in which horizontal drilling and hydraulic fracturing treatments are common.

Section 3.86(l) allows flowing oil wells in UFT fields to be completed without tubing for a six-month period. The provision allows for six-month extensions of the exception in cases where the flowing pressure remains above 300 psig surface wellhead flowing pressure, and requires the submission of a revised completion report once the well has been equipped with the required tubing string. Similar provisions have been adopted as special field rules for fields in which horizontal drilling and hydraulic fracturing treatments are common.

While the form is not included in this proposal, the Commission also adopts amended Form P-16 to make conforming changes related to the amendments to §3.40. More information on the adopted form changes is provided on the Commission's Proposed Forms Amendment web page at http://www.rrc.texas.gov/about-us/resource-center/forms/proposed-form-changes/.

The Commission adopts the amendments pursuant to Texas Natural Resources Code §§81.051 and 81.052, which provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under Commission jurisdiction; Texas Natural Resources Code §§85.042, 85.202, 86.041 and 86.042, which require the Commission to adopt rules to control waste of oil and gas; and Texas Natural Resources Code §85.053, which authorizes the Commission to adopt rules relating to the allocation of production allowables.

Statutory authority: Texas Natural Resources Code, §§81.051, 81.052, 85.042, 85.202, 86.041, 86.042, and 85.053 are affected by the proposed amendments.

Texas Natural Resources Code §§81.051, 81.052, 85.042, 85.202, 86.041, 86.042, and 85.053.

Cross-reference to statute: Texas Natural Resources Code, Chapters 81, 85, and 86.

Issued in Austin, Texas, on January 12, 2016.

§3.86. Horizontal Drainhole Wells.

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

(1) Correlative interval--The depth interval designated by the field rules or by new field designation on Form P-7 (New Field Designation).

(2) First take point--The take point in a horizontal drainhole well nearest to the point where the drainhole penetrates the top of the correlative interval. The first take point may be at a location different from the penetration point.

(3) Horizontal drainhole--That portion of the wellbore drilled in the correlative interval, between the penetration point and the terminus.

(4) Horizontal drainhole displacement--The calculated horizontal displacement of the horizontal drainhole from the first take point to the last take point.

(5) Horizontal drainhole well--Any well that is developed with one or more horizontal drainholes having a horizontal drainhole displacement of at least 100 feet.

(6) Last take point--The take point in a horizontal drainhole well nearest the terminus. The last take point may be at a location different from the terminus.

(7) Nonperforation zone (NPZ)--A portion of a horizontal drainhole well within the field between the first take point and the last take point that the operator has intentionally designated as containing no take points pursuant to the spacing requirements in §3.37 of this title (relating to Statewide Spacing Rule).

(8) Penetration point--The point where the drainhole penetrates the top of the correlative interval.

(9) Record well--The single horizontal drainhole within a stacked lateral well designated by the operator as the record well for reporting purposes.

(10) Stacked lateral well--A horizontal drainhole well in which the following conditions are met:

(A) there are two or more horizontal drainhole wells on the same lease, pooled unit, or unitized tract at different depths within the correlative interval for the field;

(B) the horizontal drainholes are drilled from different surface locations;

(C) all take points of a stacked lateral well's horizontal drainholes are within a rectangular area the width of which is 660 feet, and the length of which is 1.2 times the distance between the first and last take points of the record well;

(D) all horizontal drainholes are tested independently and have the same classification (i.e., gas or oil). Only horizontal drainholes of the same classification are eligible to be designated as a stacked lateral well; and

(E) there is only one operator for the stacked lateral well.

(11) Take point in a horizontal drainhole well--Any point along a horizontal drainhole where oil and/or gas can be produced from the correlative interval.

(12) Terminus--The farthest point required to be surveyed along the horizontal drainhole from the penetration point and within the correlative interval.

(13) Unconventional fracture treated (UFT) field--A field designated by the Commission under subsection (i) of this section for which horizontal well development and hydraulic fracture treatment (as defined in §3.29(a)(15) and (16) of this title (relating to Hydraulic Fracturing Chemical Disclosure Requirements)) must be used in order to recover resources from all or a part of the field and which may include the drilling of vertical wells along with the drilling of horizontal wells.

(b) Drainhole spacing.

(1) No take point on a horizontal drainhole shall be located nearer than 1,200 feet (horizontal displacement), or other between-well spacing requirement under applicable rules for the field, to any take point along any other horizontal drainhole in another well, or to any other well completed or permitted in the same field on the same lease, pooled unit, or unitized tract.

(2) No take point on a horizontal drainhole shall be located nearer than 467 feet, or other lease-line spacing requirement under applicable rules for the field, from any property line, lease line, or subdivision line.

(3) All wells developed with horizontal drainholes shall otherwise comply with §3.37 of this title (relating to Statewide Spacing Rule), or other applicable spacing rules.

(4) If the drilling permit application indicates that there will be one or more NPZs, then the as-drilled plat filed after completion of the well shall be certified by a person with knowledge of the facts pertinent to the application that the plat is accurately drawn to scale and correctly reflects all pertinent and required data. In addition to the information required under subsection (f) of this section, the certified as-drilled plat shall include:

(A) the as-drilled track of the wellbore;

(B) the location of each take point on the wellbore;

(C) the boundaries of any wholly or partially unleased tracts within the distance permitted under §3.37 of this title or applicable special field rules of the wellbore; and

(D) notations of the shortest distance from each wholly or partially unleased tract within the distance permitted under §3.37 of this title or applicable special field rules of the wellbore to the nearest take point on the wellbore.

(5) To comply with the spacing requirements set forth in paragraph (3) of this subsection, the take-points along the as-drilled location of a properly permitted horizontal drainhole shall fall within a rectangle established as follows:

(A) two sides of the rectangle are parallel to the permitted drainhole and 50 feet or 10% of the minimum distance to any property line, lease line or subdivision line, whichever is greater, on either side of the drainhole; and

(B) the other two sides of the rectangle are perpendicular to the sides described in subparagraph (A) of this paragraph, with one of those sides passing through the permitted first take point and the other side passing through the permitted last take point.

(6) Prior to perforating the wellbore within an approved NPZ, the operator must amend the permit to authorize perforations within the originally-approved NPZ.

(c) Well densities. All wells developed with horizontal drainholes shall comply with §3.38 of this title (relating to Well Densities) or other applicable density rules.

(d) Proration and drilling units.

(1) Acreage may be assigned to each horizontal drainhole well for the purpose of allocating allowable oil or gas production up to the amount specified by applicable rules for a proration unit for a vertical well plus the additional acreage assignment as provided in this paragraph.
Figure: 16 TAC §3.86(d)(1) (No change.)

(2) Assignment of acreage to proration and drilling units for horizontal drainhole wells shall comply with §3.40 of this title (relating to Assignment of Acreage to Pooled Development and Proration Units).

(3) All proration and drilling units shall consist of continuous and contiguous acreage and proration units shall consist of acreage that can be reasonably considered to be productive of oil or gas.

(4) The maximum daily allowable assigned to a horizontal well shall comply with the table in subsection (d)(1) of this section and the maximum daily allowable specified by paragraph (5) of this subsection, unless special field rules specify different requirements for acreage or maximum daily allowable.

(5) The maximum daily allowable for a horizontal drainhole well in a designated UFT field shall be 100 barrels of oil for each acre that is assigned to an oil well for allowable purposes, or 600 Mcf of gas for each acre that is assigned to a gas well for allowable purposes. This paragraph does not affect suspension of the allocation formula under §3.31(j) of this title (relating to Gas Reservoirs and Gas Well Allowable). The maximum daily allowable for a horizontal drainhole well in a field that has not been designated as a UFT field shall be determined by multiplying the applicable allowable for a vertical well in the field with a proration unit containing the maximum acreage authorized by the applicable rules for the field, exclusive of tolerance acreage, by a fraction:

(A) the numerator of which is the acreage assigned to the horizontal drainhole well for proration purposes; and

(B) the denominator of which is the maximum acreage authorized by the applicable field rules for proration purposes, exclusive of tolerance acreage. The daily oil allowable shall be adjusted in accordance with §3.49(a) of this title (relating to Gas-Oil Ratio), when applicable.

(6) All points on the horizontal drainhole from the first take point to the terminus shall be within the proration and drilling unit. If the penetration point is located on an offsite tract, the conditions prescribed in subsection (g) of this section shall be met before the drilling permit application is submitted to the Commission.

(e) Multiple drainholes allowed.

(1) A single well may be developed with more than one horizontal drainhole originating from a single vertical wellbore.

(2) A horizontal drainhole well developed with more than one horizontal drainhole shall be treated as a single well.

(3) The horizontal drainhole displacement used for calculating additional acreage assignment for a well completed with multiple horizontal drainholes shall be the horizontal drainhole displacement of

the longest horizontal drainhole plus the projection of any other horizontal drainhole on a line that extends in a 180 degree direction from the longest horizontal drainhole.

(f) Stacked lateral wells.

(1) For oil and gas wells, stacked lateral wells within the correlative interval for the field may be considered a single well for density and allowable purposes, at an operator's discretion. If an operator chooses to designate horizontal drainholes as a stacked lateral well, the operator shall designate:

(A) one horizontal drainhole within the stacked lateral well as the record well. An operator may change the record well designation to another wellbore by filing amended drilling permit applications and completion reports for the previous and the new record well; and

(B) all points, from the first take point to the last take point, of the record well for a stacked lateral well are within the proration and drilling unit designated for that well. Notwithstanding paragraph (4) of this subsection, all points from the first take point to the last take point of any other horizontal drainhole comprising the stacked lateral well are not required to be within the proration and drilling unit designated for the record well so long as they otherwise comply with the requirements of this section and any applicable lease line spacing rules.

(2) For the purpose of assigning additional acreage to the stacked lateral well, the horizontal drainhole displacement shall be calculated based on the distance from the first take point to the last take point in the horizontal drainhole for the record well, regardless of the horizontal drainhole displacement of other horizontal drainholes of the stacked lateral well.

(3) Each surface location of a stacked lateral well shall be permitted separately and assigned an API number. When applying for a drilling permit for a stacked lateral well, the operator shall:

(A) identify each surface location of such well as a stacked lateral well on the Form W-1 drilling permit application;

(B) identify on the plat any other existing, or applied for, horizontal drainholes comprising the stacked lateral well being permitted; and

(C) depict on the plat a rectangle described in subsection (a)(10)(C) of this section indicating the lateral boundaries of the stacked lateral well.

(4) Each horizontal drainhole of a stacked lateral well shall comply with: the applicable minimum spacing distance under §3.37 of this title or any applicable special field rules for any lease, pooled unit or property line; and the applicable minimum between well spacing distance under §3.37 of this title or any applicable special field rules for any different well, including all horizontal drainholes of any other stacked lateral well, on the same lease or pooled unit in the field. An operator may seek an exception to §3.37 or §3.38 of this title for stacked lateral wells in accordance with the Commission's rules in this chapter or any applicable special field rule. There are no maximum or minimum distance limitations between horizontal drainholes of a stacked lateral well in a vertical direction.

(5) An operator shall file separate completion forms for each surface location of the stacked lateral well. An operator shall also file a certified plat showing the as-drilled location for each surface location of a stacked lateral well. The certified as-drilled plat shall:

(A) show each horizontal drainhole from each surface location; and

(B) depict on the plat a rectangle described in subsection (a)(10)(C) of this section indicating the lateral boundaries of the stacked lateral well.

(6) In addition to the record well, each surface location of a stacked lateral well shall be listed on the proration schedule, but no allowable shall be assigned for an individual surface location. Each surface location of a stacked lateral well shall be required to have a separate well status report (Form G-10 or Form W-10, as applicable) and the sum of all horizontal drainhole test rates shall be reported as the test rate for the record well.

(7) An operator shall report all production from horizontal drainholes included as a stacked lateral well on the production report that includes the record well. Production reported for a record well shall equal the total production from all of the horizontal drainholes comprising the stacked lateral well. An operator shall measure the production from each surface location of a stacked lateral well. An operator shall measure the full well stream with the measurement adjusted for the allocation of condensate based on the gas to liquid ratio established by the most recent Form G-10 test rate for that surface location. The gas and condensate production shall be identified by individual API number, and recorded and reported on the "Supplementary Attachment to Form PR".

(8) If the field is designated as absolute open flow (AOF) pursuant to §3.31(j) of this title and that designation is removed, the Commission shall assign a single gas allowable to each record well classified as a gas well. The assigned allowable may be produced from any one, all, or a combination of the horizontal drainholes that constitute the stacked lateral well.

(9) An operator shall file Form W-3A, Notice of Intention to Plug and Abandon, and Form W-3, Well Plugging Report, for each horizontal drainhole within the stacked lateral well as required by §3.14 of this title (relating to Plugging).

(10) In order to maintain a single operator of record for a stacked lateral well, a certificate of compliance changing the designation of an operator for a horizontal drainhole in a stacked lateral well pursuant to §3.58 of this title (relating to Certificate of Compliance and Transportation Authority; Operator Reports) may only be approved if certificates of compliance designating the same operator have been filed for all horizontal drainholes within the stacked lateral well.

(11) An operator may remove a horizontal drainhole from a designated stacked lateral well by filing an amended drilling permit application and a completion report. If the horizontal drainhole being removed is the record well for the stacked lateral and there are still multiple horizontal drainholes remaining within the designated stacked lateral well, then the operator shall designate a new record well for the stacked lateral well prior to removing the existing record well from the designated stacked lateral well.

(g) Drilling applications and required reports.

(1) Application. Any intent to develop a new or existing well with horizontal drainholes must be indicated on the application to drill. An application for a permit to drill a horizontal drainhole shall include the fees required by §3.78 of this title (relating to Fees and Financial Security Requirements), and shall be certified by a person acquainted with the facts, stating that all information in the application is true and complete to the best of that person's knowledge. If the penetration point on the proposed horizontal drainhole is located on an offsite tract, the following conditions shall be met prior to submission of the application to drill:

(A) The applicant shall give written notice by certified mail, return receipt requested, to all mineral owners of any offsite tracts

through which the proposed wellbore path traverses from the point of penetration. The notice shall identify the proposed well, include a plat clearly depicting the projected path of the entire wellbore, and allow the party notified not less than 21 days to object to the proposed offsite tract penetration. Notice of offsite tract penetration is not required if:

(i) written waivers of objection are received by the applicant from all mineral owners of any offsite tracts and the waivers are attached to the drilling permit application; or

(ii) the applicant is the only mineral owner of any offsite tracts.

(B) For purposes of this subsection, the mineral owners of any offsite tracts through which the proposed wellbore path traverses from the point of penetration include:

(i) the designated operator;

(ii) all lessees of record for any offsite tracts which have no designated operator; and

(iii) all owners of unleased mineral interests where there is no designated operator or lessee.

(C) In the event the applicant is unable after due diligence to locate the whereabouts of any person to whom notice is required by this subsection, the applicant shall publish notice of this application pursuant to Chapter 1 of this title (relating to Practice and Procedure).

(D) If any mineral owner of an offsite tract objects to the location of the penetration point, the applicant may request a hearing to demonstrate the necessity of the location of the penetration point of the well to prevent waste or to protect correlative rights.

(E) If any person specified in subparagraph (B) of this paragraph did not receive notice as required in subparagraph (A) of this paragraph, that person may request a hearing. If the Commission determines at a hearing that the applicant did not provide the notice as required by subparagraph (A) of this paragraph, the Commission may cancel the permit.

(F) To mitigate the potential for wellbore collisions, the applicant shall provide copies of any directional surveys to the parties entitled to notice under this section, upon request, within 15 days of the applicant's receipt of a request.

(2) Drilling unit plat. The application to drill a horizontal drainhole shall be accompanied by a plat as required by §3.5(h) of this title (relating to Application to Drill, Deepen, Reenter, or Plug Back).

(A) For fields that require a proration unit plat, in addition to the plat requirements provided for in §3.5(h) of this title, the plat shall include the lease, pooled unit or unitized tract, showing the acreage assigned to the drilling unit for the proposed well and the acreage assigned to the drilling units for all current applied for, permitted, or completed oil, gas, or oil and gas wells on the lease, pooled unit, or unitized tract.

(B) An amended drilling permit application and plat shall be filed after completion of the horizontal drainhole well if the Commission determines that the drainhole as drilled is not reasonable with respect to the drainhole represented on the plat filed with the drilling permit application. A horizontal drainhole, as drilled, shall be considered reasonable with respect to the drainhole represented on the plat filed with the drilling permit application if the take points on the as-drilled plat comply with subsection (b)(4) and (5) of this section and with any applicable lease line spacing rules.

(3) Directional survey. A directional survey from the surface to the farthest point drilled on the horizontal drainhole shall be required for all horizontal drainholes. The directional survey and accompanying reports shall be conducted and filed in accordance with §3.11 and §3.12 of this title (relating to Inclination and Directional Surveys Required, and Directional Survey Company Report, respectively). No allowable shall be assigned to any horizontal drainhole well until an acceptable directional survey and survey plat has been filed with the Commission.

(4) Proration unit plat. The required proration unit plat must depict the lease, pooled unit, or unitized tract, showing the acreage assigned to the proration unit for the horizontal drainhole well, the acreage assigned to the proration units for all wells on the lease, pooled unit, or unitized tact, and the path, penetration point, take points, and terminus of all drainholes. No allowable shall be assigned to any horizontal drainhole well until an acceptable proration unit plat has been filed with the Commission. Proration unit plats are not required for wells in a designated UFT field. However, an operator of a well in a designated UFT field may file a proration unit plat along with Form P-16. Designated UFT fields have no maximum diagonal limit.

(5) As-drilled plat. An as-drilled plat is required for each horizontal drainhole well. The as-drilled plat for each horizontal drainhole well shall show the surface location, actual wellbore path, penetration point, terminus, and first and last take points of the horizontal drainhole. If the drilling permit for the horizontal drainhole well is approved with one or more NPZs, the as-drilled plat shall show the nearest take point on either side of each NPZ.

(6) Plat requirements. All plats required by this section shall be prepared using blue or black ink and shall include a certification by a professional land surveyor registered in accordance with Texas Occupations Code, Chapter 1071, relating to Land Surveyors, or by a registered professional engineer registered in accordance with Texas Occupations Code, Chapter 1001, relating to Professional Engineers.

(h) Exceptions and procedure for obtaining exceptions.

(1) The Commission may grant exceptions to this section in order to prevent waste, prevent confiscation, or to protect correlative rights.

(2) If a permit to drill a horizontal drainhole requires an exception to this section, the notice and opportunity for hearing procedures for obtaining exceptions to the density provisions prescribed in §3.38 of this title shall be followed as set forth in §3.38(h) of this title.

(3) For notice purposes, the Commission presumes that for each adjacent tract and each tract nearer to any point along the proposed or existing horizontal drainhole than the prescribed minimum lease-line spacing distance, affected persons include:

(A) the designated operator;

(B) all lessees of record for tracts that have no designated operator; and

(C) all owners of record of unleased mineral interests.

(i) UFT field designation criteria, application and approval procedures.

(1) Criteria for UFT field designation.

(A) Administrative UFT field designation. To be designated administratively as a UFT field, a field shall have the following characteristics:

(i) the *in situ* permeability of at least one distinct producible interval within the field is 0.1 millidarcies or less prior to hydraulic fracture treatment, as determined by core data or other supporting data and analysis; and

(ii) as to producing wells for which the Commission issued the initial drilling permit on or after February 1, 2012, that have been completed in the field, either:

(I) there are at least five such wells of which at least 65% were drilled horizontally and completed using hydraulic fracture treatment; or

(II) there are at least twenty-five such wells drilled horizontally and completed using hydraulic fracture treatment.

(B) Alternative UFT field designation obtained through evidentiary hearing. If an applicant demonstrates in a hearing that reservoir characteristics exist other than the characteristics specified in subparagraph (A) of this paragraph such that horizontal drilling and hydraulic fracture treatment must be used in order to recover the resources from all or a part of the field and that UFT field designation will promote orderly development of the field, the hearings examiner may recommend to the Commission that the field be designated as a UFT field.

(2) Procedures for UFT field designation.

(A) Commission motion to designate a UFT field. The Commission may on its own motion propose that a field be designated as a UFT field upon written notice of the motion to all operators in the field.

(i) If no written objection is filed within 21 days after the date the notice is issued, Commission staff may present a recommendation to the Commission regarding designation of the field as a UFT field.

(ii) If the Commission receives a timely filed written objection, the Commission shall notify the operators in the field that an objection was received and allow any operator in the field 21 days to request a hearing. Pursuant to paragraph (1)(B) of this subsection, the operator requesting the hearing shall bear the burden of proof at the hearing. If no request to set the matter for hearing is received from an operator in the field, the Commission may either dismiss the matter or set the matter for hearing on its own motion. If the matter is set for hearing on the Commission's motion, the proponents of UFT field designation shall bear the burden of proof.

(B) Operator application for UFT designation.

(i) An operator may propose that a field be designated as a UFT field by submitting an application to the Commission that includes an affirmative statement that the field qualifies for designation as a UFT field and providing core data or other supporting data and analysis in support of that affirmative statement.

(ii) If, on review of the completed application, Commission staff determines that the field meets the criteria in paragraph (1)(A) of this subsection, Commission staff shall notify all operators in the field that a UFT field designation order may be presented to the Commission for approval not less than 21 days after the date the notice is issued unless the Commission receives a written objection. If the applicant provides written waivers of objection from all operators in the field, then notice to the operators in the field shall not be required.

(iii) If the Commission receives a timely filed written objection to the notice of the proposal to designate the field as a UFT field, or if Commission staff determines that the field does not qualify for designation as a UFT field, then the applicant for UFT field designation may request that the application be set for hearing.

(iv) If the applicant requests a hearing, the Commission shall send a notice of hearing to all operators in the field proposed for designation as a UFT field at least 15 days in advance of the hearing.

(v) Following a hearing on the request, the hearings examiner may present a recommendation to the Commission regarding the request to designate the field as a UFT field.

(j) Effect of special field rules for UFT fields.

(1) Special field rules for a UFT field shall prevail over all conflicting provisions of this chapter.

(2) The Commission may on its own motion or on the motion of an operator in a field call a hearing to review the current special field rules applicable in a field that is designated or proposed to be designated as a UFT field and request amendment or rescission of any portion of the current field rules, in conjunction with such designation, so that the field is regulated with the appropriate combination of special field rules and the rules in this chapter to effectively and efficiently protect correlative rights and/or prevent waste.

(3) The following provisions shall apply with respect to specific amendments to the special field rules for a UFT field.

(A) A special field rule amendment hearing is not required for the following amendments:

(i) reduction of the standard and/or optional density to one-half of the existing standard and/or optional density;

(ii) deletion of the between-well spacing rule; or

(iii) replacement of the allowable provided by special field rules with the allowable provided by §3.31 of this title, §3.45 of this title (relating to Oil Allowables), and subsection (d)(4) and (5) of this section.

(B) To request one or more of the amendments listed in subparagraph (A) of this paragraph, the operator shall submit to the Commission a request for amendment and engineering and/or geological data to support the requested amendments. For each exhibit submitted, the operator shall include a written explanation showing that the requested amendment will result in the protection of correlative rights and/or the prevention of waste.

(C) Upon receipt of a request for amendment, the Commission shall provide notice of the request to all operators in the field. If no written objection is filed within 21 days after the date the notice is issued, Commission staff may present a recommendation to the Commission regarding the requested amendment. If the Commission receives a timely filed written objection, the applicant may request a hearing to establish through the submission of competent evidence that the requested amendment is necessary for continued development of a designated UFT field, and will result in the protection of correlative rights and/or prevention of waste.

(k) Exceptions to §3.38 for a well in a UFT field. To request an exception to §3.38 of this title for a well in a UFT field:

(1) The operator shall submit to the Commission a written request for an exception to §3.38 of this title. The operator shall clearly state on the drilling permit application whether the density exception is sought under this subsection or through the provisions of §3.38 of this title.

(2) The Commission shall send written notice of the request for an exception to §3.38 of this title filed under this subsection

to any designated operators, lessees of record for tracts that have no designated operator, and all owners of unleased mineral interests:

(A) within 600 feet from the location of a vertical well completed within the UFT field; or

(B) within 600 feet from any take point on a horizontal well within the UFT field correlative interval.

(3) Persons who have received notice pursuant to paragraph (2) of this subsection shall have 21 days from the date of issuance of the notice to file a written objection with the Commission.

(4) If no timely filed written objection is received by the Commission, the applicant provides written waivers from all persons entitled to notice under paragraph (2) of this subsection, or there are no persons entitled to notice, then the application may be approved administratively without the requirement of filing supporting data.

(5) If a timely filed written objection is received by the Commission, the applicant may request a hearing, at which the applicant shall show that the proposed exception to §3.38 of this title is necessary to effectively drain an area of the UFT field that will not be effectively drained by existing wells or to prevent waste or confiscation. Notice of a hearing for a protested exception application under §3.38 of this title for a well in a UFT field will be provided to those persons entitled to notice of such an application as specified in paragraph (2) of this subsection.

(6) Permits granted pursuant to paragraphs (1) - (5) of this subsection shall be issued as exceptions to §3.38 of this title.

(7) Nothing in this subsection prevents an operator from electing to apply for and obtain a density exception under the provisions of §3.38 of this title rather than the provisions of paragraphs (1) - (6) of this subsection.

(l) Tubing requirements for completions in UFT fields. An operator of a flowing oil well in a UFT field may obtain a six-month exception to the requirement in §3.13(b)(4)(A) of this title (relating to Casing, Cementing, Drilling, Well Control, and Completion Requirements) that flowing oil wells shall be produced through tubing. The exception may be granted administratively. A revised completion report shall be filed once the oil well has been equipped with the required tubing string to reflect the actual completion configuration.

(1) For good cause shown, including a showing that the well is flowing at a pressure in excess of 300 psig surface wellhead flowing pressure, an operator may obtain from the District Director one or more extensions to the six month exception. Each extension shall be no more than six months in duration. If the request for an extension is denied, the operator may request a hearing. If a hearing is requested, the exception shall remain in effect pending final Commission action on the request for an extension.

(2) This subsection applies to new drills, reworks, recompletions, or new fracture stimulation treatments for any flowing oil well in the field.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 12, 2016.

TRD-201600127

Haley Cochran
Rules Attorney, Office of General Counsel
Railroad Commission of Texas
Effective date: February 1, 2016
Proposal publication date: November 6, 2015
For further information, please call: (512) 475-1295

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16 TAC §3.78

The Railroad Commission of Texas (Commission) adopts amendments to §3.78, relating to Fees and Financial Security Requirements, without changes to the proposed text as published in the October 2, 2015, issue of the *Texas Register* (40 TexReg 6815). The Commission adopts the amendments to implement a fee for groundwater protection determination letters as provided in Texas Natural Resources Code, §91.0115(b), and to correct a form reference.

House Bill 2694 (HB 2694), enacted by the 82nd Texas Legislature (Regular Session, 2011) amended Texas Natural Resources Code, Chapter 91, and Texas Water Code, Chapter 27, to transfer the Surface Casing Unit from the Texas Commission on Environmental Quality to the Railroad Commission of Texas. HB 2694 added §91.0115, Texas Natural Resources Code, relating to Casing; Letter of Determination, which transferred to the Railroad Commission the responsibility for issuing a letter of determination stating the total depth of surface casing required for an oil or gas well by §91.011. Section 91.0115(b) authorized the Railroad Commission to charge a fee in an amount to be determined by the Railroad Commission for a letter of determination and to charge an additional fee not to exceed $75 for processing a request to expedite a letter of determination. These adopted amendments to §3.78 implement the Commission's authority to charge a fee for each request for a determination letter. The Commission will continue to charge an additional fee for a request to expedite a determination letter.

The Commission received three comments on the proposal, one from a state representative and two from individuals. The Commission appreciates these comments.

The Honorable Abel Herrero, State Representative for District 34, commented that oil and gas operators in his area have expressed concern that the fee will exacerbate an already difficult economic situation, where recent falling oil prices have threatened jobs in the Coastal Bend as producers rethink the viability of drilling new wells. Representative Herrero asked the Commission to reconsider or indefinitely suspend the proposed fee. Additionally, one individual stated that small operators are being "taxed" unfairly when oil prices have fallen below $50 a barrel, and asked the Commission not to incorporate these additional fees and to continue to provide free "water board" letters.

The Commission disagrees with these comments and will implement the fee as proposed. The fee will ensure that the Commission recovers funds necessary for Commission staff to prepare groundwater protection determination letters, including the study and evaluation of electronic access to geologic data and surface casing depths necessary to protect usable groundwater in this state. As noted in the proposal preamble, the Commission receives at least 18,000 requests for groundwater protection determination letters each year. The proposal preamble also noted that the new fee will impose a small cost compared to the overall cost of drilling a well. For example, the average cost to drill a 400-foot wildcat well (one of the shallowest wells permitted by

the Commission) is estimated to be approximately $229,600 (using an average cost of $574 per foot). The groundwater determination letter fee plus the 150% surcharge, at a total of $250, is only 0.109% of $229,600. For deeper wells, the fee will be an even smaller percentage of the overall cost. Finally, the Commission anticipates the amendments will have a lower cost impact on small or micro businesses than on large businesses. This is because the number of wells an entity drills or plugs, and the corresponding number of requests for groundwater determination letters, should be proportionate to the size of the entity.

Another individual commented that a surcharge should not be applied to a nonrefundable fee or added to the expedite fee, given the price of oil and company cut-backs, and stated that it is not a good time for the Commission to impose even more fees and surcharges. The Commission disagrees with this comment. Texas Natural Resources Code §81.070 requires the Commission to impose surcharges on fees required to be deposited into the Oil and Gas Regulation and Cleanup Fund (the Fund), and groundwater determination letter fees are required to be deposited in the Fund pursuant to Texas Natural Resources Code §81.067. For these reasons, the Commission makes no change to the rule as proposed.

The Commission adopts new subsection (a)(14) to add a definition for "Groundwater protection determination letter" to mean "a letter of determination stating the total depth of surface casing required for a well in accordance with Texas Natural Resources Code, §91.011."

The Commission adopts §3.78(b)(14)(A) to require a nonrefundable fee of $100 with each individual request for a groundwater protection determination letter. The Commission redesignates the existing language of §3.78(b)(14) concerning the fee for each individual application for an expedited letter of determination as §3.78(b)(14)(B). Pursuant to §3.78(n), for which no amendments were proposed, a 150% surcharge would apply to the $100 fee, for a total cost of $250 for each request for a groundwater protection determination letter. If an expedited letter is requested, the expedite fee and its surcharge will be charged in addition to the regular fee.

The Commission also amends §3.78(b)(13)(A) to correct a reference to Form W-3X.

The Commission adopts the amendments to §3.78 pursuant to Texas Natural Resources Code, §81.051 and §81.052, which provide the Commission with jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under Commission jurisdiction; Texas Natural Resources Code, §81.067 and §81.068, relating to the Oil and Gas Regulation and Cleanup Fund; Texas Natural Resource Code, §81.070, which authorizes the Commission to impose surcharges on fees; Texas Natural Resources Code, §91.101, which authorizes the Commission to prevent pollution of surface water or subsurface water from oil and gas operations; Texas Natural Resources Code, §91.011, which authorizes the Commission to adopt rules concerning the depth of well casing; Texas Natural Resources Code, §91.0115, which requires the Commission to issue groundwater protection determination letters and authorizes the Commission to charge an application fee and an expedite application fee; and Texas Water Code, §27.033, which requires a person applying for a permit under Chapter 27 to submit with the application a letter of determination from the Commission stating that drilling and using the disposal well and injecting oil and gas waste into the subsurface stratum will not endanger the freshwater strata in that area and that the formation or stratum to be used for the disposal is not freshwater sand.

Statutory authority: Texas Natural Resources Code, §§81.051, 81.052, 81.067,81.068, 81.070, 91.101, 91.011, and 91.0115, and Texas Water Code, §27.033 are affected by the adopted amendments.

Texas Natural Resources Code §§81.051, 81.052, 81.067,81.068, 81.070, 91.101, 91.011, and 91.0115, and Texas Water Code, §27.033.

Cross-reference to statute: Texas Natural Resources Code, Chapters 81 and 91, and Texas Water Code, Chapter 27.

Issued in Austin, Texas, on January 12, 2016.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Haley Cochran
Rules Attorney, Office of General Counsel
Railroad Commission of Texas
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For further information, please call: (512) 475-1295

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PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 60. PROCEDURAL RULES OF THE COMMISSION AND THE DEPARTMENT

The Texas Department of Licensing and Regulation (Department) adopts amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 60, Subchapter G, §60.102, and Subchapter I, §§60.300, 60.302, 60.304 - 60.308, 60.310, and 60.311; and adopts the repeal of Subchapter I, §§60.301, 60.303, and 60.309, without changes to the proposed text as published in the October 23, 2015, issue of the *Texas Register* (40 TexReg 7331). The rules will not be republished.

The adopted amendments and repeals are necessary to implement the changes made by Senate Bill 1267, House Bill 2154 and House Bill 763, 84th Legislature, Regular Session (2015).

The Department would like to clarify the sections being repealed are §§60.301, 60.303 and 60.309, but were published in the October 23, 2015, issue of the *Texas Register* (40 TexReg 7331) as §§65.301, 65.303 and 65.309.

The adopted amendments to §60.102 update terminology and require the Department to respond to a request for rulemaking in accordance with the Texas Administrative Procedure Act (APA), §2001.021.

The adopted amendments to §60.300 clarify that unless otherwise provided by statute, by the APA, by the rules of the State Office of Administrative Hearings (SOAH), or by the 16 TAC Chap-

ter 60 rules, Subchapter I governs contested cases under the APA.

The repeal of §60.301 is adopted because the requirements are found in other law.

The adopted amendments to §60.302 remove most of the provisions relating to Notices of Alleged Violation because those requirements are found in the department's enabling statute, specifically, Occupations Code Chapter 51, Subchapter F.

The repeal of §60.303 is adopted because the requirements are found in other law.

The adopted amendments to §60.304 make editorial corrections only.

The adopted amendments to §60.305 make an editorial correction and correct a rule reference only.

The adopted amendments to §60.306 remove procedural requirements found in other law, including the APA and the Occupations Code, Chapter 51.

The adopted amendments to §60.307 make editorial corrections, correct rule references and remove a requirement found in other law.

The adopted amendment to §60.308 makes an editorial correction only.

The repeal of §60.309 is adopted because the requirements are found in other law.

The adopted amendments to §60.310 remove requirements related to decisions, orders, motions for rehearing, and appeals that are found in other law, including the APA and the Occupations Code, Chapter 51.

The adopted amendments to §60.311 make editorial corrections only.

The Texas Department of Licensing and Regulation (Department) drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the October 23, 2015, issue of the *Texas Register* (40 TexReg 7331). The deadline for public comments was November 23, 2015. The Department did not receive any comments on the proposed rules during the 30-day public comment period.

SUBCHAPTER G. RULEMAKING

16 TAC §60.102

The amendments are adopted under Texas Occupations Code, Chapter 51, which authorizes the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adopted amendments are those set forth in Texas Occupations Code, Chapter 51, the Commission's and the Department's enabling statute. In addition, the following statutes that establish occupational licensing requirements under the Commission's and Department's jurisdiction may be affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Education Code, Chapter 1001 (Driver Education and Safety); Texas Health and Safety Code, Chapters 754 (Elevators, Escalators, and Related Equipment) and 755 (Boilers); Texas Government Code, Chapter 469 (Elimination of Architectural Barriers); Texas Labor Code, Chapters 91 (Professional Employer Organizations) and 92 (Temporary Common Worker Employers); and Texas Occupations Code Chapters 802 (Dog or Cat Breeders), 953 (For-Profit Legal Service Contract Companies), 1151 (Property Tax Professionals), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetologists), 1603 (Regulation of Barbering and Cosmetology), 1703 (Polygraph Examiners), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Vehicle Towing and Booting), and 2309 (Used Automotive Parts Recyclers).

In addition, the following statutes, which were amended effective September 1, 2015, and will be under the Commission's and Department's jurisdiction when the program transfers are complete pursuant to S.B. 202, 84th Legislature, Regular Session, 2015, may be affected: Texas Occupations Code, Chapters 203 (Midwives); 401 (Speech-Language Pathologists and Audiologists); 402 (Hearing Instrument Fitters and Dispensers); 403 (Licensed Dyslexia Practitioners and Therapists); 451 (Athletic Trainers); 605 (Orthotists and Prosthetists); and 701 (Dietitians). No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 14, 2016.

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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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Proposal publication date: October 23, 2015
For further information, please call: (512) 463-8179

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SUBCHAPTER I. CONTESTED CASES

16 TAC §§60.300, 60.302, 60.304 - 60.308, 60.310, 60.311

The amendments are adopted under Texas Occupations Code, Chapter 51, which authorizes the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adopted amendments are those set forth in Texas Occupations Code, Chapter 51, the Commission's and the Department's enabling statute. In addition, the following statutes that establish occupational licensing requirements under the Commission's and Department's jurisdiction may be affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Education Code, Chapter 1001 (Driver Education and Safety); Texas Health and Safety Code, Chapters 754 (Elevators, Escalators, and Related Equipment) and 755 (Boilers); Texas Government Code, Chapter 469 (Elimination of Architectural Barriers); Texas Labor Code, Chapters 91 (Professional Employer Organizations) and 92 (Temporary Common Worker

Employers); and Texas Occupations Code Chapters 802 (Dog or Cat Breeders), 953 (For-Profit Legal Service Contract Companies), 1151 (Property Tax Professionals), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetologists), 1603 (Regulation of Barbering and Cosmetology), 1703 (Polygraph Examiners), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Vehicle Towing and Booting), and 2309 (Used Automotive Parts Recyclers).

In addition, the following statutes, which were amended effective September 1, 2015, and will be under the Commission's and Department's jurisdiction when the program transfers are complete pursuant to S.B. 202, 84th Legislature, Regular Session, 2015, may be affected: Texas Occupations Code, Chapters 203 (Midwives); 401 (Speech-Language Pathologists and Audiologists); 402 (Hearing Instrument Fitters and Dispensers); 403 (Licensed Dyslexia Practitioners and Therapists); 451 (Athletic Trainers); 605 (Orthotists and Prosthetists); and 701 (Dietitians). No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
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For further information, please call: (512) 463-8179

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16 TAC §§60.301, 60.303, 60.309

The repeals are adopted under Texas Occupations Code, Chapter 51, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement this chapter and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adopted repeals are those set forth in Texas Occupations Code, Chapter 51, the Commission's and the Department's enabling statute. In addition, the following statutes that establish occupational licensing requirements under the Commission's and Department's jurisdiction may be affected: Texas Agriculture Code, Chapters 301 and 302 (Weather Modification and Control); Texas Education Code, Chapter 1001 (Driver Education and Safety); Texas Health and Safety Code, Chapters 754 (Elevators, Escalators, and Related Equipment) and 755 (Boilers); Texas Government Code, Chapter 469 (Elimination of Architectural Barriers); Texas Labor Code, Chapters 91 (Professional Employer Organizations) and 92 (Temporary Common Worker Employers); and Texas Occupations Code Chapters 802 (Dog or Cat Breeders), 953 (For-Profit Legal Service Contract Companies), 1151 (Property Tax Professionals), 1152 (Property Tax Consultants), 1202 (Industrialized Housing and Buildings), 1302 (Air Conditioning and Refrigeration Contractors), 1304 (Service Contract Providers and Administrators), 1305 (Electricians), 1601 (Barbers), 1602 (Cosmetologists), 1603 (Regulation of Barbering and Cosmetology), 1703 (Polygraph Examiners), 1802 (Auctioneers), 1901 (Water Well Drillers), 1902 (Water Well Pump Installers), 2052 (Combative Sports), 2303 (Vehicle Storage Facilities), 2306 (Vehicle Protection Product Warrantors), 2308 (Vehicle Towing and Booting), and 2309 (Used Automotive Parts Recyclers).

In addition, the following statutes, which were amended effective September 1, 2015, and will be under the Commission's and Department's jurisdiction when the program transfers are complete pursuant to S.B. 202, 84th Legislature, Regular Session, 2015, may be affected: Texas Occupations Code, Chapters 203 (Midwives); 401 (Speech-Language Pathologists and Audiologists); 402 (Hearing Instrument Fitters and Dispensers); 403 (Licensed Dyslexia Practitioners and Therapists); 451 (Athletic Trainers); 605 (Orthotists and Prosthetists); and 701 (Dietitians). No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 65. BOILERS

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 65, Subchapter A, §65.2, Subchapter C, §65.13, Subchapter I, §65.62, Subchapter J, §65.72, Subchapter N, §65.203 and §65.210, Subchapter O, §65.300, Subchapter P, §65.401, and Subchapter R, §§65.605, 65.608 - 65.611, and 65.613; adopts new rules in Subchapter B, §§65.6 - 65.8, and Subchapter K, §65.86; and adopts the repeal of Subchapter B, §65.10 and §65.11, without changes to the proposed text as published in the October 23, 2015, issue of the *Texas Register* (40 TexReg 7335). The rules and repeals will not be republished.

The amendments to §65.612 are adopted with changes to the proposed text as published in the October 23, 2015, issue of the *Texas Register* (40 TexReg 7335). The rule will be republished.

The adopted amendments, new rules and repeals are necessary to implement the changes made by House Bill 3091; address safety concerns; make technical and editorial corrections; and add a temporary operating permit fee.

The adopted amendments to §65.2 provide clarity and editorial corrections to certain definitions.

The adopted new §65.8 establishes the registration requirements for Authorized Inspection Agency without NB-360 accreditation.

The adopted repeal of §65.10 is primarily to renumber it as §65.6 and distinguish this section as registration requirements for agencies with national board accreditation.

The adopted repeal of §65.11 is primarily to renumber it as §65.7 and distinguish this section as registration renewal requirements for agencies with national board accreditation.

The adopted amendments to §65.13 establish the terms of a temporary operating permit.

The adopted amendments to §§65.62, 65.203, 65.401 and 65.613 change the language of "hydrostatic test" to "liquid pressure test" to conform to industry terminology and practice.

The adopted amendment to §65.72 adds the Executive Director of the Department to the authorized personnel who may declare a boiler unsafe.

The adopted new §65.86 establishes reporting requirements for Authorized Inspection Agencies.

The adopted amendments to §65.210 remove "preparation" from the title and make technical corrections.

The adopted amendment to §65.300 adds a fee for a temporary operating permit.

The adopted amendments to §65.605 require a screen guard to be placed around high voltage circuits and electric boilers be internally examined.

The adopted amendments to §65.608 and §65.609 correct cross references.

The adopted amendment to §65.610 allows the Department instead of just the Chief Boiler Inspector to review and maintain inspection summary reports.

The adopted amendments to §65.611 make editorial changes.

The adopted amendments to §65.612 allow plugging boiler tubes as a type of repair or alteration and make an editorial change.

The Texas Department of Licensing and Regulation (Department) drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the October 23, 2015, issue of the *Texas Register* (40 TexReg 7335). The deadline for public comments was November 23, 2015. The Department did not receive any comments on the proposed rules during the 30-day public comment period.

The Board of Boiler Rules (Board) met on December 16, 2015, to discuss the proposed rules and recommended that the Commission adopt the proposed rules as published in the *Texas Register* with minor changes to §65.612. At its meeting on January 6, 2016, the Commission adopted the proposed rules with changes as recommended by the Board.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §65.2

The amendments are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. REGISTRATION-- AUTHORIZED INSPECTION AGENCY

16 TAC §§65.6 - 65.8

The new rules are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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16 TAC §65.10, §65.11

The repeals are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. BOILER REGISTRATION AND CERTIFICATE OF OPERATION--REQUIREMENTS

16 TAC §65.13

The amendments are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

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SUBCHAPTER I. INSPECTION OF BOILERS

16 TAC §65.62

The amendments are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER J. TEXAS BOILER NUMBERS

16 TAC §65.72

The amendments are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

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SUBCHAPTER K. REPORTING REQUIREMENTS

16 TAC §65.86

The new rule is adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

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SUBCHAPTER N. RESPONSIBILITIES OF THE OWNER AND OPERATOR

16 TAC §65.203, §65.210

The amendments are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

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SUBCHAPTER O. FEES

16 TAC §65.300

The amendments are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

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SUBCHAPTER P. ADMINISTRATIVE PENALTIES AND SANCTIONS

16 TAC §65.401

The amendments are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

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SUBCHAPTER R. TECHNICAL REQUIREMENTS

16 TAC §§65.605, 65.608 - 65.613

The amendments are adopted under Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapter 51, and Health and Safety Code, Chapter 755. No other statutes, articles, or codes are affected by the adoption.

§65.612. Repair and Alterations.

(a) Repairs and alterations shall conform to the current edition of the National Board Inspection Code (NBIC) and shall be acceptable to the inspector, except that repairs and alterations may be performed by the following, provided the intended work is within the scope of the issued certificate of authorization:

(1) holders of a certificate of authorization from the National Board of Boiler and Pressure Vessel Inspectors for use of the R repair symbol stamp; or

(2) owner/operators of boilers who have been issued a certificate of authorization by the department.

(A) Issuance of the certificate of authorization will be made upon submission of an application, on forms provided by the department.

(B) Review of the applicant's program and facilities initially and at subsequent three-year intervals will be done.

(i) The review will determine the applicant has a documented program to control repairs and/or alterations conforming to minimum requirements established by the department.

(ii) The review will require demonstration of the applicant's ability to perform repairs and/or alterations by implementing on representative work the requirements of the written program.

(iii) The guidelines of the NBIC for the quality control system are a minimum, except that an Authorized Inspection Agency is not required and the Repair and Alteration forms are issued by the department. The National Board's forms shall not be used by these certificate holders.

(b) Derating a boiler's MAWP and/or allowable temperature (in accordance with the NBIC), shall be approved by the department prior to commencement of the alteration. If the derating is approved, the MAWP and/or allowable temperature shall not be increased without prior approval from the department.

(c) Non-welded repairs.

(1) Replacement parts made of plate material used for pressure retaining shall require material test reports (MTR). Traceability to the MTR must be maintained at all times.

(2) Replacement parts fabricated by welding shall be certified, stamped with the appropriate ASME Code symbol and inspected by an authorized inspector as required by the ASME Code.

(3) When a non-welded repair involves the replacement of cast or forged parts that are identified with the ASME Code symbol at the time of casting or forging, these parts shall be replaced with cast or forged parts that are identified with the ASME Code symbol or so certified by the manufacturer to be in accordance with the original code of construction.

(4) All other materials shall not require MTR's, provided the material is identified with the material specification, grade, lot and rating as required by the material or product specification and the ASME Code.

(5) When used parts are utilized for non-welded repairs, it is the repair organization's responsibility to ensure the parts are identified as required above.

(6) Boiler tubes shall be replaced with tubes of the allowed material and in accordance with the original code of construction.

(d) Lap seam cracks. The shell or drum of a boiler in which a typical lap seam crack is discovered along a longitudinal riveted lap-type joint shall be immediately and permanently discontinued for use under pressure. A lap seam crack is the typical crack frequently found in lap seams, which extends parallel to the longitudinal joint and is located either between or adjacent to rivet holes.

(e) Plugging of boiler tubes (excluding tubes in headers of economizers, evaporators, superheaters, or reheaters).

(1) Tube plugs shall be made of a material which is compatible with the material of the boiler tube being plugged and shall be welded into place, or manufactured to be expanded into the tube sheet or drum.

(2) Plugging boiler tubes on Fire Tube Boilers fabricated in accordance with ASME Section I or IV.

(A) Best practice is not to plug a boiler tube in a Fire Tube Boiler. If a Fire Tube Boiler tube is plugged, the following criteria shall apply.

(B) Plugging boiler tubes that are adjacent to another plugged boiler tube is prohibited.

(C) No more than 10% of the total number of boiler tubes shall be plugged.

(D) All non-expanded boiler tube plugs shall be welded into place.

(E) All plugged boiler tubes shall be replaced prior to the next required Certificate Inspection.

(3) Plugging boiler tubes on Water Tube Boilers, Unfired Boilers, or Process Steam Generators.

(A) No more than 10% of the boiler generating tubes may be plugged. Additional tubes may be plugged after approval is obtained from the Original Equipment Manufacturer or an Engineer experienced in boiler design. The scope of the approval is limited to the plugging of the tubes and shall consider the operational effect on the water side pressure boundary or membrane and the effect on the combustion process throughout the boiler.

(B) No Water Wall tubes may be plugged, where the tube forms a separation wall between products of combustion and the outside atmosphere or a separation of the gas passes in a multiple (gas) pass boiler.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 67. AUCTIONEERS

The Texas Commission of Licensing and Regulation (Commission) adopts amendments to existing rules at 16 Texas Administrative Code (TAC) Chapter 67, §§67.20, 67.25, 67.65 and 67.80; new rule §67.21; and repeal of current §67.70 without changes to the proposed text as published in the October 30, 2015, issue

of the *Texas Register* (40 TexReg 7553). The rules will not be republished.

The amendments to §67.30 and new rules §§67.70, 67.71 and 67.72 are adopted with changes to the proposed text as published in the October 30, 2015, issue of the *Texas Register* (40 TexReg 7553). The rules will be republished.

The adopted amendments, new rules and repeal are necessary to implement the changes made by House Bill 2481, which authorized the Commission to establish an associate auctioneer license; exempted certain auctions of property through the internet from Texas Occupations Code, Chapter 1802; and added several exemptions for auctioneers to conduct auctions of certain motor vehicles.

The adopted amendments to §67.20 make editorial corrections and add an alternative path to obtaining an auctioneer license, via experience gained through licensure as an associate auctioneer.

The adopted new §67.21 establishes the requirements for an associate auctioneer.

The adopted amendments to §67.25 add "associate auctioneer" to the continuing education requirements and makes an editorial change.

The adopted amendments to §67.30 provide clarity for exemptions regarding internet based auctions.

The adopted amendment to the title of §67.65 removes "Education" from the name of the advisory board to bring about consistency in the names of the Department's boards.

The adopted repeal of current §67.70 and new §67.70 will reorganize the current standards and add certain standards of practice for auctioneers into a more logical format by separating the duties relating to advertising, auctioneering and recordkeeping.

The adopted new §67.71 creates duties and responsibilities for the sponsoring auctioneer.

The adopted new §67.72 creates duties and responsibilities for associate auctioneers.

The adopted amendments to §67.80 create an application fee and renewal fee for the associate auctioneer license.

The Texas Department of Licensing and Regulation (Department) drafted and distributed the proposed rules to persons internal and external to the agency. The proposed rules were published in the October 30, 2015, issue of the *Texas Register* (40 TexReg 7553). The deadline for public comments was November 30, 2015. The Department received comments from three interested parties on the proposed rules during the 30-day public comment period.

Comment--One commenter did not agree with the reinstatement of the associate auctioneer.

Department Response--The reinstatement of the associate auctioneer was made by statute, so this program cannot be abolished by rule. The Department did not make any changes to the proposed rule based on this comment.

Comment--One commenter needed assistance locating the license and wanted help getting his license back.

Department Response--The Department provided the commenter the link for the proposed rules as well as the contact information to the customer service division to discuss his license.

Comment--One commenter recommended that car auctioneers should not have to hold an auctioneer license and explained that he only performs bid calling and contracts with auto dealers to provide this service. The commenter provided a letter from the Texas Comptroller waiving the requirement to provide clerking, money collection or acceptance of consignment merchandise.

Department Response--A person needs a Texas auctioneer license to sell certain motor vehicles. Pursuant to House Bill 2481, a person does not need an auctioneer license to sell motor vehicles at auction if the person has a general distinguishing number issued by the Department of Motor Vehicles, or is licensed under Texas Occupations Code, Chapters 2301 or 2302. The Department responded directly to the commenter.

The Auctioneer Advisory Board (Board) met on December 14, 2015, to discuss the proposed rules and the public comments received. The Board recommended that the Commission adopt the proposed rules as published in the *Texas Register* with minor changes to §§67.30, 67.70, 67.71 and 67.72. At its meeting on January 6, 2016, the Commission adopted the proposed rules with the changes recommended by the Board.

16 TAC §§67.20, 67.21, 67.25, 67.30, 67.65, 67.70 - 67.72, 67.80

The amendments and new rules are adopted under Texas Occupations Code, Chapters 51 and 1802, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 1802. No other statutes, articles, or codes are affected by the adoption.

§67.30. Exemptions.

(a) An auction of property by live bid call, if the property is solely bid upon through the internet, is not subject to this chapter or Texas Occupations Code, Chapter 1802 and is exempt under §1802.002(4).

(b) For purposes of this chapter and Texas Occupations Code, Chapter 1802, the sale of real or personal property is not considered to be a competitive bid subject to this chapter if all of the material terms of the transaction other than price are not the same.

(c) This chapter does not apply to a person providing an online platform to facilitate an auction.

§67.70. Auctioneer Standards of Practice.

(a) Advertising

(1) All advertisements designed to solicit auction business, including the advertisement of an auction, shall include the auctioneer's name as it appears on the license and the license number.

(2) If an auctioneer advertises an auction as "absolute" or "without reserve", no lots included may have a minimum bid. Advertising may include the wording "many lots are without reserve"; however, the auction may not be titled, headed or called an "absolute" or "without reserve" auction unless all lots meet the criteria.

(3) An auctioneer who intends to charge a buyer's premium at an auction must state this condition and the amount of the buyer's premium in all advertising for the auction.

(4) An auctioneer may not make a false or misleading statement in an advertisement.

(b) Recordkeeping

(1) An auctioneer must furnish to the department the name, including assumed names, addresses, website, or social media pages, and telephone numbers of all auction companies that the auctioneer owns or operates.

(2) An auctioneer must report any change of address to the department in writing within thirty (30) days of the change.

(3) Each licensed auctioneer shall keep records relative to all auctions for a minimum of two (2) years from the date of the sale.

(4) The records for each auction must state the name(s) and address of the owners of the property auctioned, the date of the sale, the name of the auctioneer and clerk of the sale, the gross proceeds, the location and account number of the auctioneer's trust or escrow account, an itemized list of all expenses charged to the consignor or seller, a list of all purchasers at the auction and a description and selling price for each item sold.

(5) The auctioneer shall keep, as part of the records for each auction, all documents relating to the auction, These documents shall include, but are not limited to, settlement sheets, written contracts, copies of advertising and clerk sheets.

(6) These documents include records and documents online.

(7) Each licensed auctioneer must:

(A) Maintain a separate trust or escrow account in a federally insured bank or savings and loan association, in which shall be deposited all funds belonging to others which come into the auctioneer's possession and control.

(B) Deposit all proceeds from an auction into the trust or escrow account within seventy two (72) hours of the auction unless the owner or consignor of the property auctioned is paid immediately after the sale or the written contract stipulates other terms, such as sight drafts.

(C) Pay any public monies, including, but not limited to state sales tax, received into the State Treasury at the times and as per the regulations prescribed by law; and

(D) Pay all amounts due the seller or consignor within fifteen (15) banking days of the auction unless otherwise required by statute or a written contract between license holder and seller.

(8) A licensed auctioneer shall cooperate with the department in the performance of an investigation. This includes, but is not limited to responding to requests from the department, including producing requested documents or other information, within thirty (30) days of request.

(9) The failure of a licensed auctioneer to timely pay a consignor may subject the licensed auctioneer to a claim under the Auctioneer Education and Recovery Fund.

(c) At auction

(1) Before beginning an auction, a licensee must ensure the announcement of, give notice, display notice or disclose:

(A) that the auctioneer conducting the sale is licensed by the department;

(B) the terms and conditions of the sale including whether a buyer's premium will be assessed; and

(C) if the owner, consignor, or agent thereof has reserved the right to bid.

(2) A licensee may not allow any person who is not either a Texas licensed auctioneer or associate auctioneer who is directly supervised by a licensed auctioneer, to call bids at a sale.

(3) A licensee may not knowingly use or permit the use of false bidders at any auction.

(4) All licensed auctioneers shall notify consumers and service recipients of the department's name, mailing address, telephone number and website "www.tdlr.texas.gov" for purposes of directing complaints to the department. The notification shall be included on any auction listing contract and on at least one of the following:

(A) A sign prominently displayed at the place of the auction or on any auction website;

(B) Bills of sale or receipt to be given to buyers; or

(C) Bidder cards.

§67.71. Requirements--Sponsoring Auctioneer.

(a) There must be a legitimate employee-employer relationship between an associate auctioneer and the sponsoring auctioneer or between the associate and an auction company operated by a licensed auctioneer that employs the sponsoring auctioneer.

(b) A sponsoring auctioneer must be on the premises and directly supervising an associate auctioneer when the associate is bid calling.

(c) A sponsoring auctioneer is responsible for supervision of an associate auctioneer as the associate performs the items listed in §67.72(c).

(d) An auctioneer who terminates the sponsorship of an associate auctioneer must:

(1) within thirty (30) days notify the department in writing; and

(2) provide signed documentation to the associate auctioneer showing:

(A) the beginning and ending date of sponsorship;

(B) date and location of up to ten (10) auctions bid called by the associate;

(C) items listed in §67.72(c), that the associate has performed.

§67.72. Requirements--Associate Auctioneers.

(a) An associate auctioneer shall provide auction services only when under the supervision of the licensed Texas auctioneer whose name is on file with the department as the associate's sponsoring auctioneer.

(b) When bid calling, an associate auctioneer must be under the direct on-premises supervision of the sponsoring auctioneer.

(c) In order to be eligible for licensure as an auctioneer without taking the examination, an associate auctioneer must participate in all aspects of the auction business involving the laws of this state, in at least ten (10) auctions including but not limited to:

(1) appraising;

(2) inventorying;

(3) advertising;

(4) property make ready;

(5) site selection and preparation;

(6) lotting;

(7) registration;

(8) clerking;

(9) cashiering;

(10) bid-calling;

(11) ring working;

(12) property check out;

(13) security;

(14) accounting; and

(15) escrow account procedures.

(d) An associate auctioneer must report any change of address to the department within thirty (30) days.

(e) When a sponsoring auctioneer terminates the sponsorship of an associate auctioneer, the associate may not provide auction services until an agreement with a new sponsoring auctioneer, whose name and signature are on file with the department, has been made.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 14, 2016.

TRD-201600154
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Effective date: February 15, 2016
Proposal publication date: October 30, 2015
For further information, please call: (512) 463-8179

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16 TAC §67.70

The repeal is adopted under Texas Occupations Code, Chapters 51 and 1802, which authorize the Commission, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the adoption are those set forth in Texas Occupations Code, Chapters 51 and 1802. No other statutes, articles, or codes are affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 14, 2016.

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William H. Kuntz, Jr.
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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING
SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

31 TAC §15.30

The General Land Office (GLO) adopts amendments to §15.30 (relating to Certification Status of the City of South Padre Island Dune Protection and Beach Access Plan), without changes to the proposed text as published in the July 31, 2015, issue of the *Texas Register* (40 TexReg 4874). Section 15.30 will not be republished.

BACKGROUND AND JUSTIFICATION

The City of South Padre Island's (City's) Dune Protection and Beach Access Plan (Plan) was first adopted on October 5, 1994 and most recently amended to adopt an Erosion Response Plan, which was certified by the GLO as consistent with state law and became effective April 17, 2013. The City Council amended Section 18-19.4 of its Code of Ordinances and its Plan to adopt a Beach User Fee (BUF) on May 20, 2015, and submitted the amended Plan to the GLO with a request for certification pursuant to Texas Natural Resources Code §61.015(b).

The GLO published the proposed amendments in the July 31, 2015, issue of the *Texas Register* (40 TexReg 4874) for a thirty (30) day comment period that ended on August 31, 2015. The GLO received several public comments during the comment period. In order to evaluate and respond to comments relating to the consistency of the BUF with state law, the GLO requested clarification from the City in a letter dated October 8, 2015. The City responded in a letter dated October 20, 2015, and provided additional information related to payment options, measures to ensure beach user safety, overnight parking restrictions, and enforcement procedures.

The amendment adds a Beach User Fee Plan as Appendix 2 to the Plan and establishes a BUF of up to $13 dollars a day and an annual fee of up to $50 for designated parking areas. The BUF will be charged for parking along Gulf Boulevard and at most beach access point cul-de-sacs from March 1st - September 15th from 8:00 a.m. to 8:00 p.m. The BUF will be collected through an internet-based pay system, which will require the patron to use a smart phone, a phone that texts, or any phone. Cash payments will also be collected at City Hall during the week and the Visitors Center and Police Station on the weekends. Signage within the parking areas will provide information on where cash payments can be made. In its October 20, 2015, letter to the GLO, the City clarified that cash payments will also be accepted at a future multi-modal transportation facility currently under construction and additional options such as kiosks and/or

distribution points at local businesses may be provided in the future.

Persons displaying a disabled placard or license plate do not need to pay the BUF. Forty-five free parking spaces will be provided and dedicated at three beach access cul-de-sacs, and additional free parking spaces will be provided at other locations both east and west of Padre Boulevard. Beachgoers will be able to use the City's free "Wave" bus transportation system, which runs on 30-minute intervals 365 days a year, from 7:00 a.m. to 9:00 p.m. to access the beach from more distant or remote parking areas.

In the short term, the BUF revenue will be used to increase parking adjacent to the beach; expand beach cleaning and maintenance by purchase of beach equipment; create a recycling program for the beach; install educational beach maintenance signage; and improve beach access by rehabilitating beach walkovers, constructing new walkovers, and installing rinse stations and drinking water stations.

In the long term, the BUF revenue will be used to procure and construct additional parking lots located east of Padre Island Boulevard; improve existing and future parking areas, beach access points and pedestrian pathways; develop a trolley system to enhance public access to the beach from remote off beach parking areas; and provide public restrooms along the beach or at beach access points.

The BUF Plan includes a variance from 31 Texas Administrative Code (TAC) §15.7(h)(1)(A), which requires parking adjacent to the beach to accommodate one car per 15 linear feet of beach. According to the City, historic, physical, and geographic constraints adjacent to the beach, as well as economic constraints, make it difficult to acquire the rights to the land necessary to provide the required parking. In order to obtain the variance, the City committed to devoting 50% of BUF revenue to increasing public parking adjacent to the beach. The City also committed to increasing free parking areas and purchasing land or obtaining long-term leases for parking east of Padre Boulevard within two to eight years after implementation of the BUF, which will provide up to 180 additional parking spaces. Over the long term, the City also committed to developing a trolley system to enhance public access to the beach. The City's commitment to achieve the presumptive criteria for parking spaces on or adjacent to the beach set forth in 31 TAC §15.7(h)(1)(A), and their commitment and adherence to the items found in the BUF Plan, are essential to the GLO's determination that the Plan preserves and enhances public access to and use of the beach. This determination is based explicitly on the City's assurances and commitments to the outlined short and long-term goals that will provide additional parking and enhance the public's access to and use of the public beach. The GLO will monitor the City's compliance with the Plan and its commitments. If the City fails to comply with its Plan, the GLO can withdraw certification of all or a portion of the Plan under 31 TAC §15.10(f) and (g).

The GLO has reviewed the City's BUF Plan and has determined that the BUF is reasonable. The BUF does not exceed the necessary and actual cost of providing reasonable beach-related facilities and services, does not unfairly limit public use of and access to and from public beaches in any manner, and is consistent with §15.8 of the Beach/Dune Rules and the Open Beaches Act. The BUF will provide the City with necessary resources so it can continue to maintain the public beach and provide beach related services within its jurisdiction. Therefore, the GLO finds that the BUF Plan is consistent with state law.

SUMMARY OF COMMENTS

The GLO received numerous public comments during the thirty (30) day comment period.

Comments were received by residents and visitors of the City of South Padre Island and the surrounding area, local business owners, and an individual representing the Surfrider Foundation South Texas Chapter. These comments generally objected to the implementation of a BUF within City limits based on: safety concerns relating to pedestrians crossing City streets, a lack of existing available parking adjacent to the beach, a lack of cash payment options to pay the BUF, and concerns related to enforcement of the BUF, among other issues.

Four commenters expressed concerns over the safety of pedestrians and families parking at free spaces on the west side of Padre Boulevard (HWY 100) and crossing the street with their beach supplies. Some commenters also indicated concerns over a combination of presumed increased vehicular traffic on Gulf Boulevard due to vehicles driving around to look for a parking spot, and an increased number of pedestrians crossing the street, paying the fee, and loading or unloading beach gear from vehicles. The GLO agrees that providing for the safety of persons using the public beach or its amenities is an important component of local government management of the public beach. Local governments are responsible for exercising authority to use police power and provide for public safety on roads within their jurisdictions. Local governments are responsible for exercising their authority to ensure compliance with 31 TAC §15.7(h), which requires a local government to preserve the public's right to access and use the public beach. The City has represented that it will enhance safety for beachgoers as they attempt to access the public beach. In its letter dated October 20, 2015, the City stated that they are "in the process of issuing a $3 million dollar bond to finish improving the remaining sections of Gulf Boulevard. These improvements will include formalizing the parallel parking and installation of sidewalks and crosswalks. In addition to this, installation of Padre Boulevard crosswalks and medians will increase the safety for beach users having to cross Padre Boulevard to access the beach." In its Plan (Beach Parking System, Attachment A, Page 2), the City identifies future beach access improvements to include the incorporation of loading/unloading zones for the public to safely transport items to the beach access points. In addition, one of the long-term goals identified on Page 9 of the BUF Plan and to be completed within two to five years, is to "enhance safety along Gulf Boulevard with improved and designated parking along Gulf Boulevard with appropriate signage along with pedestrian pathways." The GLO will monitor compliance with the Plan.

One commenter stated that the City should lower the speed limit on Gulf Boulevard to make it safer for pedestrians. As stated on Page 5 of the BUF Plan, "City officials are working closely with the Texas Department of Transportation to reduce speed limits, construct medians and crosswalks for the entire length of the City." However, as provided in 31 TAC §15.7(h)(3), new or amended vehicular traffic regulations enacted for public safety, such as establishing speed limits and pedestrian rights-of-way, are exempt from this certification procedure but must nevertheless be consistent with the Open Beaches Act and 31 TAC Chapter 15.

Five commenters stated there is limited existing parking on Gulf Boulevard, and expressed concern that the BUF Plan does not create any new parking spaces. The GLO agrees with the com-

menters that there is limited beachfront parking on the Island and believes that the City's commitments in the Plan will result in increased parking adjacent to the beach. The GLO disagrees that the Plan does not identify creation of additional parking spaces adjacent to the beach. On Page 9 of the BUF Plan, the City commits to the purchase or long term leasing of vacant lots adjacent to the public beach in order to provide additional parking areas for the public (up to 180 additional parking spaces). The City identifies the creation of this additional parking as a long-term goal of the Plan; to be completed within two to eight years depending on BUF revenue. In order to accomplish this, the City committed 50% of BUF revenue to either purchase or lease land for beach parking east of Padre Boulevard (HWY 100). The GLO will monitor compliance with the Plan.

Related to the issue of limited available parking on Gulf Boulevard, numerous commenters, including City homeowners and business owners, stated that condominium properties along Gulf Boulevard currently do not provide enough parking spaces for their visitors and residents, which causes an overflow of condo parking on Gulf Boulevard, and on side-streets in front of resident homes, and in beach access cul-de-sacs. Three commenters stated that existing City enforcement of illegal overnight parking in beach access cul-de-sacs is not adequate. The GLO has no authority to require local governments to establish minimum parking requirements for the construction of buildings within the local community. The City is authorized to establish standards for the construction of buildings and associated parking; however, the City must do so in accordance with 31 TAC §15.7(h), which requires a local government to preserve the public's right to access and use the public beach. The GLO has determined that over the long term, the City's Plan will result in an increase in parking adjacent to the public beach and will protect public beach parking.

One commenter suggested that the City prohibit overnight parking on Gulf Boulevard in addition to existing overnight parking restrictions at beach access cul-de-sacs. The GLO disagrees with the commenter since the prohibition of overnight parking along both Gulf Boulevard and beach access cul-de-sacs would effectively eliminate parking for vehicles on all areas adjacent to a public beach that is closed to vehicles, which would result in the restriction of public access to the beach and violate the off-beach parking requirements outlined in Texas Natural Resources Code §61.011(d)(3) of the Open Beaches Act and 31 TAC §15.7(h).

One commenter representing a local business expressed concern that the proposed payment structure of $13 per day or $50 for a season pass would encourage early arrival to a parking space and a prolonged stay at the beach in order to get the most benefit out of money spent. The commenter also stated that the BUF would not increase turnover on Gulf Boulevard for this reason. The GLO disagrees with this comment. As identified in the BUF Plan, patrons wishing to pay for a parking space on Gulf Boulevard will have the option to pay $6.35 for a 6-hour stay, providing a shorter option to stay at the beach than a full day.

Two commenters stated that recent efforts by the City to redevelop portions of Gulf Boulevard have complicated existing parking constraints. Complaints included: the recent installation of parallel parking on Gulf Boulevard has created safety concerns for children; vacant lots previously used for beach parking have been roped off by the City and no longer available for public parking; and an overall reduction of parking spaces along Gulf Boulevard has occurred due to redevelopment projects by the City. The City is responsible for exercising its responsibilities for public safety and its authority in a way that ensures compliance with 31 TAC §15.7(h), which requires a local government to preserve the public's right to access and use the public beach. The City has identified several long-term goals (page 9 of the BUF Plan) that will use BUF revenue to enhance safety along Gulf Boulevard and increase the number of parking spaces adjacent to the public beach. In order to obtain the variance from 31 TAC §15.7(h)(1)(A), the City committed to devoting 50% of BUF revenue to increasing public parking adjacent to the beach. The City will purchase land or obtain long-term leases for parking areas East of Padre Boulevard within two to eight years after implementation of the BUF. The additional lots will provide up to 180 additional parking spaces.

Relating to the use of a smart phone as the primary method of payment of the BUF, seven commenters stated that many people do not own a smart phone, have internet access, or own a credit card. Commenters also expressed concerns that the fee is not equitable for the economically disadvantaged, since this user group would be unfairly limited in their options to pay the BUF or be unable to pay it at all. One commenter stated that $13 per day was too expensive for a day permit. For these reasons, several commenters stated that the BUF Plan blocks the public's right to access the beach and violates the Open Beaches Act. The GLO agrees that persons without phones using internet capability and lines of credit must not be unfairly limited from accessing the public beach, as provided for under the OBA and 31 TAC §15.8(c)(2). However, the GLO has determined that the City has provided adequate alternative options for payment with cash at various locations, such as City Hall during the week and the Visitors Center and Police Station on the weekends. Signage will provide information on where cash payments can be made. In its October 20, 2015, letter to the GLO, the City stated that cash payments will also be accepted at a future multi-modal transportation facility and additional options such as kiosks and/or distribution points at local businesses may be provided in the future. For those who may be unable to pay the BUF, as required under 31 TAC §15.8(c) - (h), the City has identified areas where no BUF is charged for parking. As outlined in the City's BUF Plan, forty-five free parking spaces will be provided at three beach access cul-de-sacs and additional free parking spaces will be provided at other locations both east and west of Padre Boulevard. In addition, beachgoers will be able to use the City's free "Wave" bus transportation system, which runs on 30-minute intervals 365 days a year, from 7:00 a.m. to 9:00 p.m. to access the beach from remote parking areas. The GLO disagrees that $13 is too expensive for a total daily BUF amount. Based on the information provided by the City, the GLO has determined that the fee is reasonable and necessary to fund beach-related services and facilities. The City is allowed by TNRC §61.011(b) of the OBA to charge beach user fees specifically in order to fund beach-related services. For the reasons outlined above, the GLO disagrees that the BUF Plan blocks the public's right to access the beach and violates the OBA.

Relating to alternative payment options for those not using the Passport internet-based system, five commenters representing various interest groups expressed concern over paying for a parking space at an off-site location such as City Hall or the Visitor's Center with no guarantee that the parking space will still be available upon return to Gulf Boulevard. The GLO agrees that the situation presented above may be an issue during peak use times. The City represented to the GLO that it will refund money to anyone who is unable to get a parking space after paying the BUF. The GLO urges the City to develop a protocol for making

refunds to patrons. The City has also identified additional cash payment options closer to the parking areas. Possible options include kiosks located near parking areas and/or at local businesses along Gulf Boulevard.

One commenter asked how a parking pass would be available for purchase on days when City Hall is closed and stated that it was not clear how long one could park for the price of a day pass. As stated in the BUF Plan, cash payments will be accepted at City Hall during the week and the Visitors Center and Police Station on the weekends. In its October 20, 2015, letter to the GLO, the City clarified that cash payments will also be accepted at a future multi-modal transportation facility that is currently under construction and additional options such as kiosks and/or distribution points at local businesses may be provided in the future. The fee established by the City will amount to $6.35, including convenience fees, to park a vehicle for a 6-hour period. If the beachgoer wishes to extend their time, an additional $6.35 charge will be required. The BUF will be charged for parking from March 1 - September 15, between the hours of 8:00 a.m. to 8:00 p.m.

One commenter asked why there was no mention of parking meters in the BUF Plan. Parking meters were not included in the BUF Plan submitted to the GLO and are not a requirement under 31 TAC §15.8 or TNRC Chapter 61. The BUF will be collected primarily through an internet-based pay system, which will require the patron to use a smart phone, a phone that texts, or any phone. For those that do not have access to a phone, cash payment options will be available at various locations, as previously stated.

Relating to the satellite location of free parking areas at the Convention Center and on the west side of Padre Boulevard (HWY 100), three commenters stated that one Wave bus to transport beachgoers and their beach gear is not adequate or reasonable for the anticipated demand during peak visitation times. The GLO agrees that additional transportation options may be needed to transport visitors from remote parking locations to public beach accesses during peak use times. In response to GLO concerns, the City has committed BUF revenue to fund several long-term goals that will address this issue. As stated in the BUF Plan, the City will develop a trolley system that will enhance accessibility to the beach through the utilization of remote off-beach parking areas. This will be achieved within five or more years depending on BUF revenue and grant availability. In addition, BUF revenue will be used for the purchase of vacant lots adjacent to the beach, and to fund construction of future parking structures adjacent to the public beach. The GLO has determined that these measures should adequately address the comments above.

Although the topic was not presented in the City's BUF Plan, six commenters expressed concerns over enforcement procedures. Commenters stated that one enforcement officer to serve the entirety of Gulf Boulevard on one ATV would be inadequate for the number of vehicles anticipated during March and summer months. Two commenters expressed concern over a vehicle occupying a paid parking space for 24 hours and asked how an enforcement officer was supposed to ensure that a vehicle is not allowed to occupy a space continually. The previous comments are related to City enforcement of the BUF and are outside the scope of the GLO's jurisdiction. The issue before the GLO is whether the BUF Plan as submitted by the City is consistent with the OBA, the Dune Protection Act, and 31 TAC Chapter 15, which do not outline enforcement procedures for beach user fee collection. These comments and inquiries are outside the scope of the GLO's jurisdiction and certification authority. Local governments have the expertise and discretion to develop and implement enforcement procedures as appropriate for the needs of their community. The City, however, is responsible for exercising that authority in a way that ensures that there is adequate parking for beachgoers as required under 31 TAC §15.7(h). The GLO expects that the City will enforce the Plan that it has adopted in a way that ensures compliance with the TAC.

One commenter representing a local business stated that without rigid enforcement of the BUF, condominium owners would be able to purchase annual passes for renters who could continually occupy a large number of spaces, which would reduce the number of parking spaces available to the public. The GLO disagrees with the commenter and recognizes that the City has an ordinance in place that prohibits overnight parking in cul-de-sacs on Gulf Boulevard. In its October 20, 2015, letter to the GLO, the City clarified that this ordinance helps to assure the public parking spaces are available each morning and are not overtaken by nearby condo property visitors. The GLO expects that the City will enforce its ordinance in a way that ensures that there is adequate parking for beachgoers as required under 31 TAC §15.7.

Four commenters stated that the City's BUF will not create any "real" revenue for the City. Two commenters specified that they believed the cost of implementation and enforcement of the BUF program will exceed the revenue brought in and will not be able to adequately provide for the cost of amenities. The GLO disagrees with these comments. Section 31 TAC §15.8(c)(2)(A) prohibits local governments from imposing a beach user fee that exceeds the necessary and actual cost of providing reasonable beach-related public facilities and services. The GLO has reviewed the proposed fee and the estimated costs implementing the BUF and determined that the City's BUF Plan complies with this provision. In addition, the City provided clarification and assurance on the costs of implementation and enforcement of the BUF in its October 20, 2015, letter to the GLO. The letter clarifies that reserve officers work for the SPI Police Department on a part-time basis and at a minimum salary, and that an officer can easily write up to six tickets per hour. Each ticket generates a $50 fee making the use of reservist ticketing officers cost-effective. The GLO has determined that the BUF Plan as submitted by the City is consistent with the OBA, the Dune Protection Act, and 31 TAC Chapter 15 and reasonable assurances have been made that the cost of implementation and enforcement of the BUF will not exceed revenue.

One commenter stated that it was not clear where the money collected from the BUF program would go. The GLO disagrees with the commenter, as a requirement for GLO certification of the BUF Plan is that the fee is reasonable and necessary to fund and provide increased beach-related services and facilities to the public. The City is allowed by TNRC §61.011(b) to charge beach user fees specifically in order to fund beach-related services. On Pages 9 - 10 of the BUF Plan, the City has identified short and long-term goals for beach-related services to be funded by BUF revenue. In the short term, the BUF revenue will be used to increase parking adjacent to the beach; expand beach cleaning and maintenance by purchase of beach equipment; create a recycling program; install educational beach maintenance signage; and improve beach access by rehabilitating beach walkovers, constructing new walkovers, and installing rinse stations and drinking water stations. In the long term, the BUF revenue will be used to procure and construct additional parking east of Padre Island Boulevard; improve existing and

future parking, beach access points and pedestrian pathways; develop a trolley system to enhance public access to the beach from remote off beach parking areas; and provide public restrooms along the beach or at beach access points.

Comments were also made related to a historical trend of proposed public amenities being blocked by beachfront homeowners. One commenter stated that when amenities such as restrooms or shade structures have been proposed at existing beach accesses, beachfront property owners on Gulf Boulevard have historically opposed them on the grounds that increased amenities will serve to attract more people to use the beach accesses. The same commenter also expressed an opinion that the impetus to establish a beach user fee or parking fee along Gulf Boulevard comes from these same property owners who wish to limit access to the public beaches from "day trippers" or visitors from the Rio Grande Valley. The GLO has no opinion on these allegations and believes the comments are outside the scope of the GLO's jurisdiction. The issue before the GLO is whether the BUF Plan as submitted by the City is consistent with the OBA, the Dune Protection Act, and 31 TAC Chapter 15. It is the City's responsibility to propose, negotiate, adopt and implement the types of beach related services and amenities it will provide in accordance with the Plan and the TAC. The OBA and the TAC allow a local government to collect a BUF for the purposes of providing beach related services and amenities. The City must use the BUF for the purposes that it has identified and must do so in a way that ensure compliance with the BUF requirements in 31 TAC §15.8 and ensures public access to the public beach under 31 TAC §15.7.

One commenter stated that the City of South Padre Island, in collaboration with Cameron County and the GLO, should develop a comprehensive and long-term plan to address congestion in the area and one that is compliant with the Open Beaches Act. The GLO can assume that the word "congestion" used by the commenter refers to traffic density in the City. As provided for in 31 TAC §15.7(h)(3), new or amended vehicular traffic regulations are exempt from this certification procedure but must nevertheless be consistent with the Open Beaches Act and 31 TAC Chapter 15. The GLO is in favor of the collaborative development of a long term plan but it is beyond the purpose of the Plan amendment and the scope of this rule making. The issue before the GLO is whether the BUF Plan as submitted by the City is consistent with the OBA, the Dune Protection Act, and 31 TAC Chapter 15.

Two commenters stated that the BUF would hurt businesses on the island, as money spent on the fee would detract from money that may be spent at local businesses. One commenter stated that more than one enforcement officer or police office being hired by the City will serve as an added expense to the City's General Fund, and complained that City police officers are unaware of current parking restrictions on side streets. One individual directed a question at the GLO and asked if it was safe and legal for ATVs to operate on public roads. The previous comments are related to City enforcement of the BUF and are outside the scope of the GLO's jurisdiction. The issue before the GLO is whether the BUF Plan as submitted by the City is consistent with the OBA, the Dune Protection Act, and 31 TAC Chapter 15, which do not outline enforcement procedures for beach user fee collection. These comments and inquiries are outside the scope of the GLO's jurisdiction and certification authority.

CONSISTENCY WITH COASTAL MANAGEMENT PROGRAM

The amendments are subject to the Coastal Management Program as provided for in the Texas Natural Resources Code §33.2053, and 31 TAC §505.11(a)(1)(J) and (c), relating to Actions and Rules Subject to the CMP. GLO has reviewed this proposed action for consistency with the Coastal Management Program (CMP) goals and policies in accordance with the regulations and has determinate that the proposed action is consistent with the applicable CMP goals and policies. The applicable goals and policies are found at 31 TAC §501.12 (relating to Goals) and §501.26 (relating to Policies for Construction in the Beach/Dune System).

The amendments are consistent with the CMP goals outlined in 31 TAC §501.12(5). These goals seek to balance the benefits of economic development and multiple human uses, protecting, preserving, restoring, and enhancing CNRAs, and the benefits from public access to and enjoyment of the coastal zone. The amendments are consistent with 31 TAC §501.12(5) as they provide the City with the ability to enhance public access and enjoyment of the coastal zone, protect and preserve and enhance the CNRA, and balance other uses of the coastal zone.

The amended rule is also consistent with CMP policies in §501.26(a)(4) by enhancing and preserving the ability of the public, individually and collectively, to exercise its rights of use of and access to and from public beaches.

No comments were received from the public or the Commissioner regarding the consistency determination. Consequently, the GLO has determined that the adopted rule amendments are consistent with the applicable CMP goals and policies.

STATUTORY AUTHORITY

These amendments are adopted under Texas Natural Resources Code §§61.011, 61.015(b), and 61.022(b) and (c) which provide the GLO with the authority to adopt rules governing the preservation and enhancement of the public's right to access and use public beaches, imposition or increase of beach user fees, and certification of local government beach access and use plans as consistent with state law.

Texas Natural Resources Code §61.011 and §61.015 are affected by the amendments.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 13, 2016.

TRD-201600151
Anne L. Idsal
Chief Clerk, Deputy Land Commissioner
General Land Office
Effective date: February 2, 2016
Proposal publication date: July 31, 2015
For further information, please call: (512) 475-1859

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PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER A. STATEWIDE HUNTING PROCLAMATION
DIVISION 1. GENERAL PROVISIONS

31 TAC §65.29

The Texas Parks and Wildlife Commission, in a duly noticed meeting on August 20, 2015, adopted new §65.29, concerning Managed Lands Deer Program (MLDP), without changes to the proposed text as published in the July 17, 2015, issue of the *Texas Register* (40 TexReg 4533).

The new section is intended to replace the current Managed Lands Deer Permit and Landowner Assisted Managed Permit System (LAMPS) programs, currently contained in §§65.26, 65.34, and 65.28 of this subchapter, respectively. The current MLDP program has been in effect since 1996 for white-tailed deer and 2005 for mule deer and has been a very successful vehicle for encouraging deer harvest, deer management, and habitat conservation. In 2014, approximately 10,000 properties encompassing 24 million acres were participating in the program. The LAMPS program was created in 1993 to provide flexibility to landowners and land managers with respect to the harvest of antlerless deer, primarily in the eastern third of Texas. Substantial growth in the MLDP program during the last 18 years, the accretion of changes to program rules over time, and requests for modernization by staff and program participants have prompted the department to explore options to simplify both programs and create new administrative efficiencies.

New §65.29(a) sets forth the meanings of various specialized words and terms used throughout the new rule, which is necessary to provide clarity of intent for purposes of compliance and enforcement.

New §65.29(a)(1) defines "landowner" as "any person who has an ownership interest in a tract of land." The definition is necessary because enrollment in the MLDP can only be done by a landowner or a landowner's authorized agent and a legal standard of ownership must be established.

New §65.29(a)(2) defines "MLDP" as "the Managed Lands Deer Program" established by the subchapter as consisting of two enrollment options, the Harvest Option (HO) and the Conservation Option (CO). The definition is necessary to provide acronyms for easy reference.

New §65.29(a)(3) defines "MLDP tag" as "a tag issued by the department to a participant in any option under this section." Under the provisions of the new rule, the department will establish a harvest quota for properties under the HO or the CO and issue tags for the harvest of deer on those properties. The definition is necessary to clearly establish the fact that no tag other than a tag issued under the new section meets the requirements of the new section.

New §65.29(a)(4) defines "program participant" as "a landowner or a landowner's authorized agent who is enrolled in the MLDP." Under the new rule, only a landowner or landowner's authorized agent are eligible for enrollment in the MLDP; the term "program participant" is convenient shorthand that eliminates the need to repeat an unwieldy phrase throughout the rule. In addition, the new rule provides that only a landowner (and not a landowner's agent) is authorized to take certain actions. Therefore, the term "program participant" is also used to distinguish between a landowner's authority and the authority that may be exercised by a landowner or the landowner's agent (i.e., a "program participant").

New §65.29(a)(5) defines "resource management unit (RMU)" as "an area of the state designated by the department on the basis of shared characteristics such as soil types, vegetation types, precipitation, land use practices, and deer densities." The department collects population and harvest data at the RMU level to assess the effect of harvest regulations. Under the HO, a harvest recommendation will be automatically calculated by the department using RMU data and coarse data provided by the program participant.

New §65.29(a)(6) defines "unbranched antlered deer" as "a buck deer having at least one antler with no more than one antler point." The current MLDP rules allow for a harvest quota of buck deer and/or antlerless deer. The new section makes a distinction between buck deer that have two forked antlers and buck deer that have at least one antler with no forks. Allowing additional harvest opportunity for unbranched antlered deer is intended to help landowners and land managers achieve their harvest management goals without adversely impacting the resource. The definition is necessary to stratify the harvest of buck deer in the HO.

New §65.29(a)(7) defines "Wildlife Management Plan (WMP)" as "a written document on a form furnished or approved by the department that addresses habitat and population and management recommendations, associated data, and data collection methodologies." Under the new rule, participation in the CO is contingent on a department-approved management plan. The definition is necessary to broadly outline the components of a WMP for purposes of program administration and compliance.

New §65.29(a)(8) defines "Wildlife Management Associations and Cooperatives" as "a group of landowners who have mutually agreed in writing to act collectively to improve wildlife habitat and populations on their tracts of land." For many years the department has allowed groups of landowners (who because of small acreage or land use would not qualify for MLDP issuance) to pool their acreage in order to qualify. The new rule also allows this practice, but a definition is necessary to establish a formal requirement that participating landowners agree in writing to membership.

New §65.29(b) sets forth general provisions that are common to both the HO and the CO.

New §65.29(b)(1) establishes the conditions for enrollment in the HO and CO, respectively. The HO is an automated tag delivery system; landowners will access the department's web-based portal, complete an online application, provide requested acreage and other data specific to the property, and the department will then calculate the number of tags to be issued. Therefore, a prospective property and landowner will be considered enrolled at the point the department approves the electronic application. For the CO, the application will also be made online, but a WMP is required. Thus, a prospective property and landowner is considered enrolled when the department has approved the application and the WMP.

New §65.29(b)(2) allows a landowner to appoint a person to act as the landowner's authorized agent for purposes of program participation by completing a department-approved form. Under current rules, the department allows landowners to appoint an authorized agent to act on the landowner's behalf, which allows land managers, ranch employees, and private consultants to make management decisions in a quick and efficient manner.

The new rule continues this practice, but requires the authorization to be documented, which is necessary to ensure that a person purporting to be an authorized agent is actually authorized by the landowner to do so.

New §65.29(b)(3) stipulates that MLDP tags be issued to a program participant, which is necessary to specifically establish that the department does not issue tags directly to hunters.

New §65.29(b)(4) specifies that MLDP tags are valid only on the specific enrolled tract for which they are issued, with the exception of aggregate acreages in the HO. Because the MLDP is a program that furnishes a property-driven harvest quota (as opposed to the essentially open-ended harvest possible under county regulation provided in §65.42 of this title, concerning Deer), it is logical that the use of MLDP tags be restricted to the property for which they were issued. The exception is for aggregate acreages in the HO, where the rules allow multiple acreages to be combined, in effect, into a single tract of land for purposes of tag issuance, provided the tracts are contiguous. The tags could then be utilized on any of the properties.

New §65.29(b)(5) exempts an enrolled tract of land from the applicability of personal bag limits, means and method restrictions for archery-only and muzzleloader-only seasons, and archery stamp requirements. When the current MLDP program was created, the department wanted to offer landowners and land managers the most flexibility possible to achieve the management goals jointly determined by the department and landowner; thus, the current rule exempts MLDP properties from the personal bag limits established for each county under §65.42, the means and methods requirement for the archery-only and muzzleloader-only seasons, and the stamp requirements for the archery-only season. Because the department establishes a harvest quota for the property (versus the county regulation under §65.42, which establishes a personal bag limit but does not limit how many hunters may take deer), it makes no biological difference whether one person or many persons harvest deer, provided the harvest quota is not exceeded. Similarly, the means restriction of the archery-only (only lawful archery equipment may be used to take deer) and muzzleloader-only (only muzzleloading firearms may be used to take deer) seasons, because they do not allow the use of modern firearms (which are much more efficient harvest devices), were eliminated for MLDP properties in order to allow landowners and land managers to reduce habitat impacts by harvesting deer by firearm earlier than allowed under the county regulations. The current rule also exempts MLDP properties from the archery stamp requirement, which is necessary because the archery-only season established by §65.42 is statewide and under Parks and Wildlife Code, §43.201, it is unlawful for any person to hunt deer during a season restricted to the use of archery equipment unless an archery stamp has been purchased or the commission, by rule, has exempted a person from the archery stamp requirement. The new rule retains all of these provisions for the same reasons.

New §65.29(b)(6) sets forth MLDP tag utilization requirements. Because department rules at 31 TAC §65.10(c) exempt deer tagged in accordance with MLDP rules from other tagging requirements, it is necessary to precisely delineate the circumstances and procedures for the use of MLDP tags, which is necessary to prevent confusion as well as the unscrupulous use of MLDP tags. Therefore, the new rule requires harvested deer to be immediately tagged (or taken to a location on the property to be tagged), which is necessary for department law enforcement personnel to verify that deer have been lawfully harvested and for department biologists to track compliance with harvest quotas. The new paragraph also prohibits the various permutations of inappropriate use of an MLDP tag (e.g., use of a mule deer tag on a white-tailed deer and vice versa, use of an antlerless MLDP tag to a buck deer having more than one point on both antlers, use of an unbranched antlered deer with an antlerless MLDP tag); the use of an MLDP tag or tag number more than once; and the use of an MLDP tag on a tract of land other than the tract for which the MLDP tag was issued. The MLDP program tailors harvest to specific tracts of land. It is axiomatic, then, that the harvest of deer by a program participant should precisely track the recommendations of the department. Therefore, MLDP tags are issued for specific types of deer to be harvested. To allow those tags to be used indiscriminately or interchangeably would defeat the purpose of the harvest recommendation. Similarly, the harvest quota for a property represents the total number of deer the department authorizes to be harvested; allowing additional harvest by re-use of tags or tag numbers, or the use of tags issued for another property, defeats the purpose of the program.

New §65.29(b)(7) sets forth the on-site harvest documentation requirements for program participants. The new rule requires deer harvested on MLDP properties to be tagged with an MLDP tag; however, when deer are taken to a taxidermist or processor, the department must be able, if need be, to verify that the deer was lawfully harvested. To provide that ability, the new rule requires a daily harvest log to be maintained on each MLDP property. The new rule requires the hunter's name and hunting license number (or driver's license number, if the daily harvest log is also being used as a cold storage/processing book) to be entered into the harvest log for each deer harvested, along with the date of kill, type of deer killed, and the number of the MLDP tag affixed to the deer. The new provision allows the department to verify that a MLDP-tagged deer encountered at a location other than where it was killed was in fact lawfully taken on the property for which the tag was issued. The new rule also requires the daily harvest log to be presented to any department employee acting within the scope of official duties.

New §65.29(b)(8) sets forth the annual reporting requirements for program participants. Under current rule, MLDP cooperators report harvest and habitat data as part of the WMP that must be approved prior to tag issuance. Because the new MLDP will be an online system, the new rule requires program participants to report harvest data, and in the case of CO program participants, habitat management practices, as well as any other data deemed important by the department. The new provision is necessary to allow the department to gather useful population and harvest data and to verify that required habitat management practices are being performed.

New §65.29(b)(9) specifies that if an applicant does not wish to engage in program participation, the applicant must affirmatively decline program participation by September 15 via the department's online web application. The new provision also stipulates that failure to timely notify the department will result in the deer harvest on the property continuing to be subject to the MLDP regulations until the last day in February (the last day that MLDP tags are valid). When a property is in the MLDP, deer harvest cannot be conducted under the county regulations established in §65.42 and all deer must be harvested under the provisions of the MLDP regulation. Because department law enforcement personnel must know what regulations are in effect on any given property, it is imperative that a program participant who has had

a change of heart notify the department prior to opening day of the archery season.

New §65.29(b)(10) allows deer to be harvested under the county season and bag limit, provided the department is timely notified as provided by §65.29(b)(10) of the program participant's desire to cease participation in the MLDP.

New §65.29(b)(11) allows a program participant who maintains a cold storage/processing facility to satisfy the recordkeeping requirements of Parks and Wildlife Code, §62.029, by recording the hunting license number as part of the daily harvest log required by the new rule and maintaining the log for a period of one year from the date of the last entry. Under Parks and Wildlife Code, §62.029, the operator of a cold storage or processing facility must maintain a record book at the facility of game accepted by the facility and must keep the record at the facility for a period of at least one year from the last date entered in the record book. The new rule allows program participants to collect and record the information required by Parks and Wildlife Code, §62.029 as part of the daily harvest log required by the new rule and requires the harvest log to be kept at the facility for at least one year following the last date entered in the record book. The department believes it is less burdensome and more efficient to allow program participants to maintain a single system of documentation, rather than two.

New §65.29(c) sets forth the specific provisions applicable to the HO and the CO.

New §65.29(c)(1) sets forth the program provisions for the HO. The HO can be thought of as a conflation of the current LAMPS program and the current Level I and II components of the MLDP programs. Whereas the current LAMPS program is intended to help manage antlerless deer populations in the eastern third of the state and does not require a landowner to have a WMP, the current Level I and II MLDP components are statewide and require a WMP, with the Level I MLDP authorizing an antlerless-only harvest and the Level II authorizing an either-sex harvest with buck harvest by firearm limited to spike bucks during the first 35 days of tag validity. The new HO is statewide, does not require a WMP, may be structured as antlerless only or either-sex, and restricts buck harvest by firearm during the first 35 days of tag validity to bucks having at least one antler with no more than one point (any buck could be taken by lawful archery equipment).

New §65.29(c)(1)(A) establishes an application deadline of September 1 for participation in the HO, which was selected in order to allow the department sufficient time to process applications and issue MLDP tags before the period of validity for the MLDP tags begins. Additionally, there is no paper application process; applications must be made and processed via a web-based application.

New §65.29(c)(1)(B) provides for the enrollment of contiguous tracts of land by multiple landowners for program participation, which is necessary because many areas of the state are characterized by numerous small acreages which by themselves are not large enough to qualify for tag issuance. Many of these areas also experience high hunting pressure and the county bag limits established under §65.42 are therefore quite conservative. Thus, for example, if the biological limit for antlerless harvest in a given RMU is calculated to be one deer per 30 acres, properties of less than 30 acres cannot qualify, leaving the landowner no option but the county regulation established under §65.42, which might allow a minimal antlerless harvest per hunter, if any. Therefore, the department wishes to provide owners of small tracts a way to bundle aggregate acreage to maximize hunting opportunity. The new provision requires a single program participant to be designated to receive MLDP tags and allows MLDP tags to be used anywhere on the combined acreage. Because the new HO is administered via a database application that relates data unique to specific tracts of land enrolled in the program, aggregate acreages must be treated as a single tract for purpose of tag issuance; therefore, a single program participant must be designated to receive tags and the tags can then be utilized anywhere on the aggregate acreage.

New §65.29(c)(1)(C) broadly delineates the components used by the department to calculate harvest quotas for properties enrolled in the HO. The department manages population and harvest data on deer populations by the RMU concept. Areas of the state that share similar soil types, vegetation types, precipitation, land use practices, and deer densities are treated as discrete units for the purpose of determining and analyzing the effectiveness of harvest regulations. The department uses survey information collected by the department in a given RMU as a baseline and then adjusts the harvest quota as necessary to account for the location of a property, the size of the property, the quality and abundance of habitat on the property, and any other information deemed relevant by the department. The new provision is necessary to create a biologically valid standard for managing the deer harvest on properties enrolled in the HO.

New §65.29(c)(1)(D) sets forth the period of validity for MLDP tags issued under the HO. As noted previously in this preamble, the HO can be thought of as a conflation of the current LAMPS program and the Level I and II components of the current MLDP program. The general period of validity of MLDP tags under the HO remains unchanged from the current MLDP program (Saturday closest to September 30 to the last day in February). Under the Level II component of the current MLDP program, buck harvest by firearm during the first 35 days of tag validity is restricted to spike bucks (any buck could be taken by lawful archery equipment). The new HO retains this basic structure, but alters the buck restriction to encompass buck deer with at least one antler having no more than one point (i.e., at least one antler is a spike), which is called an "unbranched antlered" buck. Allowing additional harvest opportunity for unbranched antlered deer is intended to help landowners and land managers achieve their harvest management goals without adversely impacting the resource.

New (c)(1)(E) provides that if a program participant elects to receive tag issuance for only one type of deer (buck or antlerless), then the provisions of §65.42 govern the harvest of the other type of deer on the enrolled tract of land. Since the new rule allows program participants in the HO to customize their harvest, it is necessary to clarify that the county regulations provided in §65.42 are in effect for all deer harvest not governed by the new rule.

New §65.29(c)(2) sets forth the program provisions for the CO. The CO can be thought of as similar to the current MLDP Level III component. Under the current rule, a landowner with a department-approved WMP who agrees to perform four habitat management practices per year receives a harvest quota of buck and antlerless deer and may take or authorize the take of deer from the Saturday closest to September 30 until the last day of February by any lawful means without respect to the personal bag limits established in the county under §65.42. The new CO is similar.

New §65.29(c)(2)(A) requires a landowner or authorized agent to apply for program acceptance by June 15 of each year. Like the HO, application for enrollment in the CO is electronic, using the department's web-based application. The June 15 deadline was selected because unlike the HO (under which tag issuance is completely automated), the CO requires harvest, population, and habitat management reporting, a WMP, and, if necessary, personal interaction with department personnel; therefore, the application deadline must be set well in advance of the period of validity of the MLDP tags in order to allow staff sufficient time to evaluate applications.

New §65.29(c)(2)(B) sets forth the minimum requirements for the WMP required by the CO, to consist of acreage and habitat information requested by the department, deer population and harvest data for each of the two years immediately preceding the year in which initial program participation is sought, and evidence satisfactory to the department that at least two department-approved habitat management practices have been implemented on the tract of land during each of the two years immediately preceding application. The CO also requires, as part of the WMP, an acknowledgement that site visits by the department to assess habitat management practices on the tract of land may be conducted at the request of any department employee. Under the current MLDP rules, acceptance into the Level III component is automatic upon department approval of the WMP and landowner agreement to perform four habitat management practices per year. Level III is extremely popular, and as a result, department biologists have found it increasingly difficult to keep pace with the demands on time created by the current rule. By offering a completely automated alternative in the form of the HO and requiring evidence of landowner commitment to habitat management (in the form of prior/continuing habitat management activities) as part of the CO, the department hopes to direct much of the current Level III tag issuance to the HO, allowing department biologists more time to work with landowners who desire more intensive management on their properties and are willing to cooperate more closely with the department as a result.

New §65.29(c)(2)(C) stipulates that a WMP is not valid unless it has been signed by a Wildlife Division employee assigned to evaluate wildlife management plans, which is necessary to ensure that all WMPs meet a standard of quality that justifies the allocation of department resources.

New §65.29(c)(2)(D) requires the implementation of at least three habitat management practices specified in the WMP during each year of program participation. The new provision preserves the requirements of the current MLDP Level III in this regard. The department intends for the CO to be a vehicle for landowners who are committed to a high level of habitat management; in exchange for performing at least three habitat management practices annually, the department extends the most flexible tag utilization possible, allowing the harvest of any buck deer by any lawful means from the Saturday closest to September 30 until the last day in February (subject to the number of buck tags issued).

New §65.29(c)(2)(E) prescribes the period of validity for MLDP tags under the CO (the Saturday closest to September 30 until the last day in February) and allows the harvest of any deer during that time, subject to the number of tags issued.

New §65.29(c)(2)(F) allows the department to authorize additional harvest on any tract of land enrolled in the CO, provided the program participant furnishes survey or population data that in the opinion of the department justifies the additional harvest. The department acknowledges that unforeseen circumstances such as inclement weather might adversely affect a program participant's survey efforts, resulting in undercounting of deer; therefore, it is prudent to allow for additional tag issuance in cases that a program participant presents evidence that additional harvest is either possible or necessary. Similarly, unforeseen circumstances may make harvest and/or habitat management difficult or impossible; therefore, new §65.29(c)(2)(G) allows the department to, on a case-by-case basis, waive or defer the habitat management requirements of the new CO in the event that unforeseeable developments such as floods, droughts, or other natural disasters make the attainment of recommended habitat management practices impractical or impossible.

New §65.29(c)(2)(H) creates special provisions for aggregate acreages. In many parts of Texas, landowners join forces and acreages to manage habitat and wildlife on a landscape scale. A wildlife management association or cooperative are popular examples. The new provisions allow a wildlife management association or cooperative to enroll member properties in the CO under a single WMP. MLDP tags will be issued to the individual participating landowners (or their agents) and the tags will be valid only on the tract of land for which they were issued. Another form of aggregate acreage is the hunting club, in which land that is owned or leased by members is managed for habitat and hunting opportunity. The new provision allows these types of aggregate acreages to be enrolled in the CO provided the enrolled acreages are contiguous, the program participant provides the name, address, and express consent of each landowner, and a single program participant is designated to be the recipient of the tag issuance. Because aggregate acreages such as hunt clubs are highly variable from year to year, the department intends to administer the CO in such cases in much the same fashion as the HO. Because the department's web-based application employs a database application that relates data uniquely to specific tracts of land enrolled in the program, aggregate acreages must be treated as a single tract for purpose of tag issuance; therefore, a single program participant must be designated to receive tags and the tags can then be utilized anywhere on the aggregate acreage.

New §65.29(c)(2)(I) stipulates for clarity's sake that MLDP for white-tailed deer is not available in counties in which there is not an open season for white-tailed deer. The department will not open a season in a county in which the habitat is unsuitable to naturally support a population of white-tailed deer; obviously and for the same reason the department does not believe that MLDP participation should be available in such counties, either.

New §65.29(d) sets forth the provisions of the MLDP governing mule deer. Unlike white-tailed deer, mule deer are a fragile resource that the department manages with an extremely conservative harvest regime. For that reason, the MLDP for mule deer does not include the HO. The new rule's provisions with respect to mule deer are identical to those for CO for white-tailed deer, with the exceptions of the length of tag validity and restrictions on lawful means during the first 35 days of tag validity. As noted, the department utilizes a conservative harvest regime for mule deer; no general season is longer than 17 days and antlerless deer cannot be harvested without a permit except in Brewster, Pecos, and Terrell counties, and then only by lawful archery equipment during the special archery-only open season. The current MLDP rule for mule deer (31 TAC §65.34) sets a period of validity for tags to run from the Saturday closest to September 30 until the last Sunday in January, with harvest during the first 35 days of that period being limited to lawful archery equip-

ment. The new rule retains those provisions. The new MLDP for mule deer allows for program participation on the basis of aggregate acreage. Mule deer are dispersed across their range at very low densities compared to white-tailed deer and properties must be quite large in order to biologically justify tag issuance, unlike the case with white-tailed deer. Therefore, the department wishes to provide owners of small tracts a way to bundle aggregate acreage to maximize hunting opportunity.

New §65.29(e) sets forth the conditions under which the department will consider refusing to allow or continue enrollment in the MLDP.

New §65.29(e)(1) establishes the administrative violations that constitute grounds for refusing to allow or continue enrollment in the MLDP. The department does not desire or intend to micromanage program participants; however, there are three areas in which the department considers compliance to be critical to the integrity of the program. New paragraph (1)(A) allows the department to refuse to allow or continue enrollment in the MLDP for any applicant who as of a reporting deadline has failed to report to the department any information required to be reported under the provisions of the new section. The integrity of the MLDP is in part a function of receiving harvest, population, and habitat data (as applicable) from program participants with enough time for the department to make harvest recommendations that are biologically sensible and sustainable and issue MLDP tags in a timely fashion. The reporting deadlines established in the new rule are therefore quite important, and the department considers it not unreasonable to expect program participants to comply with them. Similarly, the integrity of the program also rests on compliance with the harvest quotas and habitat management goals established by the department. New paragraphs (1)(B) and (C) allow the department to refuse to allow or continue enrollment in the MLDP for any applicant who has exceeded the total harvest recommendation established for an enrolled tract of land or has failed to implement the three habitat management practices specified in a department-approved WMP during each year of program participation, if the tract of land is enrolled in the CO. A program participant who exceeds the harvest quota is in effect exceeding a bag limit, which, if repeated at a large enough scale, results in negative impacts to the resource and thus is counter to the goals of the program. A program participant who intentionally or without reason fails to perform the habitat management practices called for in the WMP under the CO is not only failing to assist the department in attaining the goal of the MLDP, which is to improve habitat on as much acreage as possible, but is also accepting the benefits of program participation without performing agreed-upon obligations. The department believes that in these types of circumstances it is justifiable to refuse to issue tags or continue program participation if necessary.

New §65.29(e)(2) allows the department to refuse to allow or continue enrollment in the MLDP for any applicant who has a final conviction or has been assessed an administrative penalty for a violation of Parks and Wildlife Code, Chapter 43, Subchapter C, E, L, R, or R-1; a provision of the Parks and Wildlife Code other than Chapter 43, Subchapter C, E, L, R, or R-1 that is a Parks and Wildlife Code Class A or B misdemeanor, state jail felony, or felony; Parks and Wildlife Code, §63.002; or the Lacey Act (16 U.S.C. §§3371-3378). In addition, the new section allows the department to prevent a person from acting on behalf of or as a surrogate for a person prevented from program participation under the new provision.

The department has determined that the decision to allow program participation should take into account an applicant's history of violations involving the capture and possession of live animals, major violations of the Parks and Wildlife Code (Class B misdemeanors, Class A misdemeanors, and felonies), and Lacey Act violations. The department reasons that it is appropriate to deny the privilege of taking or allowing the take of wildlife resources pursuant to MLDP to persons who exhibit a demonstrable disregard for the regulations governing wildlife. Similarly, it is appropriate to deny the privilege of personally benefitting from wildlife to a person who has exhibited demonstrable disregard for wildlife law in general by committing more egregious (Class B misdemeanors, Class A misdemeanors, and felonies) violations of wildlife law.

The Lacey Act (16 U.S.C. §§3371-3378) is a federal law that, among other things, prohibits interstate trade in or movement of wildlife, fish, or plants taken, possessed, transported or sold in violation of state law. Lacey Act prosecutions are normally conducted by the United States Department of Justice in federal courts. Although a Lacey Act conviction or civil penalty is often predicated on a violation of state law, the federal government need only prove that a state law was violated; there is no requirement for there to be a record of conviction in a state jurisdiction. Rather than expending resources and time conducting concurrent state and federal prosecutions, the department believes that it is reasonable to use a Lacey Act conviction or civil penalty as the basis for refusing program participation in the MLDP. Because the elements of the underlying state criminal offense must be proven to establish a conviction or assessment of a civil penalty for a Lacey Act violation, the department reasons that such conviction or assessment constitutes legal proof that a violation of state law occurred and it is therefore redundant and wasteful to pursue a conviction in state jurisdiction to prove something that has already been proven in a federal court.

The denial of program participation as a result of an adjudicative status listed in the new rule is not automatic, but within the discretion of the department. Factors that may be considered by the department in determining whether to refuse tag issuance based on adjudicative status include, but are not limited to: the number of final convictions or administrative violations; the seriousness of the conduct on which the final conviction or administrative violation is based; the existence, number and seriousness of offenses or administrative violations other than offenses or violations that resulted in a final conviction; the length of time between the most recent final conviction or administrative violation and the application for enrollment or renewal; whether the final conviction, administrative violation, or other offenses or violations was the result of negligence or intentional conduct; whether the final conviction or administrative violations resulted from the conduct committed or omitted by the applicant, an agent of the applicant, or both; the accuracy of information provided by the applicant; for renewal, whether the applicant agreed to any special provisions recommended by the department as conditions; and other aggravating or mitigation factors.

New §65.29(f) creates several special provisions. Because the new rule implements an automated, web-based application, reporting, and issuance system, it cannot take effect until the necessary software and hardware platforms have been developed, and they cannot be developed without a standing regulation that establishes the parameters of the MLDP program with certainty. For that reason, the rules take effect on their own terms on September 1, 2017. Because current rules regarding MLDP, LAMPS, bag limits, tagging requirements and license log utiliza-

tion conflicts with the new rule but must remain in effect until the new rule takes effect, the department must create an accommodation for each potential conflict, as well as a general statement to the effect that in the event of additional conflicts, the provisions of the new rule will control. The department will harmonize the various regulatory conflicts at a later date. Finally, the new provision provide for alternative program administration in the case that technical difficulties make the department's web-based application inoperable or unavailable, which is necessary to provide for program continuity.

Summary of Public Comment.

The department received 174 comments opposing adoption of the rule as proposed. Of those comments, 161 offered specific reasons or a rationale for opposing adoption. Those comments, accompanied by the department's response to each, follow.

One commenter opposed adoption and stated that rule allows hunting too early and allows it to go on too long. The department disagrees with the comment and responds that season length of the rule as adopted is identical to what has been in effect for 20 years under the current MLDP program and there is no biological evidence to suggest that the season length results in negative population impacts. No changes were made as a result of the comment.

One commenter opposed adoption and stated that restricting the harvest of antlered bucks during October will impair the ability to remove antlered bucks from the population. The department disagrees with the comment and responds under the CO this is not the case, and under the HO, antlered bucks may be taken from the first Saturday in November until the last day of February. The department believes that four full months is sufficient time for all buck harvest objectives to be met in virtually all if not all circumstances. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule will result in inferior animals breeding. The department responds that the term "inferior animals" is not further explained in the comment; the department concludes the comment is intended to allude to antler characteristics of buck deer and therefore disagrees with the comment and responds that the rule allows landowners and land managers to manage deer populations as they see fit, but within harvest quotas established by the department. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the MLD program should be eliminated and the department should let landowners be responsible for what they need to harvest. The department disagrees with the comment and responds that by any objective measure, the MLD program has been an overwhelming success. The department further responds that both the county bag limits and the harvest quotas specified by the department for an individual property represent a biologically defensible harvest limitation that is necessary to protect the resource and/or habitat. No changes were made as a result of the comment.

One commenter opposed adoption and stated that allowing unlimited take of white-tailed deer is a regression, that extending the LAMPS season avoids the major focus of the MLD program (habitat), and that landowners who don't manage habitat can harvest bucks without any control. The department disagrees with the comment and responds that the rule as adopted does not allow unlimited harvest (a cooperator must accept a harvest quota established by the department as a condition of receiving tags), the LAMPS program is being eliminated, and that landowners who do not participate in MLDP are not allowed to harvest an unlimited number of bucks (harvest is governed by personal bag limits established under biologically defensible county regulations). No changes were made as a result of the comment.

Five commenters opposed adoption and stated that the program should be left alone. The department disagrees with the comment and responds that the current MLD, although tremendously successful, cannot continue in its current form and must be replaced with a more efficient program that allows staff to achieve greater program efficiencies. No changes were made as a result of the comment.

One commenter opposed adoption and stated that more "red tape" is unnecessary. The department agrees with the comment and responds that rule as adopted streamlines and simplifies the application and reporting processes in an effort to reduce "red tape." No changes were made as a result of the comment.

One commenter opposed adoption and stated that if the problem is funding, the department should charge a fee for MLDP participation and retain the current rules. The department disagrees with the comment and responds that although funding is a constant concern, introducing administrative efficiencies through modernization is preferable to imposing fees at this time. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the proposed rule "replaces simple rules with a bureaucratic mess and constitutes overkill and excessive government philosophy and intervention." The department disagrees with the comment and responds that the rule as adopted streamlines and simplifies application and reporting processes, automates tag issuance, and is intended to be less burdensome than the current program. No changes were made as a result of the comment.

One commenter opposed adoption and stated that government agencies should stay out of people's business. The department disagrees that the rules are in intrusive and responds that the department is the state agency charged with protecting and conserving public wildlife and fisheries resources. The department further responds that participation in the MLDP is voluntary. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the period of validity for MLDP tags is too long and will result in negative population impacts by removing pregnant and nursing does. The department disagrees with the comment and responds that under the rules as adopted, a harvest quota is imposed on each program participant. In the case of the HO, a conservative harvest quota is determined by an algorithm that takes into account the location and size of the property, general habitat type for the area, and department survey and population data for the resource management unit in which the property is located. In the case of the CO, a custom harvest quota is determined specifically for the property in question on the basis of habitat information and population and harvest data submitted to the department by the program participant. In neither case will a harvest recommendation be at a level that would result in negative population impacts. No changes were made as a result of the comment.

One commenter opposed adoption and stated that unlike South Texas, October buck harvest in the rest of the state is critical and that rule as proposed is biased in that respect; that the reporting of each deer's age, weight, and gross score is worthless unless cooperators are able to compare that data to other ranches and

from year to year on a specific ranch; that if program expense is an issue, let cooperators print their own tags and report via TWIMS; and that habitat practices should be better defined and should include supplemental feeding. The department disagrees with the comment and responds (respectively) that the rule as adopted does not prohibit harvest of bucks in October (under the HO, harvest of bucks by firearm is limited to unbranched antlered bucks during the archery-only season, although any buck may be harvested by means of lawful archery equipment); that the intent of collecting age, weight, and antler data is to aid in management activities on a specific tract of land (and not to provide a basis of comparison between landowners); that the rules do not enumerate and prescribe specific habitat management practices because there are numerous biologically acceptable options and possibilities and that in any event, the department doesn't believe that they should be described by rule; and that while supplemental feeding may be appropriate in some instances, it is not considered a habitat management practice. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule as adopted will cause problems for former MLD Level III cooperators because they "will now have broken horns in November." The department disagrees with the comment and responds that the proposed new rule provides for exactly the same harvest in the CO as is possible now under Level III, with no additional requirements. No changes were made as a result of the comment.

One commenter opposed adoption and stated that lactating does should not be killed because it stresses fawns. The department disagrees with the comment and responds that under the rule as adopted, the department will establish a harvest quota for antlerless deer. The program participant may harvest antlerless deer at any time during the period of tag validity and because the harvest quota is selected either according to the biological parameters of a specific property (under the CO) or by means of an algorithm designed to make conservative harvest recommendations (the HO), the department will not authorize a harvest quota that will result in negative population impacts. A landowner is free to determine that, for various reasons, a specified animal should not be harvested. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule seems to emphasize the use of department biologists instead of real wildlife management professionals; that there is way too much emphasis on the harvest of spike bucks (which has been scientifically proven to be wrong); that doe harvest in February should be prohibited because it results in the harvest of pregnant females; and that basing HO harvest on RMU data will not result in adequate harvest on well-managed properties. The department disagrees with the comment and responds (respectively) that the rule as adopted requires a department-approved management plan for participation in the CO, but does not require a department-*prepared* management plan, meaning a program participant may accept technical guidance from a department biologist at no charge or engage whomever they like (but the management plan must be biologically credible); that there is no requirement in either the HO or the CO to harvest spike bucks (although a maximum number is established in the harvest quota); that the time of harvest (for does or bucks) is completely up to the program participant (so long as it occurs between the Saturday closest to September 30 and the last day in February) and the harvest quota itself acts as a governor against undesirable population impacts; and that the use of RMU data to assist in establishing harvest quotas for HO participants is based on scientific data. However, a landowner who is interested in more intense management is more likely seek to participate in the CO program than the HO program. No changes were made as a result of the comment.

One commenter opposed adoption and stated that firearms should be lawful for the take of buck deer in September. The department agrees with the comment and responds that the rule as adopted allows the use of firearms for the take of bucks from the Saturday closest to September 30 until the first Saturday in November on all MLDP properties; however, on HO properties buck harvest is restricted to unbranched antlered bucks only (although any buck may be taken by lawful archery equipment). No changes were made as a result of the comment.

One commenter opposed adoption and stated that because the rule does not allow buck harvest in October on HO properties, it will not achieve the goal of reducing workloads. The department disagrees with the comment and responds that the rule as adopted allows the use of firearms for the take of bucks from the Saturday closest to September 30 until the first Saturday in November on all MLDP properties; however, on HO properties buck harvest is restricted to unbranched antlered bucks only (although any buck may be taken by lawful archery equipment). Because any buck may be harvested by firearm on any MLDP property from the first Saturday in September until the last day in February, the department believes the HO will be attractive to those landowners who seek only to manage harvest. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule prevents a property owners association (POA) from acting as a landowners authorized agent for purposes of participation in the HO. The department disagrees with the comment and responds that under §65.29(c)(1)(B), multiple landowners may combine contiguous tracts of land for participation in the HO, provided a single program participant is designated for tag issuance; therefore, the owners of contiguous tracts of land within a POA may designate a single person (including an officer of the POA) to act as program participant. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule should require the department to conduct browse surveys on CO properties every two years to verify compliance with habitat management requirements; that because the CO is intended to be a habitat program, antler data is irrelevant; that yearling spike bucks will be overharvested on HO properties; and that a fee should be imposed for program participation. The department disagrees with the comment and responds (respectively) that the rule as adopted (§65.29(c)(2)(B)(iv)) requires participants in the CO to agree to allow site visits by department personnel to assess habitat management practices; that the department uses antler trend data as an indirect indicator of habitat quality and age structure; that overharvest of spike bucks is not a concern because the department will not recommend or approve a harvest quota that is not biologically defensible. The department also notes that, it is not currently seeking to charge a fee for participation since a fee could create a disincentive for the department to reach the landowners in need of technical guidance. No changes were made as a result of the comment.

Two commenters opposed adoption and stated opposition based on the perception that the rule as adopted alters the lawful means for the harvest of buck deer from the Saturday closest to September 30 to the first Saturday in November. The department disagrees that the rule as adopted changes the lawful means re-

quirements for buck harvest compared to the current rule. The current rule allows Level III MLDP cooperators to harvest any buck by any lawful means from the Saturday closest to September 30 until the last day in February. The current rule allows the take of buck deer on Level I and Level II properties from the Saturday closest to September 30, but allows firearms to be used only for the take of spike bucks by firearms (although any buck may be taken by lawful archery equipment). Under the new rule as adopted, the CO is analogous to the current Level III MLDP and continues to allow the harvest of any buck by any lawful means from the Saturday closest to September 30 until the last day in February, while the HO allows the take of buck deer allows the take of unbranched antlered bucks (which would include spike bucks) by firearms, but allows the take of any other buck deer during that time to lawful archery equipment only. Thus, the new rule as adopted does not alter the means of take stipulated for MLDP participants under the current rules. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the HO should not be changed and there should "not be an archery season only." The department disagrees with the comment and responds that the rule is adopted without changes to the proposed text (including the provisions applicable to the HO). The department also responds that the archery-only season is very popular with hunters and those landowners are not required to allow hunting during the archery-only open season. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule ruins bow hunting and that the antler restriction rule should be retained. The department disagrees with the comment and responds that the rule as adopted does not affect bow hunting, nor does it eliminate the antler restriction rule. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule was too wordy to benefit wildlife, property managers, or hunters. The department disagrees with the comment and responds that the rule was drafted with the intent of stipulating the requirements for entering and complying with the management goals of the MLDP program and was not intended to contain more words than are necessary to accomplish that goal. No changes were made as a result of the comment.

One commenter opposed adoption and stated "To continue to strangle land owners with more rules and regulations has to stop." The department disagrees that the rule sets forth the requirements for participation in the MLDP program and are not believed to be burdensome, and that participation is not mandatory. No changes were made as a result of the comment.

The department received 130 comments in opposition to adoption that were identical or nearly identical. The comments consisted of a list of proposed provisions being opposed. That list of opposed provisions (verbatim), accompanied by the department's response to each, follows.

• "Harvest Option - original Oct. 1 to Feb. 28 harvest dates by 'any legal means and methods' should not be changed and the proposed 'archery only' requirements should be removed." The department disagrees with the comment and responds that if the comment is intended to address the HO provision that limits the take of bucks by firearm to spikes and unbranched antlered bucks from the Saturday closest to September 30 until the start of the general open season, the purpose of the new MLDP program is to create two management options, one with no habitat management requirements (the HO, for landowners and land managers who are more interested in managing deer harvest) and the CO (for landowners and land managers who are interested in a more intensive approach involving habitat management), with the goal of automating the HO in order to allow staff resources to be allocated to providing assistance to CO cooperators. The rule allows CO cooperators to harvest any buck deer by firearm from the Saturday closest to September 30 until the last day in February as a way to reward landowners and land managers who utilize recommended habitat management practices. The rule as adopted does not prohibit HO cooperators from taking buck deer other than spikes and unbranched antlered deer from the Saturday closest to September 30 until the opening of the general season, but allows such deer to be harvested only by archery equipment during that time period. Any buck may be taken by firearm on a HO property from the opening day of the general season until the last day in February. No changes were made as a result of the comment.

• Harvest Option - "proposed rules changes do not fairly represent or address the counties that have no doe season or have archery only season." The department disagrees with the comment and responds that county regulations are immaterial to a discussion of the new MLD rule. A landowner or land manager has several management options to choose from: the CO, the HO, or the county regulations. The department has chosen this structure to allow maximum flexibility for landowners and land managers to choose the management option that is best for them. No changes were made as a result of the comment.

• Conservation Option - "use or potential use of a browse survey technique, as it must NOT be used as a mechanism, or 'hammer', to dictate/mandate landowner goals and objectives and/or permit participation, or dictate timing of deer releases." The department disagrees with the comment and responds that under the new rule, a CO program participant is required to perform three habitat management practices of their choice (which must be specified in a department-approved management plan). The rule as adopted does not dictate how the management practices are to be performed; however, the department will not approve practices that are inconsistent with or contrary to sound habitat management. No changes were made as a result of the comment

• Conservation Option - "approved survey methods shall be used consistently and equitably throughout the state, without local field staff bias." The department disagrees with the comment and responds that the rules do not dictate survey technique methodology, although the department will not accept survey data that is not scientifically valid. No changes were made as a result of the comment.

• Conservation Option - "harvest recommendations shall be tailored to each location rather than eco-region, so as to better serve the landowner, as eco-region is too broad." The department agrees with the comment and responds that the intent of the CO is to allow property-specific management, including harvest recommendations. No changes were made as a result of the comment.

• Conservation Option - "application deadline shall not be moved earlier, but left alone or possibly moved later in order to encourage and accommodate new landowners' participation in the program." The department disagrees with the comment and responds that under the current rules while there is absolute deadline, there is a provision stating that administratively complete applications submitted by August 15 will be approved or denied

by October 1 of the same year. The new rule as adopted establishes a June 15 application deadline for the CO because the department requires harvest, population, and habitat management reporting, a WMP, and, if necessary, personal interaction with department personnel; therefore, the application deadline must be set well in advance of the period of validity of the MLDP tags in order to allow staff sufficient time to evaluate applications. No changes were made as a result of the comment.

• Both Options - "harvest data collection requirements shall be relaxed to provide only the most basic and necessary biological information." The department agrees with the comment and responds that neither the rules nor the department require unnecessary biological information to be collected or reported. No changes were made as a result of the comment.

The department received 296 comments supporting adoption of the proposed new rule.

The Texas Wildlife Association commented in support of adoption of the proposed rule.

The new rule is adopted under the authority of Parks and Wildlife Code, Chapter 61, which requires the commission to regulate the periods of time when it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the means, methods, and places in which it is lawful to hunt, take, or possess game animals, game birds, or aquatic animal life in this state; the species, quantity, age or size, and, to the extent possible, the sex of the game animals, game birds, or aquatic animal life authorized to be hunted, taken, or possessed; and the region, county, area, body of water, or portion of a county where game animals, game birds, or aquatic animal life may be hunted, taken, or possessed; §42.0177, which authorizes the commission to modify or eliminate the tagging requirements of §§42.018, 42.0185, or 42.020, or other similar tagging requirements in Chapter 42; and §43.201(c) which authorizes the commission to exempt a person from the archery stamp requirement.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Ann Bright
General Counsel
Texas Parks and Wildlife Department
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Proposal publication date: July 17, 2015
For further information, please call: (512) 389-4775

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SUBCHAPTER B. DISEASE DETECTION AND RESPONSE

DIVISION 2. CHRONIC WASTING DISEASE - MOVEMENT OF DEER

31 TAC §§65.90 - 65.93

The Texas Parks and Wildlife Commission (Commission) in a duly noticed meeting on November 5, 2015 adopted new §§65.90 - 65.93, concerning Disease Detection and Response, with changes to the proposed text as published in the October 2, 2015, issue of the *Texas Register* (40 TexReg 6856). The new rules are constituted as new Division 2 within Chapter 65, Subchapter B, entitled Chronic Wasting Disease - Movement of Deer.

The change to §65.90(20) alters the definition of "Status" to clarify that, with regard to breeding facilities, "status" is the level of testing "performed" rather than the level of testing "required." Therefore, the definition was modified to define "status" as "the level of testing performed or required by a deer breeding facility or a release site pursuant to this division."

The change to §65.90(21) alters the definition of "Tier 1 facility" for purposes of clarification. As proposed, the definition stated that a Tier 1 facility is "Any facility registered in TWIMS that has received an exposed deer within the previous five years; or transferred deer to a CWD-positive facility within the five-year period preceding the confirmation of CWD in the CWD-positive facility; and is subject to a TAHC hold order." The department has determined that the structure of the definition in the proposal, as well as the phrase "subject to a TAHC hold order" could be a source of confusion. In the interests of clarity, subparagraphs (A) and (B) have been combined and subparagraph (C) has been redesignated as subparagraph (B) and has been reworded to read "has not been released from a TAHC hold order related to activity described in (A)." Thus, if a facility has transferred deer to or accepted deer from an index facility and has not been released from a TAHC hold order, it is a Tier 1 facility.

The change to §65.91 adds new subsection (j) to provide for the expiration of the effectiveness of the division on August 31, 2016. The Texas Parks and Wildlife (department) intends the rules as adopted to be an interim replacement for the emergency rules adopted on August 18, 2015 (40 TexReg 5566), and extended on December 14, 2015 (41 TexReg 9), hereafter referred to as "emergency CWD breeder rules." Based on additional information from the ongoing epidemiological investigation, disease surveillance data collected from captive and free-ranging deer herds, guidance from the TAHC, and input from stakeholder groups, the department intends to review the interim rules and will make an initial recommendation to the Commission at its March 2016 meeting.

The change to §65.92 alters subsection (a)(1)(C) to clarify the reference to DMP facilities. As noted elsewhere in this preamble, the department adopted emergency rules to address the movement of white-tailed via Deer Management Permit (DMP) (40 TexReg 7305). A DMP is a permit issued by the department under rules adopted pursuant to Parks and Wildlife Code, Chapter 43, Subchapters R and R-1, that allows the temporary possession of free-ranging white-tailed or mule deer for breeding purposes. In addition, interim Deer Management Permit (DMP) rules have been proposed (40 TexReg 9086) and will be considered for adoption by the Commission at its January 21, 2016 meeting. As a result, the DMP regulation would include regulations in addition to those contained in 31 TAC Chapter 65, Subchapter R. Therefore, to avoid confusion, this reference is replaced with a reference to the appropriate provision of the Parks and Wildlife Code and a more generic reference to the "department's DMP regulations."

The change to §65.93 alters subsection (b)(2)(B)(i), (b)(2)(C), and (b)(3)(B)(ii) to replace the reference to the "last day of lawful deer hunting at the site in the previous year" with "August 24, 2015." Operationally, in calculating the number of CWD samples required by this subparagraph for Class II release sites, the

department is basing the percentage on the number of deer released between August 24, 2015 and the last day of lawful hunting at the site in the current year. This change is necessary to ensure clarity.

Under Parks and Wildlife Code, Chapter 43, Subchapter L, the department regulates the possession of captive-raised deer within a facility for breeding purposes and the release of such deer into the wild. A deer breeder permit affords deer breeders certain privileges, such as (among other things) the authority to buy, sell, transfer, and release captive-bred white-tailed and mule deer, subject to the regulations of the Commission and the conditions of the permit. Breeder deer may be purchased, sold, or transferred only for purposes of propagation or liberation. There are currently 1,275 permitted deer breeders operating more than 1,300 deer breeding facilities in Texas.

On June 30, 2015, the department received confirmation that a two-year-old white-tailed deer held in a deer breeding facility in Medina County ("index facility") had tested positive for chronic wasting disease (CWD). Under the provisions of the Agriculture Code, §161.101(a)(6), CWD is a reportable disease. A veterinarian, veterinary diagnostic laboratory, or person having care, custody, or control of an animal is required to report the existence of CWD to TAHC within 24 hours after diagnosis. Subsequent testing confirmed the presence of CWD in additional white-tailed deer at the index facility. The source of the CWD at the index facility is unknown at this time. Within the last five years, the index facility accepted deer from 30 other Texas deer breeders and transferred 835 deer to 147 separate sites, including 96 deer breeding facilities, 46 release sites, and two DMP facilities in Texas, as well as two destinations in Mexico. The department estimates that more than 728 locations in Texas (including 384 deer breeders) either received deer from the index facility or received deer from a deer breeder who had received deer from the index facility. At least one of those locations, a deer breeding facility in Lavaca County, has been confirmed to have CWD positive white-tailed deer acquired from the index facility.

The new rules impose CWD testing requirements and movement restrictions for white-tailed deer and mule deer held under the authority of deer breeder permits issued by the department. The new rules are a result of extensive cooperation between the department and the TAHC to protect susceptible species of exotic and native wildlife from CWD. TAHC is the state agency authorized to manage "any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl, regardless of whether the disease is communicable, even if the agent of transmission is an animal species that is not subject to the jurisdiction" of TAHC. Tex. Agric. Code §161.041(b).

The department and TAHC have been concerned for over a decade about the possible emergence of CWD in free-ranging and captive deer populations in Texas. As a result, the department and TAHC have worked together to develop a Chronic Wasting Disease Management Plan (the Plan) to guide the department and TAHC in addressing risks, developing management strategies, and protecting big game resources from CWD in captive or free-ranging cervid populations. The most recent version of the Plan was finalized in March 2015. Much of the information provided in this preamble is also contained in the Plan.

CWD is a fatal neurodegenerative disorder that affects some cervid species, including white-tailed deer, mule deer, black-tailed deer, elk, red deer, sika, moose, and their hybrids (susceptible species). It is classified as a TSE (transmissible spongiform encephalopathy), a family of diseases that includes scrapie (found in sheep), bovine spongiform encephalopathy (BSE, found in cattle), and variant Creutzfeldt-Jakob disease (vCJD) (found in humans). Much remains unknown about CWD. The peculiarities of its transmission (how it is passed from animal to animal), infection rate (the frequency of occurrence through time or other comparative standard), incubation period (the time from exposure to clinical manifestation), and potential for transmission to other species are still being investigated. There is no scientific evidence to indicate that CWD is transmissible to humans.

What is known is that it is a progressive, fatal disease with no known immunity or treatment. CWD is known to occur via natural transmission in white-tailed deer, mule deer, black-tailed deer, red deer, sika deer, elk, and moose (Sohn et al. 2011, CWD Alliance 2012, Saunders et al. 2012). There are two primary sources of exposure to CWD for uninfected deer: (1) CWD infected deer, and (2) CWD contaminated environments (Williams et al. 2002, Miller et al. 2004, Mathiason et al. 2009). It is believed that some TSE prions may appear spontaneously and sporadically, but there is no evidence of spontaneous CWD (Chesebro 2004). The presence of infected deer over time increases the number of infectious CWD prions in the environment. As CWD becomes established in an area, environmental contamination may become the primary source of exposure for uninfected deer. Conversely, in areas where CWD is not established, and where the environment is relatively uncontaminated, direct animal contact is considered the most likely source of transmission of CWD to uninfected deer.

In early stages of infection, limiting the growth of environmental contamination through the reduction of infected individuals may offer some control in limiting disease prevalence and distribution (Wasserberg et al. 2009, Almberg et al. 2011). However, infected individuals on the landscape serve as a reservoir for prions which will be shed into the environment. Prions are shed from infected animals in saliva, urine, blood, soft-antler material, and feces (Gough et al. 2009, Mathiason et al. 2009, Saunders et al. 2012). There are no known management strategies to mitigate the risk of indirect transmission of CWD once an environment has been contaminated with infectious prions. This makes eradication of CWD very difficult, if not impossible in areas where CWD has been established for a long period before initial detection. Although the incubation period for CWD is not fully understood, a susceptible species infected with CWD is expected to display symptoms within five years after infection.

As CWD is invariably fatal, a high prevalence of the disease in free-ranging populations has been correlated to deer population declines. Human dimensions research suggests that hunters will avoid areas of high CWD prevalence (See, e.g. Duda 2011, Needham et al. 2007, Vaske 2009, Zimmer 2012). The potential implications of CWD for Texas and its annual, multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies could be significant, unless it is contained and controlled.

The number of states and provinces in which CWD has been discovered has steadily increased in the past decade, forcing many state and provincial wildlife agencies, hunters, and stakeholders to confront the myriad of consequences and implications this disease presents. Implications of CWD are often centered on the anticipated, or unknown potential impacts to wild cervid populations, most notably concerns for population declines re-

sulting from infected herds. Disease eradication is expected to become less attainable as CWD becomes more established in a population, emphasizing the criticality of a sound CWD surveillance and response plan. Of course, disease prevention is the best approach to protecting cervid populations and avoiding social and economic repercussions resulting from CWD or other wildlife diseases (Sleeman & Gillin 2012).

Currently, the only test certified by the U.S. Department of Agriculture (USDA) for CWD must be conducted post-mortem by extracting and testing the obex (a structure in the brain) or medial retropharyngeal lymph node. However, the department is actively collaborating with researchers to investigate possible efficacious live-animal tests that can be integrated into the state's overall disease surveillance efforts.

In addressing CWD, the Plan sets forth three major goals: (1) Minimize CWD risks to the free-ranging and captive white-tailed deer, mule deer, and other susceptible species in Texas; (2) Establish and maintain support for prudent CWD management with hunters, landowners, and other stakeholders; and (3) Minimize direct and indirect impacts of CWD to hunting, hunting related economies, and conservation in Texas. The department is guided by these three goals in the development of rules needed to address CWD.

As part of the department's surveillance efforts, prior to July 1, 2015, more than 32,882 "not detected" CWD test results were obtained from free-ranging deer (i.e., not breeder deer) in Texas, and deer breeders had submitted 12,759 "not detected" test results as well. The intent of the new rules is to increase the probability of detecting and containing CWD where it exists.

Previous CWD Rulemaking

The department has engaged in several rulemakings over the years to address the threat posed by CWD. In 2005, the department closed the Texas border to the entry of out-of-state captive white-tailed and mule deer and increased regulatory requirements regarding disease monitoring and record keeping. The closing of the Texas border to entry of out-of-state captive white-tailed and mule deer was updated, effective in January 2010, to address other disease threats to white-tailed and mule deer (35 TexReg 252).

On July 10, 2012, the department confirmed that two free-ranging mule deer sampled in the Texas portion of the Hueco Mountains tested positive for CWD. In response, the department and TAHC convened the CWD Task Force, comprised of wildlife-health professionals and cervid producers, to advise the department on the appropriate measures to be taken to protect white-tailed and mule deer in Texas. Based on recommendations from the CWD Task Force, the department adopted new rules in 2013 (37 TexReg 10231) to implement a CWD containment strategy in far West Texas. Those rules (31 TAC §§65.80 - 65.88), among other things, require deer harvested in a specific geographical area (the Containment Zone), to be presented at check stations to be tested for CWD.

Response to June 2015 CWD Discovery

Upon discovery of CWD in Medina County in June 2015, the department and TAHC convened the CWD Task Force to advise the department on the appropriate measures to be taken in response to the discovery. The CWD Task Force met on July 14, August 6, and September 1, 2015. In addition, on July 8, July 24, August 6, and September 16, 2015, the department and TAHC held stakeholder conference calls, some or all of which were attended by representatives of impacted groups, including the Texas Deer Association, the Deer Breeders Corporation, the North American Deer Farmers Association, the Exotic Wildlife Association, the Texas Wildlife Association, the Texas and Southwest Cattle Raisers Association, the Texas Chapter of Wildlife Society.

Furthermore, the department convened the CWD Working Group, which is comprised of representatives from the department, TAHC, Texas A&M Veterinary Medical Diagnostic Laboratory (TVMDL), and the United States Department of Agriculture - Animal Plant Health Inspection Service - Veterinary Services (USDA-APHIS-VS). Members of the CWD Working Group with expertise in epidemiology and/or disease management participated in numerous meetings and discussions in developing a CWD management strategy, of which the rules are a part.

Emergency CWD breeder rules were adopted on August 18, 2015 (40 TexReg 5566). The emergency CWD breeder rules were extended on December 14, 2015 (41 TexReg 9). Also as noted previously, the rules adopted in this rulemaking will supersede and replace the emergency CWD breeder rules.

Also, to address other types of deer movement that could result in the transmission of CWD, emergency rules were adopted to address movement of white-tailed or mule deer via a Trap, Transport and Transplant (Triple T) Permit (40 TexReg 7307), and via a DMP (40 TexReg 7305). In addition, as mentioned previously, interim DMP rules have been proposed (40 TexReg 9086) and will be considered for adoption by the Commission at its January 21, 2016 meeting.

In addition to the regulatory response (which includes enhanced CWD testing requirements), the department has undertaken an effort to obtain additional CWD tests from hunter-harvested deer on a voluntary basis. The department established goals for testing of hunter harvested deer for each of the state's 33 Resource Management Units (RMU). (An RMU is an area of the state with similar soils, vegetation types and land use practices.) As of December 20, 2015, department staff have collected >9,000 hunter-harvested samples statewide during the 2015-16 hunting season.

Current CWD Rulemaking

The new rules set forth specific CWD testing requirements for deer breeders, which would have to be satisfied in order to transfer deer to other deer breeders (or other captive-deer facilities), or for purposes of release. The new rules also impose CWD testing requirements on some sites where breeder deer are liberated (release sites). The testing strategy established in the rules is intended to increase surveillance and to prevent the spread of CWD through permitted activities.

One of the most effective approaches to managing infectious diseases and arresting the spread of a disease is to segregate suspicious individuals and populations from unexposed populations. As a matter of epidemiological probability, when animals from a population at higher risk of harboring an infectious disease are introduced to a population of animals at a lower risk of harboring an infectious disease, the confidence that the receiving population will remain disease-free is reduced.

Therefore, in establishing testing and other requirements, the rules classify breeding facilities and release sites based on the epidemiological likelihood that the breeder facility or release site will contain or spread CWD. In other words, the classifications are based on the relative level of risk for CWD associated with

the breeding facility or release site. Breeding facilities are classified as Transfer Category 1 (TC 1), Transfer Category 2 (TC 2), or Transfer Category 3 (TC 3). TC 1 breeding facilities are facilities that have a relatively low risk for CWD and TC 3 breeding facilities are facilities that have a higher risk for CWD. TC 1 breeding facilities are considered the highest status breeding facilities under the new rules. Similarly, release sites are classified as a Class I, Class II, or Class III release site. As with breeding facilities, a Class I release site poses less risk and a Class III site poses more risk. Class I release sites are considered the highest status release sites.

One factor in determining relative risk concerns a breeding facility's participation in TAHC's CWD Herd Certification Program. See, 4 TAC §40.3 (relating to Herd Status Plans for Cervidae). Participation in the TAHC CWD Herd Certification Program requires that breeding facilities comply with more stringent CWD testing, monitoring, and other requirements. Breeding facilities that have complied with the testing, monitoring, and other requirements of this program for five years or more are considered to be at the lowest risk for CWD.

Another factor in evaluating risk is the relationship of a breeding facility or release site to a breeding facility at which CWD has been detected. As described in more detail elsewhere in this preamble, those facilities and sites most closely related to the CWD-positive facility are referred to as "Tier 1" facilities.

Another significant component of the new rules is the requirement that breeder deer may be released (liberated) only on release sites that are surrounded by a fence of at least seven feet in height and that is capable of retaining deer at all times. Because deer held under deer breeder permits are frequently liberated for stocking and/or hunting purposes (27,684 in 2014), the potential for disease transmission from liberated breeder deer to other free-ranging deer is of concern. Although the release of CWD-positive deer will threaten free-ranging deer within a specific release site, the existence of a high fence around this release site will reduce or slow the transmission of the disease across the broader landscape.

The new rules are necessary to protect the state's white-tailed and mule deer populations, as well as the long term viability of associated hunting, wildlife management, and deer breeding industries. To minimize the severity of biological and economic impacts resulting from CWD, the new rules implement a more rigorous testing protocol within certain deer breeding facilities and at certain release sites than was previously required. In an effort to balance the needs of the many and varied landowner, management, and deer hunting interests in the state, the department has attempted to allow all deer breeders other than those with a CWD-positive facility the opportunity (which in some instances may require additional testing or other actions) to continue to move and release breeder deer.

Changes from Emergency CWD Breeder Rules

In addition to the changes from the rule as proposed, the new rules differ from the emergency CWD breeder rules in several ways. Although the following is not an exhaustive or comprehensive comparison, it addresses the major differences between the new rules and the emergency CWD breeder rules.

Substantive Changes from Emergency Rules

There are several other differences between the emergency CWD breeder rules and the current rules:

1. Section 65.91(e) of the emergency CWD breeder rules provides that if a breeding facility or release site accepts breeder deer from a facility of lower status, then the receiving facility assumes that lower status for the purpose of the rules. Although the emergency CWD breeder rules provide a mechanism for Transfer Category (TC) 2 status to be re-established for facilities that have dropped to TC 3 status, the emergency CWD breeder rules do not specify a timeframe for such a transition. Therefore, new §65.91(f) stipulates that a facility that has dropped in status may increase in status, either in two years (TC 3 to TC 2) or in five (TC 2 to TC 1). Following the adoption of the emergency CWD breeder rules, questions arose regarding the length of time for a facility that has dropped in status to obtain the higher status and this provision was intended to address that question. The department understands, however, that these provisions/clarifications may be moot considering the August 31, 2016 expiration of these rules. Nonetheless, the department included these provisions to address apparent ambiguity absent the expiration date.

2. Similarly, the emergency CWD breeder rules do not specifically address the status of new facilities permitted after March 31, 2015. Therefore, new §65.92(a)(4) would contain clarifying language to the effect that facilities permitted after March 31, 2015 would assume the status of the lowest status of deer accepted. In the same vein, the emergency CWD breeder rules do not explicitly state that it is possible for TC 2 facilities to become TC 1 facilities (although it would be automatic if "5th year" or "certified" status under the TAHC Herd Certification Program is attained).

3. Section 65.93(b)(3)(A) of the emergency CWD breeder rules did not note that a release site is a Class III release site if it is a Tier 1 facility. New §65.93(b)(3)(B)(i) remedies that oversight.

Clarifying and Other Changes from Emergency CWD Breeder Rules

1. The CWD emergency breeder rules did not contain a definition of "confirmed" as it relates to CWD testing. Therefore, in an effort to avoid confusion, new §65.90(3) defines the term as "a CWD test result of 'positive' received from the National Veterinary Service Laboratories of the United States Department of Agriculture."

2. The definition of "exposed" contained at §65.90(9) of the emergency CWD breeder rules did not contemplate situations in which the department is able to determine that although a deer might otherwise be considered "exposed" to CWD, the department is able, through an epidemiological investigation, to determine that a deer is, in fact, not exposed. For example, if a deer was transferred out of a breeding facility prior to a CWD-positive deer being transferred into the facility, the department may be able to determine that the deer transferred out of the facility was not exposed to CWD. The ability to determine that a deer is not, in fact, an exposed deer is important because a facility that accepts an exposed deer becomes a "Tier 1" facility, triggering provisions that not only affect that facility, but all the facilities that received deer from the facility. Therefore, the definition of "exposed" in new §65.90(10) has been altered to allow the department to truncate the trace-back of deer movements in a facility in cases where an epidemiological investigation reveals the trace-back is not necessary.

3. The definition of "Tier 1" contained at §65.90(20) of the emergency CWD breeder rules did not contemplate situations in which a facility that received exposed deer might be able to

satisfy testing requirements to become eligible to move deer, but would still be prohibited from doing so by being subject to a TAHC hold order. Therefore, new §65.90(21) stipulates that a Tier 1 facility remains a Tier 1 facility if it is under a TAHC hold order.

4. Section 65.91(i) of the emergency CWD breeder rules provided that a person who is subject to the provisions of the emergency CWD breeder rules is required to comply with the provisions of TAHC regulations at 4 TAC Chapter 40 (relating to Chronic Wasting Disease) that are applicable to white-tailed or mule deer. As worded, the provision inadvertently excludes deer released prior the effective date of the emergency CWD breeder rules, because such deer have been liberated and are not possessed under the provisions of the rules. Therefore, new §65.91(i) has been reworded to apply also to persons who receive deer for liberation.

5. New §65.93(a)(5) provides that if the owner of a release site does not comply with the CWD testing requirements, the release site is ineligible to be a destination for future releases. The emergency CWD breeder rules included a five-year timeframe for ineligibility. The five-year time frame for ineligibility is not included in the new rules.

6. The emergency CWD breeder rules contained specific dates necessary to accommodate the immediate application of the emergency CWD breeder rules. The new rules eliminate those dates where necessary and replace them with generic language.

New §65.90, concerning Definitions, sets forth the meanings of specialized words and terms in order to eliminate ambiguity and enhance compliance and enforcement.

New §65.90(1) defines "accredited testing facility" as "a laboratory approved by the United States Department of Agriculture to test white-tailed deer or mule deer for CWD." The definition is necessary in order to provide a standard for testing facilities.

New §65.90(2) defines "breeder deer" as "a white-tailed deer or mule deer possessed under a permit issued by the department pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter." The definition is necessary to establish a shorthand term for a phrase that is used frequently in the new rules but cumbersome to repeat.

New §65.90(3) defines "confirmed" as "a CWD test result of 'positive' received from the National Veterinary Service Laboratories (NVSL) of the United States Department of Agriculture." The definition is necessary in order to provide a definitive standard for asserting the presence of CWD in a sample. Samples collected from breeder deer are sent initially to an accredited testing facility, such as the Texas Veterinary Medical Diagnostic Laboratory (TVMDL). A test result of "suspect" is returned when CWD is detected, and a tissue sample is forwarded to the NVSL for confirmation.

New §65.90(4) defines "CWD" as "chronic wasting disease." The definition is necessary to provide an acronym for a term that is used repeatedly in the rules.

New §65.90(5) defines "CWD-positive facility" as "a facility where CWD has been confirmed." The definition is necessary because the new rules contain provisions that are predicated on whether or not CWD has been detected and confirmed in a given deer breeding, DMP, nursing, or other facility authorized to possess white-tailed deer or mule deer.

New §65.90(6) defines "deer breeder" as "a person who holds a valid deer breeder's permit issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter." As with several other definitions in the new rules, the definition is necessary to establish a shorthand term for a phrase that is used frequently in the new rules but cumbersome to repeat.

New §65.90(7) defines "deer breeding facility (breeding facility)" as "a facility permitted to hold breeder deer under a permit issued by the department pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter." As with several other definitions in the new rules, the definition is necessary to establish a shorthand term for a phrase that is used frequently in the new rules but cumbersome to repeat.

New §65.90(8) defines "department (department)" as "Texas Parks and Wildlife Department." The definition is necessary to avoid confusion, since the new rules contain references to another state agency.

New §65.90(9) defines "eligible mortality" as "a breeder deer that has died within a deer breeding facility and is 16 months of age or older, or, if the deer breeding facility is enrolled in the TAHC CWD Herd Certification Program, is 12-months of age or older." The definition is necessary, in part, because the rules require CWD testing of eligible mortalities. CWD is difficult to detect in deer younger than 16 months of age, and more difficult in deer younger than 12 months of age. The department's previous CWD testing rules at §65.604(e) of this title provided for testing of mortalities that were 16 months or older. The department is retaining that standard but is also recognizing that the TAHC and USDA use a standard of 12 months in their CWD herd certification program that requires testing 100 percent of eligible mortalities.

New §65.90(10) defines "exposed deer." This definition provides that "unless the department determines through an epidemiological investigation that a specific breeder deer has not been exposed to CWD, an exposed deer is a white-tailed deer or mule deer that is in a CWD-positive facility or was in a CWD-positive facility within the five years preceding the confirmation of CWD in that facility." The definition is necessary to distinguish the circumstances under which certain provisions of the new rules are applicable. The five-year timeframe was selected because a deer infected with CWD could shed prions (the infectious agent believed to cause CWD) and infect other animals during this period before exhibiting clinical symptoms of the disease. However, if an epidemiological investigation concludes that any part of the five-year window is unnecessary, the status of "exposed" could be altered.

New §65.90(11) defines "hunter-harvested deer" as "a deer required to be tagged under the provisions of Subchapter A of this chapter (relating to Statewide Hunting Proclamation)." The definition is necessary because the rules in some instances require deer harvested by hunters (as opposed to other types of mortality) to be tested for CWD.

New §65.90(12) defines "landowner (owner)" as "any person who has an ownership interest in a tract of land, and includes a landowner's authorized agent." The definition is necessary because the new rules set forth testing requirements and other obligations for persons who own land where breeder deer are released from TC 2 and/or TC 3 breeding facilities.

New §65.90(13) defines "landowner's authorized agent" as "a person designated by a landowner to act on the landowner's be-

half." The definition is necessary for the same reason set forth in the discussion of new §65.90(12).

New §65.90(14) defines "NUES tag" as "an ear tag approved by the United States Department of Agriculture for use in the National Uniform Eartagging System (NUES)." The definition is necessary because the new rules require breeder deer released from TC 3 breeding facilities to be tagged with either a RFID or NUES tag.

New §65.90(15) defines "originating facility" as "a facility that is the source facility identified on a transfer permit." The definition is necessary because the new rules allow breeder deer to be transferred between deer breeders and from deer breeders to release sites, making it necessary to distinguish the originating facility from the facility that received the deer.

New §65.90(16) defines "reconciled herd" as "the deer held in a breeding facility for which the department has determined that the deer breeder has accurately reported every birth, mortality, and transfer of deer in the previous reporting year." The definition is necessary because the rules require a deer breeder to have a reconciled herd in order to transfer or release breeder deer.

New §65.90(17) defines "release site" as "a specific tract of land that has been approved by the department for the release of breeder deer under this division." The definition is necessary because the new rules impose CWD testing requirements for tracts of land where breeder deer are liberated if the breeder deer originate from certain types of deer breeding facilities.

New §65.90(18) defines "reporting year" as "the period of time from April 1 of one calendar year to March 31 of the next calendar year." Deer breeders are required to file annual reports with the department. The new rules condition the eligibility of deer breeders to transfer and release deer on the completeness and accuracy of those reports.

New §65.90(19) defines "RFID tag" as "a button-type ear tag conforming to the 840 standards of the United States Department of Agriculture's Animal Identification Number system." The definition is necessary because the new rules require breeder deer released from TC 3 breeding facilities be tagged with either an RFID or NUES tag.

New §65.90(20) defines "status" as "the level of testing performed or required by a deer breeding facility or a release site pursuant to this division." The definition also clarifies that the highest status for a Transfer Category is 1 and the lowest status is Transfer Category 3. Similarly, Class I is the highest status for release sites and Class III is the lowest. As noted previously, the rules categorize breeding facilities and release sites based on relative risk. The definition is necessary because the new rules predicate the eligibility of deer breeding facilities to transfer and receive breeder deer, and the testing requirements of release sites, upon the status of the breeding facility or release site.

New §65.90(21) defines "Tier 1 facility" as "any facility registered in TWIMS that (A) has received an exposed deer within the previous five years or has transferred deer to a CWD-positive facility within the five-year period preceding the confirmation of CWD in the CWD-positive facility; and (B) has not been released from a TAHC hold order related to activity described in subparagraph (A) of this paragraph." The definition is necessary to offer a shorthand reference to those facilities that have a direct connection to a CWD-positive facility.

New §65.90(22) defines "TAHC" as "Texas Animal Health Commission." The Texas Animal Health Commission is the state agency charged with managing "any disease or agent of transmission for any disease that affects livestock, exotic livestock, domestic fowl, or exotic fowl, regardless of whether the disease is communicable, even if the agent of transmission is an animal species that is not subject to the jurisdiction" of TAHC. Tex. Agric. Code, §161.041(b).

New §65.90(23) defines "TAHC CWD Herd Certification Program" as "the disease-testing and herd management requirements set forth in 4 TAC §40.3 (relating to Herd Status Plans for Cervidae)." The new rules have provisions specific to deer breeders who participated in the TAHC herd certification program. The definition makes it clear that references to herd certification are references to the herd certification program administered by TAHC.

New §65.90(24) defines "TAHC Herd Plan" as "a set of requirements for disease testing and management developed by TAHC for a specific facility." The new rules in some cases make eligibility to transfer or receive breeder deer contingent on compliance with a herd plan developed by TAHC. The definition makes it clear that references to herd plans are references to herd plans developed by TAHC.

New §65.90(25) defines "TWIMS" as "the department's Texas Wildlife Information Management Services (TWIMS) online application." TWIMS is the system that all deer breeders are required to use to file required notifications and reports required by current rule.

New §65.91, concerning General Provisions, sets forth a number of provisions that are applicable to the transfer or release of breeder deer.

New §65.91(a) stipulates that in the event that a provision of the new rules conflicts with any other provision of 31 TAC Chapter 65, the new rules would apply. Because of the need to quickly implement a regulatory response to the emergence of CWD there is insufficient time to harmonize the new rules with the agency's existing rules governing white-tailed deer and mule deer. Therefore, the new rules clarify that the new rules govern in the event of conflict.

New §65.91(b) prohibits the transfer of live breeder deer for any purpose except as provided by the new rules. Because deer breeders frequently transfer deer to and receive deer from other deer breeders, as well as transfer breeder deer for release, it is necessary in light of the emergence of CWD in a Texas deer breeding facility to prohibit the movement of breeder deer except as authorized by the rules. New §65.91(c) prohibits the movement of deer to or from a deer breeding facility where CWD has been detected, beginning with the notification that a "suspect" test result has been received and lasting until the department authorizes resumption of activities. Given that CWD is an infectious disease, it is necessary to prohibit certain activities in order to contain the spread of the disease.

New §65.91(d) prohibits the transfer of exposed breeder deer from a deer breeding facility unless specifically authorized in a TAHC herd plan and then only in accordance with the provisions of the new rules. Under TAHC rules, any deer breeding facility that receives breeder deer from CWD-positive facility is automatically placed under a "hold order," which prohibits the movement of breeder deer out of the facility while TAHC conducts an epidemiological investigation and creates a herd plan for the facility based on that investigation. If the TAHC herd plan provides that movement of exposed deer can resume, then such movement

may result if authorized by and if in compliance with the new rules.

New §65.91(e) stipulates that a breeding facility or release site that receives breeder deer from an originating facility of lower status would automatically assume the status of the originating facility. The new rules create a tiered system of testing performance based on the CWD monitoring and testing performance, and thus, the level of risk of transmission of CWD for each deer breeding facility and release site. The level of risk is also based on whether the facility contains or is connected to exposed animals. Epidemiological science dictates that a population receiving individuals from a higher risk population is itself at greater risk; therefore, the new rules address such transfers from higher risk to lower risk populations by requiring the receiving breeding facility, or release site to assume the lower status.

New §65.91(f) explicitly outlines the timeframes for breeding facilities or release sites to increase status following a loss of status. A discussion of this provision was provided earlier in this preamble.

New §65.91(g) stipulates that a CWD test is not valid unless it is performed by an accredited testing facility. The department's efforts to detect and contain CWD depend on the quality of the testing itself. At the current time, USDA will not certify herd plans for cervidae unless CWD testing is performed by laboratories that have been approved by USDA. The standard for approval is compliance with 9 CFR §55.8, which sets forth the specific tests, methodology, and procedure for conducting CWD tests. Therefore, in order to ensure that CWD tests are performed in accordance with uniform standards, the new rules require all CWD tests to be performed by a laboratory approved by USDA. Additionally, the new subsection specifies which tissues must be submitted and who is authorized to collect those tissues. At the current time, the only CWD testing approved by USDA must be performed on certain tissues from eligible mortalities, such as the obex (a structure in the brain) or certain lymph nodes. The rules authorize laypersons to remove an obex, but require the extraction of appropriate lymph nodes be performed by an experienced veterinarian, technician, or biologist to ensure proper extraction and identification. Therefore, the new subsection stipulates that to be valid, a CWD test must be performed on an obex, which can be collected by anyone, but if a lymph node is to be tested in addition to the obex, it must be a medial retropharyngeal lymph node collected from the eligible mortality by an accredited veterinarian or other person approved by the department.

New §65.91(h) requires all applications and notifications required by the new rules to be submitted to the department electronically via the department's TWIMS application or by another method expressly authorized by the department. Under current rule, deer breeders are required to submit all applications and reports via TWIMS; the new rules make the same requirement, but also allow the department to authorize another method in an effort to account for unexpected situations, such as TWIMS being unavailable.

New §65.91(i) requires compliance with TAHC rules concerning CWD, to the extent that they are applicable to white-tailed deer and mule deer. The department's response to CWD is part of a multi-agency cooperative effort with TAHC. In addition to the department's rules regarding movement of breeder deer, deer breeders must comply with TAHC rules governing herd plans. The department intends to enforce those rules under the authority of Parks and Wildlife Code, Chapter 43, Subchapter L.

New §65.91(j) provides that the division of Chapter 65 containing the new rules will expire August 31, 2016. As explained elsewhere in this preamble and in a number of other contexts, the new rules are intended to be interim rules. The department intends to review the new rules following the current hunting season and present preliminary recommendations to the Commission in March 2016.

New §65.92, concerning Transfer Categories and Requirements, sets forth provisions generally applicable to deer breeding facilities as well as delineating a tiered system of testing options and associated requirements predicated on a given deer breeding facility's exposure to deer from a CWD-positive facility.

New §65.92(a) establishes those provisions generally applicable to the transfer of breeder deer from a deer breeding facility.

New §65.92(a)(1) provides for the transfer of breeder deer pursuant to activation of a valid transfer permit for four purposes: (1) to another deer breeder; (2) to an approved release site; (3) to a DMP facility; or (4) to another person for nursing purposes. Under previous rules at §65.610 (relating to Transfer of Deer), breeder deer may be transferred only after the activation of a transfer permit and only for specific purposes (to another deer breeder; for release to the wild; to a DMP facility; to the holder of an educational display or zoological permit issued by the department; or on a temporary basis to another person for nursing purposes or to receive medical attention). Given the threat of transmission of CWD, the new rules contemplate the qualified transfer of breeder deer in a narrower context. Therefore, the new rules allow the movement of breeder deer for four purposes, contingent on the satisfaction of testing requirements imposed by the new rules. Transfer of breeder deer to the holder of an educational display or zoological permit issued by the department is no longer authorized. The temporary transfer of breeder deer to a veterinarian for medical care is addressed in new §65.92(c).

Notwithstanding the provisions of new §65.92(a)(1), new §65.92(a)(2) prohibits the movement of breeder deer if: (1) the transfer is not authorized under a TAHC herd plan; (2) "not detected" CWD test results have been submitted for less than 20 percent of eligible mortalities at the breeding facility since May 23, 2006; (3) the breeding facility has an unreconciled herd inventory; or (4) the breeding facility is not in compliance with the provisions of §65.608 of this title (relating to Annual Reports and Records). The basis for each of these three prohibitions is explained as follows.

With regard to the first prohibition, since a TAHC herd plan will normally not authorize the movement of breeder deer if the deer breeder does not institute a testing program and/or comply with other requirements, paragraph (2)(A) prohibits movement of breeder deer from a breeding facility that is not authorized to do so under the TAHC herd plan for the facility.

With regard to the second prohibition in paragraph (2)(B), for a number of years, the rules at §65.604 of this title (relating to Disease Monitoring) allowed a deer breeder to move breeder deer if, among other things, CWD test results of "not detected" had been returned from an accredited test facility on a minimum of 20 percent of all eligible breeder deer mortalities occurring within the facility since May 23, 2006. Although this standard provides a very low statistical confidence of detecting CWD if it exists in a facility, the department reasons that any breeding facility not in compliance with this standard should not be allowed to move breeder deer until it has "tested out," or submitted sufficient test

samples of "not detected" to provide a higher level of confidence that CWD will not be transmitted from the facility.

The third and fourth prohibitions in paragraphs (2)(C) and (D) are related to reconciled herds and annual reports. Current department rules at §65.608 of this title (relating to Annual Reports and Records) require deer breeders to submit an annual report. The annual report must include a herd reconciliation that accounts for every breeder deer held, acquired, or transferred by a breeding facility, as well as births and mortalities. A breeding facility that is not in compliance with the reporting requirements or has submitted incomplete or inaccurate records frustrates efforts to determine the source and/or disposition of every deer in the facility, meaning that any number of scenarios could be possible with respect to disease transmission.

New §65.92(a)(3) prohibits the transfer of a breeder deer to a Class III release site unless the deer has been tagged with an approved RFID or NUES ear tag. As has been discussed elsewhere in this preamble, the new rules create a classification system for breeding facilities that is based on the extent to which a facility is believed to have been exposed to CWD and the testing history of the facility. The new rules also create a similar system for classifying release sites. As described in more detail later in this preamble, deer within a Class III release site are at a higher risk for CWD. The department believes that breeder deer released onto a Class III site should be readily identifiable for purposes of CWD testing and reporting. Therefore, the new rules require such deer to be ear-tagged prior to release.

New §65.92(a)(4) stipulates that a deer breeding facility initially permitted after March 31, 2015 will assume the lowest status among all originating facilities from which deer are received. New §65.92(a)(4) also provides that a breeding facility cannot assume TC 1 status unless it meets the criteria established in new §65.92(b)(1), which limits the TC 1 designation to those facilities that are not Tier 1 facilities and have a "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program.

New §65.92(b) enumerates the three categories of breeding facilities and the testing requirements for each.

New §65.92(b)(1) establishes that a breeding facility is a TC 1 facility if it is not a Tier 1 facility and has "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program. Because a TC 1 facility has achieved this status in a disease monitoring protocol and has neither accepted deer from nor transferred deer to a CWD-positive facility, a TC 1 facility is a breeding facility that is least likely to contain CWD-positive breeder deer. Additionally, because a TC 1 facility with "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program is considered to be adequately monitoring for CWD, there are no additional testing requirements imposed by the new rules on TC 1 facilities.

New §65.92(b)(2) establishes that a breeding facility is a TC 2 facility if it is not a Tier 1 facility and it has returned "not detected" CWD test results for either 4.5 percent (or more) of the average number of deer at least 16 months of age (or 12 months of age, if the facility is participating in the TAHC herd certification program) within the facility during the previous two reporting years, or 50 percent of all eligible mortalities during the previous two reporting years, whichever represents the lowest number of deer tested.

From an epidemiological point of view, not being a Tier 1 deer breeding facility is not, in and of itself, sufficient to provide any meaningful level of statistical confidence that CWD is not present within the population at the facility. However, in concert with effective surveillance, increased confidence can be obtained. The success of control and mitigation of infectious diseases is dependent on how soon the disease is detected after it is introduced, how quickly the source of the outbreak is identified, and how quickly infected animals can be isolated. The most effective first step in managing a disease outbreak in a herd of animals is to isolate those individuals known to have been in contact with infected individuals and then test those animals. Unfortunately, as noted previously, the only CWD tests for deer currently approved by USDA must be performed post-mortem (i.e., there is currently no accepted live-animal test). The department recognizes that deer breeders have a considerable investment in their facilities and permitted herds, and that preserving business continuity is an important consideration within the regulatory context.

The testing requirement to achieve TC 2 status in §65.92(b)(2) is the result of a statistical model developed by the department, in consultation with the TAHC, based on the reported average annual adult-mortality rate for all breeding facilities, which is approximately 4.5 percent. Testing 4.5 percent of the average adult population over two years is equivalent to 2.25 percent per year, which is equivalent to 50 percent of the expected eligible mortalities (since the average adult mortality rate is 4.5 percent per year). Or stated another way, testing 4.5 percent of the adult population on an annual basis is equivalent to testing 100 percent of expected adult mortalities, and testing 4.5 percent of the adult population over two years is equivalent to testing 50 percent of expected eligible mortalities.

As an example, a breeding facility (that is not otherwise prohibited by §65.92(a) from transferring deer) that had an average population of 100 adult deer over the preceding two reporting years, and that had not tested any eligible mortalities during the previous two reporting periods would have the option to submit five (i.e., 4.5 percent of 100, rounded up the next whole number) "not detected" test results, which could include test results obtained by the deer breeder but not submitted to the department during the previous two years. Alternatively, the breeding facility could submit "not detected" test results for 50 percent of eligible mortalities from the preceding two reporting years, provided at least one eligible mortality was tested. This standard is more stringent than the disease-testing requirements prior to the adoption of the emergency CWD breeder rules. The intent of this approach is to provide an enhanced method for detection of CWD early enough to allow for an effective response.

New §65.92(b)(3) establishes that a breeding facility is a TC 3 facility if it is neither a TC 1 nor a TC 2 facility. The new paragraph also stipulates that a TC 3 facility could achieve TC 2 status by submission of "not detected" CWD test results for each breeder deer received by the facility from a CWD-positive site, each exposed deer transferred by the breeding facility to another breeding facility or released, and for 4.5 percent (or more) of the average number of adult deer within the facility during the previous two reporting years. Obviously, a TC 3 facility represents the lowest confidence with respect to the presence of CWD. However, the testing of additional deer as provided in new §65.92(b)(3)(B) sufficiently increases the confidence level to enable a TC 3 facility to increase in status to a TC 2 facility.

New §65.92(b)(3)(C) requires all deer transferred from a TC 3 breeding facility to a DMP facility, including buck deer that are returned from a DMP facility to a breeding facility, to be eartagged with an RFID/NUES tag. As has been discussed, the new rules create a classification system for breeding facilities that is based on the extent to which the facility is believed to have been exposed to CWD and the testing history of the facility. A DMP au-

thorizes the temporary detention of free-ranging deer for breeding purposes. A DMP may also authorize the introduction of breeder deer into a DMP facility. In addition, a breeder buck that is introduced into a DMP facility may be returned to a breeding facility. A breeder deer that is introduced to a DMP pen thus comes into contact with free-ranging deer, and when the deer are released, they come into contact with additional free-ranging deer. When a TC 3 breeder deer is transferred to a DMP facility, this scenario is epidemiologically analogous to the release of breeder deer to a Class III release site, for which new §65.92(a)(3) also imposes eartagging requirements.

New §65.92(c) allows breeder deer to be temporarily transferred to a veterinarian for medical care. The department has determined that the temporary movement of breeder deer to a veterinary medical facility for treatment poses a low risk of transmitting CWD.

New §65.93, concerning Release Sites - Qualifications and Testing Requirements, sets forth provisions generally applicable to locations where breeder deer are released to the wild. As noted previously, the new rules classify release sites based on relative level of risk. More specifically, the classification of a release site is based on the classification of the deer breeding facility from which deer were liberated onto the release site. New §65.93 establishes testing and other requirements associated with release sites generally and with specific classes of release sites.

New §65.93(a) establishes those provisions generally applicable to release sites.

New §65.93(a)(1) stipulates that an approved release site consists solely of the specific tract of land and acreage designated as a release site in TWIMS. This is necessary to ensure clarity and the ability to identify the extent of a specific release site. New §65.93(a)(2) requires all release sites to be surrounded by a fence of at least seven feet in height that is capable of retaining deer at all times, and requires the owner of the release site to be responsible for ensuring that fencing and associated infrastructure retain the deer under ordinary and reasonable circumstances. In order to provide a measure of confidence that CWD is detected and contained, it is necessary to identify the specific location where breeder deer are authorized to be released. Similarly, it is necessary to establish a level of vigilance sufficient to give reasonable assurance that breeder deer are not allowed to leave the specific premise where they were released. Additionally, since some release sites have testing requirements for all or a portion of hunter-harvested deer, as well as harvest documentation for all deer harvested on site, it is necessary to delineate the specific acreage to which these requirements apply.

New §65.93(a)(3) sets forth the on-site harvest documentation requirements for deer harvested on Class II and Class III release sites. The new paragraph requires the owner of a Class II or Class III release site to maintain a daily harvest log at the release site. For each deer harvested from a Class II or Class III release site, the new rules require the hunter's name and hunting license number (or driver's license number, if the daily harvest log is also being used as a cold storage/processing book) to be entered into the harvest log, along with the date of kill, type of deer killed, any alphanumeric identifier tattooed on the deer, the tag number of any RFID or NUES tag affixed to the deer; and any other identifier and identifying number on the deer. The new provision enables the department to identify all deer harvested at a given release site (including deer that were released breeder deer) if an epidemiological investigation becomes necessary. The new paragraph also requires the daily harvest log to be presented to any department employee acting within the scope of official duties and for the contents of the daily harvest log to be reported to the department via TWIMS by no later March 15 of each year.

New §65.93(a)(4) provides that a release site's status cannot be altered by the sale or subdivision of a property to a related party if the purpose of the sale or subdivision is to avoid the requirements of this division. The department believes that a landowner subject to the provisions of the new rules should not be able to avoid compliance simply by selling, donating, or trading the property to another person if the purpose of the transaction is to avoid the requirements of this division.

New §65.93(a)(5) requires the owner of a release site, as a consequence of consenting to the release of breeder deer on the release site, to submit all required CWD test results to the department as soon as possible but not later than May 1 of each year. The new rules contemplate a disease management strategy predicated on the results of CWD testing. Incomplete, inadequate, or tardy reporting of test results confounds that strategy. For this reason, the new paragraph establishes a date certain for reporting test results to the department. The new paragraph also provides that failure to timely submit test results will result in the release site being declared ineligible to be a destination for future releases. In light of the threat that CWD poses to deer, it is prudent to suspend release site privileges for any landowner who does not comply with the testing requirements for release sites.

New §65.93(a)(6) prohibits any person from intentionally causing or allowing any live deer to leave or escape from a release site. The new provision is necessary to ensure that once a release site has received breeder deer, no deer from the release site (breeder deer or free-ranging deer) are able to come into contact with surrounding populations of free-ranging deer.

New §65.93(b) enumerates the three categories of release sites and the testing requirements for each.

New §65.93(b)(1) establishes that a release site is a Class I release site if it is not a Tier 1 facility and it receives breeder deer only from TC 1 facilities. Because a TC 1 facility has a "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program, a TC 1 facility is considered to be at relatively low risk for CWD. As a result, there are no additional testing requirements imposed by the new rules on Class I release sites.

New §65.93(b)(2)(A) establishes that a release site is a Class II release site if it is not a Tier 1 facility, receives any breeder deer from a TC 2 facility, and receives no breeder deer from a TC 3 facility. The Class II designation is an intermediate category intended for release sites that have not received breeder deer from higher risk sources (i.e., Tier 1 and/or TC 3 facilities) but at the same time have not received deer solely from TC 1 facilities. Such release sites are considered to present more risk than Class I but less risk than Class III for harboring CWD.

New §65.93(b)(2)(B) imposes testing requirements for Class II release sites. Specifically, if any deer are harvested by hunters on a Class II release site during an open deer season, the landowner must test either a number of deer equivalent to 50 percent of the number of breeder deer released at the site between August 24, 2015 and the last day of lawful deer hunting on the site in the current year, or 50 percent of all deer harvested by hunters, whichever value is lower. The new paragraph also provides that if any hunter-harvested deer were breeder deer released between August 24, 2015, and the last day of lawful hunting on the site in the current deer season, 50 percent of

those deer must be submitted for CWD testing, which may be counted to satisfy the requirements of §65.93(b)(2)(B).

As mentioned previously in this preamble, from an epidemiological perspective, not being a Tier 1 facility is not, in and of itself, sufficient to provide high statistical confidence that CWD is not present or has not been introduced within the population at the release site. However, in concert with effective surveillance, increased confidence can be obtained. The success of control and mitigation of infectious diseases is dependent on how soon the disease is detected after it is introduced, how quickly the source of the outbreak is identified, and how quickly infected animals can be isolated. Although the most efficacious monitoring regime on a release site would be to require 100 percent of all harvested deer to be submitted for testing, based on feedback from stakeholders, the department is requiring the testing of 50 percent of hunter-harvested deer.

New §65.93(b)(3) establishes that a release site is a Class III release site if it is a Tier 1 facility (i.e., it has received deer from a CWD-positive facility) or it receives deer from an originating facility that is a TC 3 facility. The Tier 1 and TC 3 designations represent those environments that have the highest likelihood of harboring CWD; accordingly, the rule requires the landowner of a Class III release site to test 100 percent of all hunter-harvested deer or one hunter-harvested deer per breeder deer released between August 24, 2015 and the last day of lawful deer hunting on the site in the current year, whichever results in the greatest number of test results. As noted above, Class III release sites pose a higher risk for CWD; therefore, it is appropriate to test deer harvested from Class III release sites at a higher rate.

The department again emphasizes that the new rules are an interim replacement for the current emergency CWD breeder rules adopted on August 18, 2015. As noted previously, based on additional information from the ongoing epidemiological investigation, disease surveillance data collected from captive and free-ranging deer herds, guidance from the TAHC, and input from stakeholder groups, the department intends to review the interim rules following the close of the deer season and present the results of that review to the Commission at the March 2016 Commission meeting for possible modifications.

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The department received 373 comments opposing adoption of the proposed rules. Those comments, accompanied by the department's response to each, follow. The department notes that because many individual comments contained multiple statements, the number of responses is larger than the total number of comments.

Need for Regulatory Certainty

One hundred and one commenters opposed adoption and stated that the "deer industry in Texas is in dire need of a permitting process that provides regulatory certainty while maintaining a climate conducive to business growth." The department acknowledges the value of regulatory certainty, and as noted above and in the proposal preamble, the department also acknowledges that the deer industry is impacted by the regulations. However, the department disagrees that the rules are an inappropriate response to the discovery of CWD, especially when considered in light of the potential significant impacts of CWD for Texas and its annual, multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies. The department also notes that the rule as adopted includes an August 2016 expiration date. It is the intent of the department to revisit the department's regulatory response to CWD in the spring of 2016 at which point a longer-term strategy will be considered.

Spread of Fear

One hundred and one commenters opposed adoption and stated that the rules have resulted in the spread of fear throughout the outdoor community. The department again disagrees and responds that the knowledge that CWD exists in captive deer populations is, in and of itself, cause for hunters and landowners to have concerns regarding the deer being hunted. As noted elsewhere in this preamble, human dimensions research suggests that hunters will avoid areas of high CWD prevalence. The department also believes that given the fact that CWD is present in at least two deer breeding facilities and the potential for exposure and spread of CWD, it is understandable that some landowners might be reluctant to obtain deer from within this highly interconnected network of deer breeding facilities in which CWD has been discovered. No changes were made as a result of the comment.

Perceived Emergency

One hundred and one commenters opposed adoption and stated that the rules were based on a perceived emergency. The department disagrees with the comment and responds that this comment is apparently intended to address the previously adopted emergency CWD breeder rules. Since the adopted rules were adopted following the Administrative Procedure Act's notice and comment requirements, the issue of whether an emergency exists or existed is not germane to the adopted rules. However, the department also notes that CWD is a communicable, fatal disease that has the potential to profoundly alter the dynamics of deer hunting and deer management. Because there is no question that CWD exists in captive cervid populations in Texas and has been spread by the movement of captive cervids in Texas, there continues to be an immediate danger to Texas deer populations that warrants regulatory action by the department. No changes were made as a result of the comment.

Change in Circumstances Due to Index Herd Findings.

One hundred and one commenters opposed adoption and stated that "the environment upon the issuance of the [emergency] Rules in August was dramatically different than it is today." The comment also states that the test results from the index facility

"validate that there is no statewide emergency to white-tailed deer" and the Commission should not adopt the rules based on the current evidence. The comment goes on to state that the department now has "a wealth of knowledge it did not have previously." The comment further states that because no additional cases of CWD have been discovered in the index facility, that fact "narrows the impact of CWD" and "narrows the scope of the investigation to find the source," that "the abundance of non-detected results significantly changes the dynamics of the rules," and that this proves there is no statewide emergency. While the department acknowledges that it is continuing to gather information, including results from additional testing, the department disagrees that the environment (assumed to mean the general state of affairs with respect to the discovery of CWD and the department's knowledge of CWD) has sufficiently changed to eliminate the need for the rules. Confronted with a transmissible, fatal disease, the department (in collaboration with TAHC and other epidemiological and disease management experts) has pursued a scientifically-based program of isolating the index facility, identifying the source and destination of all deer that entered or left the index facility, and prescribing a testing regime for all deer breeding facilities that either transferred deer to or from the index facility or had not tested for CWD at an intensity that could reasonably exclude those facilities from being potential reservoirs for the disease (via transfer from other deer breeding facilities not immediately connected to the index facility). This situation is still the case and will remain so until a definitive characterization of the epidemiological reality of CWD in captive and free-ranging populations is resolved (i.e., the specificity, temporality, biological gradient, and other factors that become known through time via ongoing epidemiological investigation). The most effective response to a disease outbreak (even when the source is known) is possible only when the nature, magnitude, and scope of the threatening agent and its pathways are known. It follows that when such parameters are unknown, as is the case with CWD at present, there is an increased (not decreased) duty incumbent upon the department and TAHC to investigate, analyze, and respond to the threat. Additionally, it is a well-established tenet of epidemiology that a small factor of association (e.g., five deer out of 100,000 or one breeder facility out of 2,000) does not preclude a causal effect (the spread of CWD to additional breeding facilities and to free-ranging populations). Also, as noted elsewhere in this preamble, CWD has since been discovered at an additional deer breeding facility. The department further responds that, and as noted elsewhere in this preamble, the intensity of testing requirements imposed by the previous CWD rules governing deer breeders provided a very low statistical confidence of detecting CWD if it existed in a facility; therefore, the testing requirements contained in the new rules continue to be necessary.

Scope of Rules

Twelve commenters opposed adoption and stated that the rules were unfair or constituted overregulation, overreach, or persecution. The department disagrees with the comment and responds that the rules represent the minimum measures necessary to discharge the department's statutory duty to protect the state's wildlife resources. The rules' classification of breeding facilities and release sites based on risk of exposure to CWD, with requirements based on a breeding facility's and release site's risk of exposure to CWD, was part of the department's effort to ensure that the rules were not, in fact, broader than necessary. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules are unfair because they affect deer that have not been exposed to CWD. The department disagrees with the comment and responds that deer are affected by the status of the facility within which they are kept or to which they are liberated. Status is a direct indicator of the potential of a facility to contain or spread CWD. A TC 1 breeding facility or Level I release site represents a higher level of certainty that CWD is not present and cannot be spread. At other facilities there is some increased uncertainty, either because deer within the facility have at some previous time come into contact with deer from a CWD-positive facility or there has not been sufficient testing to establish confidence that CWD is not present. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules should apply only to new permittees and not to existing permittees. The department disagrees with the comment and responds that exempting current permittees from compliance would not achieve the objectives of the rules, given that CWD has been discovered and spread from a currently permitted deer breeding facility. Allowing current permittees to move breeder deer without restriction would significantly increase the risk of spreading CWD. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules shouldn't "shut down the whole state." The department disagrees with the comment and responds that the rules do not completely prohibit the movement of breeder deer in the entire state. The rules as adopted impose precautionary restrictions on the movement of breeder deer based on level of risk of exposure to CWD. Only the two deer breeding facilities in which CWD has been detected are prohibited from moving deer regardless of testing history. All other facilities have the opportunity, upon compliance with the rules, to achieve a status in which deer movement is allowed. No changes were made as a result of the comment.

Basis of Rules

Four commenters opposed adoption and stated that the department is not using science. The department disagrees with the comment and responds that, as explained in more detail elsewhere in this preamble, the department enlisted veterinarians, epidemiologists, and wildlife disease specialists, including, but not limited to members of the CWD Task Force and the CWD Working Group, which consisted of scientific experts with the TAHC, TVMDL, and USDA-APHIS-VS, to advise and guide the department in the development of the rules. No changes were made as a result of the comment.

One commenter opposed adoption and stated that no agency has the right to change rules on a whim. Similarly, five commenters opposed adoption and stated that the rules were based on personal opinions and agendas. In addition, one commenter opposed adoption and stated that the rules were politically motivated. The department disagrees with the comments and responds that the rules were developed in carrying out the department's duty to protect the state's wildlife resources. The department was guided by the three goals set out in the Chronic Wasting Disease Management Plan: (1) Minimize CWD risks to the free-ranging and captive white-tailed deer, mule deer, and other susceptible species in Texas; (2) Establish and maintain support for prudent CWD management with hunters, landowners, and other stakeholders; and, (3) Minimize direct and indirect impacts of CWD to hunting, hunting related economies, and conservation

in Texas. Furthermore, as explained elsewhere in this preamble, the rules were developed in consultation and with input and guidance from veterinarians, epidemiologists, and wildlife disease specialists, including, but not limited to members of the CWD Task Force and the CWD Working Group, which consisted of scientific experts with the TAHC, TVMDL, and USDA-APHIS-VS. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules are an attempt by big ranching interests to monopolize deer genetics. The department disagrees with the comment and responds that, as noted elsewhere in this preamble and in response to other comments, the rules were developed in carrying out the department's duty to protect the state's wildlife resources, were guided by the three goals of the Plan, and were developed in collaboration with veterinarians, epidemiologists, and wildlife disease specialists. It should also be noted that the provisions of the rules applicable to landowners (release sites) do not include distinctions based on acreage. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules are intended to generate additional tax revenue for the department. The department disagrees with the comment and responds that the rules as adopted contain no component to generate revenue. No changes were made as a result of the comment.

Department's Authority

One commenter opposed adoption and stated that the department should be relieved of its regulatory authority over breeder deer. The department neither agrees nor disagrees with the comment and responds that under the provisions of the Parks and Wildlife Code, the department is the agency designated by the legislature to regulate deer breeding in Texas. No changes were made as a result of the comment.

Nature of CWD

One commenter opposed adoption and stated that CWD is nothing more than dementia in deer. The department disagrees with the comment and responds that unlike dementia, CWD is a transmissible disease. No changes were made as a result of the comment.

One commenter opposed adoption and stated that CWD is not a disease that is confined to breeder deer. The department agrees with the comment and responds that the rules, as adopted, are intended to address the susceptible species of wildlife over which the department has regulatory authority. No changes were made as a result of the comment.

One commenter opposed adoption and stated that everything has been blown out of proportion. The department disagrees that the regulatory response to the discovery of CWD has been excessive and responds that as explained elsewhere in this preamble, the threat of CWD is real and has the potential to result in population declines and to significantly impact the state's hunting-based economy. As a result, the department's response to that threat is required. No changes were made as a result of the comment.

One commenter opposed adoption and stated that deer and elk herds in other states where CWD has been confirmed are thriving. The department disagrees with the comment and responds that the long-term effects of CWD in free-ranging populations are unknown at this time. While some populations in which CWD exists may appear stable, other populations have experienced significant declines and CWD is considered to be a significant contributor to at least some of those population declines. The human dimensions research that indicates hunters will avoid areas of high CWD prevalence is cause for concern as well. Therefore, the department believes it is prudent to treat CWD as a serious threat in order to protect Texas deer populations and the economies dependent upon them. No changes were made as a result of the comment.

Fifteen commenters opposed adoption and stated, variously, that CWD is not a risk, not a threat, and not an emergency. The department disagrees with the comments and responds that CWD is a communicable, fatal disease that has the potential to profoundly alter the dynamics of deer hunting and deer management, and because there is no question that it exists in captive cervid populations in Texas and has been spread by the movement of captive cervids in Texas, there is in fact a clear and present danger to Texas deer populations that constitutes an emergency. No changes were made as a result of the comments.

Other Diseases

Three commenters opposed adoption and stated that the department does nothing about epizootic hemorrhagic disease (EHD) or anthrax. One commenter opposed adoption and stated that other diseases pose greater risks to deer populations. The department disagrees that the existence of other diseases should preclude the department from responding to CWD. Unlike EHD or anthrax, CWD is an insidious and persistent disease of long duration that may impact a deer population for many years. While EHD and anthrax can have significant short-term population impacts, the potential for long-term population impacts caused or contributed by CWD cause much more concern. In the absence of prudent disease management, CWD continuously impacts a population and increases in prevalence through time. No changes were made as a result of the comments.

Effectiveness of or Need for Rules

One commenter opposed adoption and stated that the rules would not be effective. In addition, two commenters stated that CWD cannot be stopped, so the rules won't matter anyway. The department disagrees with the comments. The department acknowledges that stopping, containing, or attenuating CWD is very difficult once an environment has been contaminated with infectious prions and where CWD has been established for a long period before initial detection. As a result, for disease eradication, early detection of CWD infected animals is paramount. The time between introduction and detection of the disease is the most critical factor impacting the ability to control and possibly eradicate the disease before it can become established. Therefore, the rules provide for enhanced surveillance in an effort to detect CWD. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department's approach has failed in other states. The department disagrees with the comment and responds that no other state where CWD has been detected has employed the model implemented under the rules as adopted. No changes were made as a result of the comment.

Three commenters opposed adoption and stated that the current rules work just fine. The department disagrees with the comment and responds that the current rules, which require the testing of 20 percent of eligible mortalities as a prerequisite for the movement of breeder deer, are inadequate for establishing confidence

that CWD can be detected within a breeder facility where it exists. No changes were made as a result of the comment.

One commenter opposed adoption and stated that CWD has already been "found and dealt with." The department disagrees with the comment and responds that among the many unknowns surrounding this disease outbreak include how CWD was introduced to the index facility, how many infected animals were dispersed to other locations, whether CWD has subsequently been introduced to free-ranging deer, and how long it will take to determine that CWD has been successfully isolated at the two known infection sites. Therefore, it would be incorrect to say that CWD has been dealt with. No changes were made as a result of the comment.

Intensity of Testing of Free-Ranging Deer

Several commenters opposed adoption based on the intensity of testing required by deer breeders as compared to the intensity of testing in free-ranging deer. The department disagrees with those comments as follows, but as general background on the level of surveillance of free-ranging deer, notes that testing a higher proportion of mortalities within a herd/population does not necessarily equate to more intensive sampling and/or a higher probability of detecting the disease. In calculating appropriate sample sizes, the department relies on probability detection tables constructed from a computation put forward by researchers Cannon and Roe that has been used extensively over many years for sample size detection determinations.

This computation and resulting tables demonstrate that testing all eligible mortalities within a captive herd for CWD in one year will not establish the same level of confidence that will be achieved for a population in which hundreds of deer are sampled in a single year, even though those hundreds of deer may represent a small percentage of all adult mortalities that occurred within that population during the year. Confidence is established by the sheer number of tests, irrespective of the number of mortalities that occurred within that population during some period of time. The larger the population, the smaller the proportion of samples required to establish sufficient confidence. For example, to establish 99 percent confidence that CWD would be detected in a population where it occurred at 1 percent prevalence, 99 samples would be required for a population of 100 deer, whereas only 367 samples would be required for a population of 1,000 deer. The same confidence can be achieved with only 433 samples in a population with an infinite number of deer.

The department has obtained a sufficient number of samples from free-ranging deer in nine of the 10 ecological regions to provide 99 percent confidence that CWD would have been detected if it existed in 0.5 percent of any of those populations when CWD surveillance began in 2002. Because of considerably lower deer densities and lower deer harvest in the High Plains ecoregion, the department has collected enough samples in that ecoregion to achieve 95 percent confidence that CWD would be detected if only 1 out of 100 adult deer was infected when surveillance began. Additionally, the department significantly increased surveillance effort during the 2015-16 hunting season to provide considerable confidence that CWD would be detected in any of 33 Resource Management Units if CWD currently exists in low prevalence within any of those populations. As of December 20, 2015, department staff had collected >9,000 samples statewide during the 2015-16 hunting season alone. No changes were made as a result of the comments.

One commenter opposed adoption and stated that there is no evidence that breeder deer are more likely to carry CWD than free-ranging deer, so there is no reason to test breeder deer at a dramatically higher intensity. The department disagrees with the comment and, in addition to the information above about intensity of testing, responds that the rules as adopted are not predicated on an assumption that breeder deer are more likely to carry CWD than free-ranging deer. For the reasons explained elsewhere in this preamble, because CWD was discovered in captive breeding facilities in Texas and there is a high degree of interconnectivity between deer breeding facilities in Texas, it is appropriate that movement of breeder deer be predicated upon meeting the testing and other requirements provided in the rules. No changes were made as a result of this comment.

One commenter opposed adoption and stated that breeder deer are tested at much higher rates than free-ranging deer and that hunters should be required to test at the same rate that deer breeders are. The department disagrees with the comment and as explained previously, responds that in fact, free-ranging deer populations are tested at levels that provide greater confidence than testing levels in most deer breeding facilities. No changes were made as a result of the comment.

Seven commenters opposed adoption and stated that MLDP cooperators should be required to test harvested deer. MLDP cooperators are landowners who participate in the department's Management Lands Deer Program (MLDP). (See, 31 TAC §65.26.) The MLDP allows landowners involved in a formal management program to have the state's most flexible seasons and bag limits. The program is incentive-based and habitat focused. The MLDP has been a very successful vehicle for encouraging deer harvest, deer management, and habitat conservation. The department disagrees that MLDP cooperators should be required to test at levels other than those as provided in the rules. Properties under MLDP that meet the criteria for a Level II or Level III release site under the rules would be required to test harvested deer as provided in the rules. However, from a disease management perspective, there is no reason to require MLDP cooperators to test harvested deer at a higher level because there is no additional threat of a disease being transmitted from those MLDP sites as a result of engaging in MLDP activities. However, it should also be noted that any landowners participating in MLDP who intend to trap and transport live deer from their properties pursuant to Triple T permit will be required to comply with the CWD testing requirements for Triple T trap sites, which are the most stringent testing requirements of all permit holders authorized to engage in intensive deer management practices in Texas. No changes were made as a result of the comment.

One commenter opposed adoption and stated that if free-ranging deer were tested at the same intensity as breeder deer, CWD would be discovered in the free-ranging population. The department disagrees with the comment and responds that as explained in more detail previously, breeder deer are not tested at a statistically greater intensity than free-ranging deer. Also, due to the number samples collected from free-ranging deer previously and over the 2015-2016 hunting season, the probability of detecting CWD in free-ranging deer populations is actually greater than the probability of detecting CWD in captive deer under current rules. No changes were made as a result of this comment.

Four commenters opposed adoption and stated that the testing intensity should be the same for everyone. The department disagrees with the comment and responds that as explained in

more detail previously, the testing intensities that the rules impose for deer breeders and release sites are predicated on the low occurrence of mortalities within the discrete populations in those facilities, whereas the testing of free-ranging deer over time has created a sample size that allows greater statistical confidence; thus, it is not necessary to mandate CWD testing on free-ranging deer. To the extent the commenters are suggesting that all classes of breeding facilities and release sites should be required to test at the same level, the department disagrees and responds that the levels of testing provided or required are based on the level of risk associated with a specified breeding facility or release site. No changes were made as a result of the comment.

Six commenters opposed adoption and stated that all deer, including hunter-harvested deer, should be required to be tested for CWD. While the department agrees that the testing of hunter harvested deer is an important component of disease management, and notes that the rules, as adopted, address the testing of hunter harvested deer at release sites, the department disagrees that all hunter-harvested deer should be required to be tested for CWD. As explained in more detail in the response to other comments, through voluntary cooperation by hunters, the department has obtained sufficient samples from free-ranging deer to provide an enhanced level of assurance of detection of CWD. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules require 90 percent of deer breeders to test 50 percent of released deer, but free-ranging deer harvested by hunters are not required to be tested. The department agrees that the rules require CWD testing at certain intensities at certain breeding facilities and release sites but do not otherwise mandate CWD testing; however, as explained above, free-ranging deer are already being tested on a voluntary basis to a high degree of statistical confidence, which makes the mandatory testing of free-ranging deer unnecessary. As of December 20, 2015, department staff have collected >9,000 hunter-harvested samples statewide during the 2015-16 hunting season. No changes were made as a result of the comment.

Level of Deer Breeder Testing

One commenter opposed adoption and stated that a TC 2 breeder facility that meets the requirement to test 4.5 percent of the deer within the facility or 50 percent of the eligible mortalities should be allowed to transfer deer to anyone and should not be considered to have "at-risk" deer. The department disagrees with the comment and responds that in order to be deemed a low risk facility (TC 1 status), a deer breeding facility must not have received deer from the index and facility and must have "fifth-year" or "certified" status in the TAHC herd certification program. The reason for this is that a five-year period is believed to be a sufficient period of time for the clinical manifestations of CWD to present in a mature deer; therefore, a five-year testing history of all eligible mortalities, coupled with the TAHC herd certification program requirement that "fifth-year" or "certified" herds cannot receive deer from herds of a lower status, gives reasonable confidence that CWD is not present and will not be spread. The two-year window for the TC 2 testing requirements does not afford equivalent confidence. No changes were made as a result of the comment.

One commenter opposed adoption and stated that TC 1 status should be afforded to every deer breeder who tests 100 percent of mortalities. The department disagrees with the comment and responds that TC 1 status is assigned to facilities for which sufficient confidence that CWD is not present has been established. Such confidence is gained not simply by the percentage of mortalities tested, but continuing to test all eligible mortalities for five consecutive years (and thereafter) while also verifying a reconciled herd inventory during annual inspections. As stated previously, certified herds also maintain a "closed population," as they receive deer only from other certified herds. No changes were made as a result of the comment.

One commenter opposed adoption and stated that a TC 3 breeding facility should be given TC 2 status upon one year of testing 4.5 percent of a population. The department disagrees with the comment and responds that one year of test results is not a sufficient sample size to conclude with confidence that a deer breeding facility does not contain CWD. Also, as noted elsewhere in this preamble, a deer that has been exposed to CWD may not display symptoms for several years. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the testing requirements of the current rules were more than sufficient to stop CWD. The department disagrees with the comment and responds that the efficacy of the previous testing requirements provide an extremely low level of confidence for detecting the disease. No changes were made as a result of the comment.

Testing Responsibility

One commenter opposed adoption and stated that testing should be the responsibility of the deer breeder. The department agrees that deer breeders should undertake testing responsibility as provided in the rules. However, the department disagrees that only deer breeders should be responsible for all testing. The department also disagrees that only deer in breeding facilities should be required to be tested. Given the number of breeder deer that have been liberated onto release sites, samples collected from liberated breeder deer that are ultimately harvested by hunters is necessary to enhance the probability of detecting the disease where it exists. No changes were made as a result of the comment.

Three commenters opposed adoption and stated either that the department should pay for the testing of breeder deer or that it is unfair that deer breeders must bear the cost of testing while deer from free-ranging populations are tested at no cost. The department disagrees with the comment and notes that the required testing of free-ranging hunter-harvested deer on release sites is the responsibility of the landowner. The department acknowledges that department is absorbing the costs for testing hunter-harvested deer voluntarily provided. The risk of exposure to CWD is enhanced by the artificial movement of deer; therefore, it is appropriate for the recipient of a permit or authorization that allows such movement of deer to be responsible for the cost of testing associated with such movement. No changes were made as a result of the comment.

Release Site Testing

One hundred and one commenters opposed adoption and stated that the testing and surveillance standards should be amended. The comment goes on to state specifically that the testing requirements of the rules should be altered to end all mandatory CWD testing at Class II release sites, which "would not impact the functions of the Department in containing the spread of CWD." One commenter opposed adoption and stated that testing should not be required at release sites unless the release site is linked to a positive test result. Three commenters opposed adoption and stated that most Class II release sites

have nothing to do with the index facility. Two commenters opposed adoption and stated that there should be no testing requirements for Class II release sites. The department disagrees with the comments and responds that since a deer infected with CWD may not display symptoms of the disease for several years, the ability of the department to identify facilities directly impacted (i.e., facilities that received deer from the index facility, referred to as "Tier 1 facilities") does not eliminate the need to test deer at release sites that receive deer from TC 2 breeding facilities. A release site is designated as a Class II release site on the basis of increased risk of containing exposed deer. Under the rules, a release site is a Class II release site if deer from a TC 2 breeding facility have been released on it. TC 2 breeding facilities do not have a testing history that provides sufficient confidence that CWD does not exist in those facilities; therefore, testing of hunter harvested deer on Class II release sites is necessary in order to establish additional confidence that CWD was not introduced from the originating breeding facilities. As noted previously, the department estimates that within the last five years at more than 728 locations in Texas (including 384 deer breeders) either received deer from the index facility or received deer from a deer breeder who had received deer from the index facility. As a result, the department cannot assume that a facility is free of CWD simply because it did not receive deer directly from the index facility. The department also disagrees that ending testing requirements for Class II release sites wouldn't impact department efforts to contain CWD. Given the previous CWD testing requirements, CWD could very well exist in additional deer breeding facilities and release sites directly or indirectly linked to CWD-positive facilities. To cease enhanced testing requirements would reduce the department's ability to detect and contain the disease. No changes were made as a result of the comments.

One commenter opposed adoption and stated that released deer should not be tested. Similarly, one commenter opposed adoption and stated that testing should not be required at release sites. The department acknowledges that under the rules as adopted, release sites that receive deer from a TC 2 or TC 3 deer breeding facility are required to test hunter-harvested deer at a level stipulated in the rules. However, the department disagrees with the comments and responds that in light of the discovery of CWD in a breeding facility that transported breeder deer to more than 728 locations in Texas (including 384 deer breeders), including to deer breeders who subsequently transported breeder deer to additional locations, the previous testing history for TC 2 and TC 3 breeding facilities is not sufficient to provide the necessary confidence that CWD does not exist in those facilities. Therefore, since Class II and Class III release sites received breeder deer from TC 2 or TC 3 breeding facilities, the rules as adopted require testing of hunter harvested deer on Class II and Class III release sites in order to establish additional confidence that CWD was not transmitted from the originating breeding facilities. No changes were made as a result of the comments.

One commenter opposed adoption and stated that no other private property owners are required to test for CWD. The department disagrees with the comment and responds that in addition to the testing of deer by release sites, private property owners engaged in Triple T activities have been required to test for CWD for a number of years. In addition, as noted elsewhere in this preamble, emergency rules were adopted to address movement of white-tailed or mule deer via a Trap, Transport and Transplant (Triple T) Permit (40 TexReg 7307) and Deer Management Permit (DMP) (40 TexReg 7305). In addition, interim DMP rules have been proposed (40 TexReg 9086) and will be considered for adoption by the Commission at its January 21, 2016 meeting. Those rules also involve the testing of deer by private property owners for CWD in order to engage in certain regulated activities. No changes were made as a result of this comment.

Method of Testing

Thirteen commenters opposed adoption and stated in one way or another that the rules should not require breeder deer to be killed. Similarly, one commenter opposed adoption and stated that the department doesn't have the right to decide if deer should live or die. To the extent that the commenters are suggesting that a deer breeder should not be required to test deer for CWD (which, under the rules as adopted, must be conducted post-mortem), the department agrees with the comment and responds that the rules do not require the testing of breeder deer unless the breeder seeks to engage in certain activities related to the transfer of deer. However, to the extent that the commenter is suggesting that deer breeders should not be required to test deer (including natural mortalities and/or deer euthanized for testing) as a prerequisite to engaging in certain activities under the rule, the department disagrees with the commenter and responds that, as explained elsewhere in this preamble, in order to provide a higher level of confidence that CWD will be detected, if it exists, testing of deer is necessary. As noted previously in this preamble, the only test currently certified by the USDA for CWD must be conducted post-mortem by extracting and testing the obex (a structure in the brain) or a medial retropharyngeal lymph node. Although the department is actively collaborating with researchers to investigate possible efficacious live-animal tests that can be integrated into the state's overall disease surveillance efforts, live animal testing standards that provide an equivalent level of predictability of detecting the disease in an infected herd (as compared to approved post-mortem tests) have yet to be developed. No changes were made as a result of the comments.

Seven commenters opposed adoption and stated that the rules should allow live-animal test results to count towards satisfaction of the testing requirements of the rules. The department disagrees with the comments and responds, as noted above, that although the department is collaborating with researchers to investigate possible efficacious live-animal tests, at this point, live animal testing standards that provide an equivalent level of predictability of detecting the disease in an infected herd (as compared to approved post-mortem tests) have yet to be developed. No changes were made as a result of the comments.

Fencing Requirements

One commenter opposed adoption and stated that the rules will impose economic hardship on deer breeders who are restricted to releasing deer only to high-fenced properties. The department disagrees with the comment and responds that department records indicate that the vast majority of breeder deer that are liberated are released on high-fenced properties. In addition, the potential for disease transmission from liberated breeder deer to other free-ranging deer is of concern, given that the source of CWD in the index facility is currently unknown and the large number of deer that have been released to the wild. In addition, in order to provide a measure of confidence that CWD is detected and contained, it is necessary to establish a level of vigilance sufficient to give reasonable assurance that liberated deer are not allowed to leave the specific premise where they were released. No changes were made as a result of this comment.

One commenter opposed adoption and stated that if breeder deer are the property of the people of the state they should be allowed to be released to low-fenced properties. The department disagrees with the comment and responds that white-tailed deer and mule deer are among the wildlife that are the property of the people of the state regardless of whether the deer are located in high-fenced, low-fenced, or unfenced property. However, the department disagrees that this fact should impact the rule's requirement regarding the release of breeder deer only to high-fenced properties. As explained elsewhere in this preamble, in order to provide a measure of confidence that CWD is detected and contained, it is necessary to establish a level of vigilance sufficient to give reasonable assurance that breeder deer are not allowed to leave the specific premise where they were released. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the high-fence requirement for release sites is illegal because the rules must apply to everyone equally. The department disagrees and notes that the high-fence requirement applies equally to all properties on which breeder deer are liberated. No changes were made as a result of the comment.

Genetics

One commenter opposed adoption and stated that prohibiting the release of breeder deer to low-fenced properties would prevent landowners from improving genetics. One commenter opposed adoption and stated that deer breeders keep the state's deer population restocked with good genetics. The department disagrees with the comment and responds that the desire to enhance genetics must be balanced against the need to protect captive and free-ranging deer. A landowner seeking to enhance genetics on the landowner's property will normally seek to contain liberated breeder deer to ensure that the landowner benefits from the genetics of the liberated deer. No changes were made as a result of the comment.

One commenter opposed adoption and stated that breeder deer could be used to breed out susceptibility to CWD and the offspring could be released to inoculate the free-ranging deer. The department disagrees with the comment and responds that very little is known about CWD, including whether or not susceptibility to it can be eliminated via selective breeding or line breeding and subsequently introduced to a wild population with any efficacy. No changes were made as a result of the comment.

Impact of Rules on Deer Breeders

One hundred and one commenters opposed adoption and stated that the deer breeding industry has been profoundly negatively impacted by the emergency CWD breeder rules and that the emergency CWD breeder rules have resulted in tens of millions of dollars of economic loss to deer breeders across the state, severely diminished a once-thriving market, resulting in hundreds of lost jobs, and are significantly injuring the deer breeding industry without due cause. Five commenters opposed adoption and stated that the purpose of the rules is to destroy or hinder deer breeders. Six commenters opposed adoption and stated that the rules will destroy the deer breeding business. Nine commenters opposed adoption and stated that the rules create hardship. One commenter opposed adoption and stated that deer breeders are being penalized for improving the deer herd. Although some of these comment appears to be directed at the emergency CWD breeder rules, since the provisions of the proposed rules and the rules as adopted are very similar to the emergency CWD breeder rules discussed in the comment, and since the comment was submitted as a comment on the proposed rules, the department will respond to the comment as a comment on the proposed rules. The department disagrees that the rules were intended to place an unwarranted burden on the regulated community. The department does acknowledge, as noted in the proposal preamble, that depending on a breeding facility's classification under the rules and the types of activities that the breeding facility seeks to undertake, there may be costs associated with additional testing. If the comments' reference to "tens of millions of dollars" is referring to marketplace behavior, the proposal preamble also noted that to the extent that any marketplace analysis can be conducted, it is difficult, if not impossible, to accurately separate and distinguish marketplace behavior that is the result of the proposed rules from marketplace behavior that is the result of the discovery of CWD. However, detection and containment of CWD is necessary to protect state's multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the rules are "significant and costly to breeders whose conditions and risk haven't changed." The department understands the intent of the comment to be similar to other comments asserting that breeders who have not received breeder deer directly from the index facility should not be required to test for CWD. The department disagrees with the comment and responds that a direct link to a facility where CWD has been detected is simply the highest, but not the only, level of risk. Facilities that have accepted deer from a TC 2 or TC 3 breeding facility, in the absence of reasonable test results over time, are not statistically excludable from being potential reservoirs for CWD; therefore, the rules require testing for all breeding facilities that do not meet the criteria for TC 1 breeding facility as a prerequisite to engaging in certain activities. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department does not have the right to affect hardworking families. The department assumes that this comment is intended to refer to families involved in deer breeding and families associated with properties on which breeder deer have been liberated. The department disagrees with the comment and responds that, as noted above, while the department recognizes that there could be costs associated with additional testing under the rules, the detection and containment of CWD is necessary to protect the state from the threat of CWD to the state's multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the rules discriminated against deer breeders. Similarly, seven commenters opposed adoption and stated that because the proposed rules affect only deer breeders, the department is guilty of profiling. The department disagrees with the comments and responds that since CWD was discovered in two deer breeding facilities and the degree of interconnectivity of among deer breeders, it is appropriate for the rules to address activities undertaken by deer breeders. However, as noted elsewhere in this preamble, the department has adopted requirements regarding other regulated activities associated with the movement of deer. Furthermore, the provisions of the rules are only a part of the department's overall CWD management strategy. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the department's economic analysis of the proposed rule ignored the fact

that persons will not buy breeder deer for release and breeders will not release to their own land because of the testing requirements. The department disagrees with the comment and responds that the department's economic analysis (including the small and microbusiness impact) noted that new rules would cause an adverse economic impact to deer breeders and release site owners who must undertake disease-testing requirements to continue certain activities. The analysis also noted that because CWD has been proven to be transmissible by direct contact (including through fences) and via environmental contamination, there may be adverse economic impacts unrelated to the proposed new rules in the event that CWD is confirmed in a breeding facility due to the possible reluctance of potential customers to purchase deer from a facility that accepted deer from a CWD-positive facility. Additionally, even in the absence of the rules, if CWD is detected within a breeding facility that accepted deer from a CWD-positive facility, there could be lost revenue to the permittee since potential purchasers who are aware of CWD would likely refrain from purchasing deer from such a facility. Therefore, the proposed new rules, by providing a mechanism to minimize the spread of CWD, could also protect the economic interests of the regulated community. The department also notes that the rules as adopted do not prohibit deer breeders from releasing deer to their own properties, provided the deer breeding facility is not an index facility and the release site is surrounded by a high fence. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules will impose economic hardship on deer breeders who are not connected to the index facility. Similarly, one commenter opposed adoption and stated that the department shouldn't change the rules in the middle of the game to affect deer breeders not connected to the index facility. One commenter opposed adoption and stated that rules penalize innocent deer breeders. One commenter opposed adoption and stated that CWD was found in only five breeder deer but the rules penalize everyone. One commenter opposed adoption and stated that deer breeders are being penalized for not testing. The department agrees that deer breeders who have not tested for CWD at sufficient intensity or who have accepted breeder deer from a TC 2 or TC 3 facility could incur increased operational costs as a result of the testing requirements imposed by the new rules as a prerequisite to the transfer of deer. The department also notes that while TC 1 breeding facilities have tested for CWD at a level that provides a higher level of confidence that the disease is not present and cannot be spread, there is some uncertainty associated with other breeding facilities, either because deer within the facility have at some previous time come into contact with individuals from a suspect facility or there has not been sufficient testing to establish confidence that CWD is not present. The department notes that the emergency CWD breeder rules and the new rules will provide regulatory certainty through the 2015-2016 hunting seasons. The Commission will reassess the new rules in the spring of 2016 to consider a longer-term response. The department also notes that the rules do not prevent a deer breeder from improving movement status by accumulating test results over time. No changes were made as a result of the comment.

Nature of Breeder Deer

One commenter opposed adoption and stated that breeder deer are livestock. The department disagrees with the comment and responds that white-tailed deer and mule deer are indigenous wildlife and therefore the property of the people of the state under Parks and Wildlife Code, §1.011. See, also, Tex. Agric. Code §1.003(3). No changes were made as a result of the comment.

Role of Deer Breeders

One commenter opposed adoption and stated that deer breeders are necessary because otherwise many people would not be able to hunt. The department disagrees with the comment and responds that while deer breeders are involved in hunting operations, most hunting opportunity does not involve breeder deer. No changes were made as a result of the comment.

Impact on Hunting

One commenter opposed adoption and stated that the rules will cause fear in hunters. Two commenters opposed adoption and stated that rules will be detrimental to hunting for years to come. The department disagrees with the comments and responds that the rules are part of an effort to protect hunting. Given the potential impact of CWD on hunting and hunting-related economies in Texas, for the reasons explained elsewhere in this preamble, regulatory action is necessary to protect hunting and related economies. No changes were made as a result of the comments.

Impact on Land Values

One commenter opposed adoption and stated that the rules will decrease land values because no one will purchase land if there are testing requirements for that land. The department, while agreeing that uncertainty surrounding the potential presence of CWD on a given tract of land could affect the land's value, disagrees that the rules impose testing requirements on anyone who purchases a tract of land; however, new §65.93(a)(4) provides that a release site's status cannot be altered by the sale or subdivision of a property to a related party if the purpose of the sale or subdivision is to avoid the requirements of the rules. No change was made as a result of the comment.

Impact on Rural Economy

Six commenters opposed adoption and stated that the rules will hurt the economy of rural Texas and result in reduced employment. The department disagrees with the comment and responds that the department's response to the discovery of CWD, including the rules, is in recognition that healthy wildlife populations are important to the state's multi-billion dollar ranching, hunting, real estate, tourism, and wildlife management-related economies. No changes were made as a result of the comment.

CWD in Mule Deer

One commenter opposed adoption and stated that the department's response to the discovery of CWD in free-ranging mule deer was not as drastic. The department disagrees with the comment and responds that the department's response to the discovery of CWD in free-ranging mule deer populations (codified at 31 TAC §§65.80 - 65.88) was more intensive than the new rules as adopted. The rules at §§65.80 - 65.88 require the mandatory testing of all deer harvested in the containment zone, prohibit the movement of breeder deer into, within, or from the containment zone, and prohibit the movement of breeder deer into, within, or from the high risk zone (unless the movement is from a deer breeder with certified status in the TAHC CWD herd certification program). Those rules also prohibit movement of deer pursuant to Triple T and DMP permitting activities into, within, or from the containment and high risk zones, although those activities are permitted in the buffer zone following the submission of considerably more "not detected" CWD test results than is required any-

where else in Texas. No changes were made as a result of the comment.

Duration of Rules

Five commenters opposed adoption and stated that the department was reneging on a promise that the emergency CWD breeder rules would not be permanent. The department disagrees with the comment and responds that the rules as adopted contain an expiration date of August 31, 2016. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules do not specify a time limit for movement restrictions on deer breeders. The department agrees with the commenter and responds that because the rules were intended to function on a temporary basis until a long-term strategy is developed, the department did not consider it necessary to address the applicability of the rules beyond the 2015-16 deer season and deer breeder reporting period. However, questions from the regulated community have caused the commission to adopt the rules with changes to clarify that a TC 3 breeding facility can attain TC 2 status by complying with the testing requirements of the rules for two years. No changes were made as a result of the comment.

Texas Wildlife Information Management Service

One hundred and one commenters opposed adoption and stated that the department's online reporting application (Texas Wildlife Information Management Service, or TWIMS) allowed the department to identify, contain, and manage CWD, resulting in the elimination of the emergency. The comment goes on to state that the deer industry "adamantly adheres to the direct traceability of movement through the TWIMS system" and that the facts "do not suggest there is any considerable threat to captive or wild white-tailed herds, based on the ability to transfer animals through the TWIMS system." The comment further states that the department "can immediately identify the facilities directly impacted by the five positives found and any positives found in future herds." Four commenters opposed adoption and stated that because TWIMS functioned perfectly, there is no need for the rules. The department disagrees with these comments. As noted elsewhere in this preamble, the issue of whether an emergency existed is not germane to this rulemaking. The department further notes that TWIMS is a database that functions to automate formerly manual reporting and notification conventions. While the department acknowledges that the TWIMS database is a valuable resource, from a disease management perspective, the availability of information does not obviate the need for an appropriate regulatory response to the discovery of CWD in a deer breeding facility. No changes were made as a result of the comment.

Other Comments

Five commenters opposed adoption and stated that the release of breeder deer should be prohibited. The department disagrees with the comments and responds that releases to high-fenced environments are defensible, since the population is contained and can be tested through time. No changes were made as a result of the comments.

One commenter opposed adoption and stated that testing should be required at Class 1 release sites. The department disagrees with the comments and responds that because a Class 1 release site receives deer only from sources that have been tested to the extent that there is a high statistical confidence that CWD is not present, there is no reason to require additional testing at the release site. No changes were made as a result of the comment.

One commenter opposed adoption and stated that deer breeding should be abolished. The department disagrees with the comments and responds that Parks and Wildlife Code, §43.352(a), authorizes the department to issue a permit to a qualified person to possess live deer in captivity. No changes were made as a result of the comment.

One commenter opposed adoption and stated that wildlife should not be genetically enhanced or farmed. The department disagrees with the comments and responds that Parks and Wildlife Code, §43.352(a), authorizes the department to issue a permit to a qualified person to possess live deer in captivity. No changes were made as a result of the comment.

One commenter opposed adoption and stated that release sites should be required to maintain fencing of greater than eight feet in height. The department disagrees with the comments and responds that the seven-foot standard established by the rule is sufficient to prevent deer from easily leaving a release site. No changes were made as a result of the comment.

The department received 701 comments supporting adoption of the rules as proposed.

The following groups and associations commented in support of adoption of the rules as proposed: Texas Farm Bureau, King Ranch, Texas and Southwestern Cattle Raisers Association, Ducks Unlimited, Archery Trade Association, Plateau Land and Wildlife Management, Audubon Texas, Pope and Young Club, Austin Woods and Waters Club, Quality Deer Management Association, Bexar Audubon Society, Rocky Mountain Elk Foundation, Boone and Crockett Club, Safari Club International - Houston Chapter, Coastal Bend Bays and Estuaries Program, Sierra Club - Lone Star Chapter, Hill Country Alliance, Texans For Saving Our Hunting Heritage, Hill Country Conservancy, Texas Bighorn Society, Texas Cattle Feeders Association, Lone Star Bow Hunters Association, Texas Chapter of The Wildlife Society, National Wild Turkey Federation, Texas Sportsman's Association, National Wildlife Federation, Texas Wildlife Association, Orion - The Hunters Institute, Wildlife Forever, Texas Conservation Alliance, and East Texas Woods and Waters Club.

The Texas Deer Association and the Deer Breeder Corporation commented against adoption of the rules as proposed.

The new rules are adopted under the authority of Parks and Wildlife Code, Chapter 43, Subchapter L, which authorizes the commission to make regulations governing the possession of breeder deer held under the authority of the subchapter; Subchapter R, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that white-tailed deer may be temporarily detained in an enclosure; Subchapter R-1, which authorizes the commission to establish the conditions of a deer management permit, including the number, type, and length of time that mule deer may be temporarily detained in an enclosure (although the department has not yet established a DMP program for mule deer authorized by Subchapter R-1); and §61.021, which provides that no person may possess a game animal at any time or in any place except as permitted under a proclamation of the commission.

The new rules affect Parks and Wildlife Code, Chapter 43, Subchapters C, E, L, R, and R-1.

§65.90. Definitions.

The following words and terms shall have the following meanings, except in cases where the context clearly indicates otherwise.

(1) Accredited testing facility--A laboratory approved by the United States Department of Agriculture to test white-tailed deer or mule deer for CWD.

(2) Breeder deer--A white-tailed deer or mule deer possessed under a permit issued by the department pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter.

(3) Confirmed--A CWD test result of "positive" received from the National Veterinary Service Laboratories of the United States Department of Agriculture.

(4) CWD--chronic wasting disease.

(5) CWD-positive facility--A facility registered in TWIMS and in which CWD has been confirmed.

(6) Deer breeder--A person who holds a valid deer breeder's permit issued pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter.

(7) Deer breeding facility (breeding facility)--A facility permitted to hold breeder deer under a permit issued by the department pursuant to Parks and Wildlife Code, Chapter 43, Subchapter L, and Subchapter T of this chapter.

(8) Department (department)--Texas Parks and Wildlife Department.

(9) Eligible mortality--A breeder deer that has died within a deer breeding facility and:

(A) is 16 months of age or older; or

(B) if the deer breeding facility is enrolled in the TAHC CWD Herd Certification Program, is 12-months of age or older.

(10) Exposed deer--Unless the department determines through an epidemiological investigation that a specific breeder deer has not been exposed, an exposed deer is a white-tailed deer or mule deer that:

(A) is in a CWD-positive facility; or

(B) was in a CWD-positive facility within the five years preceding the confirmation of CWD in that facility.

(11) Hunter-harvested deer--A deer required to be tagged under the provisions of Subchapter A of this chapter (relating to Statewide Hunting Proclamation).

(12) Landowner (owner)--Any person who has an ownership interest in a tract of land, and includes a landowner's authorized agent.

(13) Landowner's authorized agent--A person designated by a landowner to act on the landowner's behalf.

(14) NUES tag--An ear tag approved by the United States Department of Agriculture for use in the National Uniform Eartagging System (NUES).

(15) Originating facility--The source facility identified on a transfer permit.

(16) Reconciled herd--The deer held in a breeding facility for which the department has determined that the deer breeder has accurately reported every birth, mortality, and transfer of deer in the previous reporting year.

(17) Release site--A specific tract of land that has been approved by the department for the release of breeder deer under this division.

(18) Reporting year--For a deer breeder, the period of time from April 1 of one calendar year to March 31 of the next calendar year.

(19) RFID tag--A button-type ear tag conforming to the 840 standards of the United States Department of Agriculture's Animal Identification Number system.

(20) Status--The level of testing performed or required by a breeding facility or a release site pursuant to this division. For the transfer categories established in §65.92(b) of this title (relating to Transfer Categories and Requirements), the highest status is Transfer Category 1 (TC 1) and the lowest status is Transfer Category 3 (TC3). For the release site classes established in §65.93(b) of this title (relating to Release Sites - Qualifications and Testing Requirements), Class I is the highest status and Class III is the lowest.

(21) Tier 1 facility--Any facility registered in TWIMS that:

(A) has received an exposed deer within the previous five years or has transferred deer to a CWD-positive facility within the five-year period preceding the confirmation of CWD in the CWD-positive facility; and

(B) has not been released from a TAHC hold order related to activity described in subparagraph (A) of this paragraph.

(22) TAHC--Texas Animal Health Commission.

(23) TAHC CWD Herd Certification Program--The disease-testing and herd management requirements set forth in 4 TAC §40.3 (relating to Herd Status Plans for Cervidae).

(24) TAHC Herd Plan--A set of requirements for disease testing and management developed by TAHC for a specific facility.

(25) TWIMS--The department's Texas Wildlife Information Management Services (TWIMS) online application.

§65.91. General Provisions.

(a) To the extent that any provision of this division conflicts with any other provision of this chapter, this division prevails.

(b) Except as provided in this division, no live breeder deer may be transferred anywhere for any purpose.

(c) Notwithstanding any other provision of this chapter, no person shall introduce into or remove breeder deer from or allow or authorize breeder deer to be introduced into or removed from any deer breeding facility for which a CWD test result of 'suspect' has been obtained from an accredited testing facility. The provisions of this subsection take effect immediately upon the notification of a CWD 'suspect' test result for a deer breeding facility, and continue in effect until the department expressly authorizes the resumption of permitted activities at that facility.

(d) No exposed breeder deer may be transferred from a breeding facility unless expressly authorized in a TAHC herd plan and then only in accordance with the provisions of this division.

(e) A breeding facility (including a facility permitted after the effective date of this subsection) or release site that receives breeder deer from an originating facility of lower status automatically assumes the status associated with the originating facility and becomes subject to the testing and release requirements of this division at that status.

(f) A facility that has dropped in status may increase in status as follows:

(1) from TC 3to TC 2: by complying with the provisions of §65.92(b)(3)(B) of this title (relating to Transfer Categories and Requirements) for a period of two consecutive years;

(2) from TC 2 to TC 1 status: by attaining "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program.

(g) A CWD test is not valid unless it is performed by an accredited testing facility on the obex of an eligible mortality, which may be collected by anyone. A medial retropharyngeal lymph node collected from the eligible mortality by an accredited veterinarian or other person approved by the department may be submitted to an accredited testing facility for testing in addition to the obex of the eligible mortality.

(h) Unless expressly provided otherwise in this division, all applications and notifications required by this division shall be submitted electronically via TWIMS or by another method expressly authorized by the department.

(i) A person who possesses or receives white-tailed deer or mule deer under the provisions of this division and Subchapter T of this chapter is subject to the provisions of TAHC regulations at 4 TAC Chapter 40 (relating to Chronic Wasting Disease) that are applicable to white-tailed or mule deer.

(j) Unless amended to provide for a longer period of effectiveness, the provisions of this division cease effect on August 31, 2016.

§65.92. Transfer Categories and Requirements.

(a) General.

(1) A breeding facility that is a TC 1, TC 2, or TC 3 facility may transfer breeder deer under a valid transfer permit that has been activated and approved by the department as provided in §65.610(e) of this title (relating to Transfer of Deer) to:

(A) another breeding facility;

(B) an approved release site as provided in §65.93 of this division (relating to Release Sites - Qualifications and Testing Requirements);

(C) a DMP facility permitted under Parks and Wildlife Code, Chapter 43, Subchapter R (relating to White-Tailed Deer Management Permits) and department's DMP regulations; or

(D) to another person for nursing purposes.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, a breeding facility is prohibited from transferring breeder deer anywhere for any purpose if:

(A) such a transfer is not authorized pursuant to a TAHC Herd Plan associated with a hold order or quarantine;

(B) "not detected" CWD test results have been submitted for less than 20 percent of eligible mortalities at the breeding facility since May 23, 2006;

(C) the breeding facility has an unreconciled herd inventory; or

(D) the breeding facility is not in compliance with the provisions of §65.608 of this title (relating to Annual Reports and Records).

(3) A deer breeder may not transfer a breeder deer to a Class III release site unless the deer has been tagged by attaching a button-type RFID or NUES tag approved by the department to one ear.

(4) A deer breeding facility that was initially permitted after March 31, 2015 will assume the lowest status among all originating facilities from which deer are received; provided, however, a breeding facility shall not assume TC 1 status unless it meets the criteria established in subsection (b)(1) of this section.

(b) Types of Facilities.

(1) TC 1. A breeding facility is a TC 1 facility if:

(A) it is not a Tier 1 facility; and

(B) it has "fifth-year" or "certified" status in the TAHC CWD Herd Certification Program.

(2) TC 2. A breeding facility is a TC 2 facility if:

(A) it is not a Tier 1 facility; and

(B) CWD test results of "not detected" have been returned for one of the following values, whichever represents the lowest number of tested breeder deer:

(i) 4.5 percent or more of the breeder deer held within the facility during the immediately preceding two reporting years, based on the average population of deer in the facility that were at least 16 months of age on March 31 of each year (including eligible mortalities for those years); or

(ii) 50 percent of all eligible mortalities from the preceding two reporting years, provided at least one eligible mortality was tested.

(3) TC 3.

(A) A breeding facility is a TC 3 facility if it is neither a TC 1 facility nor a TC 2 facility.

(B) A breeding facility may increase status from TC 3 to TC 2 if CWD test results of "not detected" have been obtained for:

(i) each breeder deer received by the breeding facility from any CWD-positive site;

(ii) each exposed breeder deer that has been transferred by the breeding facility to another breeding facility or released; and

(iii) 4.5 percent or more of the breeder deer held within the breeding facility during the immediately preceding two reporting years, based on the average population of deer in the facility that were at least 16 months of age on March 31 of each year (including eligible mortalities for those years).

(C) All deer transferred from a TC 3 breeding facility to a DMP facility, including buck deer that are returned from a DMP facility to a breeding facility, must be eartagged with an RFID/NUES tag.

(c) Breeder deer may be temporarily transferred to a veterinarian for medical care.

§65.93. Release Sites - Qualifications and Testing Requirements.

(a) General.

(1) An approved release site consists solely of the specific tract of land and acreage designated as a release site in TWIMS.

(2) All release sites must be surrounded by a fence of at least seven feet in height that is capable of retaining deer at all times. The owner of the release site is responsible for ensuring that the fence and associated infrastructure retain the deer under ordinary and reasonable circumstances.

(3) The owner of a Class II or Class III release site shall maintain a legible daily harvest log at the release site.

(A) The daily harvest log shall be on a form provided or approved by the department and shall be maintained until the report required by subparagraph (E) of this paragraph has been submitted to and acknowledged by the department.

(B) For each deer harvested on the release site and tagged under the provisions of Subchapter A of this chapter (relating to Statewide Hunting Proclamation), the landowner must, on the same day that the deer is harvested, legibly enter the information required by this subparagraph in the daily harvest log.

(C) The daily harvest log shall contain the following information for each deer harvested on the release site:

(i) the name and hunting license of the person who harvested the deer;

(ii) the date the deer was harvested;

(iii) the species (white-tailed or mule deer) and type of deer harvested (buck or antlerless);

(iv) any alphanumeric identifier tattooed on the deer;

(v) any RFID or NUES tag number of any RFID or NUES tag affixed to the deer; and

(vi) any other identifier and identifying number on the deer.

(D) The daily harvest log shall be made available upon request to any department employee acting in the performance of official duties.

(E) By not later than March 15 of each year, the owner of a release site shall submit the contents of the daily harvest log to the department via TWIMS or other format authorized by the department.

(4) Release site status cannot be altered by the sale or subdivision of a property to a related party if the purpose of the sale or subdivision is to avoid the requirements of this division.

(5) The owner of a release site agrees, by consenting to the release of breeder deer on the release site, to submit all required CWD test results to the department as soon as possible but not later than May 1 of each year. Failure to comply with this paragraph will result in the release site being declared ineligible to be a destination for future releases.

(6) No person may intentionally cause or allow any live deer to leave or escape from a release site.

(b) Types of Release Sites.

(1) Class I.

(A) A release site is a Class I release site if it:

(i) is not a Tier 1 facility; and

(ii) receives breeder deer only from TC 1 facilities.

(B) There are no testing requirements for a Class I release site.

(2) Class II.

(A) A release site is a Class II release site if it:

(i) is not a Tier 1 facility;

(ii) receives any breeder deer from TC 2 facility; and

(iii) receives no deer from a TC 3 facility.

(B) The landowner of a Class II release site must obtain valid CWD test results for one of the following values, whichever represents the lowest number of deer tested:

(i) if deer are hunter-harvested, a number of deer equivalent to 50 percent of the number of breeder deer released at the site between August 24, 2015 and the last day of lawful deer hunting at the site in the current year; or

(ii) 50 percent of all hunter-harvested deer.

(C) If any hunter-harvested deer were breeder deer released between August 24, 2015 and the last day of lawful deer hunting at the site in the current, 50 percent of those hunter-harvested deer must be submitted for CWD testing, which may be counted to satisfy the requirements of subparagraph (B) of this paragraph.

(3) Class III.

(A) A release site is a Class III release site if:

(i) it is a Tier 1 facility; or

(ii) it receives deer from an originating facility that is a TC 3 facility.

(B) The landowner of a Class III release site must obtain valid CWD test results for one of the following values, whichever represents the greatest number of deer tested:

(i) 100 percent of all hunter-harvested deer; or

(ii) one hunter-harvested deer per breeder deer released between August 24, 2015 and the last day of lawful deer hunting at the site in the current year.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on January 13, 2016.

TRD-201600145
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: February 2, 2016
Proposal publication date: October 2, 2015
For further information, please call: (512) 389-4775

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Office of Consumer Credit Commissioner

Grant Program Announcement: 2016-2017 Texas Financial Education Endowment (TFEE) Grant Recipients

The Finance Commission of Texas has announced the grantees for the new funding cycle of the Texas Financial Education Endowment ("TFEE"). This grant program is designed to support and promote financial capability, education, and responsibility of Texans. The endowment supports innovative consumer credit building activities and programs for youth and adults throughout the state.

Eight organizations were awarded an aggregate amount of $250,000. The 2016-17 grant recipients are:

K-12 Financial Education and Capability

Texas Council on Economic Education, Statewide - *$32,000*

Financial Coaching

Family Pathfinders of Tarrant County, Tarrant County - *$32,000*

Community Development Corporation of Brownsville, Brownsville - *$32,000*

Adult Financial Education and Capability

Goodwill Industries of Central Texas, Inc., Austin - *$32,000*

Easter Seals of Greater Houston, Houston - *$32,000*

Texas State Affordable Housing Corporation, Statewide - *$32,000*

El Paso Credit Union, Inc., El Paso - *$25,000*

Family Service Association of San Antonio, Inc., San Antonio - *$32,000*

"Texas is stepping out as a leader in supporting the delivery of innovative and effective financial education and capacity building programs that enhance the personal well-being and responsibility of Texans, which in turn supports economic growth in our state," said Bill White, Chairman of the Finance Commission.

The next grant cycle is planned for 2017. Prospective applicants interested in applying for funds in 2017 can visit the website (www.tfee.texas.gov) for additional information, events and announcements.

The Endowment Fund was created by the 82nd Legislature in conjunction with the legislation that established a regulatory program for Credit Access Businesses. Each Credit Access Business, a financial service provider that facilitates payday and auto title loans, is required to pay an annual assessment to the endowment fund to sustain the financial capability and education programs.

The Finance Commission of Texas ensures banks, savings institutions, consumer credit grantors and other state-regulated financial entities operate responsibly to enhance the financial well-being of Texans.

For more information, please contact:

Dana Edgerton

TFEE Grant Coordinator

grantcoordinator@tfee.texas.gov

TRD-201600175
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: January 14, 2016

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Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.009 and 304.003, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 01/25/16 - 01/31/16 is 18% for Consumer[1]/Agricultural/Commercial[2] credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 01/25/16 - 01/31/16 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 02/01/16 - 02/29/16 is 5.00% for Consumer/Agricultural/Commercial credit through $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 02/01/16 - 02/29/16 is 5.00% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-201600227
Leslie Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: January 20, 2016

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Education Service Center Region 10

Request for Proposals for Distance Learning Speech-Language Pathology Master's Degree Program

The Education Service Center (ESC) Region 10 is soliciting proposals for a Distance Learning Speech-Language Pathology Master's Degree Program, using Individuals with Disabilities Education Act-B (IDEA-B) federal funds authorized by the Texas Education Agency for this specific project. This project seeks to fund a distance learning master's degree program that will increase the pool of highly qualified, American Speech-Language-Hearing Association (ASHA) certified, speech-language pathology professionals statewide, while allowing students to complete internship requirements during the workday. This project will be a coordinated effort between Region 10 Education Service Center, the university awarded this grant, and the Texas Education Agency.

Vendors wishing to receive a complete copy of the Request for Proposal (RFP) should write or call Sue Hayes, Chief Financial Officer, Education Service Center Region 10, 400 E. Spring Valley Road, Richardson,

Texas 75081-5101, (972) 348-1112. Please refer to RFP #2016-01 in your request.

All proposals must be received at the above address by 3:00 p.m. Friday, February 5, 2016.

The award winning vendor will be selected based on their qualifications and ability to carry out all requirements contained in the RFP. The Region 10 ESC reserves the right to select the vendor that represents the best value to the Center.

TRD-201600222
Sue Hayes
Chief Financial Officer
Education Service Center Region 10
Filed: January 20, 2016

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ, agency or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is February 29, 2016. TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be received by 5:00 p.m. on February 29, 2016. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075 provides that comments on the AOs shall be submitted to the commission in writing.

(1) COMPANY: Alvie Fritsche dba Carriage House Cafe; DOCKET NUMBER: 2015-1330-PWS-E; IDENTIFIER: RN104607486; LOCATION: Houston, Harris County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.109(c)(2)(A)(i) and Texas Health and Safety Code (THSC), §341.033(d), by failing to collect a routine distribution water sample for coliform analysis for the month of May 2015; 30 TAC §290.109(c)(2)(F) and THSC, §341.033(d), by failing to collect five routine distribution coliform samples the month following a total coliform-positive sample result for the month of March 2015; 30 TAC §290.109(c)(3)(A)(ii), by failing to collect a set of four required repeat distribution coliform samples within 24 hours of being notified of a routine total coliform-positive sample result for the month of March 2015; 30 TAC §290.109(c)(4)(B), by failing to collect a raw groundwater source *Escherichia coli* sample from the facility's one active source within 24 hours of notification of a distribution total coliform-positive result on a routine sample for the month of July 2014; and 30 TAC §290.122(c)(2)(A) and (f), by failing to timely provide public notification and submit a copy of the public notification to the executive director regarding the failure to conduct routine coliform monitoring for the months of April and June 2014; PENALTY: $1,062; ENFORCEMENT COORDINATOR: Jim Fisher, (512) 239-2537; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Aqua Utilities, Incorporated; DOCKET NUMBER: 2015-1474-MWD-E; IDENTIFIER: RN101513729; LOCATION: Kyle, Hays County; TYPE OF FACILITY: domestic wastewater system; RULES VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0013293001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; PENALTY: $10,312; ENFORCEMENT COORDINATOR: Farhaud Abbaszadeh, (512) 239-0779; REGIONAL OFFICE: 12100 Park 35 Circle, Building A, Austin, Texas 78753, (512) 339-2929.

(3) COMPANY: ASNA BUSINESS INCORPORATED dba M and M Express; DOCKET NUMBER: 2015-1040-PST-E; IDENTIFIER: RN101447225; LOCATION: Beaumont, Jefferson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.45(c)(3)(A), by failing to install an emergency shutoff valve on each pressurized delivery or product line and ensure that it is securely anchored at the base of the dispenser; PENALTY: $1,375; ENFORCEMENT COORDINATOR: Tiffany Maurer, (512) 239-2696; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(4) COMPANY: BARTON WATER SUPPLY CORPORATION; DOCKET NUMBER: 2015-1510-PWS-E; IDENTIFIER: RN101439172; LOCATION: Gordon, Erath County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.115(f)(1) and §290.122(b)(3)(A) and (f) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level (MCL) of 0.080 milligrams per liter for total trihalomethanes (TTHM), based on the locational running annual average, and failing to provide public notification and submit a copy of the public notification to the executive director regarding the failure to comply with the MCL for TTHM, based on the locational running annual average; 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to timely submit a Disinfectant Level Quarterly Operating Report to the executive director each quarter by the tenth day of the month following the end of the quarter for the first quarter of 2015; and 30 TAC §290.122(c)(2)(A) and (f), by failing to provide public notification and submit a copy of the public notification to the executive director regarding the failure to collect routine coliform monitoring samples for the month of April 2015; PENALTY: $330; ENFORCEMENT COORDINATOR: Kingsley Coppinger, (512) 239-6581; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Bell County WCID 1; DOCKET NUMBER: 2016-0033-WQ-E; IDENTIFIER: RN103898300; LOCATION: Killeen, Bell County; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a Multi-Sector General Permit; PENALTY: $875; ENFORCEMENT COORDINATOR: Jill Russell, (512) 239-4564; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(6) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2015-1353-AIR-E; IDENTIFIER: RN102320850; LOCATION: Borger, Hutchinson County; TYPE OF FACILITY: petrochemical manufacturing; RULES VIOLATED: 30 TAC §122.143(4) and §122.146(2), Texas Health and Safety Code, §382.085(b), Federal Operating Permit Number O2164, General Terms and Conditions and Special Terms and Conditions Number 20, by failing to submit a Permit Compliance Certification no later than 30 days after the end of the certification period; PENALTY: $6,450; ENFORCEMENT COORDINATOR: Jennifer Nguyen, (512) 239-6160; REGIONAL OFFICE: 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

(7) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2015-1059-AIR-E; IDENTIFIER: RN100825249; LOCATION: Sweeny, Brazoria County; TYPE OF FACILITY: chemical manufacturing; RULES VIOLATED: 30 TAC §§101.20(3), 116.115(c), and 122.143(4), Texas Health and Safety Code, §382.085(b), Federal Operating Permit Number O2151, Special Terms and Conditions Number 25, and New Source Review Permit Numbers 22690 and PSDTX751M1, Special Conditions Number 1, by failing to prevent unauthorized emissions; PENALTY: $11,550; ENFORCEMENT COORDINATOR: Jennifer Nguyen, (512) 239-6160; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(8) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2015-1104-AIR-E; IDENTIFIER: RN100209857; LOCATION: Port Arthur, Jefferson County; TYPE OF FACILITY: chemical manufacturing plant; RULES VIOLATED: 30 TAC §§101.20(1), 116.115(b)(2)(G) and (c), and 122.143(4), Texas Health and Safety Code (THSC), §382.085(b), 40 Code of Federal Regulations (CFR) §60.13(a), Federal Operating Permit (FOP) Number O1235, Special Terms and Conditions (STC) Number 22, and New Source Review (NSR) Permit Number 18568, Special Conditions (SC) Number 10, by failing to maintain Carbon Adsorption Unit, Emission Point Number (EPN) CA-1, in good working order and operating properly during normal plant operations; 30 TAC §§116.110(b), 116.115(b) and (c), 116.116(a)(1), and 122.143(4), THSC, §382.085(b), FOP Number O1235, STC Number 22, and NSR Permit Number 83741, SC Number 14 and General Conditions Number 14., by failing to comply with the representations with regard to construction plans and operation procedures in an application for a permit; 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), THSC, §382.085(b), FOP Number O1235, STC Number 22, and NSR Permit Number 83741, SC Number 1, by failing to comply with the allowable volatile organic compound (VOC), nitrogen oxide (NO_x), and carbon monoxide (CO) emissions rates for Flare 40, EPN F-40-Flare; 30 TAC §§101.20(3), 116.115(b)(2)(F) and (c), and 122.143(4), THSC, §382.085(b), FOP Number O1235, STC Number 22, and NSR Permit Numbers 21101 and PSDTX1248, SC Number 8, by failing to comply with the allowable VOC, CO, sulfur dioxide, and particulate matter equal to or less than 10 microns in diameter emissions rates for the Secondary Diesel Engine, EPN E-11-1544; 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), THSC, §382.085(b), FOP Number O1235, STC Number 22, and NSR Permit Number 83741, SC Number 1, by failing to comply with the allowable CO, NO_x, and VOC emissions rates for the Controlled Maintenance, Start-up, and Shutdown (MSS) Emissions from the Cumene Feed Preparation Unit 1740 and PS-508, EPN 1740-MSS; 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), THSC, §382.085(b), FOP Number O1235, STC Number 22, and NSR Permit Number 83741, SC Number 1, by failing to comply with the allowable CO, NO_x, and benzene emissions rates for the Controlled MSS Emissions from Ethylene Unit 1544, EPN 1544-MSS; 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), THSC, §382.085(b), FOP Number O1235, STC Number 22, and NSR Permit Number 32713, SC Number 1, by failing to comply with the allowable VOC emissions rate for Flare N1, EPN F-N1-Flare; and 30 TAC §116.115(b)(2)(F) and (c) and §122.143(4), THSC, §382.085(b), FOP Number O1235, STC Number 22, and NSR Permit Number 83741, SC Number 1, by failing to comply with the allowable CO and NO_x emissions rates for the Controlled MSS Emissions from the Cyclohexane Unit 1741, EPN 1741-MSS; PENALTY: $372,625; Supplemental Environmental Project offset amount of $149,050; ENFORCEMENT COORDINATOR: Jessica Schildwachter, (512) 239-2617; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(9) COMPANY: City of Fort Worth; DOCKET NUMBER: 2016-0015-WQ-E; IDENTIFIER: RN100785724; LOCATION: Fort Worth, Tarrant County; TYPE OF FACILITY: nature center; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a Construction General Permit; PENALTY: $875; ENFORCEMENT COORDINATOR: Jill Russell, (512) 239-4564; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: City of Nash; DOCKET NUMBER: 2015-1255-WQ-E; IDENTIFIER: RN105864847; LOCATION: Nash, Bowie County; TYPE OF FACILITY: small municipal separate storm sewer system; RULES VIOLATED: 30 TAC §281.25(b)(4) and 40 Code of Federal Regulations §122.33(b)(1), by failing to maintain authorization to discharge stormwater associated with Texas Pollutant Discharge Elimination System General Permit for Small Municipal Separate Storm Sewer Systems; PENALTY: $18,750; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 430-6023; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(11) COMPANY: City of Ore City; DOCKET NUMBER: 2015-1524-MWD-E; IDENTIFIER: RN101920122; LOCATION: Ore City, Upshur County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a)(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0014389001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; PENALTY: $17,325; Supplemental Environmental Project offset amount of $17,325; ENFORCEMENT COORDINATOR: Steven Van Landingham, (512) 239-5717; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(12) COMPANY: Exxon Mobil Corporation; DOCKET NUMBER: 2015-0039-AIR-E; IDENTIFIER: RN102574803; LOCATION: Baytown, Harris County; TYPE OF FACILITY: chemical processing plant; RULES VIOLATED: 30 TAC §101.400(a) and §122.143(4), Texas Health and Safety Code (THSC), §382.085(b), and Federal Operating Permit (FOP) Number O1278, Special Terms and Conditions (STC) Number 1.A., by failing to include all applicable Highly Reactive Volatile Organic Compound (HRVOC) sources, Emissions Point Numbers (EPNs) FS09, NRUFG, PFUFG, TDUFG, PAUFG, NRUF9B, NRUF9A, PFUF510, PFUF501, PFUF530, TDUF501, TDUF507, NRUH2/NRUH3, NRUF6, PAUF311, PAUF321, IBUF730A/B/C, NRUF1A, and NRUF1, in the HRVOC Emissions Cap and Trade Annual Compliance Report, Form ECT-1H, for the 2009 and 2010 control periods; 30 TAC §115.725(a) and §122.143(4), THSC, §382.085(b), and FOP Number O1278, STC Number 1.G.(i), by failing to conduct testing; 30 TAC §115.725(d) and §122.143(4), THSC, §382.085(b), and FOP Number O1278, STC Number 1.G.(iii), by failing to install and operate a monitoring system for Flare Stack 9, EPN FS09, in HRVOC service; 30 TAC §115.781(b) and §122.143(4), THSC, §382.085(b), and FOP Number O1278, STC Number 1.G.(v), by failing to meet applicable HRVOC monitoring requirements for four fugitive emission sources; 30 TAC §122.143(4) and §122.145(2)(A), THSC, §382.085(b), and FOP Number O1278, General Terms and Conditions, by failing to report all instances of deviations; 30 TAC

§115.725(a) and §122.143(4), THSC, §382.085(b), and FOP Number O2270, STC Numbers 1.A. and 1.E.(i), by failing to conduct testing; 30 TAC §122.210(a) and THSC, §382.085(b), by failing to timely submit a revision application for an FOP; and 30 TAC §101.400(a) and §122.143(4), THSC, §382.085(b), and FOP Number O1278, STC Number 1.A., by failing to include all applicable HRVOC sources, EPNs FS09, NRUFG, PFUFG, TDUFG, PAUFG, NRUF9B, NRUF9A, PFUF510, PFUF501, PFUF530, TDUF501, TDUF507, NRUH2/NRUH3, NRUF6, PAUF311, PAUF321, IBUF730A/B/C, NRUF1A, and NRUF1, in the HRVOC Emissions Cap and Trade Annual Compliance Report, Form ECT-1H, for the 2011 and 2012 control periods; PENALTY: $105,529; Supplemental Environmental Project offset amount of $42,212; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(13) COMPANY: Fikes Wholesale, Incorporated dba Food Fast 1020; DOCKET NUMBER: 2015-1373-PST-E; IDENTIFIER: RN103145488; LOCATION: Marshall, Harrison County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month; PENALTY: $3,375; ENFORCEMENT COORDINATOR: James Baldwin, (512) 239-1337; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(14) COMPANY: KBR INVESTMENT INCORPORATED dba Super Stop 22; DOCKET NUMBER: 2015-1539-PST-E; IDENTIFIER: RN102361938; LOCATION: Orange, Orange County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases at a frequency of at least once every month; PENALTY: $9,000; ENFORCEMENT COORDINATOR: Tiffany Maurer, (512) 239-2696; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(15) COMPANY: Nelson Gardens Energy, LLC; DOCKET NUMBER: 2015-0869-AIR-E; IDENTIFIER: RN106307663; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: landfill gas electric generating plant; RULES VIOLATED: 30 TAC §122.143(4) and §122.146(2), Texas Health and Safety Code (THSC), §382.085(b), and Federal Operating Permit (FOP) Number O3539/General Operating Permit (GOP) Number 517, Site-Wide Requirements (b)(2), by failing to submit a permit compliance certification (PCC) within 30 days after the end of the certification period; 30 TAC §101.20(1) and §122.143(4), 40 Code for Federal Regulations §60.4243(b)(2)(ii), THSC, §382.085(b), and FOP Number O3539/GOP Number 517, Site-Wide Requirements Number (b)(29), by failing to conduct the required initial performance tests on four engines within 180 days after start-up; 30 TAC §122.143(4) and §122.145(2)(B), THSC, §382.085(b), and FOP Number O3539/GOP Number 517, Site-Wide Requirements Number (b)(2), by failing to submit a semi-annual deviation report within 30 days after the end of the reporting period; PENALTY: $13,938; Supplemental Environmental Project offset amount of $5,575; ENFORCEMENT COORDINATOR: Eduardo Heras, (512) 239-2422; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(16) COMPANY: Phillips 66 Company; DOCKET NUMBER: 2015-1243-AIR-E; IDENTIFIER: RN101619179; LOCATION: Old Ocean, Brazoria County; TYPE OF FACILITY: refinery; RULES VIOLATED: 30 TAC §§101.20(3), 116.115(c), and 122.143(4), Texas Health and Safety Code, §382.085(b), New Source Review Permit Numbers 5920A and PSDTX103M4, Special Conditions Number 1, and Federal Operating Permit Number O1626, Special Terms and Conditions Number 19, by failing to prevent unauthorized emissions; PENALTY: $14,250; Supplemental Environmental Project offset amount of $5,700; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(17) COMPANY: REEVES OIL COMPANY, INCORPORATED; DOCKET NUMBER: 2015-1260-PST-E; IDENTIFIER: RN100553734; LOCATION: Longview and Marshall, Gregg County; TYPE OF FACILITY: common carrier; RULES VIOLATED: 30 TAC §334.5(b)(1)(A) and TWC, §26.3467(d), by failing to deposit a regulated substance into a regulated underground storage tank system that was covered by a valid, current TCEQ delivery certificate; PENALTY: $7,610; ENFORCEMENT COORDINATOR: Holly Kneisley, (817) 588-5856; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(18) COMPANY: Roger Gomez dba Optimum Calves; DOCKET NUMBER: 2015-1497-AGR-E; IDENTIFIER: RN104925334; LOCATION: Muleshoe, Bailey County; TYPE OF FACILITY: dairy calf feeding operation; RULES VIOLATED: 30 TAC §321.38(f) and §321.39(b), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number TXG920817, Part III. Pollution Prevention Plan Requirements A.9(a)(1), by failing to maintain dewatering equipment in proper working order and ensure that the required capacity in the retention control structure is available to contain rainfall and rainfall runoff from the design rainfall event; 30 TAC §321.39(e) and §321.40(d), TWC, §26.121(a)(1), and TPDES Permit Number TXG920817, Part III. Pollution Prevention Plan Requirements A.8(b), by failing to prevent the unauthorized discharge of manure, sludge, or wastewater from a land management unit and to store manure or sludge in a manner that contains contaminated runoff on the facility; 30 TAC §321.36(c)(1), TPDES Permit Number TXG920817, Part III. Pollution Prevention Plan Requirements A.11(a), by failing to implement a nutrient management; and 30 TAC §321.38(b)(3) and §321.40(g), and TPDES Permit Number TXG920817, Part III. Pollution Prevention Plan Requirements A.4(c), by failing to maintain applicable buffer zones for water wells used exclusively for agriculture irrigation; PENALTY: $9,750; ENFORCEMENT COORDINATOR: Jason Fraley, (512) 239-2552; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3421, (806) 796-7092.

(19) COMPANY: Scadden Real Estate Alternatives, L.L.C.; DOCKET NUMBER: 2016-0046-WQ-E; IDENTIFIER: RN108867144; LOCATION: Longview, Harrison County; TYPE OF FACILITY: residential subdivision construction site; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a Construction General Permit; PENALTY: $875; ENFORCEMENT COORDINATOR: Larry Butler, (512) 239-2543; REGIONAL OFFICE: 2616 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(20) COMPANY: Stazz Fortune Incorporated dba 24 Seven 14; DOCKET NUMBER: 2015-1272-PST-E; IDENTIFIER: RN101737195; LOCATION: Houston, Harris County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §115.246(a)(7) and Texas Health and Safety Code, §382.085(b), by failing to maintain Stage II decommissioning records at the station; and 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tank for releases at a frequency of at least once every month; PENALTY: $6,000; ENFORCEMENT COORDINATOR: Danielle Porras, (713) 767-3682; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(21) COMPANY: WATER NECESSITIES, INCORPORATED; DOCKET NUMBER: 2015-0810-PWS-E; IDENTIFIER:

RN101220838; LOCATION: Vidor, Orange County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3) and §290.122(c)(2)(A) and (f), by failing to timely submit a Disinfectant Level Quarterly Operating Report (DLQOR) to the executive director each quarter by the tenth day of the month following the end of the quarter and failing to provide public notification and submit a copy of the notification to the executive director regarding the failure to submit DLQORs for the second quarter of 2014 - the fourth quarter of 2014; 30 TAC §§290.271(b), 290.273, and 290.274(a) and (c), by failing to meet the adequacy, availability, and/or content requirements for the Consumer Confidence Report for the year of 2013; and 30 TAC §290.122(b)(3)(A) and (f), by failing to timely provide public notification and submit a copy of the notification to the executive director regarding the failure to comply with the maximum contaminant level for arsenic for the first and second quarters of 2011; PENALTY: $300; ENFORCEMENT COORDINATOR: Katy Montgomery, (210) 403-4016; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(22) COMPANY: WOODY BUTLER HOMES, INCORPORATED; DOCKET NUMBER: 2015-1042-WQ-E; IDENTIFIER: RN106081391; LOCATION: Hewitt, McLennan County; TYPE OF FACILITY: construction site; RULES VIOLATED: 30 TAC §305.125(1) and Texas Pollutant Discharge Elimination System (TPDES) General Permit Number TXR15YA95, Part III, Section F.2(c)(i)(B), by failing to install minimum sediment controls for all down slope boundaries at the site; and TWC, §26.121(a)(1), 30 TAC §305.125(1), and TPDES General Permit Number TXR15YA95, Part III, Sections F(6)(a) and (d), and G(1)(e), by failing to maintain in effective operating condition all best management practices and remove sediment accumulations that escaped the site at a frequency that minimizes off-site impacts; PENALTY: $2,400; ENFORCEMENT COORDINATOR: Jennifer Graves, (956) 430-6023; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

TRD-201600203
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: January 19, 2016

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Enforcement Orders

An agreed order was entered regarding City of Rose City, Docket No. 2013-0096-MLM-E on January 6, 2016 assessing $7,203 in administrative penalties with $1,440 deferred.

Information concerning any aspect of this order may be obtained by contacting Epifanio Villareal, Enforcement Coordinator at (361) 825-3425, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding City of Rio Vista, Docket No. 2014-1001-MWD-E on January 6, 2016 assessing $6,375 in administrative penalties with $1,275 deferred.

Information concerning any aspect of this order may be obtained by contacting Jennifer Graves, Enforcement Coordinator at (956) 430-6023, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Manitex, Inc., Docket No. 2014-1854-MLM-E on January 6, 2016 assessing $6,536 in administrative penalties with $1,306 deferred.

Information concerning any aspect of this order may be obtained by contacting Jill Russell, Enforcement Coordinator at (512) 239-4564, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Parastou Esmaeili dba Econo Lube N Tube 185, Docket No. 2015-0428-PST-E on January 6, 2016 assessing $5,577 in administrative penalties with $1,394 deferred.

Information concerning any aspect of this order may be obtained by contacting Margarita Dennis, Enforcement Coordinator at (817) 588-5892, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Derek Heath Lomas, Docket No. 2015-0511-LII-E on January 6, 2016 assessing $3,255 in administrative penalties with $651 deferred.

Information concerning any aspect of this order may be obtained by contacting David Carney, Enforcement Coordinator at (512) 239-2583, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding North Orange Water & Sewer, LLC, Docket No. 2015-0604-MWD-E on January 6, 2016 assessing $6,102 in administrative penalties with $1,220 deferred.

Information concerning any aspect of this order may be obtained by contacting Larry Butler, Enforcement Coordinator at (512) 239-2543, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Keep Kingsland Beautiful, Docket No. 2015-0644-MSW-E on January 6, 2016 assessing $7,087 in administrative penalties with $5,887 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Boyett, Enforcement Coordinator at (512) 239-2503, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Rodney C. Pfouts, Docket No. 2015-0693-WOC-E on January 6, 2016 assessing $960 in administrative penalties with $192 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding 14146 IH 35 South Real Estate Company, LLC, Docket No. 2015-0762-MWD-E on January 6, 2016 assessing $2,500 in administrative penalties with $500 deferred.

Information concerning any aspect of this order may be obtained by contacting Jason Fraley, Enforcement Coordinator at (512) 239-2552, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding I.P. "Sarge" Bell Memorial Post No. 3377 Veterans of Foreign Wars of the United States, Austin, Texas dba VFW Post 3377, Docket No. 2015-0910-PWS-E on January 6, 2016 assessing $472 in administrative penalties with $94 deferred.

Information concerning any aspect of this order may be obtained by contacting Jim Fisher, Enforcement Coordinator at (512) 239-2537, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Tonya Stalcup, Docket No. 2015-1020-OSS-E on January 6, 2016 assessing $2,362 in administrative penalties with $472 deferred.

Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, Enforcement Coordinator at (817) 588-5886, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding In-N-Out Burgers, Docket No. 2015-1023-EAQ-E on January 6, 2016 assessing $6,563 in administrative penalties with $1,312 deferred.

Information concerning any aspect of this order may be obtained by contacting Had Darling, Enforcement Coordinator at (512) 239-2520, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Mohinder Pall dba Diamond Shamrock Food Mart, Docket No. 2015-1028-PST-E on January 6, 2016 assessing $2,438 in administrative penalties with $487 deferred.

Information concerning any aspect of this order may be obtained by contacting Holly Kneisley, Enforcement Coordinator at (817) 588-5856, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding DEL RIO FOOD MART, INC., Docket No. 2015-1045-PST-E on January 6, 2016 assessing $2,813 in administrative penalties with $562 deferred.

Information concerning any aspect of this order may be obtained by contacting Catherine Kruthsch, Enforcement Coordinator at (512) 239-2607, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding JEFFY'S EXXON #2, Inc. dba Jeffy's Exxon Mobil 2, Docket No. 2015-1054-PST-E on January 6, 2016 assessing $6,750 in administrative penalties with $1,350 deferred.

Information concerning any aspect of this order may be obtained by contacting Holly Kneisley, Enforcement Coordinator at (817) 588-5856, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TONY'S ENTERPRISES, INC dba Quick & Save, Docket No. 2015-1055-PST-E on January 6, 2016 assessing $2,568 in administrative penalties with $513 deferred.

Information concerning any aspect of this order may be obtained by contacting Abigail Lindsey, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding TRIPLE S REALTY LLC dba Texas Food Mart, Docket No. 2015-1069-PST-E on January 6, 2016 assessing $5,086 in administrative penalties with $1,017 deferred.

Information concerning any aspect of this order may be obtained by contacting Danielle Porras, Enforcement Coordinator at (713) 767-3682, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Martinsville Independent School District, Docket No. 2015-1072-MWD-E on January 6, 2016 assessing $4,102 in administrative penalties with $820 deferred.

Information concerning any aspect of this order may be obtained by contacting Jason Fraley, Enforcement Coordinator at (512) 239-2552, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Kulsoom Bano, Inc dba Get N Go, Docket No. 2015-1100-PST-E on January 6, 2016 assessing $3,563 in administrative penalties with $712 deferred.

Information concerning any aspect of this order may be obtained by contacting James Baldwin, Enforcement Coordinator at (512) 239-1337, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Samuel T. Jordan, Docket No. 2015-1126-MSW-E on January 6, 2016 assessing $1,337 in administrative penalties with $267 deferred.

Information concerning any aspect of this order may be obtained by contacting Abigail Lindsey, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding LONE WOLF TRUCKING, INC., Docket No. 2015-1178-MLM-E on January 6, 2016 assessing $1,876 in administrative penalties with $375 deferred.

Information concerning any aspect of this order may be obtained by contacting Had Darling, Enforcement Coordinator at (512) 239-2520, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding H. M. MEMON, Inc. dba Metro Food Mart, Docket No. 2015-1195-PST-E on January 6, 2016 assessing $3,375 in administrative penalties with $675 deferred.

Information concerning any aspect of this order may be obtained by contacting John Fennell, Enforcement Coordinator at (512) 239-2616, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding WILLIAM MARSH RICE UNIVERSITY, Docket No. 2015-1228-PST-E on January 6, 2016 assessing $1,463 in administrative penalties with $292 deferred.

Information concerning any aspect of this order may be obtained by contacting Abigail Lindsey, Enforcement Coordinator at (512) 239-2576, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding SAND LAND, INC., Docket No. 2015-1247-WQ-E on January 6, 2016 assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting Austin Henck, Enforcement Coordinator at (512) 239-6155, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding MARTA ENTERPRISES, INC dba Gulfway Quik Mart Shell, Docket No. 2015-1251-PST-E on January 6, 2016 assessing $4,125 in administrative penalties with $825 deferred.

Information concerning any aspect of this order may be obtained by contacting Rebecca Boyett, Enforcement Coordinator at (512) 239-2503, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding Advancement Services, L.L.C., Docket No. 2015-1377-AIR-E on January 6, 2016 assessing $938 in administrative penalties with $187 deferred.

Information concerning any aspect of this order may be obtained by contacting Carol McGrath, Enforcement Coordinator at (210) 403-4063, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was entered regarding B & B SAND AND GRAVEL, INC., Docket No. 2015-1418-WQ-E on January 6, 2016 assessing $5,000 in administrative penalties with $1,000 deferred.

Information concerning any aspect of this order may be obtained by contacting James Boyle, Enforcement Coordinator at (512) 239-2527, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Shelly S. Hattan, Docket No. 2015-1517-WOC-E on January 6, 2016 assessing $175 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting David Carney, Enforcement Coordinator at (512) 239-2583, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Frank A. Powell, R.S., Docket No. 2015-1518-WOC-E on January 6, 2016 assessing $175 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting David Carney, Enforcement Coordinator at (512) 239-2583, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Mark Jeffrey Risinger, Docket No. 2015-1569-OSS-E on January 6, 2016 assessing $175 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jill Russell, Enforcement Coordinator at (512) 239-4564, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A field citation was entered regarding Magruder Homes, LP, Docket No. 2015-1601-WQ-E on January 6, 2016 assessing $875 in administrative penalties.

Information concerning any aspect of this order may be obtained by contacting Jill Russell, Enforcement Coordinator at (512) 239-4564, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201600216
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: January 20, 2016

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Notice of Correction to Agreed Order Number 8

In the January 1, 2016, issue of the *Texas Register* (41 TexReg 316), the Texas Commission on Environmental Quality published notice of an Agreed Order, specifically item Number 8, for James Construction Group LLC (FC). The reference to location should be corrected to read: Navasota, Grimes County.

For questions concerning this error, please contact Candy Garrett at (512) 239-1456.

TRD-201600206
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: January 19, 2016

♦ ♦ ♦

Notice of Correction to Agreed Order Number 14

In the December 25, 2015, issue of the *Texas Register* (40 TexReg 9793), the Texas Commission on Environmental Quality published notice of an Agreed Order, specifically item Number 14, for City of Selma. The reference to location should be corrected to read: Selma, Bexar, Comal, and Guadalupe Counties.

For questions concerning this error, please contact Candy Garrett at (512) 239-1456.

TRD-201600204
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: January 19, 2016

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Notice of Correction to Agreed Order Number 17

In the December 25, 2015, issue of the *Texas Register* (40 TexReg 9793), the Texas Commission on Environmental Quality published notice of an Agreed Order, specifically item Number 17, for Earth Haulers, Incorporated. The reference to penalty should be corrected to read: $8,750.

For questions concerning this error, please contact Candy Garrett at (512) 239-1456.

TRD-201600205
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: January 19, 2016

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Notice of Hearing

Trio Residential Developers, Inc.

SOAH Docket No. 582-16-0594

TCEQ Docket No. 2015-0841-MWD

Permit No. WQ0015219001

APPLICATION.

Trio Residential Developers, Inc., 1851 South Lakeline Boulevard, Suite 104-122, Cedar Park, Texas 78613, has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, draft TCEQ Permit No. WQ0015219001, to authorize the disposal of treated domestic wastewater at a daily average flow not to exceed 140,000 gallons per day via surface irrigation of 40.5 acres of public access land. This permit will not authorize a discharge of pollutants into waters in the State.

The wastewater treatment facility and disposal site will be located along the north right-of-way of Ammann Road at its intersection with Rolling Acres Trail in Kendall County, Texas 78006. The wastewater treatment facility and disposal site will be located in the drainage basin of Upper Cibolo Creek in Segment No. 1908 of the San Antonio River Basin.

The TCEQ Executive Director has prepared a draft permit which, if approved, would establish the conditions under which the facility must operate. The Executive Director has made a preliminary decision that this permit, if issued, meets all statutory and regulatory requirements. The permit application, Executive Director's preliminary decision, and draft permit are available for viewing and copying at the Kendall County Courthouse located at 201 East San Antonio Avenue, Boerne, Texas. This link to an electronic map of the site or facility's general location is provided as a public courtesy and not part of the application or notice. For exact location, refer

to application. http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=29.7725&lng=-98.618611&zoom=13&type=r.

CONTESTED CASE HEARING.

The State Office of Administrative Hearings (SOAH) will conduct a preliminary hearing on this application at:

10:00 a.m. - March 9, 2016

William P. Clements Building

300 West 15th Street, 4th Floor

Austin, Texas 78701

The contested case hearing will be a legal proceeding similar to a civil trial in state district court. The hearing will address the disputed issues of fact identified in the TCEQ order concerning this application issued on September 15, 2015. In addition to these issues, the judge may consider additional issues if certain factors are met.

The purpose of a preliminary hearing is to establish jurisdiction, name the parties, establish a procedural schedule for the remainder of the proceeding, provide an opportunity for settlement discussions, and address other matters as determined by the administrative law judge.

The contested case hearing will be conducted in accordance with Chapter 2001, Texas Government Code; Chapter 26, Texas Water Code; and the procedural rules of the TCEQ and SOAH, including 30 TAC Chapter 80 and 1 TAC Chapter 155. The preliminary hearing and contested case hearing will be held unless all timely hearing requests have been withdrawn or denied.

To request to be a party, you must attend the preliminary hearing and show you would be adversely affected by the application in a way not common to members of the general public. Any person may attend the preliminary hearing and request to be a party. Only persons named as parties may participate at the contested case hearing.

INFORMATION.

If you need more information about the hearing process for this application, please call the Public Education Program, toll free, at 1 (800) 687-4040. General information about the TCEQ can be found at our web site at http://www.tceq.texas.gov/.

Further information may also be obtained from Trio Residential Developers, Inc. at the address stated above or by calling Mr. Marc Frease at (512) 230-7555.

Persons with disabilities who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week prior to the hearing.

Issued: January 13, 2016

TRD-201600196
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: January 15, 2016

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Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075 requires that notice of the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **February 29, 2016.** TWC, §7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711 3087 and must be **received by 5:00 p.m. on February 29, 2016.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorney is available to discuss the AO and/or the comment procedure at the listed phone number; however, TWC, §7.075 provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: 3400 LLC dba Millennium Mart 3400; DOCKET NUMBER: 2015-0238-PST-E; TCEQ ID NUMBER: RN102354040; LOCATION: 3400 Lombardy Lane, Suite 108, Dallas, Dallas County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(d) and 30 TAC §334.49(a)(2), by failing to ensure the corrosion protection system was operated and maintained in a manner that will ensure corrosion protection is continuously provided to the UST system; and TWC, §26.3475(a) and (c)(1) and 30 TAC §334.50(b)(1)(A) and (2), by failing to monitor the USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring) and by failing to provide release detection for the pressurized piping associated with the UST system by failing to conduct the annual line leak detector and piping tightness tests; PENALTY: $13,629; STAFF ATTORNEY: Amanda Patel, Litigation Division, MC 175, (512) 239-3990; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Diogenes A. Franco; DOCKET NUMBER: 2015-0981-MSW-E; TCEQ ID NUMBER: RN107269862; LOCATION: 2973 Center Street, San Angelo, Tom Green County; TYPE OF FACILITY: property with an unauthorized municipal solid waste (MSW) disposal site; RULES VIOLATED: 30 TAC §330.7(a) and §330.15(a) and (c), by causing, suffering, allowing, or permitting the unauthorized storage, processing, removal, or disposal of MSW; PENALTY: $3,937; STAFF ATTORNEY: Jess Robinson, Litigation Division, MC 175, (512) 239-0455; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(3) COMPANY: Ilyas Shaikh Shakoor and Hira Food LLC dba Cowboy Jims Food Mart; DOCKET NUMBER: 2015-1183-PST-E; TCEQ ID NUMBER: RN104761721; LOCATION: 302 West Bermuda Street, Quitman, Wood County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases at a

frequency of at least once every month (not to exceed 35 days between each monitoring); PENALTY: $3,750; STAFF ATTORNEY: Amanda Patel, Litigation Division, MC 175, (512) 239-3990; REGIONAL OFFICE: Tyler Regional Office, 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(4) COMPANY: LULING O&G LLC and Delton Bishop; DOCKET NUMBER: 2014-1030-MLM-E; TCEQ ID NUMBER: RN107228421; LOCATION: 1237 Hoover Street, Luling, Caldwell County; TYPE OF FACILITIES: real property, and an oil field services company and an aboveground storage tank (AST) at the site; RULES VIOLATED: 30 TAC §335.2(a) and (b), by failing to prevent the disposal of industrial hazardous waste at an unauthorized facility; 30 TAC §327.5(a), by failing to immediately abate and contain a spill or discharge and by failing to begin reasonable response actions; 30 TAC §335.9(a)(1), by failing to maintain records of waste generation and accumulation activities; 40 Code of Federal Regulations (CFR) §262.11 and 30 TAC §§335.62, 335.503, 335.504, and 335.511, by failing to conduct hazardous waste determinations and waste classifications for all solid waste streams; 40 CFR §122.26(c) and 30 TAC §281.25(a)(4), by failing to obtain authorization to discharge stormwater associated with industrial activities under Texas Pollutant Discharge Elimination System Multi-Sector General Permit Number TXR050000; and 30 TAC §334.75(b), by failing to contain and immediately clean up a spill or overfill of a petroleum substance from an AST; PENALTY: $22,500; STAFF ATTORNEY: Tracy Chandler, Litigation Division, MC 175, (512) 239-0629; REGIONAL OFFICE: Austin Regional Office, 12100 Park 35 Circle, Building A, Austin, Texas 78753, (512) 239-3400.

(5) COMPANY: Rainbow Landscape Materials, LLC; DOCKET NUMBER: 2014-1523-WQ-E; TCEQ ID NUMBER: RN105695563; LOCATION: 3916 East Highway 67, Rainbow, Somervell County; TYPE OF FACILITY: aggregate production operation (APO); RULES VIOLATED: 30 TAC §342.25, by failing to register the site as an APO; and 40 Code of Federal Regulations §122.26(c) and 30 TAC §281.25(a)(4), by failing to obtain authorization to discharge stormwater associated with industrial activities under Texas Pollutant Discharge Elimination System General Permit Number TXR050000; PENALTY: $6,687; STAFF ATTORNEY: Jake Marx, Litigation Division, MC 175, (512) 239-5111; REGIONAL OFFICE: Dallas-Fort Worth Regional Office, 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

TRD-201600201
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: January 19, 2016

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Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent an executive director's preliminary report and petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **February 29, 2016.** The commission will consider any written comments received, and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction, or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on February 29, 2016.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075 provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: City of Joaquin; DOCKET NUMBER: 2015-1223-MWD-E; TCEQ ID NUMBER: RN102095437; LOCATION: approximately 2,800 feet east of North Chalk Street on Faulkville Road and approximately 2,700 feet northeast of the intersection of Jackson Street and United States Highway 84, Joaquin, Shelby County; TYPE OF FACILITY: wastewater treatment plant; RULES VIOLATED: TWC, §26.121(a)(1), 30 TAC §305.125(1) and (5), and Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0012718001, Permit Conditions Number 2.g., by failing to prevent the unauthorized discharge of untreated wastewater into or adjacent to any water in the state; and TWC, §26.039(b), 30 TAC §305.125(1) and (9)(A), and TPDES Permit Number WQ0012718001, Monitoring and Reporting Requirements Numbers 7.a. and 7.b., by failing to report any noncompliance which may endanger human health or safety or the environment to the TCEQ within 24 hours of becoming aware of the noncompliance; PENALTY: $37,287; STAFF ATTORNEY: Ryan Rutledge, Litigation Division, MC 175, (512) 239-0630; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(2) COMPANY: Eli Rodriguez dba Rodriguez Tire Shop; DOCKET NUMBER: 2015-1022-MSW-E; TCEQ ID NUMBER: RN107890097; LOCATION: 119 South Avenue K, Hereford, Deaf Smith County; TYPE OF FACILITY: used tire shop; RULE VIOLATED: 30 TAC §328.58(f), by failing to retain and make available upon request by agency personnel original manifests, work orders, invoices or other documentation used to support activities related to the accumulation, handling, and shipment of used or scrap tires or scrap tire pieces; PENALTY: $1,312; STAFF ATTORNEY: Audrey Liter, Litigation Division, MC 175, (512) 239-0684; REGIONAL OFFICE: Amarillo Regional Office, 3918 Canyon Drive, Amarillo, Texas 79109-4933, (806) 353-9251.

TRD-201600202
Kathleen C. Decker
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: January 19, 2016

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Notice of Receipt of Application and Intent to Obtain Municipal Solid Waste Permit Amendment Limited Scope Amendment to Permit Number 2334

APPLICATION. Stericycle, Inc., 5710 East Grimes Street, Harlingen, Cameron County, Texas 78550, a medical waste storage and processing facility, has applied to the Texas Commission on Environmental Quality (TCEQ) for a Type V Limited Scope Permit Major Amendment requesting to add autoclave sterilization as an additional medical waste treatment method at the Harlingen Processing Facility. Additionally, the facility permit boundary is being changed to add a parking area. The facility is located at the address listed above. The TCEQ received this application on September 14, 2015. The permit application is available for viewing and copying at Mario E. Ramirez, M.D., Library, 2102 Treasure Hills Boulevard, Harlingen, Cameron County, Texas 78550, and may be viewed online at http://www.lnvinc.com/files/stericycle/. The following web site which provides an electronic map of the site or facility's general location is provided as a public courtesy and is not part of the application or notice: http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=26.204166&lng=-97.636944&zoom=13&type=r. For exact location, refer to application.

ADDITIONAL NOTICE. TCEQ's Executive Director has determined the application is administratively complete and will conduct a technical review of the application. After technical review of the application is complete, the Executive Director may prepare a draft permit and will issue a preliminary decision on the application. Notice of the Application and Preliminary Decision will be published and mailed to those who are on the county-wide mailing list and to those who are on the mailing list for this application. That notice will contain the deadline for submitting public comments.

CHANGE IN LAW. The Texas Legislature enacted Senate Bill 709, effective September 1, 2015, amending the requirements for comments and contested case hearings. This application is subject to those changes in law.

PUBLIC COMMENT/PUBLIC MEETING. You may submit public comments or request a public meeting on this application. The purpose of a public meeting is to provide the opportunity to submit comments or to ask questions about the application. TCEQ will hold a public meeting if the Executive Director determines that there is a significant degree of public interest in the application or if requested by a local legislator. A public meeting is not a contested case hearing.

OPPORTUNITY FOR A CONTESTED CASE HEARING. After the deadline for submitting public comments, the Executive Director will consider all timely comments and prepare a response to all relevant and material, or significant public comments. Unless the application is directly referred for a contested case hearing, the response to comments, and the Executive Director's decision on the application, will be mailed to everyone who submitted public comments and to those persons who are on the mailing list for this application. If comments are received, the mailing will also provide instructions for requesting reconsideration of the Executive Director's decision and for requesting a contested case hearing. A person who may be affected by the facility is entitled to request a contested case hearing from the commission. A contested case hearing is a legal proceeding similar to a civil trial in state district court.

TO REQUEST A CONTESTED CASE HEARING, YOU MUST INCLUDE THE FOLLOWING ITEMS IN YOUR REQUEST: your name, address, phone number; applicant's name and permit number; the location and distance of your property/activities relative to the facility; a specific description of how you would be adversely affected by the facility in a way not common to the general public; a list of all disputed issues of fact that you submit during the comment period; and the statement "(I/we) request a contested case hearing." If the request for contested case hearing is filed on behalf of a group or association, the request must designate the group's representative for receiving future correspondence; identify by name and physical address an individual member of the group who would be adversely affected by the facility or activity; provide the information discussed above regarding the affected member's location and distance from the facility or activity; explain how and why the member would be affected; and explain how the interests the group seeks to protect are relevant to the group's purpose.

Following the close of all applicable comment and request periods, the Executive Director will forward the application and any requests for reconsideration or for a contested case hearing to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. The Commission may only grant a request for a contested case hearing on issues the requestor submitted in their timely comments that were not subsequently withdrawn.

If a hearing is granted, the subject of a hearing will be limited to disputed issues of fact or mixed questions of fact and law that are relevant and material to the Commission's decision on the application submitted during the comment period.

MAILING LIST. If you submit public comments, a request for a contested case hearing or a reconsideration of the Executive Director's decision, you will be added to the mailing list for this application to receive future public notices mailed by the Office of the Chief Clerk. In addition, you may request to be placed on: (1) the permanent mailing list for a specific applicant name and permit number; and/or (2) the mailing list for a specific county. To be placed on the permanent and/or the county mailing list, clearly specify which list(s) and send your request to TCEQ Office of the Chief Clerk at the address below.

AGENCY CONTACTS AND INFORMATION. All public comments and requests must be submitted either electronically at www.tceq.texas.gov/about/comments.html or in writing to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087. If you choose to communicate with the TCEQ electronically, please be aware that your email address, like your physical mailing address, will become part of the agency's public record. For more information about this permit application or the permitting process, please call the TCEQ's Public Education Program, Toll Free, at (800) 687-4040. Si desea información en español, puede llamar al (800) 687-4040.

Further information may also be obtained from Stericycle, Inc. at the address stated above or by calling Mr. R. Mark Triplett, Regional Environmental Manager at (504) 220-9372.

TRD-201600215
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: January 20, 2016

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Notice of Water Quality Application

The following notice was issued on January 14, 2016.

The following do not require publication in a newspaper. Written comments or requests for a public meeting may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087 WITHIN (30) DAYS OF THE ISSUED DATE OF THE NOTICE.

M&D Development LLC has applied for a minor amendment to the Texas Pollutant Discharge Elimination System Permit No. WQ0015090001 to authorize the addition of an Interim phase with a daily average flow not to exceed 25,000 gallons per day of treated domestic wastewater. The existing permit authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 49,000 gallons per day. The facility will be located at 16726 House Hahl Road, in Harris County, Texas 77433.

TRD-201600214
Bridget C. Bohac
Chief Clerk
Texas Commission on Environmental Quality
Filed: January 20, 2016

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Texas Facilities Commission

Request for Proposals #303-7-20537

The Texas Facilities Commission (TFC), on behalf of the Texas Department of Motor Vehicles (TxDMV), announces the issuance of Request for Proposals (RFP) #303-7-20537. TFC seeks a five (5) or ten (10) year lease of approximately 3,916 square feet of office space in San Antonio, Texas.

The deadline for questions is February 16, 2016, and the deadline for proposals is March 1, 2016, at 3:00 p.m. The award date is April 20, 2016. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of an RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting the Program Specialist, Evelyn Esquivel, at (512) 463-6494. A copy of the RFP may be downloaded from the Electronic State Business Daily at *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=122251*.

TRD-201600212
Kay Molina
General Counsel
Texas Facilities Commission
Filed: January 19, 2016

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Department of State Health Services

Licensing Actions for Radioactive Materials

During the second half of December, 2015, the Department of State Health Services (Department) has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables (in alphabetical order by location). The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout TX [Texas]" indicates that the radioactive material may be used on a temporary basis at locations throughout the state.

In issuing new licenses and amending and renewing existing licenses, the Department's Radiation Safety Licensing Branch has determined that the applicant has complied with the licensing requirements in Title 25 Texas Administrative Code (TAC), Chapter 289, for the noted action. In granting termination of licenses, the Department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC, Chapter 289.

This notice affords the opportunity for a hearing on written request, within 30 days of the date of publication of this notice, of a person affected by the Department's action. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. 25 TAC §289.205(b)(15); Health and Safety Code §401.003(15). A person affected may request a hearing as prescribed in 25 TAC § 289.205(c) by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, Radiation Material Licensing – MC 2835, PO Box 149347, Austin, Texas 78714-9347. For information call (512) 834-6688.

NEW LICENSES ISSUED:

Location of Use/Possession of Material	Name of Licensed Entity	License Number	City of Licensed Entity	Amend-ment Number	Date of Action
Throughout TX	Micro Motion Inc. dba Roxar	L06760	Houston	00	12/17/15

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location of Use/Possession of Material	Name of Licensed Entity	License Number	City of Licensed Entity	Amend-ment Number	Date of Action
Abilene	Cardinal Health dba National Central Pharmacy	L04781	Abilene	37	12/30/15
Austin	Seton Family of Hospitals	L00268	Austin	141	12/17/15
Austin	Austin Radiological Association	L00545	Austin	184	12/17/15
Austin	St. Davids Healthcare Partnership L.P., L.L.P. dba North Austin Medical Center	L04910	Austin	98	12/28/15
Austin	St. Davids Healthcare Partnership L.P., L.L.P. dba St. Davids Medical Center	L06335	Austin	19	12/18/15
Bryan	St. Joseph Regional Health Center	L00573	Bryan	84	12/31/15
Carthage	East Texas Medical Center	L02540	Carthage	43	12/28/15
Dallas	Southern Methodist University	L00443	Dallas	28	12/30/15
Dallas	Methodist Hospitals of Dallas	L00659	Dallas	108	12/16/15
Denton	University of North Texas	L00101	Denton	109	12/22/15
Edinburg	Sunshine Medical Services	L06742	Edinburg	01	12/22/15
Fort Worth	Baylor All Saints Medical Center dba Baylor Scott & White All Saints Medical Center – Fort Worth	L02212	Fort Worth	99	12/18/15
Helotes	Medicine and Radiation Oncology P.A.	L06503	Helotes	05	12/22/15
Houston	Memorial Hermann Health System dba Memorial Hermann Southwest Hospital	L00439	Houston	208	12/30/15
Houston	Baylor College of Medicine	L00680	Houston	120	12/16/15
Houston	University of Houston Clear Lake	L02108	Houston	22	12/21/15
Houston	Memorial Hermann Health System dba Memorial Hermann Northeast Hospital	L02412	Houston	107	12/21/15
Houston	American Diagnostic Tech. L.L.C.	L05514	Houston	112	12/30/15

Houston	I.M. Jawdat M.D., P.A. dba Houston Heart Clinic	L05671	Houston	09	12/17/15
Houston	University General Hospital L.P.	L06018	Houston	17	12/16/15
Houston	Radiomedix Inc. dba Radiomedix	L06044	Houston	18	12/18/15
Irving	Baylor Medical Center at Irving dba Baylor Scott & White Medical Ctr. Irving	L02444	Irving	103	12/18/15
League City	Suntrac Services Inc.	L03062	League City	29	12/18/15
Lubbock	Covenant Health System dba Covenant Womens and Childrens Hospital	L01547	Lubbock	101	12/18/15
Lubbock	Covenant Health System dba Joe Arrington Cancer Research and Treatment Center	L04881	Lubbock	66	12/18/15
McAllen	McAllen Hospitals L.P. dba South Texas Health System	L06593	McAllen	01	12/28/15
Midland	West Texas Nuclear Pharmacy Partners	L04573	Midland	31	12/30/15
Plano	Texas Health Presbyterian Hospital Plano	L04467	Plano	70	12/31/15
Port Lavaca	Seadrift Coke L.P.	L03432	Port Lavaca	30	12/16/15
Richardson	Methodist Hospitals of Dallas dba Methodist Richardson Medical Center	L06475	Richardson	05	12/21/15
San Antonio	South Texas Blood & Tissue Center	L04381	San Antonio	16	12/23/15
San Antonio	Southwest Research Institute	L04958	San Antonio	19	12/18/15
Seguin	Guadalupe Regional Medical Center	L02292	Seguin	54	12/16/15
Throughout TX	Desert NDT L.L.C. dba Shawcor	L06462	Abilene	32	12/22/15
Throughout TX	Capital Geotechnical Services P.L.L.C.	L06675	Austin	04	12/22/15
Throughout TX	KLX Energy Services L.L.C.	L06640	Benbrook	03	12/23/15
Throughout TX	FTS International Services L.L.C.	L06188	Fort Worth	19	12/22/15
Throughout TX	Nuclear Sources & Services Inc. dba NSSI/Sources & Services Inc. NSSI	L02991	Houston	41	12/22/15
Throughout TX	Nuclear Scanning Services Inc.	L04339	Houston	30	12/30/15
Throughout TX	ECS Texas L.L.P.	L06693	Houston	03	12/21/15
Throughout TX	Framo Houston Inc.	L06436	La Porte	01	12/31/15
Throughout TX	Quantum Technical Services L.L.C.	L06406	Pasadena	11	12/22/15
Throughout TX	PSI Wireline Inc.	L05911	San Angelo	08	12/22/15
Throughout TX	Advanced Inspection Technologies L.L.C.	L06608	Spring	03	12/18/15
Throughout TX	GR Wireline L.P. Operations L.P.	L06734	Sugar Land	01	12/21/15
Waxahachie	Baylor Medical Center at Waxahachie dba Baylor Scott & White Medical Center – Waxahachie	L04536	Waxahachie	47	12/21/15
Wichita Falls	Kell West Regional Hospital L.L.C.	L05943	Wichita Falls	15	12/28/15

RENEWAL OF LICENSES ISSUED:

Location of Use/Possession of Material	Name of Licensed Entity	License Number	City of Licensed Entity	Amend-ment Number	Date of Action
Andrews	Andrews County Hospital District dba Permian Regional Medical Center	L03158	Andrews	27	12/18/15
Throughout TX	HVJ Associates Inc.	L03813	Houston	53	12/22/15

TERMINATIONS OF LICENSES ISSUED:

Location of Use/Possession of Material	Name of Licensed Entity	License Number	City of Licensed Entity	Amend-ment Number	Date of Action
Austin	Consolidated Technologies Inc.	L02045	Austin	26	12/31/15
Houston	Hall Garcia Cardiology Associates	L05431	Houston	06	12/16/15

TRD-201600176
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: January 14, 2016

♦ ♦ ♦

Texas Department of Insurance

Company Licensing

Application for TEAM DENTAL, INC., a domestic Health Maintenance Organization, to change its name to NEW ERA QUALITY HEALTH, INC. The home office is in Houston, Texas.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, MC 305-2C, Austin, Texas 78701.

TRD-201600219
Norma Garcia
General Counsel
Texas Department of Insurance
Filed: January 20, 2016

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Texas Juvenile Justice Department

Notice of Change of Effective Date

This notice is to advise of a change in the effective date for recently adopted revisions to 37 TAC Chapter 343, concerning Secure Juvenile Pre-Adjudication Detention and Post-Adjudication Correctional Facilities.

In the October 23, 2015, issue of the *Texas Register* (40 TexReg 7430 and 40 TexReg 7442), the Texas Juvenile Justice Department adopted new and amended rules and repealed rules throughout 37 TAC Chapter 343. These revisions will take effect on June 1, 2016, and not on February 1, 2016, as originally published.

TRD-201600225
Karen Kennedy
Deputy General Counsel
Texas Juvenile Justice Department
Filed: January 20, 2016

♦ ♦ ♦

Texas Lottery Commission

Scratch Ticket Game Number 1744 "Texas Lottery Live!"

1.0 Name and Style of Game.

A. The name of Scratch Ticket Game No. 1744 is "TEXAS LOTTERY LIVE!". The play style is "key number match".

1.1 Price of Scratch Ticket Game.

A. Tickets for Scratch Ticket Game No. 1744 shall be $5.00 per Ticket.

1.2 Definitions in Scratch Ticket Game No. 1744.

A. Display Printing - That area of the Scratch Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Ticket.

C. Play Symbol - The printed data under the latex on the front of the Scratch Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: 01, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 2X SYMBOL, $5.00, $10.00, $15.00, $20.00, $50.00, $100, $250, $500, $1,000, $5,000 and $100,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1744 - 1.2D

PLAY SYMBOL	CAPTION
01	ONE
03	THR
04	FOR
05	FIV
06	SIX
07	SVN
08	EGT
09	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
41	FRON
42	FRTO
43	FRTH
44	FRFR
45	FRFV
46	FRSX
47	FRSV

48	FRET
49	FRNI
50	FFTY
2X SYMBOL	WINX2
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUN
$250	TWO FTY
$500	FIV HUN
$1,000	ONE THOU
$5,000	FIV THOU
$100,000	100 THOU

E. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the Ticket. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100, $250 or $500.

H. High-Tier Prize - A prize of $1,000, $5,000 or $100,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Scratch Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1744), a seven (7) digit Pack number, and a three (3) digit Scratch Ticket number. Scratch Ticket numbers start with 001 and end with 075 within each Pack. The format will be: 1744-0000001-001.

K. Pack - A Pack of "TEXAS LOTTERY LIVE!" Scratch Ticket Game contains 075 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). Ticket 001 will be shown on the front of the Pack; the back of Ticket 075 will be revealed on the back of the Pack. All Packs will be tightly shrink-wrapped. There will be no breaks between the Tickets in a Pack. Every other book will reverse i.e., reverse order will be: the back of Ticket 001 will be shown on the front of the Pack and the front of Ticket 075 will be shown on the back of the Pack.

L. Non-Winning Scratch Ticket - A Scratch Ticket which is not programmed to be a winning Scratch Ticket or a Scratch Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Scratch Ticket Game or Scratch Ticket, or Ticket - A Texas Lottery "TEXAS LOTTERY LIVE!" Scratch Ticket Game No. 1744 Ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Scratch Ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each Scratch Ticket. A prize winner in the "TEXAS LOTTERY LIVE!" Scratch Ticket Game is determined once the latex on the Scratch Ticket is scratched off to expose 45 (forty-five) Play Symbols. If a player matches any of YOUR NUMBERS Play Symbols to any of the WINNING NUMBERS Play Symbols, the player wins the prize for that number. If a player reveals a "2X" Play Symbol, the player wins DOUBLE the prize for that symbol. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Scratch Ticket.

2.1 Scratch Ticket Validation Requirements.

A. To be a valid Scratch Ticket, all of the following requirements must be met:

1. Exactly 45 (forty-five) Play Symbols must appear under the Latex Overprint on the front portion of the Scratch Ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The Scratch Ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Scratch Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Scratch Ticket;

8. The Scratch Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The Scratch Ticket must not be counterfeit in whole or in part;

10. The Scratch Ticket must have been issued by the Texas Lottery in an authorized manner;

11. The Scratch Ticket must not have been stolen, nor appear on any list of omitted Scratch Tickets or non-activated Scratch Tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Scratch Ticket Number must be right side up and not reversed in any manner;

13. The Scratch Ticket must be complete and not miscut and have exactly 45 (forty-five) Play Symbols under the Latex Overprint on the front portion of the Scratch Ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Scratch Ticket Number on the Scratch Ticket;

14. The Serial Number of an apparent winning Scratch Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Scratch Tickets, and a Scratch Ticket with that Serial Number shall not have been paid previously;

15. The Scratch Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 45 (forty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 45 (forty-five) Play Symbols on the Scratch Ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Scratch Ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Scratch Ticket Number must be printed in the Pack-Scratch Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Scratch Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Scratch Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Scratch Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Scratch Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Scratch Ticket. In the event a defective Scratch Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Scratch Ticket with another unplayed Scratch Ticket in that Scratch Game Ticket (or a Scratch Ticket of equivalent sales price from any other current Texas Lottery Scratch Ticket Game) or refund the retail sales price of the Scratch Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive Non-Winning Tickets within a Pack will not have matching patterns of either Play Symbols or Prize Symbols.

B. A Ticket will win as indicated by the prize structure.

C. A Ticket can win up to twenty (20) times.

D. On winning and Non-Winning Tickets, the top cash prizes of $100,000, $5,000 and $1,000 will each appear at least once, except on Tickets winning more than fifteen (15) times.

E. No matching non-winning YOUR NUMBERS Play Symbols will appear on a Ticket.

F. Non-winning Prize Symbols will not match a winning Prize Symbol on a Ticket.

G. Tickets winning more than one (1) time will use as many WINNING NUMBERS Play Symbols as possible to create matches, unless restricted by other parameters, play action or prize structure.

H. No matching WINNING NUMBERS Play Symbols will appear on a Ticket.

I. The "2X" (WINX2) Play Symbol will never appear as a WINNING NUMBERS Play Symbol.

J. The "2X" (WINX2) Play Symbol will never appear more than once on a Ticket.

K. The "2X" (WINX2) Play Symbol will never appear on a Non-Winning Ticket.

L. The "2X" (WINX2) Play Symbol will win DOUBLE the prize for that Play Symbol and will win as per the prize structure.

M. YOUR NUMBERS Play Symbols will never equal the corresponding Prize Symbol (i.e., 5 and $5, 10 and $10, 15 and $15, 20 and $20, 50 and $50).

N. On all Tickets, a Prize Symbol will not appear more than four (4) times except as required by the prize structure to create multiple wins.

O. On Non-Winning Tickets, a WINNING NUMBERS Play Symbol will never match a YOUR NUMBERS Play Symbol.

2.3 Procedure for Claiming Prizes.

A. To claim a "TEXAS LOTTERY LIVE!" Scratch Ticket Game prize of $5.00, $10.00, $20.00, $50.00, $100, $250 or $500, a claimant shall sign the back of the Scratch Ticket in the space designated on the Scratch Ticket and present the winning Scratch Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Scratch Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $50.00, $100, $250 or $500 Scratch Ticket Game. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "TEXAS LOTTERY LIVE!" Scratch Ticket Game prize of $1,000, $5,000 or $100,000, the claimant must sign the winning Scratch Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Scratch Ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "TEXAS LOTTERY LIVE!" Scratch Ticket Game prize, the claimant must sign the winning Scratch Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, P.O. Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Scratch Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. a sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

F. If a person is indebted or owes delinquent taxes to the State, and is selected as a winner in a promotional second-chance drawing, the debt to the State must be paid within 30 days of notification or the prize will be awarded to an Alternate.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the Scratch Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under $600 from the "TEXAS LOTTERY LIVE!" Scratch Ticket Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of $600 or more from the "TEXAS LOTTERY LIVE!" Scratch Ticket Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Scratch Ticket Claim Period. All Scratch Ticket prizes must be claimed within 180 days following the end of the Scratch Ticket Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Scratch Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Scratch Tickets ordered. The number of actual prizes available in a game may vary based on number of Scratch Tickets manufactured, testing, distribution, sales and number of prizes claimed. A Scratch Ticket Game may continue to be sold even when all the top prizes have been claimed.

2.9 Promotional Second-Chance Drawings. Any non-winning "TEXAS LOTTERY LIVE!" Scratch Ticket Game may be entered into one of five promotional drawings for a chance to win a promotional second-chance drawing prize. See instructions on the back of the Scratch Ticket for information on eligibility and entry requirements.

3.0 Scratch Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of a Scratch Ticket in the space designated, a Scratch Ticket shall be owned by the physical possessor of said Scratch Ticket. When a signature is placed on the back of the Scratch Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Scratch Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Scratch Ticket in the space designated. If more than one name appears on the back of the Scratch Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Scratch Tickets and shall not be required to pay on a lost or stolen Scratch Ticket.

4.0 Number and Value of Scratch Ticket Prizes. There will be approximately 7,200,000 Scratch Tickets in the Scratch Ticket Game No. 1744. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1744 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$5	608,000	11.84
$10	848,000	8.49
$20	288,000	25.00
$50	48,300	149.07
$100	11,800	610.17
$250	2,480	2,903.23
$500	1,980	3,636.36
$1,000	360	20,000.00
$5,000	60	120,000.00
$100,000	7	1,028,571.43

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 3.98. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Scratch Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Scratch Ticket Game. The Executive Director may, at any time, announce a closing date (end date) for the Scratch Ticket Game No. 1744 without advance notice, at which point no further Scratch Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Scratch Ticket closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing a Scratch Ticket, the player agrees to comply with, and abide by, these Game Procedures for Scratch Ticket Game No. 1744, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201600224
Bob Biard
General Counsel
Texas Lottery Commission
Filed: January 20, 2016

♦ ♦ ♦

Scratch Ticket Game Number 1795 "Instant Bingo"

1.0 Name and Style of Scratch Ticket Game.

A. The name of Scratch Ticket Game No. 1795 is "INSTANT BINGO". The play style is "bingo".

1.1 Price of Scratch Ticket Game.

A. The price for Scratch Ticket Game No. 1795 shall be $2.00 per Ticket.

1.2 Definitions in Scratch Ticket Game No. 1795.

A. Display Printing - That area of the Scratch Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Scratch Ticket.

C. Play Symbol - The printed data under the latex on the front of the Scratch Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: B01, B02, B03, B04, B05, B06, B07, B08, B09, B10, B11, B12, B13, B14, B15, I16, I17, I18, I19, I20, I21, I22, I23, I24, I25, I26, I27, I28, I29, I30, N31, N32, N33, N34, N35, N36, N37, N38, N39, N40, N41, N42, N43, N44, N45, G46, G47, G48, G49, G50, G51, G52, G53, G54, G55, G56, G57, G58, G59, G60, O61, O62, O63, O64, O65, O66, O67, O68, O69, O70, O71, O72, O73, O74, O75, 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, FREE SYMBOL, GOLD BAR SYMBOL, BELL SYMBOL, CROWN SYMBOL, DIAMOND SYMBOL, STAR SYMBOL, POT OF GOLD SYMBOL, HORSESHOE SYMBOL and CHERRY SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. Crossword and Bingo style games do not typically have Play Symbol Captions. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1795 - 1.2D

PLAY SYMBOL	CAPTION
B01	
B02	
B03	
B04	
B05	
B06	
B07	
B08	
B09	
B10	
B11	
B12	
B13	
B14	
B15	
I16	
I17	
I18	
I19	
I20	
I21	
I22	
I23	
I24	
I25	
I26	
I27	
I28	
I29	
I30	
N31	
N32	
N33	
N34	
N35	
N36	
N37	
N38	
N39	
N40	
N41	
N42	
N43	
N44	
N45	
G46	

G47	
G48	
G49	
G50	
G51	
G52	
G53	
G54	
G55	
G56	
G57	
G58	
G59	
G60	
O61	
O62	
O63	
O64	
O65	
O66	
O67	
O68	
O69	
O70	
O71	
O72	
O73	
O74	
O75	
01	
02	
03	
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FREE SYMBOL	
GOLD BAR SYMBOL	BAR
BELL SYMBOL	BELL
CROWN SYMBOL	CRN
DIAMOND SYMBOL	DMD
STAR SYMBOL	STAR
POT OF GOLD SYMBOL	PTGD
HORSESHOE SYMBOL	SHOE
CHERRY SYMBOL	CHRY

E. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the Scratch Ticket. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

F. Low-Tier Prize - A prize of $2.00, $3.00, $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $30.00, $50.00, $100 or $500.

H. High-Tier Prize - A prize of $1,000 or $30,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Scratch Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Scratch Ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1795), a seven (7) digit Pack number, and a three (3) digit Scratch Ticket number. Scratch Ticket numbers start with 001 and end with 125 within each Pack. The format will be: 1795-0000001-001.

K. Pack - A Pack of the "INSTANT BINGO" Scratch Ticket Game contains 125 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). There will be 2 fanfold configurations for this game. Configuration A will show the front of Scratch Ticket 001 and the back of Scratch Ticket 125. Configuration B will show the back of Scratch Ticket 001 and the front of Scratch Ticket 125.

L. Non-Winning Scratch Ticket - A Scratch Ticket which is not programmed to be a winning Scratch Ticket or a Scratch Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Scratch Game Ticket, Scratch Ticket or Ticket - Texas Lottery "INSTANT BINGO" Scratch Ticket Game No. 1795.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Scratch Ticket validation requirements set forth in Texas Lottery Rule §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each Scratch Ticket. A prize winner in the "INSTANT BINGO" Scratch Ticket Game is determined once the latex on the Scratch Ticket is scratched off to expose 132 (one hundred thirty-two) Play Symbols. INSTANT BINGO PLAY INSTRUCTIONS: The player scratches the "CALLER'S CARD" to reveal twenty-four (24) Bingo Numbers and scratches the "BONUS NUMBERS" to reveal six (6) BONUS Bingo Numbers. The player scratches only those Bingo Numbers on the four (4) "BINGO CARDS" that match the "CALLER'S CARD" Bingo Numbers and the BONUS Bingo Numbers. The player also scratches the "FREE" spaces. If a player matches all Bingo Numbers in a complete vertical, horizontal or diagonal line; all Bingo Numbers in all four (4) corners; or all Bingo Numbers to complete an "X" [eight (8) Bingo Numbers plus the "FREE" space] on the same "BINGO CARD", the player wins the prize in the corresponding prize legend for that "BINGO CARD". INSTANT BONUS PLAY INSTRUCTIONS: If a player reveals two matching Play Symbols, the player wins $10. Note: Only the highest prize per "BINGO CARD" will be paid. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Scratch Ticket.

2.1 Scratch Ticket Validation Requirements.

A. To be a valid Scratch Ticket, all of the following requirements must be met:

1. Exactly 132 (one hundred thirty-two) Play Symbols must appear under the Latex Overprint on the front portion of the Scratch Ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, and each Play Symbol must agree with its Play Symbol Caption; Crossword and Bingo style games do not typically have Play Symbol captions;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The Scratch Ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Scratch Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Scratch Ticket;

8. The Scratch Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The Scratch Ticket must not be counterfeit in whole or in part;

10. The Scratch Ticket must have been issued by the Texas Lottery in an authorized manner;

11. The Scratch Ticket must not have been stolen, nor appear on any list of omitted Scratch Tickets or non-activated Scratch Tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Scratch Ticket Number must be right side up and not reversed in any manner;

13. The Scratch Ticket must be complete and not miscut and have exactly 132 (one hundred thirty-two) Play Symbols under the Latex Overprint on the front portion of the Scratch Ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Scratch Ticket Number on the Scratch Ticket;

14. The Serial Number of an apparent winning Scratch Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Scratch Tickets, and a Scratch Ticket with that Serial Number shall not have been paid previously;

15. The Scratch Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 132 (one hundred thirty-two) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 132 (one hundred thirty-two) Play Symbols on the Scratch Ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Scratch Ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Scratch Ticket Number must be printed in the Pack-Scratch Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Scratch Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Scratch Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Scratch Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Scratch Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Scratch Ticket. In the event a defective Scratch Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Scratch Ticket with another unplayed Scratch Ticket in that Scratch Ticket Game (or a Scratch Ticket of equivalent sales price from any other current Texas Lottery Scratch Ticket Game) or refund the retail sales price of the Scratch Ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive Non-Winning Tickets in a Pack will not have matching play data, spot for spot.

B. Bingo: The "CALLING AREA" is defined as the "CALLER'S CARD" and "BONUS NUMBERS" play areas.

C. Bingo: The number range used for each letter (B, I, N, G, O) will be as follows: B (1-15), I (16-30), N (31-45), G (46-60), O (61-75).

D. Bingo: No matching Play Symbols (numbers) will appear in the "CALLING AREA".

E. Bingo: Each Play Symbol (number) in the "CALLING AREA" will appear on at least one of the "BINGO CARDS".

F. Bingo: There will be one (1) "FREE" Play Symbol per card fixed in the center of each "BINGO CARD".

G. Bingo: Each "BINGO CARD" on a Ticket will be different. Two (2) cards match if they have the same Play Symbols (numbers) in the same spots.

H. Bingo: All Play Symbols (numbers) within each "BINGO CARD" are different.

I. Bingo: There can only be one winning pattern on each "BINGO CARD".

J. Bingo: Non-winning "BINGO CARDS" will match a minimum of three (3) Play Symbols (numbers).

K. Bonus: There will be two (2) matching Instant Bonus Play Symbols only as dictated by the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim an "INSTANT BINGO" Scratch Ticket Game prize of $2.00, $3.00, $5.00, $10.00, $15.00, $20.00, $30.00, $50.00, $100 or $500, a claimant shall sign the back of the Scratch Ticket in the space designated on the Scratch Ticket and present the winning Scratch Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Scratch Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a $30.00, $50.00, $100 or $500 Scratch Ticket Game. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "INSTANT BINGO" Scratch Ticket Game prize of $1,000 or $30,000, the claimant must sign the winning Scratch Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Scratch Ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "INSTANT BINGO" Scratch Ticket Game prize, the claimant must sign the winning Scratch Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, P.O. Box 16600, Austin, Texas 78761-6600. The Texas

Lottery is not responsible for Scratch Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct:

1. A sufficient amount from the winnings of a prize winner who has been finally determined to be:

a. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

b. in default on a loan made under Chapter 52, Education Code; or

c. in default on a loan guaranteed under Chapter 57, Education Code; and

2. delinquent child support payments from the winnings of a prize winner in the amount of the delinquency as determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the Scratch Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under $600 from the "INSTANT BINGO" Scratch Ticket Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of $600 or more from the "INSTANT BINGO" Scratch Ticket Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Scratch Ticket Claim Period. All Scratch Ticket prizes must be claimed within 180 days following the end of the Scratch Ticket Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Scratch Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Scratch Tickets ordered. The number of actual prizes available in a game may vary based on number of Scratch Tickets manufactured, testing, distribution, sales and number of prizes claimed. A Scratch Ticket Game may continue to be sold even when all the top prizes have been claimed.

3.0 Scratch Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of a Scratch Ticket in the space designated, a Scratch Ticket shall be owned by the physical possessor of said Scratch Ticket. When a signature is placed on the back of the Scratch Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Scratch Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Scratch Ticket in the space designated. If more than one name appears on the back of the Scratch Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Scratch Tickets and shall not be required to pay on a lost or stolen Scratch Ticket.

4.0 Number and Value of Scratch Prizes. There will be approximately 35,040,000 Scratch Tickets in Scratch Ticket Game No. 1795. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1795 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$2	3,363,840	10.42
$3	1,892,160	18.52
$5	1,681,920	20.83
$10	560,640	62.50
$15	350,400	100.00
$20	280,320	125.00
$30	63,656	550.46
$50	43,800	800.00
$100	23,360	1,500.00
$500	2,336	15,000.00
$1,000	122	287,213.11
$30,000	18	1,946,666.67

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.
**The overall odds of winning a prize are 1 in 4.24. The individual odds of winning for a particular prize level may vary based on sales, distribution, and number of prized claimed.

A. The actual number of Scratch Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Scratch Ticket Game. The Executive Director may, at any time, announce a closing date (end date) for the Scratch Ticket Game No. 1795 without advance notice, at which point no further Scratch Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Scratch Ticket closing procedures and the Instant Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing a Scratch Ticket, the player agrees to comply with, and abide by, these Game Procedures for Scratch Ticket Game No. 1795, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-201600226
Bob Biard
General Counsel
Texas Lottery Commission
Filed: January 20, 2016

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Panhandle Regional Planning Commission

Legal Notice

The Panhandle Regional Planning Commission (PRPC) is seeking quotes for comprehensive child development curricula suitable for use in a regulated day-care setting. The curricula should cover the learning domains clearly in each learning activity of Health and Well-being, Social and Emotional, Language and Communication, and Cognitive Development for Infants and Toddlers; and Social and Emotional, Language and Communication, Emergent Literacy-Reading and Writing, Mathematics, Science, Social Studies, Fine Arts, Health and Well-being and Technology for Preschoolers. All kits, at a minimum, must meet associated Texas Rising Star (TRS) Provider Certification guidelines.

A copy of the Request for Quotes (RFQ) can be obtained Monday through Friday, 8:00 a.m. to 5:00 p.m., at 415 Southwest Eighth Ave., Amarillo, Texas 79101 or by contacting Leslie Hardin, PRPC's Workforce Development Contracts Coordinator at (806) 372-3381 or *lhardin@theprpc.org*. Proposals must be received at PRPC by 3:00 p.m. on Friday, February 12, 2016.

TRD-201600152
Leslie Hardin
WFD Contracts Coordinator
Panhandle Regional Planning Commission
Filed: January 14, 2016

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Texas Department of Public Safety

Correction of Error

The Texas Department of Public Safety proposed amendments to 37 TAC §15.42, concerning Social Security Number, in the January 8, 2016, issue of the *Texas Register* (41 TexReg 446). During the Texas Register editing process, four errors were introduced into the proposal.

On page 447, first column, fifth paragraph, the email address for submitting comments on the proposal is incorrectly shown as "LDrulecomments@dps.texas.gov". The correct email address is "DLDrulecomments@dps.texas.gov".

In §15.42(b), the rule language is incorrect. The corrected subsection reads as follows:

"(b) When an SSN [~~a social security number~~] is originally obtained, it is mandatory that documentation be provided to verify the number. All documents presented for proof of SSN must be verifiable through the issuing entity and include a pre-printed SSN. Documentation may include:"

In §15.42(e), the rule language is incorrect. The corrected subsection reads as follows:

"(e) [~~(f)~~] Applicants who state they have not applied for, have not been issued or do not have an SSN [~~a social security number~~] assigned by the Social Security Administration will be given the department's "Social Security" affidavit for completion. This sworn affidavit will contain:"

In §15.42(e)(2), the rule language is incorrect. The corrected paragraph reads as follows:

"(2) A statement that the applicant has not applied for, been issued or assigned an SSN [~~a social security number~~] by the United States Social Security Administration;"

TRD-201600221

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Public Utility Commission of Texas

Notice of Application for Sale, Transfer, or Merger

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on January 11, 2016, pursuant to the Texas Water Code.

Docket Style and Number: Application of HOE Water Supply Corporation and Harris County MUD No. 480 for Sale, Transfer, or Merger of Certificate Rights in Harris County (37986-S); Docket Number 45510.

The Application: HOE Water Supply Corporation and Harris County Municipal Utility District (MUD) No. 480 filed an application for sale, transfer, or merger of facilities and certificate of convenience and necessity (CCN) rights in Harris County. Specifically, HOE Water Supply seeks approval to transfer a portion of their water service area to Harris County MUD held under water CCN No. 12756. A single new development will be served by the MUD as a single service unit.

Persons who wish to intervene in the proceeding or comment upon the action sought should contact the commission as soon as possible as an intervention deadline will be imposed. A comment or request to intervene should be mailed to Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326. Further information may also be obtained by calling the commission's Office of Customer Protection at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All correspondence should refer to Docket Number 45510.

TRD-201600171
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 14, 2016

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Notice of Petition to Cancel a Sewer Certificate of Convenience and Necessity

Notice is given to the public of a petition filed with the Public Utility Commission of Texas (commission) to cancel a sewer certificate of convenience and necessity (CCN) in Travis County.

Docket Style and Number: Petition of Travis Vista Water and Sewer Supply Corporation to Discontinue Service and Cancel a Certificate of Convenience and Necessity in Travis County, Docket Number 45512.

The Application: Travis Vista Water and Sewer Supply Corporation filed a petition with the commission to cancel its sewer CCN No. 20744 in Travis County. All customers are now physically connected to the Travis County Water Control and Improvement District No. 17 sewer service.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326 or by phone at (512) 936-7120 or toll-free at (888) 782-8477. A deadline for intervention in this proceeding will be established. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 45512.

TRD-201600170
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 14, 2016

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Strawman Proposal

The Public Utility Commission of Texas (commission) Staff proposes to add new Subchapter E, Enhanced Contract Monitoring, to Chapter 27 of the Texas Administrative Code (TAC) to reflect the procedure of identifying contracts that require enhanced contract monitoring by SB 20, 84th Legislative Session. Commission Staff proposes to add new 16 TAC §27.170, relating to Enhanced Contract Monitoring Procedure, to create a procedure to identify contracts that require enhance contract monitoring pursuant to Senate Bill 20.

Commission Staff requests that interested parties submit comments on this strawman proposal by Friday, February 5, 2016. The strawman proposal is available on the commission interchange filing system under Project No. 45273 at http://interchange.puc.texas.gov/WebApp/Interchange/application/dbapps/login/pgLogin.asp. Comments may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326. All responses should reference Project No. 45273.

A subsequent workshop will be held at the Public Utility Commission offices on Wednesday, February 10, 2016, to provide a forum for further comment. A workshop agenda will be filed in Project No. 45273 at least one week prior to the workshop.

TRD-201600174
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: January 14, 2016

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Texas Department of Transportation

Notice of Availability

Pursuant to Texas Administrative Code, Title 43, §2.108, the Texas Department of Transportation (TxDOT) is advising the public of the availability of the ROD for the proposed construction of the US 181 Harbor Bridge Project improvements in Nueces County, Texas. The project limits include: US 181 at Beach Avenue on the north; Crosstown Expressway at Morgan Avenue on the south; I-37 and Up River Road on the west; and I-37 and Shoreline Boulevard on the east.

The project would replace the existing Harbor Bridge and reconstruct portions of US 181, I-37 and the Crosstown Expressway. The improvements would consist of constructing a six-lane controlled-access facility within a right-of-way width that varies between 200-430 feet, three lanes in each direction with a median barrier, shoulders and a bicycle and pedestrian shared-use path on the main span of the bridge and approaches.

The ROD identifies the Recommended Alternative as the selected alternative for construction of the US 181 Harbor Bridge Project. It presents the basis for the decision, summarizes the mitigation measures that will be incorporated into the project, and summarizes the responses to comments received on the FEIS. It also describes the Voluntary Resolution Agreement between the Federal Highway Administration and TxDOT that is the response to a complaint filed under Title VI of the Civil Rights Act of 1964 concerning the project.

A digital version of the ROD may be downloaded from the project website at *ccharborbridgeproject.com.* Paper copies of the ROD and other information about the project may be requested from TxDOT Corpus Christi District Office, 1701 S. Padre Island Drive, Texas 78416 or from TxDOT Environmental Affairs Division, 118 E. Riverside Drive, Austin, Texas 78704. Paper copies may be obtained at the requester's expense. Submit requests in writing to Christopher Amy, TxDOT Corpus Christi District Office, 1701 S. Padre Island Drive, Texas 78416, *christopher.amy@txdot.gov,* (361) 808-2376.

TRD-201600155
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: January 14, 2016

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Notice of Availability

Final Environmental Impact Statement (EIS) and Record of Decision (ROD) SH 249 Extension from south of Farm-to-Market Road (FM) 1774/FM 149 in Pinehurst to FM 1774 north of Todd Mission in Montgomery and Grimes Counties, Texas

Pursuant to Texas Administrative Code, Title 43, §2.108, the Texas Department of Transportation (TxDOT) is advising the public of the availability of the combined Final EIS and ROD for proposed construction of State Highway 249 Extension (SH 249) in Montgomery and Grimes Counties, Texas. The project would construct a four-lane, limited access toll road. The project limits extend from south of FM 1774 in Pinehurst to FM 1774 north of Todd Mission, a distance of 15 miles. The Selected Alternative would consist of a limited access toll facility on new location and would typically include four 12-foot-wide lanes, 10-foot-wide outside shoulders, and four-foot-wide inside shoulders within a 400 foot right-of-way. The Selected Alternative would require the acquisition of 727 acres of additional right-of-way.

The ROD explains how the Selected Alternative was chosen and signifies the completion of the environmental review process.

A digital version of the combined Final EIS and ROD may be downloaded from the SH 249 Extension project website at *http://www.txdot.gov/inside-txdot/projects/studies/houston/sh249-extension.html.* In addition, the Final EIS/ROD is on file at the following locations:

(1) Texas Department of Transportation, 7600 Washington Avenue, Houston, Texas 77007;

(2) Montgomery County Area Office, 901 N. FM 3083 East, Conroe, Texas 77303; and

(3) TxDOT Bryan District Office, 2591 North Earl Rudder Freeway, Bryan, Texas 77803.

For further information, please contact Mr. Carlos Swonke, Director, Environmental Affairs Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701; telephone: (512) 416-3001; email: *carlos.swonke@txdot.gov.* TxDOT's normal business hours are 8:00 a.m. to 5:00 p.m., Monday through Friday.

The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried-out by TxDOT pursuant to 23 U.S.C. §327 and a Memorandum of Understanding dated December 16, 2014, and executed by FHWA and TxDOT. Under the Moving Ahead for Progress in the 21st Century Act, Section 1319, TxDOT has issued a combined Final EIS and ROD.

TRD-201600173
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: January 14, 2016

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the *Texas Register* is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 40 (2015) is cited as follows: 40 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "40 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 40 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the *Texas Register* office, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using *Texas Register* indexes, the *Texas Administrative Code* section numbers, or TRD number.

Both the *Texas Register* and the *Texas Administrative Code* are available online at: http://www.sos.state.tx.us. The *Texas Register* is available in an .html version as well as a .pdf version through the internet. For website information, call the Texas Register at (512) 463-5561.

Texas Administrative Code

The *Texas Administrative Code (TAC*) is the compilation of all final state agency rules published in the *Texas Register*. Following its effective date, a rule is entered into the *Texas Administrative Code.* Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the *TAC*.

The *TAC* volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete *TAC* is available through the Secretary of State's website at http://www.sos.state.tx.us/tac.

The Titles of the *TAC*, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the *TAC* scheme, each section is designated by a *TAC* number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the *Texas Administrative Code*; *TAC* stands for the *Texas Administrative Code*; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the *Texas Administrative Code*, please look at the *Index of Rules*.

The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the *Texas Register*.

If a rule has changed during the time period covered by the table, the rule's *TAC* number will be printed with the *Texas Register* page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

TITLE 1. ADMINISTRATION
Part 4. Office of the Secretary of State
Chapter 91. Texas Register
1 TAC §91.1…….....950 *(P)*

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